

B.6

Request for Comments

B.6.1 CSA Notice of Consultation – Proposed Amendments to National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives



Canadian Securities
Administrators

Autorités canadiennes
en valeurs mobilières

CSA NOTICE OF CONSULTATION

PROPOSED AMENDMENTS TO NATIONAL INSTRUMENT 94-101 MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES

September 19, 2024

Introduction

The members of the Canadian Securities Administrators (the **CSA** or **we**) are publishing for comment proposed amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* (**National Instrument 94-101**). The proposed amendments to National Instrument 94-101 (the **Proposed Amendments**) aim to update the list of mandatory clearable derivatives to reflect the transition to a new interest rate benchmarks regime based on overnight risk-free interest rate benchmarks. Specifically, the Proposed Amendments reflect the cessation of certain inter-bank offered rates (**IBORs**) and the Canadian dollar offered rate (**CDOR**) interest rate benchmarks. The Proposed Amendments also contemplate adding credit default swaps (**CDS**) referencing certain indexes as mandatory clearable derivatives.

The Proposed Amendments will be available on the websites of CSA jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.ca
<https://mbsecurities.ca>
<http://nssc.novascotia.ca>
www.fcnb.ca
www.osc.ca
www.fcaa.gov.sk.ca

We are publishing this Notice and the Proposed Amendments for comment for 90 days. The comment period will expire on December 19, 2024. See below under “Request for Comments” section.

The British Columbia Securities Commission (**BCSC**) did not publish the Proposed Amendments for comment at this time. BCSC staff anticipates doing so following the British Columbia election.

Background of National Instrument 94-101

National Instrument 94-101 came into force in 2017. Its main purposes are to reduce counterparty risk in the over-the-counter (**OTC**) derivatives market and increase financial stability by requiring certain counterparties to clear certain prescribed derivatives through a central clearing counterparty. An overview of this regime was provided in the January 19, 2017, CSA Notice of Publication: National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives* and related Companion Policy¹.

National Instrument 94-101 is divided into two parts: (i) mandatory central counterparty clearing for prescribed derivatives by certain counterparties (including exemptions), and (ii) the determination of derivatives subject to mandatory central counterparty clearing. The list of mandatory clearable derivatives is included as Appendix A to National Instrument 94-101.

¹ Available online at: https://www.osc.ca/sites/default/files/pdfs/irps/csa_20170119_94-101_derivatives.pdf

Purpose of Proposed Amendments

(1) *Transition to risk-free interest rate benchmarks*

In 2012, allegations of manipulation of the London inter-bank offered rate (**LIBOR**) led to the loss of market confidence in the credibility and integrity of not only LIBOR, but also in financial benchmarks in general. In response to concerns regarding IBORs, the Financial Stability Board called for the cessation of the IBORs and the implementation of alternative reference rates. Publication of several IBORs has stopped and CDOR has ceased to be published on June 28, 2024².

As a result, the use of interest rate swaps referencing these benchmarks has significantly decreased and, in several cases, has disappeared.

Conversely, the adoption of risk-free interest rate benchmarks, as an alternative for certain IBORs and CDOR, has led to an increase in the liquidity of interest rate swaps referencing these benchmarks. Consequently, their systemic importance in financial markets globally and in Canada has also increased.

Other international regulators have recognized the systemic importance of interest rate swaps referencing risk-free interest rate benchmarks and have required these swaps to be mandatorily cleared in their respective jurisdictions³.

The CSA contributes to and follows international regulatory proposals and legislative developments on an ongoing basis. Among the latest proposals, the CSA have closely monitored the replacement of IBORs and CDOR with risk-free interest rate benchmarks and the impact of this development on Appendix A of National Instrument 94-101.

As a result, the list of derivatives required to be cleared needs to be updated to reflect the transition to risk-free interest rate benchmarks, such as the Canadian Overnight Repo Rate Average (**CORRA**) and Secured Overnight Financing Rate (**SOFR**). This update accounts for the shift in trading activity and systemic importance. Consequently, the Proposed Amendments remove the requirement to clear certain classes of OTC derivatives referencing certain IBORs or CDOR. These benchmarks are no longer of systemic importance, and they are replaced with overnight interest rate swaps (**OIS**) referencing risk-free interest rate benchmarks.

