



General Assembly

February Session, 2012

Raised Bill No. 5415

LCO No. 1555

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Referred to Committee on Banks

Introduced by:
(BA)

AN ACT PROVIDING CONSUMER PROTECTION TO CLIENTS OF EXCHANGE FACILITATORS FOR TAX DEFERRED EXCHANGES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective October 1, 2012*) As used in this section
2 and sections 2 to 7, inclusive, of this act:

3 (1) "Affiliated with" means that a person, directly or indirectly,
4 through one or more intermediaries, controls, is controlled by or is
5 under common control with another specified person;

6 (2) "Client" means the taxpayer with whom an exchange facilitator
7 enters into an agreement, as described in subparagraph (B) of
8 subdivision (3) of this section;

9 (3) "Exchange facilitator" means, except as otherwise provided in
10 subdivision (4) of this section, a person who: (A) Maintains an office in
11 this state for the purpose of soliciting business facilitating the exchange
12 of like-kind property as described in subparagraph (B) of this
13 subdivision; or (B) for a fee (i) facilitates an exchange of like-kind
14 property by entering into an agreement with a client pursuant to

15 which the exchange facilitator acquires from such client the contractual
16 rights to sell such client's relinquished property located in this state
17 and transfer a replacement property to such client as a qualified
18 intermediary, within the meaning of 26 CFR 1.1031(k)-1(g)(4), (ii)
19 enters into an agreement with a client to take title to a property in this
20 state as an exchange accommodation titleholder, as defined in Internal
21 Revenue Service Procedure 2000-37, or (iii) enters into an agreement
22 with a client to act as a qualified trustee or qualified escrow holder, as
23 such terms are defined in United States Treasury Regulation Section
24 1.1031(k)-1(g)(3); but shall not include:

25 (A) Any financial institution, as defined in subdivision (6) of this
26 section, that is acting solely as a depository for exchange funds or
27 solely as a qualified escrow holder or qualified trustee, as such terms
28 are defined in 26 CFR 1.1031(k)-1(g)(3), and is not otherwise facilitating
29 exchanges in accordance with subparagraph (B) of subdivision (3) of
30 this section;

31 (B) An individual or entity that is (i) teaching seminars or classes or
32 giving other presentations to attorneys, accountants, real estate
33 professionals, tax professionals or other professionals where the
34 primary purpose is to teach such professionals about tax deferred
35 exchanges or to train such professionals to act as exchange facilitators,
36 and (ii) advertising for such seminars, classes or other presentations; or

37 (C) An entity that is wholly owned by an exchange facilitator or by a
38 person acting as the exchange facilitator and used by such exchange
39 facilitator or person to facilitate exchanges or take title to property in
40 this state as an exchange accommodation titleholder;

41 (4) "Exchange funds" means the funds received by an exchange
42 facilitator from or on behalf of a client for the purpose of facilitating an
43 exchange of like-kind property;

44 (5) "Fee" means compensation of any nature, direct or indirect,
45 monetary or in-kind, that is received by a person or related person, as

46 defined in Section 267(b) or Section 707(b) of the Internal Revenue
47 Code of 1986, or any subsequent corresponding internal revenue code
48 of the United States, as amended from time to time, for any services
49 relating or incidental to the exchange of like-kind property under
50 Section 1031 of said Internal Revenue Code;

51 (6) "Financial institution" means any bank, federal credit union,
52 Connecticut credit union, savings and loan holding company, savings
53 and loan association, savings bank, trust company or trust bank, as
54 such terms are defined in section 36a-2 of the general statutes,
55 chartered under the laws of this state or the United States whose
56 accounts are insured by the full faith and credit of the United States of
57 America, the Federal Deposit Insurance Corporation, the National
58 Credit Union Share Insurance Fund or other similar or successor
59 programs;

60 (7) "Person" means a natural person, cooperative association, limited
61 liability company, firm, partnership, corporation or other legal entity,
62 and includes any agent or employee of any such person;

