

1 CHAPTER ~~27.1~~ XX [3].

2 EXCHANGE FACILITATORS ACT.

3 **Drafting note: Existing Chapter 27.1, Exchange Facilitators Act, is retained as**
4 **proposed Chapter XX [3].**

5 § ~~55-525.1~~ 55.1-xxx. Definitions.

6 As used in this chapter, unless the context requires a different meaning:

7 "Affiliated with" means that a person directly, or indirectly through one or more
8 intermediaries, controls, or is controlled by, or is under common control with, the other specified
9 person.

10 "Change in control" means any transfer within 12 months of more than 50 percent of the
11 assets or ownership interests, direct or indirect, of the exchange facilitator.

12 "Commingle" means to mix together exchange funds with operating and other
13 nonexchange funds belonging to or under control of the exchange facilitator in such a manner
14 that a client's exchange funds cannot be distinguished from operating or other nonexchange funds
15 belonging to or under control of the exchange facilitator.

16 "Deposit account" means a demand, time, savings, passbook, money market, certificate
17 of deposit, or similar account maintained with a financial institution.

18 "Exchange Accommodation Titleholder" or "EAT" has the same meaning ascribed
19 thereto in IRS Revenue Procedure 2000-37.

20 "Exchange client" means the taxpayer with whom the exchange facilitator enters into an
21 agreement described in subdivision 1 of the definition of "exchange facilitator."

22 "Exchange facilitator" means a person that:

23 1. For a fee facilitates an exchange of like-kind property by entering into an agreement
24 with a taxpayer:

25 a. By which the exchange facilitator acquires from ~~said~~ such taxpayer the contractual
26 rights to sell ~~said~~ such taxpayer's relinquished property located in the Commonwealth and

27 transfer a replacement property to ~~said~~ such taxpayer as a qualified intermediary as that term is
28 defined under Treasury Regulation § 1.1031(k)-1(g)(4);

29 b. To take title to a property located in the Commonwealth as an Exchange
30 Accommodation Titleholder; or

31 c. To act as a qualified trustee or qualified escrow holder as those terms are defined under
32 Treasury Regulation § 1.1031(k)-1(g)(3), except as otherwise provided in this definition; or

33 2. Maintains an office in the Commonwealth for the purpose of soliciting business as an
34 exchange facilitator.

35 "Exchange facilitator" ~~shall~~ does not include (i) the taxpayer or disqualified person as
36 that term is defined under Treasury Regulation § 1.1031(k)-1(k) seeking to qualify for the
37 nonrecognition provisions of Internal Revenue Code § 1031; (ii) any financial institution ~~as~~
38 defined herein or any title insurance company, underwritten title company, or escrow company
39 that is merely acting as a depository for exchange funds or that is acting solely as a qualified
40 escrow holder or qualified trustee as those terms are defined under Treasury Regulation §
41 1.1031(k)-1(g)(3), and is not otherwise facilitating exchanges ~~as defined herein~~; (iii) a person
42 who advertises for and teaches seminars or classes or otherwise gives presentations to attorneys,
43 accountants, real estate professionals, tax professionals, or other professionals where the primary
44 purpose is to teach the professionals about tax deferred exchanges or train them to act as
45 exchange facilitators; or (iv) an entity that is wholly owned by an exchange facilitator or that is
46 wholly owned by the same person as the exchange facilitator and is used by such entity to
47 facilitate exchanges or to take title to property in the Commonwealth as an EAT.

48 "Exchange funds" means the funds received by the exchange facilitator from or on behalf
49 of the exchange client for the purpose of facilitating an exchange of like-kind property.

50 "Fee" means, for purposes of subdivision 1 of the definition of "exchange facilitator,"
51 compensation of any nature, direct or indirect, monetary or in-kind, that is received by a person
52 or a related person as described in Internal Revenue Code § 267(b) or 707(b) for any services

53 relating to or incidental to the exchange of like-kind property under Internal Revenue Code §
54 1031.

55 "Financial institution" means any bank, credit union, savings and loan association,
56 savings bank, or trust company chartered under the laws of the Commonwealth or the United
57 States whose accounts are insured by the full faith and credit of the United States of America,
58 the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or
59 other similar or successor programs and any direct or indirect subsidiary of such bank, credit
60 union, savings and loan association, savings bank, or trust company.