(2) *Addition of certain OTC derivatives*

In addition to updating the list of mandatory clearable derivatives to reflect the transition, the CSA has also reviewed the suitability of adding certain OTC derivatives to be mandatorily cleared.

To determine which OTC derivatives or classes of OTC derivatives will be subject to the mandatory central counterparty clearing requirements, the CSA used most of the factors listed in Companion Policy 94-101 *Mandatory Central Counterparty Clearing of Derivatives*⁴. Such factors include the following:

- the availability of the derivative to be cleared by a regulated clearing agency;
- the level of standardization of the derivative;
- the effect of central clearing of the derivative on the mitigation of systemic risk, taking into account the size of the market for the derivative and the available resources of the regulated clearing agency to clear the derivative;
- whether mandating the derivative or class of derivatives to be cleared would bring undue risk to regulated clearing agencies;
- the current liquidity in the market for the derivative or class of derivatives. Specifically, for the review period of April 2023 to September 2023 (the **reference period**), we analyzed monthly volume by assessing the number of transactions and the gross notional amount outstanding for certain OTC derivatives, including the gross notional by maturity, and the percentage of outstanding notional cleared during each month of the reference period;
- with regards to a regulated clearing agency, the existence of capacity, operational expertise and resources; and
- international harmonization.

² See CSA Multilateral Staff Notice 25-312 *Reminder of Cessation of CDOR on June 28, 2024*.

³ For example, you may consult the Commodity Futures Trading Commission (CFTC) amendments adopted in 2022 available online at: <https://www.cftc.gov/sites/default/files/2022/08/2022-17736a.pdf>

⁴ Available online at: https://www.osc.ca/sites/default/files/2022-09/csa_20220901_94-101cp_unofficial-consolidation.pdf

To conduct our analysis, we have relied upon data reported by market participants to designated or recognized trade repositories in accordance with applicable regulations, as well as discussions with recognized central counterparties and requirements in foreign jurisdictions.

Summary of Proposed Amendments

(1) *Proposed Amendments to reflect the cessation of certain IBORs and CDOR and the transition to risk-free interest rate benchmarks*

The Proposed Amendments will remove mandatory central counterparty clearing of certain interest rate swaps and forward rate agreements (**FRA**) referencing the following interest rate benchmarks listed in Appendix A of National Instrument 94-101:

- Canadian dollar (**CAD**) CDOR,
- United States dollar (**USD**) LIBOR,
- British pound (**GBP**) LIBOR, and
- Euro (**EUR**) Euro Overnight Index Average (**EONIA**).

These derivatives are removed in each of the fixed-to-float swap, basis swap, OIS, and FRA classes, as applicable.

Furthermore, we propose to amend Appendix A of National Instrument 94-101 by adding mandatory central counterparty clearing of OIS referencing USD SOFR with a maturity between 7 days to 50 years and EUR Euro Short-Term Rate (**€STR**) with a maturity between 7 days to 3 years.

For reasons of liquidity and international harmonization, we are also proposing to expand the maturity of OIS referencing GBP SONIA subject to mandatory clearing to include maturity between 7 days to 50 years. Likewise, it is our view that given the significant liquidity for the reference period, we propose to expand the maturity of OIS referencing CAD CORRA to include maturity between 7 days to 30 years.

(2) *Addition of new classes of OTC derivatives*

Based on the factors listed above, we concluded that the following classes of OTC derivatives should be added to the list of mandatory clearable derivatives provided in Appendix A of National Instrument 94-101:

- Fixed-to-float interest rate swaps referencing Australian dollar (**AUD**) Bank Bill Swap rates (**BBSW**) with a maturity including 28 days to 30 years;
- CDS index CDX.NA.IG⁵ with tenors of 5 and 10 years (Series 46 and all subsequent Series);
- CDS index CDX.NA.HY⁶ with a tenor of 5 years (Series 46 and all subsequent Series); and
- CDS index iTraxx Europe with a tenor of 5 years (Series 45 and all subsequent Series).

