

MTCADR FORM 100 (November 1995)

**STATEMENT OF SPECIFIC PROCEDURES FOR
INITIATION AND CONDUCT OF MULTISTATE
ALTERNATIVE DISPUTE RESOLUTION PROCESSES**

Until further action by the Executive Committee of the Multistate Tax Commission, the following specific procedures "Statement of Specific Procedures" shall apply regarding the initiation and conduct of alternative dispute resolution ("ADR") processes in multistate tax issues under Bylaw 14 of the Multistate Tax Commission ("MTC"):

I. APPLICABILITY OF ADR PROCESSES TO STATES VOLUNTARILY ELECTING TO PARTICIPATE; CONFLICT WITH STATE LAW

This Statement of Specific Procedures shall apply to those states and taxpayers that by written notice advise the Multistate Tax Commission of their desire to participate in a voluntary multistate ADR process.

II. INITIATION OF MULTISTATE ADR PROCESS.

A. *Application of Multistate ADR Process.* The MTC may offer its Multistate ADR processes for state tax matters in which a taxpayer is affected by a transactional, operational, centrally-assessed property, or other tax matter in which a taxpayer and two or more states voluntarily agree to participate. In addition, two or more states may also agree, without the necessity of a taxpayer being a party, to participate between or among themselves in a Multistate ADR process to address tax matters of common interest.

B. *Initiation of Multistate ADR Process.* The initiation of a Multistate ADR process shall be made by the submission on a form to be provided by the MTC of a written notice to the Executive Director of the MTC executed by a taxpayer and two or more states or by two or more states which shall contain, if applicable -

1. The names, addresses and telephone numbers of each of the parties and their appointed representatives. At the taxpayer's request, its name and all identifying information may be redacted from the forms it has executed which are submitted to the MTC. In such event, the taxpayer shall designate a representative to receive forms and other information to be provided by the MTC.

2. A brief description of the nature of the dispute and the issues involved.
 3. A unanimous agreement as to the ADR process to be followed, including the number of arbitrators or mediators required. In the event that no agreement is reached on the number of arbitrators or mediators to preside, the number shall be one (1).
 4. When required by any party, notice that a written waiver or extension of any and all applicable statutes of limitation has been executed to the parties' satisfaction. No party shall be required to execute any waiver or extension of a statutory limitation as a condition of participating in an ADR process when such a waiver or extension is not authorized by state law. Unless otherwise agreed to by the parties, any such waiver or extension shall apply to only those issues agreed upon as subject to the ADR process. Absent an agreement by all parties to the extent of the waiver or extension and the actual execution thereof, no ADR process shall be commenced.
 5. A statement setting forth (i) whether any state(s), other than those who have agreed to be parties to the MTC ADR process, have issued any assessment, denied any refund or entered any other formal action with respect to the same taxpayer addressing the same issue(s) for the same tax period(s) that are subject to the MTC ADR process; (ii) whether, by unanimous agreement all parties have invited any one or more of such other states to participate in the process; and (iii) whether any such other state(s) have agreed to so participate. No state or taxpayer is required to invite any other party to its ADR process and no other party is required to participate therein even if such invitation is extended.
- C. *Role of MTC.* As soon as practicable, but not later than ten (10) working days from the receipt of a fully completed written notice under paragraph II.B, the MTC Executive Director shall send to each party's representative a list of potential qualified mediators and arbitrators, as the case may be. Thereafter, unless requested by the mediator(s) or arbitrator(s) and agreed upon by all of the parties, neither the MTC Executive Director, nor any member of the MTC

staff, shall participate in the particular ADR process that is conducted, except for maintaining the records of the ADR process and performing such acts as are reasonably required to inform the Executive Committee and the Commission on the conduct and effectiveness of the MTC ADR processes.

III. TYPES OF ALTERNATIVE DISPUTE RESOLUTION PROCESSES TO BE MADE AVAILABLE.

Unless otherwise unanimously agreed to by the parties participating in the ADR, the Multistate ADR processes that are to be made available to the taxpayer and affected states shall be mediation and arbitration or a combination thereof as described below. The type of process to be used in any particular matter shall be determined by unanimous consent of the parties.

