

This document is an unofficial consolidation of all amendments to Ontario Securities Commission Rule 35-502 *Non-Resident Advisers*, applying from **September 28, 2009**. This document is for reference purposes only and is not an official statement of the law.

**ONTARIO SECURITIES COMMISSION RULE 35-502
NON-RESIDENT ADVISERS**

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**ONTARIO SECURITIES COMMISSION RULE 35-502
NON-RESIDENT ADVISERS**

PART 1 DEFINITIONS AND INTERPRETATION

1.1 Definitions - In this Rule

"book-based system" has the meaning ascribed to that term in National Instrument 81-102 Mutual Funds;

"Canadian security" means a security other than a foreign security;

"foreign security" has the meaning ascribed to that term in subsection 204(1) of the Regulation as it read on September 27, 2009;

"Form 33-109F4" means Form 33-109F4 to Multilateral Instrument 33-109;"

"fund" means a mutual fund or a non-redeemable investment fund;

"international adviser applicant" means a person or company applying for registration as an international adviser under the Act;

"international adviser" means

- (a) a person or company that has been granted registration as an international adviser (investment counsel, portfolio manager or securities adviser) under the Act, and
- (b) a registrant whose registration is subject to the restrictions set out in former Rule *In the Matter of Certain Advisers* (1997), 20 OSCB 1217, as amended;

"manager" means the person or company that directs the business, operations or affairs of a fund;

"Ontario client" means a permitted client who is ordinarily resident in Ontario;

"permitted client" means one of the following clients:

1. A bank listed in Schedule I or II to the *Bank Act* (Canada), acting as principal or as agent for accounts fully managed by it.
2. A loan corporation or trust corporation registered under the *Loan and Trust Corporations Act*, acting as principal or as trustee or agent for accounts fully managed by it.
3. An insurance company licensed under the *Insurance Act*.
4. Each of a treasury branch, credit union or caisse populaire that, in each case, is authorized to carry on business in Ontario.

5. The Business Development Bank of Canada incorporated under the *Business Development Bank of Canada Act* (Canada).
6. Her Majesty in right of Canada or of any jurisdiction.
7. A portfolio manager acting as principal or as agent for accounts fully managed by it.
8. A broker or investment dealer acting as principal or, as permitted by section 148 of the Regulation, as agent for accounts fully managed by it.
9. A pension fund that is regulated either by the Office of the Superintendent of Financial Institutions (Canada) or by a provincial pension commission, or a group of pension funds that are so regulated, if the pension fund has, or the group of pension funds have, net assets of at least \$100 million, or its equivalent in another currency, provided that, in determining net assets, the liability of the pension fund for future pension payments shall not be included.
10. A registered charity under the ITA with assets not used directly in charitable activities or administration of at least \$5 million or its equivalent in another currency.
11. An individual who has a net worth of at least \$5 million or its equivalent in another currency, excluding the value of his or her principal residence, as certified by the individual.
12. A person or company that is entirely owned, legally and beneficially, by an individual or individuals referred to in paragraph 11, who hold its or their ownership interest in the person or company directly or through a trust the trustee of which is a trust company registered under the *Loan and Trust Corporations Act*.
13. A corporation that has shareholders' equity of at least \$100 million on a consolidated basis or its equivalent in another currency.
14. A fund that distributes its securities in Ontario, if the manager of the fund
 - (a) is ordinarily resident in a jurisdiction and is registered under the Act as a portfolio manager, broker, investment dealer or mutual fund dealer, or is registered under Canadian securities legislation other than the Act in an equivalent category of registration, and
 - (b) is a party to the contract under which the international adviser provides investment advice or portfolio management services to the fund.
15. A fund that distributes its securities in Ontario only to persons or companies referred to in paragraphs 1 through 13.
16. A fund that distributes its securities only to persons or companies referred to in sections 7.7. or 7.8 of this Rule as those sections read on September 27, 2009.

"portfolio adviser" means a person or company that provides investment advice or portfolio management services under a contract with a fund or with the manager of the fund; and

"submission to jurisdiction and appointment of agent for service of process form" means, for a partner, officer or representative of an international adviser, the form set out in Appendix B to this Rule.

Note: The definitions of "book-based system", "Canadian security", "foreign security", "Form 33-109F4", "international adviser applicant", "international adviser", "Ontario client", "permitted client" and "submission to jurisdiction and appointment of agent for service of process form" are to be repealed on September 28, 2010.

