

NEW CONSUMER PROTECTION MEASURES FOR PREPAID CREDIT CARDS

Marc Beauchemin and Luc Thibaudeau

On October 24, 2012, the Harper government announced its intentions to enact new regulations to protect consumers who use prepaid credit cards in order to broaden their options regarding the forms of payment that best suit their needs. Such prepaid payment products allow consumers to make purchases or cash withdrawals through a payment network like American Express, MasterCard or Visa, with funds that have been paid in advance to a financial institution. Properly speaking, they are not credit cards because the funds must be paid in advance in order to use them, but they offer many of the same advantages, such as being able to shop on line, or make reservations by phone. The use of such prepaid cards does not result in interest charges, but the financial institutions that issue them often charge fees for using or activating the card. Moreover, some prepaid cards may have an expiry date, which, once exceeded, means that the holder loses the unused balance on the card.

Federal measures

A draft regulation entitled *Prepaid Payment Products Regulations* (the "Federal Regulations") was published for comment on October 27, 2012 in the *Canada Gazette*. The draft regulation will apply to all federal financial institutions that may issue prepaid payment products, such as banks, trust or loan companies, insurance companies and cooperative retail associations.

The draft Federal Regulations provide that the financial institution governed by the proposed regulation must, before issuing the prepaid product to the consumer, disclose certain prescribed information on the product's exterior packaging, if packaged, and in all other documents concerning issuance of the product, such as the toll-free telephone number to call for information regarding the terms and conditions of the product and any restrictions on use imposed by the issuing institution. Information on the fees charged by the institution issuing the prepaid product must be presented in a prominently displayed information box. However, if a person requests a prepaid payment product by telephone, the necessary information must be provided verbally rather than in writing, and always before issuance of the product. In this way, the government wishes to facilitate the ability of consumers to readily compare prepaid payment products and its secondary goal is to encourage market efficiency and competition. All the information disclosed by the issuing institution must be clear, straightforward and not misleading.

The Federal Regulations will thus restrict some operational practices specific to prepaid payment products by prohibiting the funds from expiring on a certain date except in the case of a promotional payment product purchased by a business or other entity and distributed by it in connection with a promotional loyalty or rewards program. So as to give consumers a reasonable period within which to use the prepaid payment product, the imposition of non-use or account maintenance fees for at least one year after activation of the product will be prohibited, except in the case of a promotional product. Lastly, the imposition of overdraft fees and interest without the express consent of the holder of the product will be prohibited.

The Financial Consumer Agency of Canada will be responsible for implementing the application of the Federal Regulations and will oversee compliance by the institutions subject to the new requirements under those regulations by using its existing compliance tools.

The various stakeholders concerned and the general public have thirty (30) days (until November 26, 2012) to send their comments on the draft Federal Regulations to the federal government.

Situation in Quebec

On June 30, 2010, phase II of the reform of the *Consumer Protection Act* ("CPA") came into force. Sections 187.1 and following of the new provisions regulate prepaid card sale contracts and apply to certificates, cards or other means of exchange allowing a consumer to acquire goods or services from one or more merchants.

To a certain extent, the measures promulgated by the provincial regulatory provisions have the same objectives as the new Federal Regulations, including disclosure of conditions of use, prohibitions against imposing an expiry date and against imposing fees for issuing or using such cards. There is also an obligation to refund an unused balance of five dollars or less on a prepaid card.

The *Regulation respecting the application of the Consumer Protection Act* (the "**Provincial Regulation**") contains several exceptions, however. For example, prepaid mobile telephone cards can have an expiry date and the issuer is not obliged to refund any unused amounts.

Another exception under the Provincial Regulation concerns prepaid cards that allow holders to acquire goods or services from several independent merchants who do not use the same name. In this case, under certain conditions, the consumer could be charged activation or non-use fees. Under the CPA and the Provincial Regulation, the consumer may not be charged any non-use fees for this type of card before the 15th month following the date the card is issued.

Lastly, two exceptions stipulated in the Provincial Regulation deal with inapplicability of the obligation to refund an unused balance and the prohibition against fees in the case of prepaid cards issued by a financial institution that allow for the procurement of goods or services from all the merchants using the international payment network identified on the card. These exceptions are aimed specifically at federal financial institutions, such as banks, which now will be subject to obligations in that regard now governed by the new Federal Regulations.

The question arises as to what regime would apply to other Quebec financial institutions that offer the same type of payment method. There appears to be a regulatory gap left by the exception applicable to those institutions in the Provincial Regulation and by the federal legislator's absence of jurisdiction over financial institutions such as financial services cooperatives in Quebec and the other provinces. However, considering that the Federal Regulations do not deal with fees for using prepaid cards or the obligation to reimburse balances, the practical consequences of the gap are not significant for the time being given that all federal, provincial or other financial institutions are exempt in that regard under the Provincial Regulation.

To be continued.

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