63 (8) "Pool" means to (A) aggregate exchange funds of multiple
64 taxpayers for investment purposes to achieve common investment
65 goals and efficiencies, and (B) ensure that such exchange funds are
66 readily identifiable as to each taxpayer for whom they are held,
67 through an accounting or subaccounting system;

68 (9) "Prudent investor standard" means the prudent investor rule, as
69 set forth by the Connecticut Uniform Prudent Investor Act, or as
70 otherwise defined by part VII of chapter 802c of the general statutes;
71 and

72 (10) "Publicly traded company" means a corporation whose
73 securities are publicly traded on the New York Stock Exchange, the
74 American Stock Exchange, or the national market system of the
75 National Association of Securities Dealers Automated Quotation
76 System established pursuant to the Securities Exchange Act of 1934,

77 and the subsidiaries of any such corporation.

78 Sec. 2. (NEW) (*Effective October 1, 2012*) An exchange facilitator shall
79 notify all existing clients, whose relinquished property, as defined in
80 26 CFR 1.1031(k)-1(a), is located in this state or whose replacement
81 property, as defined in 26 CFR 1.1031(u)-1(a), held under a qualified
82 exchange accommodation agreement is located in this state, of any
83 change in control of the exchange facilitator. Such notification shall be
84 made to the exchange facilitator's clients not later than ten business
85 days after the effective date of such change in control by either
86 facsimile or electronic mail transmission or by first class mail and by
87 posting such notice of change of control on the exchange facilitator's
88 web site for a period ending not earlier than ninety days after the
89 change in control. Such notification shall set forth the name, address
90 and other contact information of the persons to whom control was
91 transferred. Notwithstanding the provisions of this section, if the
92 exchange facilitator is a publicly traded company and remains a
93 publicly traded company after a change in control, the publicly traded
94 company shall not be required to notify its existing clients of such
95 change in control. For purposes of this section, "change in control"
96 means any transfer or transfers within a twelve-month period of more
97 than fifty per cent of the assets or ownership interests, directly or
98 indirectly, of the exchange facilitator.

99 Sec. 3. (NEW) (*Effective October 1, 2012*) An exchange facilitator at all
100 times shall:

101 (1) Maintain a fidelity bond in an amount of not less than one
102 million dollars executed by an insurer authorized to do business in this
103 state;

104 (2) Deposit all exchange funds in a separately identified account, as
105 defined in 26 CFR 1.468B-6(c)(2)(ii)(A), and provide that any
106 withdrawals from such separately identified account require the
107 written authorizations of both the client and the exchange facilitator.
108 Deliver authorization for withdrawals by any commercially reasonable

109 means, including (i) the client's delivery to the exchange facilitator of
110 the client's authorization to disburse exchange funds and the exchange
111 facilitator's delivery to the depository institution of the exchange
112 facilitator's sole authorization to disburse exchange funds, or (ii)
113 delivery to the depository institution of both the client's and the
114 exchange facilitator's authorizations to disburse exchange funds; or

115 (3) Deposit all exchange funds in a qualified escrow or qualified
116 trust, as such terms are defined in 26 CFR 1.1031(k)-1(g)(3), with a
117 financial institution and provide that any withdrawals from such
118 qualified escrow or qualified trust require the taxpayer's and the
119 exchange facilitator's written authorization.

120 Sec. 4. (NEW) (*Effective October 1, 2012*) An exchange facilitator at all
121 times shall: (1) Maintain a policy of errors and omissions insurance in
122 an amount not less than two hundred fifty thousand dollars executed
123 by an insurer authorized to do business in this state; (2) deposit an
124 amount of cash or securities; or (3) provide irrevocable letters of credit
125 in an amount not less than two hundred fifty thousand dollars.

126 Sec. 5. (NEW) (*Effective October 1, 2012*) Any person claiming to have
127 suffered damage by reason of the failure of an exchange facilitator to
128 comply with the provisions of sections 2 to 7, inclusive, of this act, may
129 file a claim against the exchange facilitator to recover such damage
130 from (1) the fidelity bond maintained in accordance with subdivision
131 (1) of section 3 of this act, (2) cash or securities deposited in accordance
132 with subdivision (2) of section 4 of this act, or (3) letters of credit
133 provided in accordance with subdivision (3) of section 4 of this act.