1.2 Extended Meaning of Affiliates - An international adviser that is a partnership is considered to be affiliated with another partnership or with a company, and an international adviser that is a company is considered to be affiliated with a partnership, if the partnerships, or the partnership and the company, would be affiliates of each other under the definition of "affiliated companies" in the Act, if that definition and the related definitions of "controlled companies" and "subsidiary companies" were each read as if references to a "company" were references to a "partnership".

Note: Section 1.2 to be repealed on September 28, 2010.

PART 2 INTERNATIONAL ADVISER APPLICANTS

2.1 [Repealed]

2.2 Completion of Form 33-109F4

(1) A person who seeks approval as a partner, officer, or representative shall complete and execute a Form 33-109F4, but, despite National Instrument 33-109, is not required to complete items 8, 10 and 11 of Form 33-109F4 and may answer "no" to item 17 of Form 33-109F4.

(2) Despite subsection 2.1(1) of National Instrument 33-109, a person who applies for registration as a advising representative of an international adviser is not required to complete items 8, 10 and 11 of Form 33-109F4 and may answer "no" to item 17 of Form 33-109F4.

Note: Section 2.2 to be repealed on September 28, 2010.

PART 3 INTERNATIONAL ADVISERS

Note: PART 3 to be repealed on September 28, 2010.

3.1 General Requirements

(1) [Repealed]

(2) An international adviser and each of its partners, officers or directors registered under the Act

shall comply with the requirements of this Rule and any other applicable requirements of Ontario securities law.

- (3) The Commission may prescribe conditions of registration for an international adviser or its registered partners, officers or representatives, or for a group of international advisers or group of its or their registered partners, officers or representatives, that are in lieu of some or all of the conditions of registration set forth in this Rule, if the Commission gives prior notice of the proposed conditions to those persons or companies affected and affords them an opportunity to be heard and the Commission publishes notice in a publication published by the Commission of each instance when it so prescribes.

3.2 Acquisition of an Interest in Another Registrant - An international adviser is subject to the requirements of section 104 of the Regulation as it read on September 27, 2009.

3.3 Record Keeping and Production of Records and Witnesses

- (1) An international adviser is subject to the requirements relating to record keeping set out in subsections 113(1), (2) and (4) of the Regulation as they read on September 27, 2009.
- (2) If the laws of the foreign jurisdiction in which the books, records or documents referred to in subsection 19(3) of the Act of an international adviser are located prohibit production of the books, records or documents in Ontario without the consent of the relevant client, an international adviser shall, upon a request by the Commission under subsection 19(3) of the Act
 - (a) so advise the Commission; and
 - (b) use its best efforts to obtain the client's consent to the production of the books, records or documents.
- (3) At the request of the Director, the Commission or a person appointed by the Commission to make an investigation under the Act relating to the international adviser's activities in Ontario, an international adviser shall
 - (a) immediately produce in Ontario, at the international adviser's expense, appropriate persons in its employ as witnesses to give evidence on oath or otherwise;
 - (b) if the appropriate persons referred to in paragraph (a) are not in its employ, use its best efforts immediately to produce in Ontario, at the international adviser's expense, the persons to give evidence on oath or otherwise, subject to the laws of the foreign jurisdiction that are otherwise applicable to the giving of evidence; and
 - (c) if the laws of a foreign jurisdiction that are otherwise applicable to the giving of evidence prohibit the international adviser or the persons referred to in paragraph (a) from giving the evidence without the consent of the relevant client
 - (i) so advise the Commission or the person making the request, and

- (ii) use its best efforts to obtain the client's consent to the giving of the evidence.

3.4 Standards Ensuring Fairness - An international adviser shall adopt and maintain standards directed to ensuring fairness in the allocation of investment opportunities among the Ontario clients of the investment counsel and a copy of the standards so established shall be furnished to each Ontario client of the international adviser and filed with the Commission.

3.5 Compensation of Partners, Officers or Representatives of International Advisers - An international adviser shall not compensate its partners, officers or representatives in a manner that is based upon the value or the volume of the transactions initiated for the Ontario clients of the international adviser.

3.6 Supervision of Accounts - Subsections 115(3) and (4) of the Regulation as they read on September 27, 2009 apply to an international adviser.

