

CHAPTER 212-C**REGULATION OF EXCHANGE FACILITATORS****§1395. Definitions**

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings. [PL 2009, c. 61, §1 (NEW).]

1. Administrator. "Administrator" means the Superintendent of Consumer Credit Protection within the Department of Professional and Financial Regulation.

[PL 2009, c. 61, §1 (NEW).]

2. Affiliated. "Affiliated" means a person, directly or indirectly through one or more intermediaries, who controls, is controlled by or is under common control of, another person.

[PL 2009, c. 61, §1 (NEW).]

3. Client. "Client" means the taxpayer with whom the exchange facilitator enters into an agreement described in subsection 4, paragraph A.

[PL 2009, c. 61, §1 (NEW).]

4. Exchange facilitator. "Exchange facilitator" means a person that does any of the following:

A. Facilitates, for a fee, an exchange of like-kind 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 property located in this State and transfers a replacement property to the taxpayer as a qualified intermediary as that term is defined under United States Treasury Regulation Section 1.1031(k)-1(g)(4) or enters into an agreement with the taxpayer to take title to a property in this State as an exchange accommodation titleholder as that term is defined in United States 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 under United States Treasury Regulation Section 1.1031(k)-1(g)(3), except as provided in section 1396; [PL 2009, c. 61, §1 (NEW).]

B. Maintains an office in this State for the purpose of soliciting business as an exchange facilitator; or [PL 2009, c. 61, §1 (NEW).]

C. Purports to be an exchange facilitator by advertising any of the services listed in paragraph A or soliciting clients in printed publications, direct mail, television or radio advertisements, telephone calls, facsimile transmissions or other electronic communications directed to the general public in this State for purposes of providing any of those services. [PL 2009, c. 61, §1 (NEW).]

[PL 2009, c. 61, §1 (NEW).]

5. Fee. "Fee" means compensation of any nature, direct or indirect, monetary or in-kind, that is received by a person or related person as defined in the United States Internal Revenue Code, Section 267(b) or 707(b) for any services relating to or incidental to the exchange of like-kind property.

[PL 2009, c. 61, §1 (NEW).]

6. Financial institution. "Financial institution" means a bank, credit union, savings and loan association, savings bank or trust company or other similar depository or nondepository financial institution including an institution whose accounts are insured by the full faith and credit of the United States, the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund or other similar or successor programs as well as an affiliate or subsidiary of such institution.

[PL 2009, c. 61, §1 (NEW).]

7. Person. "Person" means an individual, corporation, partnership, limited liability company, joint venture, association, joint stock company, trust or any other form of legal entity, including agents and employees of a person.

[PL 2009, c. 61, §1 (NEW).]

8. Prudent investor standard. "Prudent investor standard" means the prudent investor standard referenced in Title 18-B, Part 1, section 901, subsection 1.

[PL 2009, c. 61, §1 (NEW).]

SECTION HISTORY

PL 2009, c. 61, §1 (NEW).

§1396. License; requirements

1. License. A person may not directly or indirectly engage in or carry on, or purport to engage in or carry on, the business of, or act in the capacity of, an exchange facilitator in this State without first obtaining a license from the administrator in accordance with this chapter.

[PL 2009, c. 61, §1 (NEW).]

2. Issuance of license; requirements; fees. An application for a license as an exchange facilitator must be in writing and filed with the administrator in the manner and form prescribed by the administrator. The administrator may require licensing through the nationwide mortgage licensing system and registry as defined in Title 9-A, section 13-102, subsection 8. The administrator is authorized to participate in the nationwide mortgage licensing system and registry.

In all cases, whether licensing is through the nationwide mortgage licensing system and registry or otherwise, the administrator may establish, by rule, requirements for licensing, including but not limited to:

A. Background checks for:

- (1) Criminal history through fingerprint or other databases;
- (2) Civil or administrative records;
- (3) Credit history; or
- (4) Any other information determined necessary by the nationwide mortgage licensing system and registry; [PL 2021, c. 245, Pt. D, §5 (NEW).]

