



## NEXUS COMMITTEE MINUTES

**July 28, 2009**

Marriott Country Club Plaza  
4445 Main Street, Kansas City, Missouri

*-- Salus populi suprema lex esto --*

**-- Public Session --**

The following persons attended in whole or in part:

NAME	AFFILIATION	E-MAIL
Michael Mason	AL	Mike.mason@revenue.alabama.gov
Danny Walker	AR	Danny.walker@dfa.arkansas.gov
Tom Atchley	AR	Tom.atchley@rev.state.ar.us
Tamra Fucci *	AZ	Tfucci@azdor.gov
Anita DeGumbia	GA	Anita.degumbia@dor.ga.gov
Pat Verschelden *	KS	Pat_Verschelden@kdor.state.ks.us
Tina Folse	LA (St. Charles Parish Sch. Bd.)	tfolse@stcharles.k12.la.us
Diane Luebbering	MO	Diane.luebbering@dor.mo.gov
Dave Garro	MO	David.garro@dor.mo.gov
Lee Baerlocher	MT	Lbaerlocher@mt.gov
Ted Jutras *	MTC	tjutras@mtc.gov
Antonio Soto *	MTC	asoto@mtc.gov
Thomas Shimkin	MTC	tshimkin@mtc.gov
Ken Beier	MTC	kbeier@mtc.gov
Rebecca Abbo *	NM	rebecca.abbo@state.nm.us
Lennie Collins	NC	Lennie.collins@dorncc.com
Ryan Rauschenberger	ND	rarauschenberger@nd.gov
Myles Vosberg	ND	msvosberg@nd.gov
Mary Loftsgard	ND	mloftsgard@nd.gov
Gary Helman	NE	Gary.helman@nebraska.gov
Eric Smith	OR	Eric.h.smith@state.or.us
Janielle Lipscomb	OR	Janielle.d.lipscomb@state.or.us

Brandin Seibel *	SD	Brandin.seibel@state.sd.us
Stacy Gibson	TN	Stacy.gibson@tn.gov
Joan Cagle *	TN	Joan.Cagle@tn.gov
Hermi Nanez	TX	Hermi.nanez@cpa.state.tx.us
Gary Johnson	TX	Gary.johnson@cpa.state.tx.us
Frank Hales	UT	fhaless@utah.gov
Michael Christensen *	UT	Mchristensen@utah.gov
Michael Grundhoffer *	WA	MichaelG@dor.wa.gov
Roy Davis	WI	Roy.davis@revenue.wi.gov
Craig Griffith	WV	cgriffith@tax.state.wv.us

\* attended by telephone

Substantive committee votes and actions requiring follow up are italicized for easier reference.

#### March Minutes

*The committee approved the minutes of the March 2009 meeting.*

#### Nexus Schools

Mr. Soto reported the status of the Nexus School program. He said that there had been five schools in fiscal year 2009 and that there were opportunities for states to sponsor schools in the future. He reminded committee members that the Commission will itself host a Nexus School on December 7 and 8 in the Washington, DC area. Mr. Beier distributed to committee members a revised promotional brochure with information about all Commission trainings. He said that there is as yet no course on pass-throughs.

#### Commission Website

In response to a question, Mr. Shimkin and Mr. Matson explained how to access the voluntary disclosure section of the Commission's website – three popular ways are to search for “disclosure” in the search box, to click on the “Multi-State Voluntary Disclosure” button on the Commission's main page, and to click the Multi-State Voluntary Disclosure button on the Nexus program's page.

#### Voluntary Disclosure Database

Mr. Shimkin reviewed the status of Phase I of the voluntary disclosure database revision. He said that the software is installed and running. He then explained the general idea of Phase II, which would allow states and taxpayers to have direct access to appropriate portions of the Commission's voluntary disclosure records and would allow states and taxpayers to communicate directly with each other in a secure environment through the Commission's software. He said that Phase was only a set of goals and principles at the moment.