3.7 Holding of Client Assets

- (1) Subject to subsections (2) and (3), an international adviser shall ensure that the securities and money of an Ontario client are held
 - (a) by the Ontario client; or
 - (b) by a custodian or sub-custodian
 - (i) that meets the requirements prescribed for acting as a custodian or sub-custodian of a mutual fund in National Instrument 81-102, and
 - (ii) that is subject to the agreement announced by the Bank for International Settlements on July 1, 1988 concerning international convergence of capital measurement and capital standards.
- (2) An international adviser or an affiliate of the international adviser that holds the securities or money of an Ontario client as custodian or sub-custodian shall hold the securities and money in compliance with sections 116, 117, 118 and 119 of the Regulation as they read on September 27, 2009.
- (3) The securities of an Ontario client may be deposited with or delivered to a depository or clearing agency that is authorized to operate a book-based system.

3.8 [Repealed]

3.9 Examinations - Section 134 of the Regulation applies to an international adviser and each of its registered partners, officers and representatives.

3.10 [Repealed]

3.11 Conducting an Audit at the Request of the Commission - Section 145 of the Regulation as it

read on September 27, 2009 applies to an international adviser.

3.12 Disclosure of Status to Clients - An international adviser shall deliver to an Ontario client, before acting as an adviser to the Ontario client, a statement in writing disclosing

- (a) to the extent applicable, that there may be difficulty enforcing any legal rights the Ontario client may have against the international adviser because
 - (i) the international adviser is ordinarily resident outside Canada and all or a substantial portion of its assets are situated outside Canada, and
 - (ii) if applicable, that the laws of the foreign jurisdiction in which the books, records and documents referred to in subsection 19(3) of the Act of the international adviser are located prevent the production of those books, records and documents in Ontario; and
- (b) that the international adviser is not fully subject to the requirements of the Act and the regulations concerning proficiency, capital, insurance, record keeping, segregation of funds and securities and statements of account and portfolio.

3.13 Disclosure of Status in Offering Documents - A prospectus filed in Ontario for a fund whose portfolio adviser is an international adviser, or whose portfolio adviser receives investment advice or portfolio management services from an international adviser, shall disclose the matters referred to in section 3.12.

3.14 [Repealed]

3.15 Partial Exemption from National Instrument 31-103 - An international adviser is exempt from the following provisions of National Instrument 31-103:

- (a) sections 11.2 to 11.6;
- (b) section 11.9;
- (c) section 11.10;
- (d) section 12.1;
- (e) section 12.2;
- (f) section 12.4;
- (g) section 12.6 to 12.8;
- (h) section 12.13;
- (i) section 13.4;

- (j) Division 3 of Part 13;
- (k) section 13.16;
- (l) section 14.2;
- (m) section 14.3;
- (n) section 14.6 to 14.9;
- (o) section 14.11;
- (p) section 14.14.

3.16 Application of Part XIII of the Regulation - An international adviser is subject to Part XIII of the Regulation, except section 228, as that Part read on September 27, 2009.

PART 4 EXEMPTION FROM FINANCIAL STATEMENT PREPARATION AND FILING REQUIREMENTS

4.1 Exemption from Financial Statement Preparation Requirements and Filings - An application under section 147 of the Act for an exemption from the requirement of subsection 21.10(3) of the Act that registrants file annual audited financial statements may consist of the following sentence if the international adviser applicant or the international adviser is not applying for registration, and is not registered, in any category of registration in addition to registration as a international adviser and if the application is made by an international adviser applicant concurrently with the filing of an application for registration or by an international adviser before or on the first anniversary of registration as an adviser after the date this Rule comes into force:

"We hereby apply for an exemption from the requirement of the Act that registrants file annual audited financial statements. We understand that this exemption will terminate if we become a registrant in another category of registration under the Act."

Note: Section 4.1 to be repealed on September 28, 2010.

4.2 Order Granting Exemption - The issuance by the Director of a certificate of registration or renewal of registration to the international adviser applicant or to the international adviser is evidence of the approval of the application made under section 4.1, if that section has been complied with, unless the exemption request is denied in writing by the Director.

Note: Section 4.2 to be repealed on September 28, 2010.

PART 5 EXEMPTION FROM REPORTING OF CERTAIN CHANGES

5.1 Exemption from National Instrument 33-109 - Despite National Instrument 33-109, an

international adviser that is not also registered in another category of registration is not required to notify the Director of a change relating to information that was not required to be furnished to the Director upon the filing of the adviser's application for registration.

Note: Section 5.1 to be repealed on September 28, 2010.

