

MAINE STATE LEGISLATURE

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INSURANCE AND FINANCIAL SERVICES

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
124TH LEGISLATURE
FIRST REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 144, L.D. 165, Bill, "An Act To Supervise and Regulate Escrow Agents in Order To Protect Consumers"

Amend the bill by striking out the title and substituting the following:

'An Act To Supervise and Regulate Real Estate Settlement Agents and Exchange Facilitators in Order To Protect Consumers'

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

'Sec. 1. 10 MRSA c. 212-C is enacted to read:

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.

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

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.

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

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

1 taxpayer the contractual rights to sell the taxpayer's relinquished property located in
2 this State and transfers a replacement property to the taxpayer as a qualified
3 intermediary as that term is defined under United States Treasury Regulation Section
4 1.1031(k)-1(g)(4) or enters into an agreement with the taxpayer to take title to a
5 property in this State as an exchange accommodation titleholder as that term is
6 defined in United States Internal Revenue Service Revenue Procedure 2000-37 or
7 enters into an agreement with a taxpayer to act as a qualified trustee or qualified
8 escrow holder as those terms are defined under United States Treasury Regulation
9 Section 1.1031(k)-1(g)(3), except as provided in section 1396;

10 B. Maintains an office in this State for the purpose of soliciting business as an
11 exchange facilitator; or

12 C. Purports to be an exchange facilitator by advertising any of the services listed in
13 paragraph A or soliciting clients in printed publications, direct mail, television or
14 radio advertisements, telephone calls, facsimile transmissions or other electronic
15 communications directed to the general public in this State for purposes of providing
16 any of those services.

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

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

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

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

32 **§1396. License; requirements**

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

37 2. Issuance of license. An application for a license as an exchange facilitator must
38 be in writing and filed with the administrator in the manner and form prescribed by the
39 administrator. The administrator shall set an application fee for a primary office not to
40 exceed \$350 and for any branch offices not to exceed \$200. All funds received by the
41 administrator under this chapter are appropriated for the use of the administrator.

42 3. Renewal. On or before April 30th of each year, an exchange facilitator licensed
43 under this chapter shall pay an annual license renewal fee of \$150 and shall file with the

1 administrator a renewal form containing such information as the administrator may
2 require.

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

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

13 A. A taxpayer or a disqualified person, as that term is defined under United States
14 Treasury Regulation Section 1.1031(k)-1(k), seeking to qualify for the
15 nonrecognition provisions of Section 1031 of the United States Internal Revenue
16 Code of 1986, as amended;

17 B. A financial institution;

18 C. A title insurance company underwritten title company or escrow company that is
19 acting solely as a qualified escrow holder or qualified trustee, as those terms are
20 defined under United States Treasury Regulation Section 1.1031(k)-1(g)(3), and that
21 is not facilitating exchanges;

22 D. A person that advertises for and teaches seminars or classes or otherwise makes a
23 presentation to attorneys, accountants, real estate professionals, tax professionals or
24 other professionals, when the primary purpose is to teach the professionals about tax-
25 deferred exchanges or to train them to act as exchange facilitators;

26 E. A qualified intermediary, as that term is defined under United States Treasury
27 Regulation Section 1.1031(k)-1(g)(4), who holds exchange funds from the disposition
28 of relinquished property located outside this State;

29 F. An entity in which an exchange accommodation titleholder has a 100% interest
30 and that is used by the exchange accommodation titleholder as defined in United
31 States Internal Revenue Service Revenue Procedure 2003-37 to take title to property
32 in this State;

33 G. A person licensed to practice law in this State while engaged in the performance
34 of the person's professional duties, except an attorney or law firm actively engaging
35 in a separate business as an exchange facilitator;

36 H. A real estate company, broker or salesperson licensed by and subject to the
37 jurisdiction of this State while performing acts in the course of or incidental to sales
38 or purchases of real or personal property handled or negotiated by the real estate
39 company, broker or salesperson;