B. The payment of fees to apply for or renew licenses, except that the fee for an initial application may not exceed \$600 and for a renewal may not exceed \$500. If licensing is through the nationwide mortgage licensing system and registry, an applicant must also pay a nationwide mortgage licensing system and registry processing fee in an amount to be determined by the administrators of the nationwide mortgage licensing system and registry. Renewal applications received after the due date are subject to an additional fee of \$100; [PL 2021, c. 245, Pt. D, §5 (NEW).]

C. The setting or resetting as necessary of renewal or reporting dates; and [PL 2021, c. 245, Pt. D, §5 (NEW).]

D. Other requirements for application for, amendment of or revocation of a license or any other such activities as the administrator considers necessary. [PL 2021, c. 245, Pt. D, §5 (NEW).]

All funds received by the administrator under this chapter are appropriated for the use of the administrator, and any balance of the funds does not lapse but must be carried forward to be expended for the same purposes in the following fiscal year.

Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

[PL 2021, c. 245, Pt. D, §5 (AMD).]

3. Renewal.

[PL 2021, c. 245, Pt. D, §6 (RP).]

4. Place of business; name. An exchange facilitator licensed under this chapter shall maintain a home office as its principal location for the transaction of exchange facilitator business. The administrator may issue additional branch licenses to the same exchange facilitator licensee upon compliance with all the provisions of this chapter governing the issuance of a single exchange facilitator license. An exchange facilitator may not engage in the exchange facilitator business at any place of business for which it does not hold a license or engage in business under any other name than that on the license.

[PL 2009, c. 61, §1 (NEW).]

5. Exemptions. The following persons described in this subsection are exempt from the requirements of this chapter:

A. A taxpayer or a disqualified person, as that term is defined under United States Treasury Regulation Section 1.1031(k)-1(k), seeking to qualify for the nonrecognition provisions of Section 1031 of the United States Internal Revenue Code of 1986, as amended; [PL 2009, c. 61, §1 (NEW).]

B. A financial institution; [PL 2009, c. 61, §1 (NEW).]

C. A title insurance company, underwritten title company or escrow company that is acting solely as a qualified escrow holder or qualified trustee, as those terms are defined under United States Treasury Regulation Section 1.1031(k)-1(g)(3), and that is not facilitating exchanges; [PL 2009, c. 61, §1 (NEW).]

D. A person that advertises for and teaches seminars or classes or otherwise makes a presentation to attorneys, accountants, real estate professionals, tax professionals or other professionals, when the primary purpose is to teach the professionals about tax-deferred exchanges or to train them to act as exchange facilitators; [PL 2009, c. 61, §1 (NEW).]

E. A qualified intermediary, as that term is defined under United States Treasury Regulation Section 1.1031(k)-1(g)(4), who holds exchange funds from the disposition of relinquished property located outside this State; [PL 2009, c. 61, §1 (NEW).]

F. An entity in which an exchange accommodation titleholder has a 100% interest and that is used by the exchange accommodation titleholder as defined in United States Internal Revenue Service Revenue Procedure 2003-37 to take title to property in this State; [PL 2009, c. 61, §1 (NEW).]

G. A person licensed to practice law in this State while engaged in the performance of the person's professional duties, except an attorney or law firm actively engaging in a separate business as an exchange facilitator; [PL 2009, c. 61, §1 (NEW).]

H. A real estate company, broker or salesperson licensed by and subject to the jurisdiction of this State while performing acts in the course of or incidental to sales or purchases of real or personal property handled or negotiated by the real estate company, broker or salesperson; [PL 2009, c. 61, §1 (NEW).]

I. A receiver, trustee in bankruptcy, executor, administrator, guardian or other person acting under the supervision or order of a court of this State or of a federal court; [PL 2009, c. 61, §1 (NEW).]