We concluded that the addition of the above listed derivatives would be in the public interest.

Local Matters

An annex is being published in any local jurisdiction that is making related changes to local securities laws, including local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

Alternatives Considered to the Proposed Amendments

The alternative to the Proposed Amendments would be not to proceed with making amendments to National Instrument 94-101 to reflect the cessation of certain IBORs and CDOR, or not adding certain liquid and standardized classes of products to the list of mandatory clearable derivatives. However, not proceeding with the removal of derivatives referencing certain IBORs and CDOR would be inconsistent with the desire to align with both the implementation of Canada's commitments in relation to global OTC derivatives markets reforms stemming from the G20 commitments of 2009⁷ and the Financial Stability Board's recommendations for reforming major interest rate benchmarks⁸. Furthermore, not proceeding with the Proposed Amendments would result in certain

⁵ North American Investment Grade CDX Index

⁶ North American High Yield CDX Index

⁷ For more information relating to the G20 Summit of Pittsburgh, please see: <http://www.g20.utoronto.ca/2009/2009communique0925.html>

⁸ For more information relating to the Financial Stability Board's recommendations published in July 2014, please see: https://www.fsb.org/2014/07/r_140722/

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liquid and standardized OTC derivatives remaining uncleared by a central counterparty potentially increasing systemic risks in Canada.

Anticipated Costs and Benefits of the Proposed Amendments

The Proposed Amendments would only apply to certain counterparties executing OTC derivatives which are subject to mandatory central counterparty clearing. Overall, the CSA is of the view that the regulatory costs of the Proposed Amendments are proportionate to the benefits that would be gained by reducing the credit risk of counterparties and increasing financial stability in the Canadian OTC derivatives market.

Contents of Annexes:

This Notice includes the following Annexes:

Annex A: Proposed Amendments to National Instrument 94-101 *Mandatory Central Counterparty Clearing of Derivatives*

Annex B: Specific question of the CSA relating to the Proposed Amendments

Annex C: Local Matters

Request for Comments

We welcome your comments on the Proposed Amendments and also invite comments on the specific question set out in Annex B of this Notice. Please submit your comments in writing on or before December 19, 2024. Please send your comments by email. Your submissions should be provided in Microsoft Word format.

Please address your submission to all of the CSA members as follows:

Alberta Securities Commission
Autorité des marchés financiers
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission, New Brunswick
Manitoba Securities Commission
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Superintendent of Securities Nunavut
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
Financial and Consumer Services Division, Department of Justice and Public Safety, Prince Edward Island

Please deliver your comments only to the addresses that follow. Your comments will be forwarded to the remaining CSA member jurisdictions.

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour PwC
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514 864-6381
E-mail: consultation-en-cours@lautorite.qc.ca

The Secretary Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416 593-2318
E-mail: comments@osc.gov.on.ca

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.asc.ca, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

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Questions with respect to this Notice and the Proposed Amendments may be referred to:

Julie Boyer,
Senior Policy Advisor
Autorité des marchés financiers
Tel: 514 395-0337, ext. 4345
Email: julie.boyer@lautorite.qc.ca

Greg Toczylowski,
Manager, Derivatives, Trading & Markets
Ontario Securities Commission
Tel: 416-419-1133
Email: gtoczylowski@osc.gov.on.ca

Janice Cherniak
Senior Legal Counsel
Alberta Securities Commission
403-355-4864
janice.cherniak@asc.ca

Leigh-Anne Mercier
General Counsel
Manitoba Securities Commission
204-945-0362
Leigh-Anne.Mercier@gov.mb.ca

Abel Lazarus
Director, Corporate Finance
Nova Scotia Securities Commission
902-424-6859
abel.lazarus@novascotia.ca

ANNEX A

**PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 94-101 MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES**

1. *National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives is amended by this Instrument.*
2. *Appendix A is replaced with the following:*