PART 6 RESTRICTED ADVISORY ACTIVITIES FOR INTERNATIONAL ADVISERS

6.1 Permitted Clients

- (1) An international adviser shall only act as an adviser in Ontario for permitted clients.
- (2) In determining whether a permitted client that is a pension fund, group of pension funds, registered charity or corporation meets the financial requirements referred to in paragraphs 9, 10 and 13 of the definition of a "permitted client" in section 1.1, the international adviser may rely on the most recent audited financial statements of the permitted client.
- (3) The financial requirements referred to in paragraphs 9, 10, 11 and 13 of the definition of the term "permitted client" in section 1.1 are only required to be satisfied at the time the international adviser first acts as an adviser for the client.
- (4) Despite subsection (2), if an international adviser was acting as an adviser for a client on June 1, 1992 and has acted for that client continuously since that date, the financial requirements referred to in section 1.1 may be satisfied as of June 1, 1992.

Note: Section 6.1 to be repealed on September 28, 2010.

6.2 Indirect Advising - An international adviser shall not act as an adviser in Ontario to a person or company that is not a permitted client indirectly, by providing investment advice or portfolio management services through another person or company, other than a person or company referred to in paragraphs 1, 2, 7 or 8 of the definition of "permitted client" in section 1.1 or except as permitted by Part 7.

Note: Section 6.2 to be repealed on September 28, 2010.

6.3 Advising in Another Country - An international adviser shall not act as an adviser in Ontario for a type of security unless it is engaged in the business of an adviser in a foreign jurisdiction for that type of security.

Note: Section 6.3 to be repealed on September 28, 2010.

6.4 Advising in Respect of Foreign Securities - An international adviser shall not act as an adviser in Ontario for Canadian securities unless this activity is incidental to its acting as an adviser in Ontario for foreign securities. Whether the activity can be considered to be incidental shall be evaluated from the point of view of the adviser, on an account by account basis, and not the client.

Note: Section 6.4 to be repealed on September 28, 2010.

6.5 Limitation on Revenues - No more than 25 per cent of the aggregate consolidated gross revenues from advisory activities of an international adviser and its affiliates or affiliated partnerships, in any financial year of the international adviser, shall arise from the international adviser and its affiliates or affiliated partnerships acting as advisers for clients in Canada.

Note: Section 6.5 to be repealed on September 28, 2010.

PART 7 EXEMPTIONS FROM REGISTRATION

7.1 [Repealed]

7.2 Commodity Pool Programs - The adviser registration requirement does not apply to a person or company, not ordinarily resident in Ontario, that is registered under the *Commodity Futures Act*, in connection with that person or company acting as a portfolio adviser to a mutual fund that is subject to National Instrument 81-104 *Commodity Pools* or to a non-redeemable investment fund that would be subject to that National Instrument if it were a mutual fund.

7.3 Sub-Adviser for a Registrant

- (1) The adviser registration requirement does not apply to a person or company, not ordinarily resident in Ontario, in connection with that person or company acting as an adviser for a registrant that is a registered adviser or a registered investment dealer acting as an adviser in accordance with section 8.24 of National Instrument 31-103 *Registration Requirements and Exemptions*, if
- (a) the obligations and duties of the person or company so acting as an adviser are set out in a written agreement with the registrant;
 - (b) the registrant contractually agrees with its clients on whose behalf investment advice is or portfolio management services are to be provided to be responsible for any loss that arises out of the failure of the person or company so acting as an adviser
 - (i) to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the registrant and each client of the registrant for whose benefit the advice is or portfolio management services are to be provided, or
 - (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances;
 - (c) the registrant cannot be relieved by its clients from its responsibility for loss under paragraph (b); and
 - (d) the person or company so acting as an adviser, if a resident of a jurisdiction, is registered as an adviser in that jurisdiction of Canada.

7.4 [Repealed]

7.5 [Repealed]

7.6 Advising Pension Funds of Affiliates - The adviser registration requirement does not apply to a person or company, not ordinarily resident in Ontario, in connection with that person or company acting as an adviser for a pension fund sponsored by an affiliate of the person or company for the benefit of the employees of the affiliate or affiliates of the affiliate.

