

Exchange Facilitators

Generally, this Act refers to “exchange facilitators” as people, who, for a fee, enter into an agreement with a taxpayer to act as a qualified intermediary in an exchange of like-kind property, an Exchange Accommodation Titleholder, or a qualified trustee or escrow holder. It requires exchange facilitators maintain certain funds in separately identified accounts or in a qualified escrow or qualified trust in order to do business. It prohibits exchange facilitators from making misrepresentations, failing to account for moneys or property of others, engaging in fraudulent or dishonest dealings, committing certain crimes, or materially failing to fulfill contractual duties to an exchange client. The Act requires exchange facilitators notify their clients about changes in the control of the exchange facilitator. Violations are subject to a civil penalty of up to \$2,500.

Submitted as:

Virginia

[HB 417 \(Enrolled version\)](#)

Status: Enacted into law in 2010.

Suggested State Legislation

(Title, enacting clause, etc.)

1 Section 1. [*Short Title.*] This Act shall be cited as “The Exchange Facilitators Act.”

2

3 Section 2. [*Definitions.*] As used in this Act:

4

5 “Affiliated with” means that a person directly, or indirectly through one or more
6 intermediaries, controls, or is controlled by, or is under common control with the other specified
7 person.

7

8 “Commingle” means to mix together exchange funds with operating and other
9 nonexchange funds belonging to or under control of the exchange facilitator in such a manner
10 that a client's exchange funds cannot be distinguished from operating or other nonexchange
11 funds belonging to or under control of the exchange facilitator.

11

12 “Exchange Accommodation Titleholder” or “EAT” has the same meaning ascribed
13 thereto in IRS Revenue Procedure 2000-37.

13

14 “Exchange client” means the taxpayer with whom the exchange facilitator enters into an
15 agreement described in subdivision 1 of the definition of exchange facilitator.

15

16 “Exchange facilitator” means a person that:

16

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

18

19 a. By which the exchange facilitator acquires from said taxpayer the
20 contractual rights to sell said taxpayer's relinquished property located in the state and transfer a
21 replacement property to said taxpayer as a qualified intermediary as that term is defined under
22 Treasury Regulation § 1.1031(k)-1(g)(4);

22

23 b. To take title to a property located in the state as an Exchange
24 Accommodation Titleholder; or

24

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

27 2. Maintains an office in the state for the purpose of soliciting business as an
28 exchange facilitator.

29 “Exchange facilitator” shall not include:

30 1. The taxpayer or disqualified person as that term is defined under Treasury
31 Regulation § 1.1031(k)-1(k) seeking to qualify for the non-recognition provisions of Internal
32 Revenue Code § 1031;

33 2. Any financial institution as defined herein or any title insurance company,
34 underwritten title company, or escrow company that is merely acting as a depository for
35 exchange funds or that is acting solely as a qualified escrow holder or qualified trustee as those
36 terms are defined under Treasury Regulation § 1.1031(k)-1(g)(3), and is not otherwise
37 facilitating exchanges as defined herein;

38 3. A person who advertises for and teaches seminars or classes or otherwise
39 gives presentations to attorneys, accountants, real estate professionals, tax professionals, or other
40 professionals where the primary purpose is to teach the professionals about tax deferred
41 exchanges or train them to act as exchange facilitators; or

42 4. An entity that is wholly owned by an exchange facilitator or that is wholly
43 owned by the same person as the exchange facilitator and is used by such entity to facilitate
44 exchanges or to take title to property in the state as an EAT.

45 “Exchange funds” means the funds received by the exchange facilitator from or on behalf
46 of the exchange client for the purpose of facilitating an exchange of like-kind property.

47 “Fee” means, for purposes of subdivision 1 of the definition of exchange facilitator,
48 compensation of any nature, direct or indirect, monetary or in-kind, that is received by a person
49 or a related person as described in Internal Revenue Code § 267(b) or 707(b) for any services
50 relating to or incidental to the exchange of like-kind property under Internal Revenue Code §
51 1031.

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

58 “Person” means, in addition to the singular, persons, groups of persons, cooperative
59 associations, limited liability companies, firms, partnerships, corporations, or other legal entities
60 and includes the agents and employees of any such person.