40 I. A receiver, trustee in bankruptcy, executor, administrator, guardian or other person
41 acting under the supervision or order of a court of this State or of a federal court;

1 J. A person licensed in this State as a certified public accountant while engaged in
2 the performance of the person's professional duties who is not actively engaged in a
3 separate business as an exchange facilitator;

4 K. A regulated lender subject to the licensing requirements of Title 9-A to the extent
5 the lender is not engaged in a separate business as an exchange facilitator;

6 L. Any federal or state agency and its political subdivisions; and

7 M. A loan broker subject to the licensing requirements of Title 9-A, Article 10 to the
8 extent the loan broker is not engaged in a separate business as an exchange facilitator.

9 **§1397. Financial responsibility and insurance coverage requirements**

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

12 A. Maintain a fidelity bond or bonds in an amount not less than \$250,000, executed
13 by an insurer authorized to do business in this State;

14 B. Deposit an amount of cash or securities or irrevocable letters of credit in an
15 amount not less than \$250,000 in an interest-bearing deposit account or a money
16 market account with a financial institution. Interest on that amount must accrue to the
17 exchange facilitator; or

18 C. Deposit all exchange funds in a qualified escrow account or qualified trust, as
19 those terms are defined under United States Treasury Regulation Section
20 1.1031(k)-1(g)(3), with a financial institution and provide that any withdrawals from
21 that escrow account or trust require that person's and the client's written
22 authorization.

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

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

29 A. Maintain an errors and omissions insurance policy in an amount not less than
30 \$100,000, executed by an insurer authorized to do business in this State; or

31 B. Deposit an amount of cash, securities or irrevocable letters of credit in an amount
32 not less than \$100,000 in an interest-bearing deposit account or a money market
33 account with a financial institution. Interest on that amount must accrue to the
34 exchange facilitator.

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

1 **§1398. Duties of exchange facilitators; prohibited activities**

2 **1. Duty to client.** An exchange facilitator shall act as a custodian for all exchange
3 funds, including, but not limited to, money, property, other consideration or instruments
4 received by the person from, or on behalf of, a client, except funds received as the
5 person's compensation. An exchange facilitator shall invest those exchange funds in
6 investments that meet a prudent investor standard and that satisfy the investment goals of
7 liquidity and preservation of principal. For purposes of this subsection, a prudent investor
8 standard is violated if any of the following occurs:

9 **A.** Exchange funds are knowingly commingled by the exchange facilitator with the
10 operating accounts of the exchange facilitator;

11 **B.** Exchange funds are loaned or otherwise transferred to any person or entity, other
12 than a financial institution, that is affiliated with or related to the exchange facilitator.
13 This paragraph does not apply to the transfer of funds from an exchange facilitator to
14 an exchange accommodation titleholder as defined in United States Internal Revenue
15 Service Revenue Procedure 2003-37 in accordance with an exchange contract; or

16 **C.** Exchange funds are invested in a manner that does not provide sufficient liquidity
17 to meet the exchange facilitator's contractual obligations to its clients and does not
18 preserve the principal of the exchange funds.

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

25 **2. Notice of change in control.** An exchange facilitator shall notify all existing
26 exchange clients whose relinquished property is located in this State, or whose
27 replacement property held under a qualified exchange accommodation agreement is
28 located in this State, of any change in control of the exchange facilitator. The notice must
29 be provided within 10 business days of the effective date of the change in control by hand
30 delivery, facsimile transmission, e-mail, overnight mail or first-class mail, and must be
31 posted on the exchange facilitator's publicly accessible website for at least 90 days
32 following the change in control. The notice must include the name, address and other
33 contact information of the transferees. For purposes of this subsection, "change in
34 control" means any transfer of more than 50% of the assets or ownership interests,
35 directly or indirectly, of the exchange facilitator.

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

38 **A.** Make any material misrepresentations concerning any like-kind exchange
39 transaction that are intended to mislead;

40 **B.** Pursue a continued or flagrant course of misrepresentation, or make false
41 statements through advertising or otherwise;

42 **C.** Fail, within a reasonable time, to account for any money or property belonging to
43 others that may be in the possession of, or under control of, the person;

1 the National Credit Union Share Insurance Fund or other similar or successor programs
2 as well as an affiliate or subsidiary of such financial institution.