APPENDIX A

TO

**NATIONAL INSTRUMENT 94-101 MANDATORY CENTRAL COUNTERPARTY CLEARING OF DERIVATIVES
MANDATORY CLEARABLE DERIVATIVES
(Subsection 1(1))**

INTEREST RATE SWAPS

FIXED-TO-FLOAT SWAPS

Floating Rate Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable
BBSW	AUD	28 days to 30 years	Single currency	No	Constant or variable

BASIS SWAPS

Floating Rate Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
EURIBOR	EUR	28 days to 50 years	Single currency	No	Constant or variable

OVERNIGHT INDEX SWAPS

Floating Rate Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
CORRA	CAD	7 days to 30 years	Single currency	No	Constant
FedFunds	USD	7 days to 3 years	Single currency	No	Constant
SOFR	USD	7 days to 50 years	Single currency	No	Constant
€STR	EUR	7 days to 3 years	Single currency	No	Constant
SONIA	GBP	7 days to 50 years	Single currency	No	Constant

FORWARD RATE AGREEMENTS

Floating Rate Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
EURIBOR	EUR	3 days to 3 years	Single currency	No	Constant

CREDIT DEFAULT SWAPS

Index	Region	Maturity	Applicable Series	Tranched
CDX.NA.IG	North America	5 years, 10 years	Series 46 and all subsequent Series.	No
CDX.NA.HY	North America	5 years	Series 46 and all subsequent Series.	No
iTraxx Europe	Europe	5 years	Series 45 and all subsequent Series.	No

3. This Instrument comes into force on *[insert date here]*.

ANNEX B

Would adding some single-name CDS to the list of mandatory clearable derivatives be beneficial for market participants? Please explain the reasons why it would be appropriate or not.

ANNEX C

LOCAL MATTERS

COST AND BENEFIT ANALYSIS

As set out in the main body of this Notice, the CSA are publishing the following for a comment period:

- The proposed amendments (**Proposed Amendments**) to National Instrument 94-101, *Mandatory Central Counterparty Clearing Of Derivatives (NI 94-101)*

In this annex, we present our qualitative assessment of the estimated costs and benefits of the Proposed Amendments to Ontario's capital markets.

A. Background – Current Framework and the Purpose of the Proposed Amendments

The NI 94-101 is part of Canada's commitments in relation to global over-the-Counter (**OTC**) derivatives markets reforms stemming from the G20 commitments of 2009 in response to the financial crisis. The NI 94-101 first came into force in April 2017. Since then, many of the OTC derivatives required to be cleared in the NI 94-101 reference interest rate benchmarks that have been or will be replaced with new reference interest rates. For example, in Canada, the Canadian Dollar Offered rate (**CDOR**) will be replaced by the Canadian Overnight Reference Rate Average (**CORRA**) on June 28, 2024. The Proposed Amendments have two objectives:

1. Updating the list of mandatory clearable OTC derivatives to include products that reference the new replacement interest rate benchmarks.
 - In 2012, allegations of manipulation of the London inter-bank offered rate (**LIBOR**) led to the loss of market confidence in the credibility and integrity of not only LIBOR, but also in financial benchmarks in general. In response to concerns regarding inter-bank offered rates (**IBORs**), the Financial Stability Board has called for the cessation of IBORs and the implementation of alternative reference rates. Subsequently on May 16, 2022, the Ontario Securities Commission (**OSC**) authorised a cessation plan of CDOR.¹
 - As a result, the list of those derivatives that are required to be cleared needs to be updated to reflect the transition to risk-free rate benchmarks such as CORRA and Secured Overnight Financing Rate (**SOFR**) to reflect the shift in trading activity and systemic importance.
2. Adding new products to the list of OTC derivatives subject to mandatory clearing.
 - To determine which OTC derivatives or class of OTC derivatives will be subject to mandatory central counterparty clearing requirements, we considered most of the factors outlined in the Companion Policy to NI 94-101.² We came to our conclusion by analysing data reported by market participants to designated or recognized trade repositories in accordance with applicable regulations, and by also having discussions with recognized central counterparties.