61
62 Section 3. [*Change in Control.*] An exchange facilitator shall notify all existing exchange
63 clients whose relinquished property is located in the state, or whose replacement property held
64 under a Qualified Exchange Accommodation Agreement as defined in [insert citation] and is
65 located in the state, of any change in control of the exchange facilitator. Such notification shall
66 be made to the exchange facilitator's clients within [10 business days] following the effective
67 date of such change in control either by facsimile or email transmission, or by first class mail,
68 and by posting such notice of change in control on the exchange facilitator's website, if any, for a
69 period ending not sooner than [90 days] after the change in control. Such notification shall set
70 forth the name, address, and other contact information of the transferees. For purposes of this
71 Act, “transferee” means the party or parties to whom the ownership or control of the exchange
72 facilitator has been transferred. Notwithstanding the above, if the exchange facilitator is a
73 publicly traded company and remains a publicly traded company after a change in control, the
74 publicly traded company shall not be required to notify its existing clients of such change in
75 control. For purposes of this section, “change in control” means any transfer within [12 months]

76 of more than [50 percent] of the assets or ownership interests, direct or indirect, of the exchange
77 facilitator.

78
79 Section 4. [*Separately Identified Accounts, or Qualified Escrows or Qualified Trusts.*]

80 A. An exchange facilitator at all times shall:

81 1. Deposit the exchange funds in a deposit account that is a separately identified
82 account, as defined in Treasury Regulation § 1.468B-6(c)(ii), and provide that any withdrawals
83 from such separately identified account require the written authorization of the exchange client
84 and written acknowledgment of the exchange facilitator. Authorization for withdrawals may be
85 delivered by any commercially reasonable means, including the exchange client's delivery to the
86 exchange facilitator of the exchange client's authorization to disburse exchange funds and the
87 exchange facilitator's delivery to the financial institution of the exchange facilitator's
88 authorization to disburse exchange funds or delivery to the financial institution of both the
89 exchange client's and the exchange facilitator's authorizations to disburse exchange funds. For
90 purposes of this Act, a "deposit account" means a demand, time, savings, passbook, money
91 market, certificate of deposit, or similar account maintained with a financial institution; or

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

94 B. The deposit account shall be with a financial institution and the interest earned on such
95 account shall accrue to the parties as provided in a written agreement between the exchange
96 facilitator and the exchange client. However, the exchange client may expressly direct the
97 exchange facilitator in writing to invest the exchange proceeds in an investment of the exchange
98 client's choice, provided that the exchange facilitator provides written acknowledgment back to
99 the exchange client that includes a confirmation of how the exchange proceeds will be invested.

100
101 Section 5. [*Errors and Omissions Insurance; Cash or Letters of Credit.*]

102 A. An exchange facilitator at all times shall:

103 1. Maintain a policy of errors and omissions insurance in an amount not less than
104 [\$250,000] executed by an insurer authorized to do business in the state; or

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

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

109
110 Section 6. [*Accounting for Money and Property.*]

111 A. Every exchange facilitator shall hold all property related to the exchange client
112 including the exchange funds, other property, and other consideration or instruments received by
113 the exchange facilitator, on behalf of the client, except funds received as the exchange
114 facilitator's compensation. Exchange funds shall be held in accordance with the requirements of
115 Section 4 of this Act.

116 B. An exchange facilitator shall not:

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

119 2. Lend or otherwise transfer exchange funds to any person or entity affiliated
120 with or related (as described in Internal Revenue Code § 267(b) or 707(b)) to the exchange
121 facilitator except that this subsection shall not apply to a transfer or loan made to a financial
122 institution that is the parent of or related to the exchange facilitator or to a transfer from an
123 exchange facilitator to an EAT as required under the exchange contract.