7.7 [Repealed]

7.8 [Repealed]

7.9 [Repealed]

7.10 [Repealed]

7.11 Disclosure in Offering Documents - A prospectus filed in Ontario for a fund whose portfolio adviser is relying upon an exemption from the adviser registration requirements provided by this Part, or whose portfolio adviser receives investment advice or portfolio management services from a person or company that relies upon an exemption from the adviser registration requirements provided by this Part, shall include disclosure that

- (a) if the person or company is advising a registrant in reliance on the exemption in section 7.3, the registrant or portfolio adviser has responsibility for the investment advice given or portfolio management services provided by the person or company; and
- (b) to the extent applicable, there may be difficulty in enforcing any legal rights against the person or company because it is resident outside Canada and all or a substantial portion of its assets are situated outside Canada.

PART 8 [Repealed]

PART 9 SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT FOR SERVICE OF PROCESS FORMS

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| Note: PART 9 to be repealed on September 28, 2010. |
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9.1 Submission to Jurisdiction - A representative of an international adviser seeking registration under the Act shall file as part of his or her application for registration an executed submission to jurisdiction and appointment of agent for service of process form.

9.2 Disclosure of Submission to Jurisdiction to Clients - An international adviser shall deliver to an Ontario client, before acting as an adviser to the Ontario client, a statement in writing disclosing the

name and address of the agent for service of process of the international adviser in Ontario appointed by the international adviser or that this information is available from the Commission.

9.3 Disclosure of Submission to Jurisdiction in Offering Documents - A prospectus filed in Ontario for a fund whose portfolio adviser is an international adviser or an extra-provincial adviser, or whose portfolio adviser receives investment advice or portfolio management services from an international adviser, shall disclose the matters referred to in section 9.2.

PART 10 EXEMPTION

10.1 Exemption - The Director may grant an exemption to this Rule, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

**ONTARIO SECURITIES COMMISSION RULE 35-502
NON-RESIDENT ADVISERS**

APPENDIX A

[REPEALED]

**ONTARIO SECURITIES COMMISSION RULE 35-502
NON-RESIDENT ADVISERS**

APPENDIX B

Note: Appendix B to be repealed on September 28, 2010.

FORM OF SUBMISSION TO JURISDICTION AND APPOINTMENT OF AGENT
FOR SERVICE OF PROCESS BY NON-RESIDENT PARTNERS, OFFICERS OR
REPRESENTATIVES OF A NON-RESIDENT ADVISER

1. Name of the adviser (the "Registrant"):
2. Jurisdiction of incorporation or organization of the Registrant:
3. Name and address of person filing this form (the "Filing Person"):
4. Name of agent for service of process (the "Agent"):
5. Address for service of process of the Agent in Ontario:
6. The Filing Person designates and appoints the Agent at the address of the Agent stated above as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal, penal or other proceeding (each, a "Proceeding") arising out of or relating to or concerning the Filing Person's activities in Ontario as a registrant under the Securities Act (Ontario) (the "Act"), and irrevocably waives any right to raise as a defence in any Proceeding any alleged lack of jurisdiction to bring that Proceeding.
7. The Filing Person irrevocably and unconditionally submits to the non-exclusive jurisdiction of the judicial, quasi-judicial and administrative tribunals of Ontario and any administrative proceeding in Ontario, in any Proceeding arising out of or related to or concerning the Filing Person's activities in Ontario as a registrant under the Act.
8. Until the earlier of the termination of the Filing Person's position as a partner, officer or representative of the Registrant and six years after the Registrant ceases to be a registrant under the Act, the Filing Person shall file
 - (a) a new Submission to Jurisdiction and Appointment of Agent for Service of Process in this form at least 30 days prior to termination for any reason of this Submission to Jurisdiction and Appointment of Agent for Service of Process and immediately after the death or incapacity of the Agent or the Agent

ceasing to carry on business; and

(b) an amended Submission to Jurisdiction and Appointment of Agent for Service of Process at least 30 days before any change in the name or address of the Agent as set forth above.

9. This Submission to Jurisdiction and Appointment of Agent for Service of Process is governed by and construed in accordance with the laws of Ontario.

Dated:

(Signature of Filing Person)

(Name of Filing Person)

Acceptance

The undersigned accepts the appointment as agent for service of process of **(Insert name of Filing Person)** pursuant to the terms and conditions of the foregoing Submission to Jurisdiction and Appointment of Agent for Service of Process and acknowledges agrees to deliver to the Ontario Securities Commission (the "Commission") a copy of each document served on the undersigned as agent for service of process of the Filing Person, within five days of the date the document was served on the undersigned, and to advise the Commission immediately if the undersigned is unable to deliver to the Filing Person a copy of a document served on the undersigned as Agent.

Dated:

(Signature of Agent or authorized signatory)

(Name and title of authorized signatory)