B. Stakeholders Affected by the Proposed Amendment

The stakeholders that will be affected include:

1. Entities³ operating in Ontario that transact in the class of designated OTC derivatives found in Appendix A of NI 94-101 (**Appendix A**) and that satisfy one or more of the conditions listed in section 3 of the NI 94-101.⁴ These entities (nine entities in total) consist of local Canadian Banks, as well as local pension funds.

¹ The OSC's decision is available at: <https://www.osc.ca/en/securities-law/orders-rulings-decisions/canadian-dollar-offered-rate-and-refinitiv-benchmark-services-uk-limited-1>

² The relevant Companion Policy can be found at: https://www.osc.ca/sites/default/files/2022-09/csa_20220901_94-101cp_unofficial-consolidation.pdf

³ By Ontario entities we mean "local counterparty" in Ontario.

Pursuant to section 1(1) of NI 94-101, "local counterparty" means a counterparty to a derivative if, at the time of execution of the transaction, either of the following applies:

(a) the counterparty is a person or company, other than an individual, to which one or more of the following apply:

(i) the person or company is organized under the laws of the local jurisdiction;

(ii) the head office of the person or company is in the local jurisdiction;

(iii) the principal place of business of the person or company is in the local jurisdiction;

(b) the counterparty is an affiliated entity of a person or company referred to in paragraph (a) and the person or company is liable for all or substantially all the liabilities of the counterparty;

⁴ Both the Ontario entity and its counterparty must satisfy at least one of the following three conditions:

1. The party is a participant of a regulated clearing agency that offers clearing services in respect of the mandatory clearable derivative, and the party subscribe to clearing services for the class of derivatives to which the mandatory clearable derivative belongs.

2. The general public in Ontario including assets owners and investors insofar as they receive the benefits of a more stable financial system.

C. Impact on the OSC mandate

The OSC considers the impact of proposed rulemaking on the OSC's mandate to:

- provide protection to investors from unfair, improper or fraudulent practices,
- foster fair, efficient and competitive capital markets and confidence in the capital markets,
- foster capital formation, and
- contribute to the stability of the financial system and the reduction of systemic risk.

The Proposed Amendments will impact the systemic risk component of the OSC's mandate.

By updating the list of products that must be cleared through a central counterparty (**CCP**) and that have systemic importance to Ontario's capital markets, the Proposed Amendments help mitigate potential systemic risks by reducing the counterparty credit risk present in bilateral trades.

Clearing OTC derivatives through a CCP mitigates counterparty credit risk by novating bilateral trades to one CCP, the clearing agency. As a result, the CCP is the buyer to every seller, and the seller to every buyer. Due to the strict regulation and oversight of CCPs and the CCP's rules for products, valuation, and collateral, it is widely felt that mandating suitable products to be cleared at a CCPs is beneficial to the stability of capital markets.

D. Anticipated costs and benefits

1. Benefits to stakeholders

a. Ontario entities and their domestic and foreign counterparties

Increased harmonization with other jurisdictions and reduced confusion amongst market participants

- Maintaining an up-to-date and relevant list of clearable products helps reduce regulatory confusion amongst market participants. We do so by updating Appendix A, to reflect the cessation of IBOR and CDOR interest rate benchmarks. The interest rate benchmarks added or modified in Appendix A (SOFR, CORRA, and Euro Short-Term Rate (**ESTR**)) are being or have been adopted by other jurisdictions globally in their mandatory clearing rules. By adopting these interest rate benchmarks in NI 94-101, we will be in-line with the global standard.

b. General Public in Ontario

Reduction in systemic risk

- Central clearing of OTC derivatives will result in more effective management of counterparty credit risk, thus mitigating the effects if one of the counterparties does not fulfill its obligations.⁵ Central clearing can increase market transparency, contribute to the stability of our financial markets, and reduce systemic risk.⁶

Increased confidence in regulatory oversight

- Maintaining an up-to-date and relevant list of clearable products helps increase confidence amongst market participants that regulatory authorities are being vigilant and aware of market characteristics and trends.

