

Enrolled
House Bill 3484

Sponsored by Representatives ESQUIVEL, WHISNANT, BARKER, RILEY; Representative BERGER

CHAPTER

AN ACT

Relating to exchange facilitators.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in sections 1 to 6 of this 2009 Act:

(1) "Affiliate" means a person that controls, is controlled by or is under common control with another person, directly or indirectly.

(2) "Client" means a taxpayer that enters into an agreement with an exchange facilitator for services.

(3) "Exchange accommodation titleholder" means an exchange accommodation titleholder as described in section 4.02(1) of Internal Revenue Service Revenue Procedure 2000-37.

(4)(a) "Exchange facilitator" means a person that:

(A) Is engaged in a business in which, for a fee, the person enters into agreements with clients for the purpose of performing services as:

- (i) A qualified intermediary;
- (ii) An exchange accommodation titleholder;
- (iii) A trustee of a qualified trust; or
- (iv) An escrow holder of a qualified escrow account; or

(B) Maintains an office in this state for the purpose of soliciting or engaging in business of the type described in subparagraph (A) of this paragraph.

(b) "Exchange facilitator" does not include:

(A) A taxpayer or a disqualified person, as defined in 26 C.F.R. 1.1031(k)-1(k), that is seeking to qualify for the nonrecognition provisions of 26 U.S.C. 1031.

(B) A financial institution, as defined in ORS 706.008, that is not facilitating exchanges under 26 U.S.C. 1031 and is:

- (i) Acting as a depository for exchange funds;
- (ii) Acting solely as a trustee of a qualified trust, notwithstanding the provisions of paragraph (a)(A)(iii) of this subsection; or
- (iii) Acting solely as an escrow holder of a qualified escrow account, notwithstanding the provisions of paragraph (a)(A)(iv) of this subsection.

(C) An escrow agent, as defined in ORS 696.505, title insurance company or other person that is not facilitating exchanges under 26 U.S.C. 1031 and is:

- (i) Acting solely as a trustee of a qualified trust, notwithstanding the provisions of paragraph (a)(A)(iii) of this subsection; or
- (ii) Acting solely as an escrow holder of a qualified escrow account, notwithstanding the provisions of paragraph (a)(A)(iv) of this subsection.

(D) A person that advertises and teaches seminars or classes or that otherwise makes presentations for the primary purpose of educating professionals in the field of taxation about tax-deferred exchanges or training persons to act as exchange facilitators.

(E) A qualified intermediary that holds funds from the disposition of property located outside this state and used in an exchange under 26 U.S.C. 1031, notwithstanding the provisions of paragraph (a)(A)(i) of this subsection, or an exchange accommodation titleholder that does not hold title to property located in this state.

(F) An entity that an exchange facilitator wholly owns and uses to take title to property in this state.

(5)(a) "Exchange funds" means moneys, property, instruments or other consideration an exchange facilitator receives from or on behalf of a client in connection with an exchange conducted under 26 U.S.C. 1031.

(b) "Exchange funds" does not include moneys or other consideration the exchange facilitator receives from a client as compensation for the exchange facilitator's services.

(6) "Fee" means compensation of any nature, direct or indirect, monetary or in-kind, that a person or another person related to the person in the manner described in 26 U.S.C. 267(b) or 26 U.S.C. 707(b) receives for services related or incidental to the exchange of like-kind property under 26 U.S.C. 1031.

(7) "Financial institution" has the meaning given that term in ORS 706.008.

(8) "Person" means an individual, corporation, partnership, limited liability company, joint venture, association, joint stock company, trust or other legal entity and the agents and employees of the entity.

(9) "Prudent investor standard" means an exercise of judgment and care under circumstances then prevailing that investors of prudence, discretion and intelligence exercise in the management of the investors' own affairs not in regard to speculation but in regard to the permanent disposition of the investors' funds when considering probable income and the probable safety of the investors' capital.

(10) "Qualified escrow account" has the meaning given that term in 26 C.F.R. 1.1031(k)-1(g)(3)(ii).

(11) "Qualified exchange accommodation agreement" means a qualified exchange accommodation agreement as described in section 4.02(3) of Internal Revenue Service Revenue Procedure 2000-37.

(12) "Qualified intermediary" has the meaning given that term in 26 C.F.R. 1.1031(k)-1(g)(4)(iii).

(13) "Qualified trust" has the meaning given that term in 26 C.F.R. 1.1031(k)-1(g)(3)(iii).

(14) "Relinquished property" means relinquished property as described in 26 C.F.R. 1.1031(k)-1(a).

(15) "Replacement property" means replacement property as described in 26 C.F.R. 1.1031(k)-1(a).

SECTION 2. (1) When a change in control occurs for an exchange facilitator, the exchange facilitator within 10 business days after the change in control becomes effective shall notify the exchange facilitator's clients with relinquished property located in this state or for which the exchange facilitator holds replacement property under a qualified exchange accommodation agreement. If the exchange facilitator is a publicly traded company and remains a publicly traded company after the change in control, the publicly traded company need not notify existing clients about the change in control.