61 "Person" means, in addition to the singular, persons, groups of persons, cooperative
62 associations, limited liability companies, firms, partnerships, corporations, or other legal entities
63 and includes the agents and employees of any such person.

64 "Transferee" means the party or parties to whom the ownership or control of the exchange
65 facilitator has been transferred.

66 **Drafting note: The definitions for the terms "change in control" and "transferee"**
67 **are relocated from existing § 55-525.2, and the definition for the term "deposit account" is**
68 **relocated from existing § 55-525.3 to this chapter-wide definitions section. Technical**
69 **changes are made.**

70 § ~~55-525.2~~ 55.1-xxx. Change in control.

71 An exchange facilitator shall notify all existing exchange clients whose relinquished
72 property is located in the Commonwealth, or whose replacement property held under a Qualified
73 Exchange Accommodation Agreement is located in the Commonwealth, of any change in control
74 of the exchange facilitator. Such notification shall be made to the exchange facilitator's clients
75 within 10 business days following the effective date of such change in control either by facsimile
76 or email transmission, or by first class mail, and by posting such notice of change in control on
77 the exchange facilitator's website, if any, for a period ending not sooner than 90 days after the
78 change in control. Such notification shall set forth the name, address, and other contact
79 information of the transferees. ~~For purposes of this chapter, "transferee" means the party or~~

80 ~~parties to whom the ownership or control of the exchange facilitator has been transferred.~~
81 Notwithstanding the above, if the exchange facilitator is a publicly traded company and remains
82 a publicly traded company after a change in control, the publicly traded company shall not be
83 required to notify its existing clients of such change in control. ~~For purposes of this section,~~
84 ~~"change in control" means any transfer within 12 months of more than 50 percent of the assets~~
85 ~~or ownership interests, direct or indirect, of the exchange facilitator.~~

86 **Drafting note: The definitions of the terms "change in control" and "transferee"**
87 **are relocated to proposed § 55.1-xxx, the chapter-wide definitions section.**

88 § ~~55-525.3~~ 55.1-xxx. Separately identified accounts, or qualified escrows or qualified
89 trusts.

90 A. An exchange facilitator at all times shall:

91 1. Deposit the exchange funds in a deposit account that is a separately identified account,
92 as defined in Treasury Regulation § 1.468B-6(c)(ii), and provide that any withdrawals from such
93 separately identified account require the written authorization of the exchange client and written
94 acknowledgment of the exchange facilitator. Authorization for withdrawals may be delivered by
95 any commercially reasonable means, including (i) the exchange client's delivery to the exchange
96 facilitator of the exchange client's authorization to disburse exchange funds and the exchange
97 facilitator's delivery to the financial institution of the exchange facilitator's authorization to
98 disburse exchange funds or (ii) delivery to the financial institution of both the exchange client's
99 and the exchange facilitator's authorizations to disburse exchange funds. ~~For purposes of this~~
100 ~~chapter, a "deposit account" means a demand, time, savings, passbook, money market, certificate~~
101 ~~of deposit, or similar account maintained with a financial institution;~~ or

102 2. Deposit the exchange funds in a deposit account that is a qualified escrow or qualified
103 trust as those terms are defined under Treasury Regulation § 1.1031(k)-1(g)(3).

104 B. The deposit account shall be with a financial institution, and the interest earned on
105 such account shall accrue to the parties as provided in a written agreement between the exchange
106 facilitator and the exchange client. However, the exchange client may expressly direct the

107 exchange facilitator in writing to invest the exchange proceeds in an investment of the exchange
108 client's choice, provided that the exchange facilitator provides written acknowledgment back to
109 the exchange client that includes a confirmation of how the exchange proceeds will be invested.

110 **Drafting note: The definition of the term "deposit account" is relocated to proposed**
111 **§ 55.1-xxx, the chapter-wide definitions section.**

112 § ~~55-525.4~~ 55.1-xxx. Errors and omissions insurance; cash or letters of credit.

113 A. An exchange facilitator at all times shall:

114 1. Maintain a policy of errors and omissions insurance in an amount not less than
115 \$250,000 executed by an insurer authorized to do business in the Commonwealth; or

116 2. Deposit an amount of cash or provide irrevocable letters of credit equivalent to the sum
117 of not less than \$250,000.