3 **3. Settlement agency.** "Settlement agency" means the person responsible for
4 conducting the settlement or disbursement of settlement proceeds in a residential real
5 estate transaction effecting the sale, transfer, encumbrance or lease to another person of
6 real or personal property located in this State. "Settlement agency" includes an individual,
7 corporation, limited liability company, partnership or other entity conducting the
8 settlement and disbursement of settlement proceeds.

9 **4. Settlement agent.** "Settlement agent" means a person engaged in the business of
10 settlements on behalf of a settlement agency.

11 **5. Settlement.** "Settlement" means the receipt of loan funds, loan documents or other
12 documents or funds to carry out the contractual terms of a residential real estate
13 transaction.

14 **§1400-B. Registration; requirements**

15 **1. Registration.** A person may not directly or indirectly engage in or carry on, or
16 purport to engage in or carry on, the business of, or act in the capacity of, a settlement
17 agency in this State without first registering with the administrator in accordance with
18 this chapter. The registration must be in a manner and form prescribed by the
19 administrator. The administrator shall set a registration fee for a primary office or a
20 branch office not to exceed \$25. All funds received by the administrator under this
21 chapter are appropriated for the use of the administrator.

22 **2. Exemptions.** This chapter does not apply to:

23 A. A person licensed to practice law in this State while engaged in the performance
24 of the person's professional duties, except an attorney or law firm actively engaging
25 in a separate business as a settlement agency;

26 B. Individual settlement agents, working on behalf of a settlement agency registered
27 or exempt under this section;

28 C. A real estate company, broker or salesperson licensed by and subject to the
29 jurisdiction of this State while performing acts in the course of or incidental to sales
30 or purchases of real or personal property handled or negotiated by the real estate
31 company, broker or salesperson;

32 D. A receiver, trustee in bankruptcy, executor, administrator, guardian or other
33 person acting under the supervision or order of a court of this State or of a federal
34 court;

35 E. A person licensed in this State as a certified public accountant while engaged in
36 the performance of the person's professional duties who is not actively engaged in a
37 separate business as a settlement agency;

38 F. A financial institution;

39 G. A regulated lender subject to the licensing requirements of Title 9-A to the extent
40 the lender is not engaged in a separate business as a settlement agency;

41 H. Any federal or state agency and its political subdivisions; and

1 I. A loan broker subject to the requirements of Title 9-A, Article 10 to the extent the
2 loan broker is not engaged in a separate business as a settlement agency.

3 3. **Renewal.** On or before April 30th of each year, a settlement agency registered
4 under this chapter shall pay an annual renewal fee of \$25 and shall file with the
5 administrator a renewal form containing such information as the administrator may
6 require.

7 4. **Place of business; name.** A settlement agency registered under this chapter shall
8 maintain a home office as its principal location for the transaction of settlement business.
9 The administrator may issue additional branch registrations to the same settlement agency
10 upon compliance with all the provisions of this chapter governing the issuance of a single
11 settlement agency registration. For purposes of this subsection, the conducting of a
12 settlement by mail or at a remote location for the convenience of the parties by a
13 settlement agent based out of the settlement agency's registered principal office or
14 registered branch office is not considered the transaction of settlement business at a place
15 of business other than the registered location of the settlement agency.

16 5. **Examinations and investigations.** Upon any complaint alleging a violation of
17 law, including the Funded Settlement Act, the federal Real Estate Settlement Procedures
18 Act of 1974, 12 United States Code, Section 2601 et seq. or the Maine Consumer Credit
19 Code, the administrator may examine or investigate the books, records and accounts of a
20 settlement agency.