(2) The notice required under subsection (1) of this section must:

(a) Be delivered by hand, first-class mail, overnight mail, electronic mail or facsimile;

(b) Be posted on any website the exchange facilitator maintains for 90 days after the effective date of the change in control; and

(c) Set forth the name, address, telephone number and other contact information for the person that assumes control of the exchange facilitator.

(3) For purposes of this section, a change in control for an exchange facilitator occurs if more than 50 percent of the exchange facilitator's assets or ownership interests transfer, directly or indirectly, to another person within 12 months.

SECTION 3. (1) An exchange facilitator shall at all times:

(a) Maintain one or more fidelity bonds that are issued by a corporate surety authorized to do business in this state in an aggregate amount of not less than \$1 million;

(b) Deposit with a financial institution in an interest-bearing deposit account or money market account, the interest of which accrues to the exchange facilitator, moneys, securities or irrevocable letters of credit issued by corporate sureties authorized to do business in this state in an aggregate amount of not less than \$1 million;

(c) Deposit with a financial institution funds used in an exchange under 26 U.S.C. 1031 in a qualified escrow account or a qualified trust and provide that withdrawals from the account or trust require both the exchange facilitator's and the client's written authorization; or

(d) Be listed as a named insured on one or more fidelity bonds that are issued by a corporate surety authorized to do business in this state in an aggregate amount of not less than \$1 million.

(2) An exchange facilitator shall at all times:

(a) Maintain errors and omissions insurance issued by an authorized insurer, as defined in ORS 731.066, in an amount not less than \$250,000;

(b) Deposit with a financial institution in an interest-bearing deposit account or money market account, the interest of which accrues to the exchange facilitator, moneys, securities or irrevocable letters of credit issued by corporate sureties authorized to do business in this state in an aggregate amount of not less than \$250,000; or

(c) Be listed as a named insured in an errors and omissions insurance policy issued by an authorized insurer, as defined in ORS 731.066, in an amount of not less than \$250,000.

(3) An exchange facilitator may maintain bonds or deposits as provided in subsection (1) of this section or insurance or deposits as provided in subsection (2) of this section in amounts in excess of the minimum amounts specified in subsections (1) and (2) of this section.

SECTION 4. (1) An exchange facilitator shall act as a custodian for all exchange funds and shall invest the exchange funds only in investments that:

(a) Meet a prudent investor standard; and

(b) Satisfy the investment goals of liquidity and preservation of principal.

(2) An exchange facilitator fails to invest exchange funds according to a prudent investor standard if:

(a) The exchange facilitator knowingly commingles exchange funds with the exchange facilitator's operating accounts; or

(b) Exchange funds are loaned or otherwise transferred to a person or entity, other than a financial institution, that is an affiliate of or otherwise related to the exchange facilitator, unless the exchange funds are transferred from an exchange facilitator to an exchange accommodation titleholder in accordance with a qualified exchange accommodation agreement.

(3) Exchange funds are not subject to execution or attachment in any claim against the exchange facilitator.

(4) An exchange facilitator may not knowingly keep moneys or cause moneys to be kept in a financial institution under a name that designates the moneys as belonging to a client unless the moneys belong to the client and the client entrusted the moneys to the exchange facilitator.

SECTION 5. An exchange facilitator may not knowingly:

(1) Make a materially false statement, material misrepresentation or material statement intended to mislead a client or another person concerning an exchange conducted under 26

U.S.C. 1031, or continue a course of material misrepresentation through advertising or otherwise;

(2) Fail to account within a reasonable time for moneys or property in the exchange facilitator's possession that belongs to another person;

(3) Engage in conduct that constitutes fraud or dishonesty or commit a crime involving fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery or theft; or

(4) Materially fail to fulfill the exchange facilitator's contractual duty to deliver moneys or property to a client, unless the failure results from circumstances beyond the exchange facilitator's control.

SECTION 6. (1) A person that claims to have suffered damage because an exchange facilitator violated a provision of section 4 or 5 of this 2009 Act has a right of action on the bonds or deposits described in section 3 of this 2009 Act. An action under this subsection does not limit the remedies available to the person under this section or under other provisions of law.

(2) An exchange facilitator that violates a provision of section 4 or 5 of this 2009 Act is subject to an action for damages brought in a circuit court of this state.

SECTION 7. Sections 1 to 6 of this 2009 Act are repealed on January 2, 2014.

Passed by House June 10, 2009

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Chief Clerk of House

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Speaker of House

Passed by Senate June 23, 2009

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President of Senate

Received by Governor:

.....M.,....., 2009

Approved:

.....M.,....., 2009

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Governor

Filed in Office of Secretary of State:

.....M.,....., 2009

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Secretary of State