

CHAPTER 116

CONSUMER AND COMMERCIAL TRANSACTIONS

HOUSE BILL 09-1254

BY REPRESENTATIVE(S) Judd, Rice, Ryden, Pommer;
also SENATOR(S) Harvey, Carroll M., Hodge, Penry.

AN ACT

**CONCERNING ADDITIONAL CONSUMER PROTECTIONS RELATING TO LIKE-KIND EXCHANGES
FACILITATED BY EXCHANGE FACILITATORS.**

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 7 of article 1 of title 6, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

6-1-721. Like-kind exchanges by exchange facilitators - definitions.

(1) **Legislative declaration.** THE GENERAL ASSEMBLY HEREBY:

(a) FINDS THAT, ABSENT ENACTMENT OF THIS SECTION, COLORADO HAS NO REQUIREMENTS FOR THE PROTECTION OF TAXPAYERS WHO ENGAGE PERSONS OR ENTITIES THAT FACILITATE LIKE-KIND EXCHANGES PURSUANT TO 26 U.S.C. SEC. 1031; AND

(b) DETERMINES THAT, TO PROTECT TAXPAYERS WHO ENGAGE EXCHANGE FACILITATORS, EXCHANGE FACILITATORS SHOULD MEET CERTAIN REQUIREMENTS AND FOLLOW CERTAIN PROCEDURES.

(2) **Definitions.** AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "AFFILIATED WITH" MEANS THAT A PERSON DIRECTLY, OR INDIRECTLY THROUGH ONE OR MORE INTERMEDIARIES, CONTROLS, IS CONTROLLED BY, OR IS UNDER COMMON CONTROL WITH THE OTHER SPECIFIED PERSON.

(b) "COLORADO PROPERTY" MEANS REAL PROPERTY LOCATED IN COLORADO; EXCEPT THAT REPLACEMENT PROPERTY NEED NOT BE LOCATED IN COLORADO.

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(c) (I) "EXCHANGE FACILITATOR" MEANS A PERSON THAT HOLDS A TAXPAYER'S EXCHANGE FUNDS AND THAT:

(A) FOR A FEE, FACILITATES AN EXCHANGE OF LIKE-KIND COLORADO PROPERTY BY ENTERING INTO AN AGREEMENT WITH A TAXPAYER BY WHICH THE EXCHANGE FACILITATOR ACQUIRES FROM THE TAXPAYER THE CONTRACTUAL RIGHTS TO SELL THE TAXPAYER'S RELINQUISHED COLORADO PROPERTY AND TRANSFER A REPLACEMENT PROPERTY TO THE TAXPAYER AS AN EXCHANGE FACILITATOR, AS IS DEFINED IN 26 CFR 1.1031 (k)-1 (g) (4), OR ENTERS INTO AN AGREEMENT WITH A TAXPAYER TO TAKE TITLE TO COLORADO PROPERTY AS AN EXCHANGE ACCOMMODATION TITLEHOLDER, AS THAT TERM IS DEFINED IN FEDERAL INTERNAL REVENUE SERVICE REVENUE PROCEDURE 2000-37, OR ENTERS INTO AN AGREEMENT WITH A TAXPAYER TO ACT AS A QUALIFIED TRUSTEE OR QUALIFIED ESCROW HOLDER, AS THOSE TERMS ARE DEFINED IN 26 CFR 1.1031 (k)-1 (g) (3), EXCEPT AS OTHERWISE PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (c); OR

(B) MAINTAINS AN OFFICE IN THIS STATE FOR THE PURPOSE OF SOLICITING BUSINESS AS AN EXCHANGE FACILITATOR REGARDING COLORADO PROPERTY.