In response to a question Mr. Shimkin said that the voluntary disclosure software project was funded with available Nexus Program funds and would not affect member dues. Ms. Nanez (TX) explained some features of her state's voluntary disclosure management software. *The consensus of the committee was that the Nexus Program should continue to develop Phase II.*

#### Voluntary Disclosure Guidelines

*After four members of the committee objected to section 5.4, the committee approved by unanimous vote a motion by to delete the section (an entity is not disqualified from voluntary disclosure based only on its membership in a unitary or combined group). This deletion leaves the guidelines silent on the matter.*

A member of the public who represents taxpayers commented on section 12 (when it has clear and convincing evidence that a voluntary disclosant has grossly misrepresented a material fact in its application, the Commission must inform all states that received the application of the disclosant's identity and the evidence of gross misrepresentation). She pointed out that the rule would require disclosure of the applicant's identity even to states that received the voluntary disclosure offer but did not (or had not yet) accepted it. Because these states would not yet have been harmed, the Commission could simply withdraw the application without explaining the reason for doing so [this is the Commission's present unwritten policy]. She said that it is very common for a taxpayer to use voluntary disclosure to clean up potential liability of an acquired entity and that the acquiring taxpayer often cannot be entirely sure of facts arising from activities that took place before the taxpayer made the acquisition. She emphasized that employees of an acquired business with knowledge of material events are sometimes dismissed or otherwise leave that company's employment and that records of the acquired entity cannot be relied on to always reveal material information.

She continued, saying that it would be unwise for a taxpayer to pursue voluntary disclosure through the Commission given this rule. She said that a taxpayer could achieve the same voluntary disclosure result with less risk by approaching each state independently – if a state that has not yet signed the voluntary disclosure contract (and therefore does not know its identity) discovers an unintentional misrepresentation it would be unable to inform its sister states of the applicant's identity, unlike the Commission, which knows the taxpayer's identity after the first state enters into an agreement.

Mr. Shimkin also addressed the section 12 issue. He cautioned the committee that the National Nexus Program, because of its unique access to multi-state taxpayer data, has operated from its inception based on absolute respect for taxpayer confidentiality, which taxpayers have come to expect and trust, and which has allowed the program to increase its revenue substantially as time goes on. He said that only a bright-line rule of confidentiality, applicable even to the malfeasant, is the only way to assure the great majority of truthful disclosants that it is safe to do business with the Commission. He noted that the Nexus Program has worked successfully to overcome taxpayer concerns that the Commission's focus on involuntary compliance, e.g., the Audit Program, should dissuade a taxpayer from using the multi-state voluntary disclosure program.

Mr. Shimkin said that he believes the rule of section 12 would decimate voluntary disclosure revenue, the heart of the National Nexus Program.

Mr. Shimkin suggested that the rule should be that when the Commission has clear and convincing evidence of a material misrepresentation it must inform only those states that have concluded a voluntary disclosure agreement with that taxpayer. This would allow those states to decide whether to void the agreement. The Commission's voluntary disclosure agreements have always allowed a signatory state to void the agreement in the event of material misrepresentation. He explained that non-signatory states – to which section 12 requires the Commission to disclose the taxpayer's identity and alleged misrepresentation -- would not have detrimentally relied on the representation and therefore would not have been harmed. He encouraged the committee to retain the Commission's current unwritten policy, which is to withdraw the voluntary disclosure offer from those states without comment.

Mr. Shimkin acknowledged the view that even non-signatory states should be informed of a gross misrepresentation so that they can identify the misrepresentation should that taxpayer approach the state directly. He said that in his experience this consideration is outweighed by the necessity to ensure taxpayers of confidentiality and to not create a disincentive to use the Commission's services by making it more risky to do so than approaching states directly.

Mr. Shimkin emphasized the point previously made by the member of the public that taxpayers frequently do not know all the facts attendant to their disclosure offer, especially when dealing with a recently acquired company, and that they may therefore make an honest mistake that would taint their position in every state. Also, taxpayers may reasonably believe that the Commission and states will interpret "gross misrepresentation" more amply than they would.

*The committee voted to retain section 12 unamended.*

*The committee voted unanimously to approve the guidelines as amended. Mr. Collins (NC) explained that he would submit the guidelines to the Executive Committee for review and possible amendment, and if that body approves, they will be published as rules of the Commission's voluntary disclosure program.*

#### New Business

There was no new business.

#### Closed Session

The committee resolved into closed session. It later returned to open session and reported on its closed session activities (there were no members of the public present at this time).

#### Adjournment

The committee adjourned.