

**PROPOSED REGULATION OF
THE DIVISION OF FINANCIAL INSTITUTIONS
OF THE DEPARTMENT OF BUSINESS AND INDUSTRY**

LCB File No. R141-08

February 17, 2009

EXPLANATION – Matter in *italics* is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

AUTHORITY: §§1-18, NRS 645G.100.

A REGULATION relating to exchange facilitators; authorizing the appointment of receiver licensees or successor licensees in the event of the death of a licensee; establishing certain fiduciary duties of a licensee; establishing procedures for the withdrawal of money maintained by a financial institution; requiring proof of a bond or deposit to be made available to clients; establishing appropriate designations for exchange funds deposited in a financial institution; authorizing the appointment of receiver licensees or successor licensees in the event of the suspension, revocation or denial of the renewal of a license; requiring certain information to be submitted with an application for a license; providing for the maintenance of certain records; establishing provisions relating to exchange facilitator officers; requiring certain documents to be confidential; establishing provisions relating to disciplinary actions; and providing other matters properly relating thereto.

Section 1. Chapter 645G of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 18, inclusive, of this regulation.

Sec. 2. *As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 645G.020 to 645G.060, inclusive, and sections 3 and 4 of this regulation have the meanings ascribed to them in those sections.*

Sec. 3. *“Exchange fund” means all money, property and any other consideration or instrument received by a licensee from or on behalf of a client, except any money received by the licensee as compensation.*

Sec. 4. *“Publicly traded company” means a company which is publicly traded or a subsidiary of a company which is publicly traded.*

Sec. 5. *As defined in NRS 645G.040, the term “exchange facilitator” will be interpreted not to include an entity in which an exchange facilitator has a 100-percent ownership interest that is used to facilitate exchanges or to take title to a property in this State as an exchange accommodation titleholder.*

Sec. 6. 1. *In addition to any other requirement set forth in this chapter or chapter 645G of NRS, an application for a license as an exchange facilitator must be submitted on a form prescribed by the Division and must:*

- (a) Be verified;*
- (b) State the locations of the principal office and each branch office, if any;*
- (c) State the name of the exchange facilitator officer responsible for the operation of the office and each branch office, if any;*

(d) State the name under which the applicant proposes to conduct his business; and

(e) Include, as an attachment:

(1) A financial statement for the applicant’s most recent fiscal year or a copy of the applicant’s federal income tax return for each of the preceding 2 years, or both; and

(2) Proof of the fidelity bond or deposit required to be provided to the client pursuant to subsection 3 of NRS 645G.320.

2. *In addition to the information required pursuant to subsection 1, an applicant must submit proof satisfactory to the Commissioner that he:*

(a) Is a citizen of the United States or lawfully entitled to remain and work in the United States; and

(b) Has not made a false statement of material fact on the application.

3. If the exchange facilitator is not a publicly traded company, any person who owns at least 10 percent of the voting stock, partnership or member interests of the business of the applicant and who is doing business as an exchange facilitator in this State must provide a record of the personal history of the person. The record must be submitted in a manner prescribed by the Commissioner.

Sec. 7. *A licensee may not conduct any business as an exchange facilitator unless:*

1. He possesses each license and permit required by this State or a local government as a condition to conducting business;

2. The business location complies with the provisions of all applicable planning and zoning ordinances;

3. If the exchange facilitator is a corporation, every officer, director and exchange facilitator officer designated pursuant to NRS 645G.170 doing business as an exchange facilitator has applied for and obtained a license pursuant to the provisions of this chapter and chapter 645G of NRS; and

4. If the exchange facilitator is not a natural person or a publicly traded company, each shareholder, member or other owner who owns 10 percent or more of the voting stock, shares or other ownership interest of the exchange facilitator and who is doing business as an exchange facilitator in this State has applied for and obtained a license pursuant to the provisions of this chapter and chapter 645G of NRS.

Sec. 8. *1. For the purposes of NRS 645G.300, the required fiduciary duty is limited to the licensee's obligations to manage the exchange funds, excluding any other duty which may otherwise be deemed a fiduciary duty, except as otherwise expressly provided in this chapter.*

2. A licensee's fiduciary duty is satisfied if the licensee manages and invests the exchange funds he is responsible for in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances and pursuant to investment goals of liquidity and the preservation of principal.

3. A licensee breaches his fiduciary duty if the exchange fund the licensee is responsible for is:

(a) Knowingly commingled with the operating account of the licensee by the licensee.