(II) "EXCHANGE FACILITATOR" DOES NOT INCLUDE:

(A) THE TAXPAYER OR DISQUALIFIED PERSON, AS DEFINED UNDER 26 CFR 1.1031 (k)-1 (k), SEEKING TO QUALIFY FOR THE NONRECOGNITION PROVISIONS OF 26 U.S.C. SEC. 1031;

(B) A BANK, SAVINGS BANK, SAVINGS AND LOAN ASSOCIATION, BUILDING AND LOAN ASSOCIATION, OR CREDIT UNION; A BANK OR SAVINGS ASSOCIATION HOLDING COMPANY ORGANIZED UNDER THE LAWS OF ANY STATE, THE DISTRICT OF COLUMBIA, A TERRITORY OR PROTECTORATE OF THE UNITED STATES, OR THE UNITED STATES, SUBJECT TO REGULATION AND SUPERVISION BY A FEDERAL BANKING AGENCY; AN OPERATING SUBSIDIARY OF SUCH ENTITIES; OR AN EMPLOYEE OR EXCLUSIVE AGENT OF ANY OF SUCH ENTITIES, INCLUDING, WITHOUT LIMITATION, A SUBSIDIARY THAT IS OWNED OR CONTROLLED BY SUCH ENTITIES;

(C) A PERSON WHO ADVERTISES FOR AND TEACHES SEMINARS OR CLASSES FOR, OR GIVES PRESENTATIONS TO, ATTORNEYS, ACCOUNTANTS, REAL ESTATE PROFESSIONALS, TAX PROFESSIONALS, OR OTHER PROFESSIONALS, WHERE THE PRIMARY PURPOSE IS TO TEACH THE PROFESSIONALS ABOUT TAX-DEFERRED EXCHANGES OR TRAIN THEM TO ACT AS EXCHANGE FACILITATORS;

(D) AN EXCHANGE FACILITATOR, AS DEFINED IN 26 CFR 1.1031 (k)-1 (g) (4), WHOSE SOLE BUSINESS IN THIS STATE AS AN EXCHANGE FACILITATOR CONSISTS OF HOLDING EXCHANGE FUNDS FROM THE DISPOSITION OF RELINQUISHED PROPERTY LOCATED OUTSIDE THIS STATE; OR

(E) AN ENTITY THAT IS WHOLLY OWNED BY AN EXCHANGE FACILITATOR OR IS WHOLLY OWNED BY THE OWNER OF AN EXCHANGE FACILITATOR AND IS USED BY THAT EXCHANGE FACILITATOR TO FACILITATE EXCHANGES OR TO TAKE TITLE TO COLORADO PROPERTY AS AN EXCHANGE ACCOMMODATION TITLEHOLDER, AS DEFINED IN FEDERAL INTERNAL REVENUE SERVICE REVENUE PROCEDURE 2000-37.

(III) FOR PURPOSES OF THIS PARAGRAPH (c), "FEE" MEANS COMPENSATION OF ANY NATURE, DIRECT OR INDIRECT, MONETARY OR IN-KIND, THAT IS RECEIVED BY A PERSON OR A RELATED PERSON AS DEFINED IN 26 U.S.C. SEC. 1031 (f) (3) FOR ANY SERVICES RELATING TO OR INCIDENTAL TO THE EXCHANGE OF LIKE-KIND PROPERTY UNDER 26 U.S.C. SEC. 1031.

(d) "LIKE-KIND EXCHANGE" MEANS A SECTION 1031 EXCHANGE THAT IS SUBJECT TO 26 U.S.C. SEC. 1031.

(e) "PUBLICLY TRADED COMPANY" MEANS A CORPORATION WHOSE SECURITIES ARE PUBLICLY TRADED ON A STOCK EXCHANGE THAT IS REGULATED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION. THE TERM "PUBLICLY TRADED COMPANY" ALSO INCLUDES ALL SUBSIDIARIES OF SUCH PUBLICLY TRADED COMPANY.

(f) "SECTION 1031 EXCHANGE" MEANS AN EXCHANGE CONDUCTED PURSUANT TO 26 U.S.C. SEC. 1031 THAT ALLOWS INVESTORS TO DEFER THE TAX ON CAPITAL GAINS.

(g) "TAXPAYER EXCHANGE FUNDS" OR "EXCHANGE FUNDS" MEANS MONEY A TAXPAYER ENTRUSTS TO AN EXCHANGE FACILITATOR.