21 6. **Enforcement.** The administrator may undertake any action authorized pursuant to
22 Title 9-A, Article 6 to ensure compliance with this chapter. Nothing in this subsection
23 may be construed to affect the ability of a settlement company to assert the attorney-client
24 privilege. With respect to a settlement company that is owned or operated by an attorney
25 licensed in this State, the administrator shall notify the Board of Overseers of the Bar of
26 any enforcement action taken by the administrator pursuant to this chapter.

27 Sec. 3. **Appropriations and allocations.** The following appropriations and
28 allocations are made.

29 **PROFESSIONAL AND FINANCIAL REGULATION, DEPARTMENT OF**
30 **Administrative Services - Professional and Financial Regulation 0094**

31 Initiative: Allocates funds for the one-time costs of establishing new license and
32 registration categories in the agency's licensing system.

33	OTHER SPECIAL REVENUE FUNDS	2009-10	2010-11
34	All Other	\$5,000	\$0
35			
36	OTHER SPECIAL REVENUE FUNDS TOTAL	<u>\$5,000</u>	<u>\$0</u>

37 **Bureau of Consumer Credit Protection 0091**

38 Initiative: Allocates funds for the ongoing costs of regulating exchange facilitators and
39 residential real estate settlement agencies.

1	OTHER SPECIAL REVENUE FUNDS	2009-10	2010-11
2	All Other	\$1,525	\$6,100
3			
4	OTHER SPECIAL REVENUE FUNDS TOTAL	<u>\$1,525</u>	<u>\$6,100</u>
5	PROFESSIONAL AND FINANCIAL		
6	REGULATION, DEPARTMENT OF		
7	DEPARTMENT TOTALS	2009-10	2010-11
8			
9	OTHER SPECIAL REVENUE FUNDS	\$6,525	\$6,100
10			
11	DEPARTMENT TOTAL - ALL FUNDS	<u>\$6,525</u>	<u>\$6,100</u>
12			

SUMMARY

This amendment replaces the bill. In section 1, the amendment regulates those entities that operate as exchange facilitators, requiring those entities to be licensed by the Department of Professional and Financial Regulation, Bureau of Consumer Credit Protection and to demonstrate financial responsibility by obtaining fidelity bonds or surety bonds and insurance. In section 2, the amendment requires residential mortgage settlement agencies to register with the Bureau of Consumer Credit Protection. The amendment gives the Superintendent of Consumer Credit Protection authority to examine a settlement agency and investigate complaints alleging a violation of existing laws, such as the federal Real Estate Settlement Procedures Act of 1974, the Funded Settlement Act and the Maine Consumer Credit Code, for the protection of consumers.

The amendment also adds an appropriations and allocations section.

FISCAL NOTE REQUIRED

(See attached)



124th MAINE LEGISLATURE

LD 165

LR 405(02)

An Act To Supervise and Regulate Escrow Agents in Order To Protect Consumers

Fiscal Note for Bill as Amended by Committee Amendment "A"
Committee: Insurance and Financial Services
Fiscal Note Required: Yes

Fiscal Note

	2009-10	2010-11	Projections 2011-12	Projections 2012-13
Appropriations/Allocations				
Other Special Revenue Funds	\$6,525	\$6,100	\$6,100	\$6,100
Revenue				
Other Special Revenue Funds	\$7,375	\$6,375	\$6,375	\$6,375

Correctional and Judicial Impact Statements

Increases the number of civil violations

The collection of additional fines may also increase General Fund revenue by minor amounts.

Fiscal Detail and Notes

Provides an Other Special Revenue Funds allocation of \$1,525 in 2009-10 and \$6,100 in 2010-11 to the Bureau of Consumer Credit Protection in the Department of Professional and Financial Regulation for the ongoing costs of regulating exchange facilitators and residential real estate settlement agencies. Also provides an allocation of \$5,000 in 2009-10 to the Office of Administrative Services in the Department of Professional and Financial Regulation for the one-time costs of establishing new license and registration categories in the agency's licensing system. Also assumes increased Other Special Revenue Funds revenue collections of \$7,375 in 2009-10 and \$6,375 in 2010-11 from new licensing and registration fees.