(b) Except as otherwise provided in this paragraph, loaned or otherwise transferred to any person affiliated with or related to the licensee within the third degree of consanguinity or to any entity in which ownership of more than 50 percent of the entity is common to the licensee or in which more than 50 percent of the ownership is held, in the aggregate, by persons affiliated with or related to the licensee within the third degree of consanguinity. This paragraph does not apply to any transfer to an exchange accommodation titleholder as required by an exchange contract or to any transfer to a financial institution that is the parent company of or otherwise related to the licensee.

(c) Invested in a manner that does not allow sufficient liquidity to satisfy the licensee's contractual obligations to his clients or does not preserve the principal amount of the exchange fund.

Sec. 9. *The withdrawal of money from an account maintained by a financial institution may be authorized in any commercially reasonable manner so long as the authorization contains written approval by both the licensee and the client, including, without limitation:*

1. The client's delivery of his written authorization to the licensee to withdraw funds, followed by the licensee's delivery of the licensee's written authorization to the financial institution; or

2. Receipt by the financial institution of written authorization in any other manner.

Sec. 10. *Proof of the fidelity bond or deposit required to be provided to a client pursuant to subsection 3 of NRS 645G.320 may be made in any commercially reasonable manner, including, without limitation:*

1. Posting proof of the fidelity bond or deposit on an Internet website maintained by the licensee, if he maintains one, so long as the licensee sends each client a written notice:

(a) Stating that proof of the bond or deposit may be viewed on the website; and

(b) Providing the Internet address of the website; or

2. Delivering a copy of the licensee's proof of fidelity bond or deposit to each client.

Sec. 11. *1. For the purposes of NRS 645G.350, in addition to "trust funds" or "escrow accounts," other appropriate designations for exchange funds deposited in a financial institution indicating that the money is not the money of the licensee may include, without limitation:*

(a) "Exchange funds."

(b) Descriptions indicating that the fund is held "for the benefit of" the named client.

2. Exchange funds must be deposited in such a manner as not to violate the provisions of subsection 1 of NRS 205.960.

Sec. 12. *1. In the event of the death of a licensee without whom an existing open exchange cannot be conducted, the Commissioner may appoint a receiver licensee or successor licensee for the purpose of winding up and completing any existing open exchanges.*

2. A receiver licensee or successor licensee appointed pursuant to subsection 1 may not accept new exchange facilitation business during the receivership or successorship, or winding up and completion period.

Sec. 13. *1. If the Commissioner suspends, revokes or denies the renewal of a license pursuant to NRS 645G.515, the Commissioner may appoint a receiver licensee or successor licensee for the purpose of winding up and completing any existing open exchanges.*

2. A receiver licensee or successor licensee appointed pursuant to subsection 1 may not accept new exchange facilitation business during the receivership or successorship, or the winding up and completion period.

Sec. 14. *Notice informing the Division of a licensee's establishment of a branch office must:*

- 1. Be filed with the Commissioner on a form prescribed by the Commissioner; and*
- 2. Contain proof that the exchange facilitator named in the application holds a current license pursuant to the provisions of this chapter and chapter 645G of NRS.*

Sec. 15. *1. Except as otherwise provided in this chapter, a licensee shall maintain for at least 7 years the original or a copy of each account, book, paper, written or electronic record or other document that concerns each exchange or other transaction involving a customer in this State.*

2. Except as otherwise provided in this chapter, those records must be maintained at a place of business in this State designated by the licensee or provided upon request.

Sec. 16. *1. The person who holds a valid license and who is the designated exchange facilitator officer pursuant to NRS 645G.170 must have direct supervisory responsibility for*

employees who engage in the business of an exchange facilitator in this State and must devote a substantial portion of each business day to the:

- (a) Supervision of employees who engage in the business of an exchange facilitator; and*
- (b) Actual management, operation and administration of the licensed exchange facilitator.*

2. The exchange facilitator officer must be available in person at the business address of the licensed exchanged facilitator in order to perform his required functions and duties.

Sec. 17. *An application for a license and financial records submitted by an applicant pursuant to the provisions of this chapter and chapter 645G of NRS, financial records or other documents submitted by a licensee pursuant to an audit or examination conducted by the Division and any report of examination made by the Division are confidential and may be disclosed only to:*

- 1. An authorized employee of the Division who needs the records for purposes relating to the administration of the provisions of this chapter; or*
- 2. A person or governmental entity that is authorized to obtain the records pursuant to an order issued by a court of competent jurisdiction.*

Sec. 18. *1. If a licensee subject to disciplinary action pursuant to the provisions of this chapter and chapter 645G of NRS fails to file a verified answer to a complaint within 30 days after the date of service of the complaint, the licensee is deemed to have admitted to the allegations contained in the complaint and a default may be entered against him.*

2. Except as otherwise provided in NRS 645G.510 or other specific statute, a complaint filed with the Division, any documents filed with the complaint and any report or information resulting from an investigation of a complaint are confidential.