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

129
130 Section 7. [*Prohibited Acts and Penalties.*]

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

- 132 1. Making any material misrepresentations concerning any exchange facilitator
133 transaction that are intended to mislead another;
- 134 2. Pursuing a continued course of misrepresentation or making false statements
135 through advertising or otherwise;
- 136 3. Failing, within a reasonable time, to account for any moneys or property
137 belonging to others that may be in the possession or under the control of the exchange facilitator;
- 138 4. Engaging in any conduct constituting fraudulent or dishonest dealings;
- 139 5. Committing any crime involving fraud, misrepresentation, deceit,
140 embezzlement, misappropriation of funds, robbery, or other theft of property;
- 141 6. Materially failing to fulfill its contractual duties to the exchange client to
142 deliver property or funds to the exchange client unless such failure is due to circumstances
143 beyond the control of the exchange facilitator; or

144 B. A person who is an owner, officer, director, or employee of an exchange facilitator is
145 prohibited from committing any crime involving fraud, misrepresentation, deceit, embezzlement,
146 misappropriation of funds, robbery, or other theft of property; however, the commission of such
147 crime by an officer, director, or employee of an exchange facilitator shall not be considered a
148 violation of this Act if the employment or appointment of such officer, director, or employee has
149 been terminated and no clients of the exchange facilitator were harmed or full restitution has
150 been made to all harmed clients within a reasonable period of time.

151
152 Section 8. [*Penalty, Attorney Fees.*]

153 A. In any action brought under this Act, if a court finds that a person has willfully
154 engaged in an act or practice in violation of this Act, the [Attorney General], the [attorney for the
155 State], or the attorney for the locality may recover for a [Literary Fund] established under [insert
156 citation], upon petition to the court, a civil penalty of not more than [\$2,500] per violation. For
157 purposes of this section, prima facie evidence of a willful violation may be shown when the
158 [Attorney General], the [attorney for the State], or the attorney for the locality notifies the
159 alleged violator by certified mail that an act or practice is a violation of this Act and the alleged
160 violator, after receipt of the notice, continues to engage in the act or practice.

161 B. In any action brought under this Act, the [Attorney General], the [attorney for the
162 State], or the attorney for the county, city, or town may recover costs and reasonable expenses
163 incurred by the state or local agency in investigating and preparing the case, and attorney fees.

164
165 Section 9. [*Severability.*] [Insert severability clause.]

166
167 Section 10. [*Repealer.*] [Insert repealer clause.]

168
169 Section 11. [*Effective Date.*] [Insert effective date.]

Food Banks

This Act establishes a program in the state department of agriculture to award grants to nonprofit organizations to collect and distribute surplus food grown in the state to food banks and other charitable organizations which serve needy or low-income people. The Act creates a Surplus Agricultural Commodities Fund to fund the program and an advisory committee to guide the program.

Submitted as:

Kentucky

[Chapter 24 of 2009 \(HB 344\)](#)

Status: Enacted into law in 2009.

Suggested State Legislation

(Title, enacting clause, etc.)

1 Section 1. [*Short Title.*] This Act shall be cited as “An Act to Establish Food Banks Using
2 Surplus Agricultural Commodities.”

3

4

Section 2. [*Definitions.*] As used in this Act:

5

(1) “Agricultural commodity” means any agricultural product, including but not limited
6 to plant and animal products grown, raised, or produced within this state for use as food, feed,
7 seed, or any aesthetic, industrial, or chemurgic purpose; and

8

(2) “Food bank” means a surplus food collection and distribution system operated and
9 established to assist in bringing donated food to nonprofit charitable organizations and
10 individuals for redistribution to reduce hunger and supply nutritional needs.

11

12 Section 3. [*Establishing a Program to Collect and Distribute Surplus Agricultural*
13 *Commodities to Food Banks and Other Charitable Organizations.*]

14

(A) There is hereby established in the [department of agriculture] a program to
15 award grants to nonprofit organizations for the purpose of collecting and distributing surplus
16 agricultural commodities grown and raised in this state to food banks and other charitable
17 organizations that serve needy or low-income individuals.

18

(B) Subject to available funds, a nonprofit organization is eligible to receive a grant under
19 this Act if the organization:

20

(1) Has at least [five (5)] years of experience coordinating a statewide network of
21 food banks and charitable organizations that serve counties of this state;

22

(2) Operates a program that coordinates the collection and transportation of
23 surplus agricultural commodities to a statewide network of food banks that provide food to
24 needy or low-income individuals; and

25

(3) Submits to the [department], in a manner and time prescribed by the
26 [department], a proposal for the collection and distribution of agricultural commodities to food
27 banks and other charitable organizations for use in providing food for needy or low-income
28 individuals, including:

29

(a) A description of the proposal;

30

(b) A schedule of projected costs for the proposal;

31

(c) Measurable goals for the proposal; and