- A. *Mediation.* Mediation is the process in which a neutral person assists the parties in reaching a mutually acceptable settlement of the issues, but such person does not have the authority to enter any decision (binding or otherwise). The mediator may conduct informal joint and separate meetings (the latter referred to as "caucuses") with the parties to understand the facts, develop or refine the issues and explore the potentials for settlement.
- B. *Arbitration.* Arbitration is the process in which the parties present their respective cases to a neutral person or persons (expert in the state tax field) and a decision is entered. The decision can be binding or advisory depending upon what has been agreed upon in advance by the parties.
- C. *Arbitration-Mediation.* A combination of arbitration and mediation (known as *Arbitration-Mediation*) is the process in which the arbitration process is first conducted, but before the arbitrator makes the decision known, the parties are first given an opportunity to reach settlement through the mediation process. Unless the parties unanimously agree, a different person shall be selected to conduct the mediation segment of this process.
- D. *Mediation-Arbitration.* A combination of mediation and arbitration (known as *Mediation-Arbitration*) is the process in which mediation

efforts are first used and, failing the reaching of a settlement, the matter is thereafter arbitrated and a decision entered. Unless, subsequent to the failed mediation effort, the parties unanimously agree, a different person or persons shall be selected to conduct the arbitration segment of this process.

IV. QUALIFICATION AND APPOINTMENT OF MEDIATORS AND ARBITRATORS; REGISTRY

A. *List of Qualified Mediators and Arbitrators for Multistate ADR.*

The Executive Director shall certify and maintain a list of pre-qualified mediators and arbitrators to participate in the Multistate ADR processes. This list shall be comprised of persons found by the Executive Director to be qualified by having a minimum amount of education, knowledge, and experience in state tax issues having a multistate impact, as well as possessing a minimum amount of training or experience conducting ADR processes.

B. *Registry of Mediators and Arbitrators for Matters Not Processed under Multistate ADR.*

The Executive Director shall also maintain a state-by-state list or "Registry" of persons who desire to act as mediators and arbitrators in matters of state taxation, including matters that are not of a multistate character. Each name appearing upon such Registry shall be accompanied by a *vita* that reflects what experience such person has had in the field of state taxation. This Registry shall not be limited by any pre-qualification and shall be made available to the public upon request. However, such Registry shall bear a notice upon it that the MTC has not pre-qualified any person on such Registry other than those that may be otherwise qualified to perform services under the MTC Multistate ADR Program as provided for in paragraph IV. A. above.

C. *Conflict of Interest.*

Unless agreed to in writing by all parties, no mediator or arbitrator shall have any personal or financial interest in the result of any ADR process. Prior to accepting any specific appointment, the mediator(s) or arbitrator(s) shall disclose to the parties any circumstance likely to create in fact or in appearance any conflict of interest or bias on his or her part.

Upon receipt of such information, the parties shall either unanimously accept such person or select another person from the list provided to serve as mediator or arbitrator, as the case may be.

D. *Selection Process.*

The procedure to be followed by the parties for selecting the mediators or arbitrator(s), as the case may be, shall be as follows:

1. The parties shall first have an opportunity to unanimously agree among themselves as to the selection from the list maintained by the Executive Director of the persons determined pre-qualified to act as mediators or arbitrators. The parties may also select by unanimous agreement any other person(s) to act as mediator(s) or arbitrator(s); and, in that event, the ADR process shall no longer be one considered as held under the MTC ADR Program and the parties may proceed as they determine appropriate.
2. If the selection of the particular person(s) required to conduct the ADR process is not agreed upon within ten (10) business days from the date the parties have received the pre-qualified list, the remaining person(s) required to act as mediator(s) or arbitrator(s) shall be appointed by the parties from the list of pre-qualified persons maintained by the MTC as follows:
 - a. Within ten (10) business days from the date the parties have failed to agree upon the selection of the mediator(s) or arbitrator(s) required to conduct the ADR process, each party shall select one person acceptable to it from the pre-qualified list and simultaneously exchange the identity thereof with the other party.
 - b. Within five (5) business days from such exchange, the two persons so selected shall select the remaining person(s) required to conduct the mediation or arbitration.
 - c. No MTC ADR process shall be considered as initiated unless and until the parties have selected the person(s) to conduct such process. Upon such selection, the person(s) so selected shall conduct the MTC ADR

process without any further involvement by the MTC, except as otherwise provided herein.

V. PROCEDURES TO APPLY TO MEDIATION AND ARBITRATION CONDUCTED UNDER MTC ADR PROGRAM.

A. Mediation Procedures.

1. The mediation process is informal in nature and, given the expertise of the mediator in issues of state taxation, the presentation of witnesses or representation by counsel will seldom be necessary. However, the mediator shall be advised by each of the parties in writing and at least ten (10) business days in advance of the initial mediation session -
 - a. of the party's intention to present witnesses;
 - b. whether the party desires to be represented by counsel;
 - c. who will be present at the mediation session that will be authorized to agree to and execute any settlement reached; and
 - d. a brief statement of facts, law, and issues to be resolved, not to exceed ten (10) pages in length, unless otherwise agreed to or required by the mediator.
2. At least (3) business days in advance of the initial session of mediation, the mediator shall distribute to each party the information provided in subparagraphs a., b., c., and d. of paragraph 1, provide a written description of the mediation process to be followed, and inform the parties as to any additional information the mediator determines should be either provided to the mediator and/or mutually exchanged among the parties.
3. At the initial session of the mediation, each of the parties shall be given an opportunity to present their positions as to the issues under consideration and shall provide all information reasonably necessary for the mediator to understand the issues

presented. The mediator may require any party to supplement such information.