118 B. The exchange facilitator may maintain errors and omissions insurance, cash, or
119 irrevocable letters of credit in excess of the amounts required in this section.

120 **Drafting note: No change.**

121 § ~~55-525.5~~ 55.1-xxx. Accounting for moneys and property.

122 A. Every exchange facilitator shall hold all property related to the exchange client,
123 including the exchange funds, other property, and other consideration or instruments received by
124 the exchange facilitator, on behalf of the client, except funds received as the exchange
125 facilitator's compensation. Exchange funds shall be held in accordance with the requirements of
126 § ~~55-525.3~~ 55.1-xxx.

127 B. An exchange facilitator shall not:

128 1. Commingle exchange funds with the operating accounts of the exchange facilitator; or

129 2. Lend or otherwise transfer exchange funds to any person or entity affiliated with or
130 related (as described in Internal Revenue Code § 267(b) or 707(b)-) to the exchange facilitator,

131 except that this subsection shall not apply to a transfer or loan made to a financial institution that
132 is the parent of or related to the exchange facilitator or to a transfer from an exchange facilitator
133 to an EAT as required under the exchange contract.

134 C. Exchange funds are not subject to execution or attachment on any claim against the
135 exchange facilitator. An exchange facilitator shall not keep or cause to be kept any money in any
136 financial institution under any name designating the money as belonging to an exchange client
137 of the exchange facilitator unless the money equitably belongs to the exchange client and was
138 actually entrusted to the exchange facilitator by the exchange client.

139 **Drafting note: No change.**

140 § ~~55-525.6~~ 55.1-xxx. Prohibited acts.

141 A. A person who engages in the business of an exchange facilitator is prohibited from:

142 1. Making any material misrepresentations concerning any exchange facilitator
143 transaction that are intended to mislead another;

144 2. Pursuing a continued course of misrepresentation or making false statements through
145 advertising or otherwise;

146 3. Failing, within a reasonable time, to account for any moneys or property belonging to
147 others that may be in the possession or under the control of the exchange facilitator;

148 4. Engaging in any conduct constituting fraudulent or dishonest dealings;

149 5. Committing any crime involving fraud, misrepresentation, deceit, embezzlement,
150 misappropriation of funds, robbery, or other theft of property;

151 6. Materially failing to fulfill its contractual duties to the exchange client to deliver
152 property or funds to the exchange client unless such failure is due to circumstances beyond the
153 control of the exchange facilitator; or

154 7. Materially violating any of the provisions of this chapter.

155 B. A person who is an owner, officer, director, or employee of an exchange facilitator is
156 prohibited from committing any crime involving fraud, misrepresentation, deceit,
157 embezzlement, misappropriation of funds, robbery, or other theft of property; however, the
158 commission of such crime by an officer, director, or employee of an exchange facilitator shall
159 not be considered a violation of this chapter if the employment or appointment of such officer,

160 director, or employee has been terminated and no clients of the exchange facilitator were harmed
161 or full restitution has been made to all harmed clients within a reasonable period of time.

162 **Drafting note: No change.**

163 § ~~55-525.7~~ 55.1-xxx. Penalty; attorney fees.

164 A. In any action brought under this chapter, if a court finds that a person has willfully
165 engaged in an act or practice in violation of this chapter, the Attorney General, the attorney for
166 the Commonwealth, or the attorney for the locality may recover for the Literary Fund, upon
167 petition to the court, a civil penalty of not more than \$2,500 per violation. For purposes of this
168 section, prima facie evidence of a willful violation may be shown when the Attorney General,
169 the attorney for the Commonwealth, or the attorney for the locality notifies the alleged violator
170 by certified mail that an act or practice is a violation of this chapter and the alleged violator, after
171 receipt of the notice, continues to engage in the act or practice.

172 B. In any action brought under this chapter, the Attorney General, the attorney for the
173 Commonwealth, or the attorney for the ~~county, city, or town~~ locality may recover costs and
174 reasonable expenses incurred by the state or local agency in investigating and preparing the case,
175 and attorney fees.

176 **Drafting note: In subsection B, "county, city, or town" is replaced with "locality"**
177 **on the basis of § 1-221, which states that throughout the Code "locality" means a county,**
178 **city, or town."**

179 #