

By: Estes

S.B. No. 2127

A BILL TO BE ENTITLED

AN ACT

relating to consumer protections for clients of exchange facilitators for tax-deferred exchanges of real property.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 5, Business & Commerce Code, is amended by adding Chapter 106 to read as follows:

CHAPTER 106. CONSUMER PROTECTIONS FOR CLIENTS OF EXCHANGE FACILITATORS

Sec. 106.001. LEGISLATIVE PURPOSE. The legislature finds that ensuring the integrity, trustworthiness, and capacity of persons holding themselves out as, or performing or contracting to perform the activities of, exchange facilitators is vital to the consummation of transactions involving exchange of and reinvestment in property located in this state and is in the public interest. The purpose of this chapter is to provide consumer protections for clients of persons that engage in the activities of an exchange facilitator in order to ensure the integrity, trustworthiness, and capacity of such persons to engage in those activities.

Sec. 106.002. DEFINITIONS. In this chapter:

(1)(A) "Exchange facilitator" means a person, other than a person described by Paragraph (B), that:

(i) for a fee facilitates an exchange of like kind property by entering into an agreement with a taxpayer by

1 which the person acquires from the taxpayer the contractual rights
2 to sell the taxpayer's relinquished property located in this state
3 and transfers a replacement property to the taxpayer as a qualified
4 intermediary, as that term is defined under Treasury Regulation
5 Section 1.1031(k)-1(g)(4), or that enters into an agreement with
6 the taxpayer to take title to a property in this state as an
7 exchange accommodation titleholder, as that term is defined in
8 Internal Revenue Service Procedure 2000-37, or that enters into an
9 agreement with a taxpayer to act as trustee of a qualified trust or
10 as a holder of a qualified escrow as those terms are defined under
11 Treasury Regulation Section 1.1031(k)-1(g)(3);

12 (ii) maintains an office in this state for
13 the purpose of soliciting business to perform any of the activities
14 described by Subparagraph (i); or

15 (iii) advertises to the public in this
16 state the ability or willingness of the person to provide, or
17 solicits customers to whom to sell, the services of the person
18 described by Subparagraph (i) or services as a qualified
19 intermediary, as that term is defined under Treasury Regulation
20 Section 1.1031(k)-1(g)(4), in printed publications, direct mail,
21 television or radio advertisements, telephone calls, facsimile
22 transmissions, electronic mail and messaging, or other electronic
23 communications, whether active or passive.

24 (B) "Exchange facilitator" does not include any
25 of the following persons:

26 (i) the taxpayer or a disqualified person,
27 as that term is defined under Treasury Regulation Section

1 1.1031(k)-1(k), seeking to qualify for the nonrecognition
2 provisions of Section 1031 Internal Revenue Code of 1986;

3 (ii) a financial institution that is acting
4 only as a depository for exchange funds and that is not facilitating
5 exchanges;

6 (iii) a person that advertises for and
7 teaches seminars or classes or otherwise makes presentations to
8 attorneys, accountants, real estate professionals, tax
9 professionals, or other professionals, when the primary purpose is
10 to teach the professionals about tax-deferred exchanges or to train
11 them to act as exchange facilitators; or

12 (iv) a person licensed as an attorney at law
13 by this state.

14 (2) "Fee" means compensation of any nature, direct or
15 indirect, monetary or in kind, that is received by a person or
16 related person as defined by Section 267(b) or 707(b), Internal
17 Revenue Code of 1986, for any services relating to or incidental to
18 the exchange of like kind property.

19 (3) "Financial institution" means any entity the
20 operations of which are regulated by an agency of the United States
21 Department of the Treasury or the United States Department of
22 Housing and Urban Development, a finance agency as defined by
23 Chapter 11, Finance Code, the Texas Credit Union Commission and
24 credit union department, the Texas Real Estate Commission, or the
25 Texas Department of Insurance.

26 Sec. 106.003. FINANCIAL ASSURANCES. (a) An exchange
27 facilitator must obtain, maintain, and provide to the clients of

1 the exchange facilitator the following financial assurances:

2 (1) a fidelity bond or fidelity bonds in an amount not
3 less than \$1 million, executed by a surety company authorized to do
4 business in this state and approved by the commissioner of
5 insurance for the purpose of issuing bonds under this chapter, or a
6 deposit of cash or securities or letters of credit in an amount not
7 less than \$1 million, with financial institutions; and

8 (2) a policy of errors and omissions insurance in an
9 amount not less than \$250,000, or a deposit of cash or securities or
10 letters of credit in an amount not less than \$250,000, with
11 financial institutions and issuers, as applicable.

12 Sec. 106.004. NATURE AND DUTIES OF AN EXCHANGE FACILITATOR.

13 A person that engages in the business of providing the services of
14 an exchange facilitator is a fiduciary with respect to the parties
15 with whom the person contracts to provide services as an exchange
16 facilitator. An exchange facilitator has a duty of loyalty and of
17 good faith and fair dealing with such parties. A breach of the
18 duties or of either duty is actionable by the parties with whom the
19 exchange facilitator contracted that suffered a loss due to the
20 breach of duty. This section is a clarification of existing law and
21 does not create a separate cause of action.

22 SECTION 2. This Act applies only to exchange facilitators
23 acting under agreements entered into on or after the effective date
24 of this Act or under agreements entered into before the effective
25 date of this Act that do not become effective as to all other
26 parties until on or after that date. Exchange facilitators acting
27 under agreements that became effective as to all parties before the

1 effective date of this Act are covered by the law in effect on the
2 date the agreements became effective, and the former law is
3 continued in effect for that purpose.

4 SECTION 3. This Act takes effect January 1, 2010.