(3) **Deceptive trade practices.** A PERSON ENGAGES IN A DECEPTIVE TRADE PRACTICE WHEN A PERSON ACTS AS AN EXCHANGE FACILITATOR AND:

(a) (I) EXCEPT AS SPECIFIED IN SUBPARAGRAPH (III) OF THIS PARAGRAPH (a), FAILS TO NOTIFY ALL CURRENT CLIENTS OF ANY CHANGE IN CONTROL OF THE EXCHANGE FACILITATOR WITHIN TWO BUSINESS DAYS AFTER THE EFFECTIVE DATE OF THE CHANGE BY:

(A) FACSIMILE, E-MAIL TRANSMISSION, OR FIRST-CLASS MAIL; AND

(B) POSTING SUCH NOTICE ON THE EXCHANGE FACILITATOR'S WEB SITE FOR A PERIOD ENDING NOT SOONER THAN NINETY DAYS AFTER THE CHANGE IN CONTROL.

(II) THE NOTICE REQUIRED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (a) SHALL SPECIFY THE NAME, ADDRESS, AND OTHER CONTACT INFORMATION OF THE TRANSFEREES.

(III) IF THE EXCHANGE FACILITATOR IS A PUBLICLY TRADED COMPANY AND REMAINS A PUBLICLY TRADED COMPANY AFTER A CHANGE IN CONTROL, THE EXCHANGE FACILITATOR NEED NOT NOTIFY ITS CLIENT OF THE CHANGE IN CONTROL.

(IV) FOR PURPOSES OF THIS PARAGRAPH (a), "CHANGE IN CONTROL" MEANS ANY TRANSFER WITHIN TWELVE MONTHS OF MORE THAN FIFTY PERCENT OF THE ASSETS OR OWNERSHIP INTERESTS, DIRECTLY OR INDIRECTLY, OF THE EXCHANGE FACILITATOR.

(b) (I) FAILS TO MAINTAIN ADEQUATE FINANCIAL ASSURANCE AND ERRORS AND OMISSIONS INSURANCE OR DEPOSITS. AN EXCHANGE FACILITATOR MAY MAINTAIN BONDS, INSURANCE POLICIES, DEPOSITS, OR IRREVOCABLE LETTERS OF CREDIT IN EXCESS OF THE AMOUNTS REQUIRED BY THIS SUBPARAGRAPH (I). AN EXCHANGE

FACILITATOR SHALL AT ALL TIMES:

(A) MAINTAIN A FIDELITY BOND OR BONDS EXECUTED BY AN INSURER AUTHORIZED TO DO BUSINESS IN THIS STATE IN THE AMOUNT OF AT LEAST ONE MILLION DOLLARS AND MAINTAIN A POLICY OF ERRORS AND OMISSIONS INSURANCE, IN AN AMOUNT OF AT LEAST TWO HUNDRED FIFTY THOUSAND DOLLARS, EXECUTED BY AN INSURER AUTHORIZED TO DO BUSINESS IN THIS STATE;

(B) DEPOSIT AN AMOUNT OF CASH OR IRREVOCABLE LETTERS OF CREDIT IN AN AMOUNT OF AT LEAST THE SUM OF THE AMOUNTS SPECIFIED IN SUB-SUBPARAGRAPH (A) OF THIS SUBPARAGRAPH (I) IN AN INTEREST-BEARING DEPOSIT ACCOUNT OR IN A MONEY MARKET ACCOUNT WITH A FINANCIAL INSTITUTION OF THE EXCHANGE FACILITATOR'S CHOICE, WITH THE INTEREST EARNED ON SUCH ACCOUNT ACCRUING TO THE EXCHANGE FACILITATOR; OR

(C) DEPOSIT ALL EXCHANGE FUNDS IN A QUALIFIED ESCROW OR QUALIFIED TRUST AS THOSE TERMS ARE DEFINED UNDER 26 CFR 1.1031(k)-1 (g) (3) WITH A FINANCIAL INSTITUTION AND PROVIDE THAT ANY WITHDRAWALS FROM SUCH QUALIFIED ESCROW OR QUALIFIED TRUST REQUIRE THE TAXPAYER'S AND THE EXCHANGE FACILITATOR'S WRITTEN AUTHORIZATION.