J. A person licensed in this State as a certified public accountant while engaged in the performance of the person's professional duties who is not actively engaged in a separate business as an exchange facilitator; [PL 2009, c. 61, §1 (NEW).]

K. A regulated lender subject to the licensing requirements of Title 9-A to the extent the lender is not engaged in a separate business as an exchange facilitator; [PL 2009, c. 61, §1 (NEW).]

L. Any federal or state agency and its political subdivisions; and [PL 2009, c. 61, §1 (NEW).]

M. A loan broker subject to the licensing requirements of Title 9-A, Article 10 to the extent the loan broker is not engaged in a separate business as an exchange facilitator. [PL 2009, c. 61, §1 (NEW).]

[PL 2009, c. 61, §1 (NEW).]

SECTION HISTORY

PL 2009, c. 61, §1 (NEW). PL 2021, c. 245, Pt. D, §§5, 6 (AMD).

§1397. Financial responsibility and insurance coverage requirements

1. Financial responsibility. An exchange facilitator shall at all times comply with one or more of the following:

A. Maintain a fidelity bond or bonds in an amount not less than \$250,000, executed by an insurer authorized to do business in this State; [PL 2009, c. 61, §1 (NEW).]

B. Deposit an amount of cash or securities or irrevocable letters of credit in an amount not less than \$250,000 in an interest-bearing deposit account or a money market account with a financial institution. Interest on that amount must accrue to the exchange facilitator; or [PL 2009, c. 61, §1 (NEW).]

C. Deposit all exchange funds in a qualified escrow account or qualified trust, as those terms are defined under United States Treasury Regulation Section 1.1031(k)-1(g)(3), with a financial institution and provide that any withdrawals from that escrow account or trust require that person's and the client's written authorization. [PL 2009, c. 61, §1 (NEW).]

An exchange facilitator may maintain a bond or bonds or deposit an amount of cash or securities or irrevocable letters of credit in excess of the minimum required amounts. If an exchange facilitator is listed as a named insured on one or more fidelity bonds totaling at least \$250,000, the requirements of this subsection are deemed satisfied.

[PL 2009, c. 61, §1 (NEW).]

2. Insurance or alternative coverage. An exchange facilitator shall at all times comply with either of the following:

A. Maintain an errors and omissions insurance policy in an amount not less than \$100,000, executed by an insurer authorized to do business in this State; or [PL 2009, c. 61, §1 (NEW).]

B. Deposit an amount of cash, securities or irrevocable letters of credit in an amount not less than \$100,000 in an interest-bearing deposit account or a money market account with a financial institution. Interest on that amount must accrue to the exchange facilitator. [PL 2009, c. 61, §1 (NEW).]

An exchange facilitator may maintain insurance or deposit an amount of cash or securities or irrevocable letters of credit in excess of the minimum required amounts. If an exchange facilitator is listed as a named insured on an errors and omissions policy of at least \$100,000, the requirements of this section are deemed satisfied.

[PL 2009, c. 61, §1 (NEW).]

SECTION HISTORY

PL 2009, c. 61, §1 (NEW).

§1398. Duties of exchange facilitators; prohibited activities

1. Duty to client. An exchange facilitator shall act as a custodian for all exchange funds, including, but not limited to, money, property, other consideration or instruments received by the person from, or on behalf of, a client, except funds received as the person's compensation. An exchange facilitator shall

invest those exchange funds in investments that meet a prudent investor standard and that satisfy the investment goals of liquidity and preservation of principal. For purposes of this subsection, a prudent investor standard is violated if any of the following occurs:

- A. Exchange funds are knowingly commingled by the exchange facilitator with the operating accounts of the exchange facilitator; [PL 2009, c. 61, §1 (NEW).]
- B. Exchange funds are loaned or otherwise transferred to any person or entity, other than a financial institution, that is affiliated with or related to the exchange facilitator. This paragraph does not apply to the transfer of funds from an exchange facilitator to an exchange accommodation titleholder as defined in United States Internal Revenue Service Revenue Procedure 2003-37 in accordance with an exchange contract; or [PL 2009, c. 61, §1 (NEW).]
- C. Exchange funds are invested in a manner that does not provide sufficient liquidity to meet the exchange facilitator's contractual obligations to its clients and does not preserve the principal of the exchange funds. [PL 2009, c. 61, §1 (NEW).]