4. The mediator does not have the authority to impose a settlement of the issues on the parties, but will attempt to assist their reaching a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties. Whenever necessary, the mediator may obtain expert advice concerning technical aspects of the dispute, provided the parties agree in advance and assume the expenses thereof. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.
5. There shall be no stenographic or other record of the mediation process, unless agreed upon in writing by all parties.
6. If an agreed upon resolution of the dispute is reached, the parties shall remain a sufficient time to prepare and execute the closing or settlement agreement or, if time does not permit, an outline thereof. Should either the state or taxpayer be required by law, guideline or practice to obtain review and approval of such agreement by another person or body, such approval shall be sought without delay and within the time agreed upon by the parties. If such approval is not obtained within the time agreed upon, then, unless otherwise agreed to in writing by the parties, the ADR shall be considered terminated without agreement.
7. As to each mediation completed, irrespective of its outcome, the mediator shall complete and return a form provided by the MTC which, in an anonymous manner, will reflect the number and types of parties, whether any agreements were reached, and the number of hours or days used in the process. The mediator shall take care in assuring that such information does not identify any of the parties. In addition, each party to the mediation shall complete a form reviewing the effectiveness of the mediator(s) and the ADR process and deliver the completed form to the Executive Director.
8. In all other respects the mediator(s) shall determine the process to be followed.

B. *Arbitration Procedures.*

1. The arbitration process is more formal in nature than mediation, but less formal than either a formal administrative hearing or litigation.
2. The arbitrator(s) shall take such steps as determined necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution.
3. Each party shall cooperate in the exchange of documents, exhibits and information within such party's control, if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution.
4. Each party may conduct such discovery as may be agreed upon by all the parties, however, the arbitrator(s) may provide for or place such limitations on the conduct of such discovery as the arbitrator(s) may deem appropriate.
5. At the request of a party, the arbitrator(s) may order the taking of the deposition of, or the asking of written interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to a determination of the matter.
6. Except as otherwise provided herein, absent an agreement by all of the parties, the rules of evidence that shall apply shall be determined by the arbitrator(s), but in no event shall such rules be strictly applied. The substantive tax laws of the respective state parties to the arbitration shall control issues of tax liability. The arbitrator(s) shall also select which procedural rules shall be followed. However, no error by the arbitrator(s) in the application of any rule of evidence or procedure shall be grounds as such for vacating any decision by the arbitrator(s)
7. All decisions of the arbitrator(s) must be by a majority.
8. Any party desiring a stenographic or other recording of the proceedings shall make arrangements directly with a

stenographer or other person responsible for recording the proceedings and shall notify the arbitrator(s) and all other parties of such arrangements at least ten (10) business days in advance of the arbitration hearing. The requesting party or parties shall pay the costs of such recording and such recording or transcript thereof shall be made available to the arbitrator(s) and other parties for inspection and copying at a date, time and place determined by the arbitrator(s).

9. Unless otherwise requested by any party, the arbitrator(s) shall enter a written or recorded decision without a statement of reasons supporting such decision. When requested by any party, a written or recorded statement of the reasons upon which such decision is based shall be provided.
10. Where the parties have agreed that an arbitration proceeding shall be binding upon the parties, an official record shall be made and maintained by the arbitrator(s).
11. Parties to a binding arbitration proceeding shall be deemed to have consented that judgment upon the arbitration decision may be entered in any state judicial or administrative body having jurisdiction thereof. Notwithstanding this provision, to the extent that applicable state laws regarding arbitration and the appeal and entry of judgments therefrom provide otherwise, such state laws will control.
12. The decision by the arbitrator(s) shall be made promptly and, unless otherwise agreed by all of the parties or specified by law, no later than thirty (30) days from the date of the closing of the arbitration hearing.
13. As to each arbitration completed, irrespective of its outcome, the arbitrator(s) shall complete and return a form provided by the MTC which, in an anonymous manner, will reflect the number and types of parties, whether the arbitration was binding or not, and the number of hours or days used in the process. The arbitrator(s) shall take care in assuring that such information does not identify any of the parties participating in the process. In addition, each party to the arbitration shall complete a form reviewing the effectiveness of the arbitrator(s)

and the ADR process and deliver the form to the Executive Director.