(II) A PERSON CLAIMING TO HAVE SUSTAINED DAMAGE BY REASON OF THE FAILURE OF AN EXCHANGE FACILITATOR TO COMPLY WITH THIS SECTION MAY FILE A CLAIM TO RECOVER DAMAGES FROM THE BOND OR DEPOSIT DESCRIBED IN THIS PARAGRAPH (b).

(c) FAILS TO ACT AS A CUSTODIAN FOR ALL EXCHANGE FUNDS, INCLUDING MONEY, COLORADO PROPERTY, OTHER CONSIDERATION, OR INSTRUMENTS RECEIVED BY THE EXCHANGE FACILITATOR FROM OR ON BEHALF OF THE TAXPAYER, EXCEPT FUNDS RECEIVED AS THE EXCHANGE FACILITATOR'S COMPENSATION. AS USED IN THIS PARAGRAPH (c), "CUSTODIAN" MEANS A PERSON WHO HAS THE SAME RESPONSIBILITIES AS A FIDUCIARY UNDER COLORADO LAW TO PROTECT AND PRESERVE ASSETS AND SHALL NOT MEAN A PERSON WHO HAS THE SAME RESPONSIBILITIES AS A FIDUCIARY UNDER COLORADO LAW TO INCREASE ASSETS OR TO ACCOMPLISH OTHER FIDUCIARY DUTIES. EXCHANGE FUNDS ARE NOT SUBJECT TO EXECUTION OR ATTACHMENT ON ANY CLAIM AGAINST AN EXCHANGE FACILITATOR. AN EXCHANGE FACILITATOR SHALL NOT KNOWINGLY KEEP OR CAUSE TO BE KEPT ANY MONEY IN A FINANCIAL INSTITUTION UNDER ANY NAME DESIGNATING THE MONEY AS BELONGING TO A TAXPAYER UNLESS THE MONEY EQUITABLY BELONGS TO THE TAXPAYER AND WAS ACTUALLY ENTRUSTED TO THE EXCHANGE FACILITATOR BY THE TAXPAYER. TAXPAYER EXCHANGE FUNDS IN EXCESS OF TWO HUNDRED FIFTY THOUSAND DOLLARS SHALL BE INVESTED OR DEPOSITED IN SUCH MANNER AS TO REQUIRE BOTH THE TAXPAYER'S AND THE EXCHANGE FACILITATOR'S COMMERCIALY REASONABLE MEANS OF AUTHORIZATION FOR WITHDRAWAL, INCLUDING: THE TAXPAYER'S DELIVERY TO THE EXCHANGE FACILITATOR OF THE TAXPAYER'S AUTHORIZATION TO DISBURSE EXCHANGE FUNDS, AND THE EXCHANGE FACILITATOR'S DELIVERY TO THE DEPOSITORY OF THE EXCHANGE FACILITATOR'S AUTHORIZATION TO DISBURSE EXCHANGE FUNDS; OR DELIVERY TO THE DEPOSITORY OF BOTH THE TAXPAYER'S AND THE EXCHANGE FACILITATOR'S AUTHORIZATIONS TO DISBURSE EXCHANGE FUNDS. AN EXCHANGE FACILITATOR SHALL PROVIDE THE TAXPAYER WITH WRITTEN NOTIFICATION OF THE MANNER IN WHICH THE EXCHANGE FUNDS WILL

BE INVESTED OR DEPOSITED, SHALL INVEST OR DEPOSIT EXCHANGE FUNDS FOR THE BENEFIT OF THE TAXPAYER IN INVESTMENTS THAT MEET A STANDARD OF CARE THAT AN ORDINARILY PRUDENT INVESTOR WOULD USE WHEN DEALING WITH THE PROPERTY OF ANOTHER, AND SHALL SATISFY INVESTMENT GOALS OF LIQUIDITY AND PRESERVATION OF PRINCIPAL. FOR PURPOSES OF THIS PARAGRAPH (c), A PRUDENT INVESTOR STANDARD OF CARE SHALL BE DEEMED TO HAVE BEEN VIOLATED IF:

(I) A TAXPAYER'S EXCHANGE FUNDS ARE COMMINGLED BY THE EXCHANGE FACILITATOR WITH THE OPERATING ACCOUNTS OF THE EXCHANGE FACILITATOR OR WITH THE EXCHANGE FUNDS OF ANOTHER TAXPAYER; EXCEPT THAT AN EXCHANGE FACILITATOR MAY AGGREGATE EXCHANGE FUNDS. FOR PURPOSES OF THIS SUBPARAGRAPH (I):

(A) "AGGREGATE" MEANS TO COMBINE EXCHANGE FUNDS OF MULTIPLE TAXPAYERS FOR INVESTMENT PURPOSES TO ACHIEVE COMMON INVESTMENT GOALS AND EFFICIENCIES. EXCHANGE FUNDS THAT HAVE BEEN AGGREGATED INTO COMMON INVESTMENTS SHALL BE READILY IDENTIFIABLE BY THE FINANCIAL INSTITUTION OR OTHER REGULATED INVESTMENT CUSTODIAN HOLDING THE FUNDS AS TO EACH TAXPAYER FOR WHOM THEY ARE HELD THROUGH AN ACCOUNTING OR SUBACCOUNTING SYSTEM.

(B) "COMMINGLE" MEANS TO MIX TOGETHER EXCHANGE FUNDS OF TAXPAYERS WITH OTHER FUNDS BELONGING TO OR UNDER THE CONTROL OF THE EXCHANGE FACILITATOR IN SUCH A MANNER THAT A TAXPAYER'S EXCHANGE FUNDS CANNOT BE DISTINGUISHED FROM OTHER FUNDS BELONGING TO OR UNDER THE CONTROL OF THE EXCHANGE FACILITATOR.

(II) EXCHANGE FUNDS ARE LOANED OR OTHERWISE TRANSFERRED TO ANY PERSON OR ENTITY AFFILIATED WITH THE EXCHANGE FACILITATOR; EXCEPT THAT THIS SUBPARAGRAPH (II) SHALL NOT APPLY TO A TRANSFER OR LOAN MADE TO A FINANCIAL INSTITUTION THAT IS THE PARENT OF OR AFFILIATED WITH THE EXCHANGE FACILITATOR OR FROM AN EXCHANGE FACILITATOR TO AN EXCHANGE ACCOMMODATION TITLEHOLDER, AS DEFINED IN FEDERAL INTERNAL REVENUE SERVICE REVENUE PROCEDURE 2000-37, AS REQUIRED UNDER THE SECTION 1031 EXCHANGE CONTRACT; OR

(III) EXCHANGE FUNDS ARE INVESTED IN A MANNER THAT DOES NOT PROVIDE SUFFICIENT LIQUIDITY TO MEET THE EXCHANGE FACILITATOR'S CONTRACTUAL OBLIGATIONS TO THE TAXPAYER AND DOES NOT PRESERVE THE PRINCIPAL OF THE EXCHANGE FUNDS. THE DEPOSIT OF FUNDS IN A FINANCIAL INSTITUTION EXEMPTED FROM THIS SECTION PURSUANT TO SUB-SUBPARAGRAPH (B) OF SUBPARAGRAPH (II) OF PARAGRAPH (c) OF SUBSECTION (2) OF THIS SECTION SHALL BE DEEMED TO BE SUFFICIENTLY LIQUID TO MEET THE REQUIREMENTS OF THIS SUBPARAGRAPH (III).

