

# 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:

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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  
27 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.”

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4

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

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          (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;

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          (c) Measurable goals for the proposal; and