14. In all other respects, the arbitrator(s) shall determine the process to be followed.

VI. PRIVACY OF ADR PROCESS.

All ADR processes are private. The parties and their representatives may attend the sessions, but other persons, including representatives of the MTC may attend only with the unanimous permission of the parties and the mediator(s) or arbitrator(s).

VII. CONFIDENTIALITY OF ADR PROCESS.

Except as may be otherwise authorized herein or required by law, neither the MTC, nor a party or mediator or arbitrator may disclose the existence, content, or results of any MTC ADR process without the prior written consent of all parties. Each participant to any process conducted, including the mediator(s) and arbitrator(s), shall execute a confidentiality form to that effect before the MTC ADR process can begin. Therefore, except as may be so authorized, required or consented to, no MTC employee, party, mediator or arbitrator or any agent or other representative thereof, may make public, offer or introduce as evidence or otherwise refer to in any administrative, judicial or other proceeding any statement made or any document or item of evidence provided while setting up or during the course of any MTC ADR process or any finding, conclusion, order or result or lack thereof relating to such process. This prohibition applies, but is not limited to the following matters:

- A. views expressed or suggestions made by a party with respect to possible settlement of the dispute;
- B. admissions made by any party in the course of the ADR proceedings;
- C. statements made or views expressed by any witness, mediator(s) or arbitrator(s) or other person privy to the ADR process; or
- D. the fact that another party had or had not indicated a willingness to accept a proposal for settlement.

At the conclusion of the MTC ADR process and after receipt of notification from all parties that no further need therefor exists, the mediator(s) or arbitrator(s) shall return or destroy all documents received from the parties and destroy any record of the proceedings, except as either required by law, necessary for the enforcement of any finding, conclusion or order, or to be used for the purpose of completing the confidential information report required under paragraphs V. A. 7 and V. B. 13.

VIII. REPRESENTATION BY COUNSEL.

In any MTC ADR process, any party may freely elect to proceed with or without representation by legal counsel or others.

IX. FEES AND EXPENSES.

- A. Each party shall bear the fees and expenses for its own counsel, expert witnesses, travel and the preparation and presentation of its case. Except as otherwise agreed by the parties, the fees and expenses of the mediator(s) or arbitrator(s), as well as the MTC ADR administrative processing fee, if any, shall be borne one-half (1/2) by the taxpayer and the remaining one-half (1/2) by the states in equal amounts between or among them. Should the MTC ADR process involve solely state parties, said fees shall, unless otherwise agreed to among the states, be borne equally among the participating states.
- B. In the event that an MTC ADR session has been scheduled and a party fails to appear at the session, the party so failing to appear shall be responsible for the payment of the reasonable costs and fees of the mediator(s) or arbitrator(s) and the reasonable travel expenses actually incurred by the other parties, unless (i) the party has provided reasonable notice in writing to the mediator(s) or arbitrator(s) and all other parties that it will not appear; or, (ii) if such reasonable notice is not provided, the mediator(s) or arbitrator(s) determines that good cause appeared for such failure. It shall be presumed, subject to a contrary showing under the circumstances, that the giving of five (5) days advanced written notice is reasonable notice.

X. DATE, TIME AND PLACE FOR ADR PROCESS.

Unless unanimously agreed upon by all of the parties and the mediator(s) (arbitrator(s)), the date, time and place for the ADR process shall be selected by the mediator(s) (arbitrator(s)) with due consideration being given to the location and convenience of the parties and their witnesses.

XI. TERMINATION OF ADR PROCESS.

Due to the voluntary nature of the ADR processes, unless otherwise agreed to in writing by the parties, an ADR process shall be terminated at any time:

- A. by two or more parties executing a document stating that an agreement has been reached by two or more of the parties to the ADR process;
- B. by the entry of a decision by the arbitrator(s) in either a binding or non-binding arbitration process;
- C. by a written declaration of a mediator during a mediation process that further efforts at mediation are no longer worthwhile; or
- D. by a written declaration of any party to a mediation or non-binding arbitration to the effect that such ADR proceeding is terminated.

XII. WARNING OF TAXPAYER'S DUTY TO PERFECT PROTESTS AND APPEALS.

It shall be the duty of the taxpayer to protect its right to protest or appeal any assessment or proposed assessment or to pursue any right to refund relating to any issue that may also be subject to the MTC ADR process. Compliance with all conditions and time limits for perfecting and pursuing any and all administrative and judicial protests and appeals or requests for refund shall be the sole responsibility of the taxpayer. Any agreement by a representative of any party state to an ADR process that is

sought to alter such conditions or time limits must be authorized by law and executed in writing to be effective.