2. A party is a subsidiary of a party referred in paragraph (1) and has had a month-end gross notional amount under all outstanding derivatives exceeding \$1 000 000 000.

3. The party is from a Canadian jurisdiction and has had a month-end gross notional amount under all outstanding derivatives, combined with each affiliated entity that is a local counterparty in any jurisdiction of Canada, exceeding \$500 000 000 000.

⁵ A central counterparty (CCP) reduces counterparty credit and liquidity risk exposures through netting. It replaces bilateral trading exposures between market participants with a centralized network of exposures between clearing participants. Instead of being subject to multiple exposures to a range of counterparties, each market participant maintains just a single trading exposure to the CCP. Because of multilateral netting, the size of this exposure is equivalent to the net position vis-à-vis all other clearing members.

⁶ BIS Quarterly review, December 2015, *Central Clearing: Trends and current issues*, https://www.bis.org/publ/qtrpdf/r_qt1512g.htm

2. Costs to stakeholders

a. Ontario Entities

The incremental cost of clearing to Ontario entities:

- The OTC derivatives products being added to Appendix A are already being cleared by the majority of the Ontario entities that are required to clear pursuant to NI 94-101. The majority of the entities that will be affected by the Proposed Amendments are already clearing members of regulated clearing agencies.
- For entities that are not clearing members of a recognized or exempt clearing agency, they can clear their transactions through existing clearing members of the regulated clearing agencies provided there is a trading relationship established. From reviewing the trade repository data, we know that the entities are currently clearing some or all of the products listed in the amended Appendix A. Thus, we do not anticipate that the Proposed Amendments will create significant operational or administration burden to these Ontario entities.

Legal and compliance costs:

- We anticipate the costs for entities to review the rule and implement processes and controls to ensure compliance with the rule will be minimal. The Proposed Amendments do not change any of the text in the rule and as a result, the amount of time and expertise required to review and assess its impact should be minimal. In addition, as the OTC derivatives being added to the Appendix A are highly liquid and are currently cleared, changes to existing trading agreements may not be required.

There may be some initial set-up compliance costs associated with the changes for each impacted Ontario entity, but they should not persist going forward. These initial set up costs could include the following:

- Legal analysis and review of the Proposed Amendments (in house legal – 2 hours);
- compliance analysis and review (compliance director – 2 hours); and
- systems development to ensure compliance (project manager, developers, business analyst – 5 hours each).

Thus, the estimated cost⁷ on personnel per firm will be:

Activity	Staff Involved	Hourly rate	Total hours per activity	Total cost per activity
Legal analysis and review of the amendment	Senior Legal Counsel	\$96	2	\$192
Compliance analysis and review	Compliance Director	\$78	2	\$156
Systems development to ensure compliance	Project Manager	\$75	5	\$380
	Software Developer	\$65	5	\$325
	Business Analyst	\$64	5	\$320

⁷ The source of the hourly rate is from Robert Half salary Guide 2024, <https://www.roberthalf.com/ca/en/insights/salary-guide>:

Position	Hourly rate
In-House Legal Counsel 0-3 Years' Experience	\$66.35
In-House Legal Counsel 4-9 Years' Experience	\$82.86
In-House Legal Counsel 10+ years' Experience	\$95.90
Compliance Director - Corporate Accounting	\$78.23
Project Manager	\$75.47
Software Developer	\$65.44
Business Analyst - Technology	\$64.44

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Estimated cost	\$1,373 ⁸
Total estimated costs of the 9 entities	\$12,357

b. Retail investors

Retail investors will not be impacted by the Proposed Amendments.

⁸ We round the number to the nearest dollar.

The precise estimation when a senior legal counsel (10+ years of experience) is being employed is:
 $(2 \times 95.90) + (2 \times 78.23) + (5 \times (75.47 + 65.44 + 64.44)) = \text{CAD } 1375.01$

In the scenario where a mid-level legal counsel (4-9 years of experience) is being employed, the precise estimated cost is:
 $(2 \times 82.86) + (2 \times 78.23) + (5 \times (75.47 + 65.44 + 64.44)) = \text{CAD } 1348.93.$