Exchange funds are not subject to execution or attachment on any claim against the exchange facilitator. An exchange facilitator may not knowingly keep, or cause to be kept, any money in any bank, credit union, or other financial institution under a name designating the money as belonging to the client of any exchange facilitator, unless that money belongs to that client and was actually entrusted to the exchange facilitator by that client.

[PL 2009, c. 61, §1 (NEW).]

2. Notice of change in control. An exchange facilitator shall notify all existing exchange clients whose relinquished property is located in this State, or whose replacement property held under a qualified exchange accommodation agreement is located in this State, of any change in control of the exchange facilitator. The notice must be provided within 10 business days of the effective date of the change in control by hand delivery, facsimile transmission, e-mail, overnight mail or first-class mail, and must be posted on the exchange facilitator's publicly accessible website for at least 90 days following the change in control. The notice must include the name, address and other contact information of the transferees. For purposes of this subsection, "change in control" means any transfer of more than 50% of the assets or ownership interests, directly or indirectly, of the exchange facilitator. [PL 2009, c. 61, §1 (NEW).]

3. Prohibitions. A person engaged in business as an exchange facilitator may not do any of the following:

- A. Make any material misrepresentations concerning any like-kind exchange transaction that are intended to mislead; [PL 2009, c. 61, §1 (NEW).]
- B. Pursue a continued or flagrant course of misrepresentation, or make false statements through advertising or otherwise; [PL 2009, c. 61, §1 (NEW).]
- C. Fail, within a reasonable time, to account for any money or property belonging to others that may be in the possession of, or under control of, the person; [PL 2009, c. 61, §1 (NEW).]
- D. Engage in any conduct constituting fraudulent or dishonest dealings; [PL 2009, c. 61, §1 (NEW).]
- E. Commit any crime involving fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery or theft; or [PL 2009, c. 61, §1 (NEW).]
- F. Materially fail to fulfill its contractual duties to a client to deliver property or funds to the client, unless that failure is due to circumstances beyond the control of the person engaging in business as an exchange facilitator. [PL 2009, c. 61, §1 (NEW).]

[PL 2009, c. 61, §1 (NEW).]

SECTION HISTORY

PL 2009, c. 61, §1 (NEW).

§1399. Civil liability

1. Claim on bonds, deposits or letters of credit. The administrator may file a claim on behalf of any client or clients on the bonds, deposits or letters of credit described in section 1397, subsection 1 to recover the damages as a result of financial loss or damages by reason of the failure of an exchange facilitator to comply with this chapter.

[PL 2009, c. 61, §1 (NEW).]

2. Civil action. A person may bring a civil action in a court of competent jurisdiction against an exchange facilitator for any violation of this chapter.

[PL 2009, c. 61, §1 (NEW).]

SECTION HISTORY

PL 2009, c. 61, §1 (NEW).

§1400. Powers and duties of the administrator

1. Rules. In addition to any other powers and duties of the administrator authorized by law, the administrator may adopt rules as necessary to carry out the purposes of this chapter. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

[PL 2009, c. 61, §1 (NEW).]

2. Examinations and investigations. The administrator may examine or investigate the books, records and accounts of each exchange facilitator, within or without the State, at intervals the administrator considers necessary. The administrator may assess the exchange facilitator for the actual costs of the examination pursuant to Title 9-A, Article 6.

[PL 2009, c. 61, §1 (NEW).]

3. Enforcement. The administrator may undertake any action authorized pursuant to Title 9-A, Article 6 to ensure compliance with this chapter.

[PL 2009, c. 61, §1 (NEW).]

SECTION HISTORY

PL 2009, c. 61, §1 (NEW).

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