(d) COMMITS ANY OF THE FOLLOWING:

(I) KNOWINGLY MAKES ANY MATERIAL MISREPRESENTATION CONCERNING AN EXCHANGE FACILITATOR'S TRANSACTION THAT IS INTENDED TO MISLEAD ANOTHER;

(II) PURSUES A CONTINUED OR FLAGRANT COURSE OF MISREPRESENTATION OR MAKES FALSE STATEMENTS THROUGH ADVERTISING OR OTHERWISE;

(III) FAILS, WITHIN A REASONABLE TIME, TO ACCOUNT FOR ANY MONEY OR PROPERTY BELONGING TO OTHERS THAT MAY BE IN THE POSSESSION OR UNDER THE CONTROL OF THE EXCHANGE FACILITATOR;

(IV) ENGAGES IN ANY CONDUCT CONSTITUTING FRAUDULENT OR DISHONEST DEALING;

(V) IS CONVICTED OF, OR, IN THE CASE OF AN ENTITY, ONE OR MORE OF ITS OWNERS, OFFICERS, DIRECTORS, OR EMPLOYEES WHO HAS ACCESS TO EXCHANGE FUNDS IS CONVICTED OF, ANY CRIME INVOLVING FRAUD, MISREPRESENTATION, DECEIT, EMBEZZLEMENT, MISAPPROPRIATION OF FUNDS, ROBBERY, OR OTHER THEFT OF PROPERTY; EXCEPT THAT COMMISSION OF SUCH CRIME BY AN OFFICER, DIRECTOR, OR EMPLOYEE OF AN EXCHANGE FACILITATOR SHALL NOT BE CONSIDERED A VIOLATION OF THIS SUBPARAGRAPH (V) IF THE EMPLOYMENT OR APPOINTMENT OF THE OFFICER, DIRECTOR, OR EMPLOYEE HAS BEEN TERMINATED AND NO CLIENTS OF THE EXCHANGE FACILITATOR WERE HARMED OR FULL RESTITUTION HAS BEEN MADE TO ALL HARMED CLIENTS;

(VI) WILFULLY FAILS TO FULFILL AN EXCHANGE FACILITATOR'S CONTRACTUAL DUTIES TO THE TAXPAYER TO DELIVER PROPERTY OR FUNDS TO THE TAXPAYER UNLESS SUCH FAILURE IS DUE TO CIRCUMSTANCES BEYOND THE CONTROL OF THE EXCHANGE FACILITATOR;

(VII) MATERIALLY VIOLATES THIS SECTION OR AIDS, ABETS, OR KNOWINGLY PERMITS ANY PERSON TO VIOLATE THIS SECTION;

(VIII) COMMITS AN ACT THAT DOES NOT MEET GENERALLY ACCEPTED STANDARDS OF PRACTICE FOR ORDINARILY PRUDENT INVESTORS OR FAILS TO PERFORM AN ACT NECESSARY TO MEET GENERALLY ACCEPTED STANDARDS OF PRACTICE FOR ORDINARILY PRUDENT INVESTORS;

(IX) FAILS TO KEEP APPROPRIATE BUSINESS AND TRANSACTION RECORDS, FALSIFIES SUCH RECORDS, OR KNOWINGLY AND WILFULLY MAKES INCORRECT ENTRIES OF AN ESSENTIAL NATURE ON SUCH RECORDS; EXCEPT THAT AN EXCHANGE FACILITATOR MAY DISPOSE OF RECORDS AFTER A REASONABLE TIME PURSUANT TO THE EXCHANGE FACILITATOR'S DOCUMENT RETENTION AND DOCUMENT DESTRUCTION POLICY;

(X) IS DISCIPLINED IN ANY WAY BY A NATIONAL CERTIFYING AGENCY OR BY A REGULATORY AGENCY OF ANOTHER JURISDICTION FOR CONDUCT THAT RELATES TO THE PERSON'S EMPLOYMENT AS AN EXCHANGE FACILITATOR; OR

(XI) IS CONVICTED OF OR PLEADS GUILTY OR NOLO CONTENDERE TO A FELONY OR ANY CRIME DEFINED IN TITLE 18, C.R.S., THAT RELATES TO THE PERSON'S EMPLOYMENT AS AN EXCHANGE FACILITATOR. A CERTIFIED COPY OF THE JUDGMENT OF A COURT OF COMPETENT JURISDICTION OF THE CONVICTION OR PLEA SHALL BE PRIMA FACIE EVIDENCE OF THE CONVICTION OR PLEA.

SECTION 2. Applicability. This act shall apply to acts occurring on or after the effective date of this act.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: April 16, 2009