134 Sec. 6. (NEW) (*Effective October 1, 2012*) (a) An exchange facilitator
135 shall hold all exchange funds, including money, property, other
136 consideration or instruments received by the exchange facilitator from
137 or on behalf of the client, but not including funds received as the
138 exchange facilitator's compensation, in a manner that provides
139 liquidity and preserves principal. An exchange facilitator shall provide
140 the client with written notification of the manner in which the

141 exchange funds will be invested or deposited and shall deposit or
142 invest exchange funds in investments which meet the prudent investor
143 standard and which satisfy investment goals of liquidity and
144 preservation of principal. Exchange funds may be pooled. For
145 purposes of this section, an exchange facilitator violates the prudent
146 investor standard if:

147 (1) Exchange funds are knowingly commingled by the exchange
148 facilitator with the operating accounts of the exchange facilitator; or

149 (2) Exchange funds are loaned or otherwise transferred to any
150 person or entity affiliated with or related to the exchange facilitator
151 except that this subdivision shall not apply to a transfer made
152 pursuant to the exchange contract (A) for payment of an exchange
153 expense or completion of the acquisition of the replacement property,
154 (B) for depositing exchange funds with a financial institution, or (C) to
155 an exchange accommodation titleholder, a trustee of a qualified trust
156 or a qualified escrow agent.

157 (b) Exchange funds are not subject to execution or attachment on
158 any claim against the exchange facilitator. An exchange facilitator shall
159 not knowingly keep or cause to be kept any money in any financial
160 institution under any name designating the money as belonging to a
161 client of the exchange facilitator unless the money equitably belongs to
162 the client and was actually entrusted to the exchange facilitator by the
163 client.

164 Sec. 7. (NEW) (*Effective October 1, 2012*) No exchange facilitator, or in
165 the case of an exchange facilitator that is an entity, no owner, officer,
166 director or employee of such exchange facilitator, shall knowingly:

167 (1) Make any material misrepresentations concerning any exchange
168 facilitator transaction that are intended to mislead;

169 (2) Pursue a continued or flagrant course of misrepresentation or
170 making false statements through advertising or by any other means;

171 (3) Fail, within a reasonable time, to account for any money or
172 property belonging to another person that may be in the possession or
173 under the control of the exchange facilitator;

174 (4) Engage in any conduct constituting fraudulent or dishonest
175 dealings;

176 (5) Commit any crime related to the exchange facilitation business
177 involving fraud, misrepresentation, deceit, embezzlement,
178 misappropriation of funds, robbery or other theft of property, except
179 that commission of such crime by an officer, director or employee shall
180 not be considered a violation of this section, provided (A) the
181 employment or appointment of such officer, director or employee has
182 been terminated, and (B) no clients of the exchange facilitator were
183 harmed or full restitution has been made to all harmed clients;

184 (6) Materially fail to fulfill the exchange facilitator's contractual
185 duties to the client to deliver property or funds to the client unless
186 such failure is due to circumstances beyond the control of the exchange
187 facilitator; and

188 (7) Materially violate any provision of sections 2 to 7, inclusive, of
189 this act or the rules adopted pursuant to said sections.

190 Sec. 8. (NEW) (*Effective October 1, 2012*) A person who violates any
191 provision of sections 2 to 7, inclusive, of this act is subject to civil suit
192 in a court of competent jurisdiction.

This act shall take effect as follows and shall amend the following sections:		
Section 1	<i>October 1, 2012</i>	New section
Sec. 2	<i>October 1, 2012</i>	New section
Sec. 3	<i>October 1, 2012</i>	New section
Sec. 4	<i>October 1, 2012</i>	New section
Sec. 5	<i>October 1, 2012</i>	New section
Sec. 6	<i>October 1, 2012</i>	New section
Sec. 7	<i>October 1, 2012</i>	New section

Sec. 8	October 1, 2012	New section
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Statement of Purpose:

To require persons and entities to comply with best practices and standards when they facilitate tax deferred exchanges in this state.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]