

Blakes Bulletin

Financial Services Regulatory

Proposed Federal Prepaid Card Regulations

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On October 24, 2012, the Minister of Finance and the Financial Consumer Agency of Canada (FCAC) announced new federal regulations governing prepaid cards. We have been anticipating these regulations for some time, as the government had indicated that protecting consumers of prepaid cards was part of its Economic Action Plan 2011 and had hinted that such regulations were forthcoming in previous announcements respecting federal consumer protection measures. The proposed *Prepaid Payment Products Regulations* (Proposed Regulations) will be published in the *Canada Gazette* on October 27, 2012 for a 30-day comment period.

The Proposed Regulations will apply to prepaid payment products that are issued in Canada by a federally regulated financial institution (FRFI). The Proposed Regulations define "prepaid payment product" to mean a payment card, whether physical or electronic, that is – or can be – loaded with funds and that can be used by the cardholder to make withdrawals or purchase goods or services.

We note the following with respect to the Proposed Regulations.

Disclosures prior to issuance: Certain information must be provided to consumers *before* the product is issued and must be set out in the product documentation, including on the product's exterior packaging. This information must include all fees that are imposed by the issuer, any restrictions on the use of the product, the name of the issuing FRFI and a toll-free number that can be used to make inquiries about the product's terms and conditions.

This information must also be provided in writing to any person "applying" to the FRFI for the product. In this respect, the Proposed Regulations contemplate

that an individual will "apply" for a product and set out a disclosure regime that is similar to the disclosure regime with respect to credit cards. That is, there are disclosures that are required to be given before issuance (i.e., "on application") and additional disclosures that are required to be given when the product is issued. This process seems inconsistent with the manner in which prepaid cards are generally distributed. Further, as these are not credit products, there is generally no "application" to purchase a prepaid card.

Information box: The fees payable on a product must be presented in an information box displayed prominently on the product's exterior packaging or other product documentation. Unlike the requirements for credit cards, there is no specific format or font sizing requirement for the information box.

Disclosures upon issuance: As previously noted, because the Proposed Regulations distinguish between "application" and "issuance", additional disclosures are required upon issuance of the product. These disclosures include any charges that an individual becomes responsible for by accepting or using the product, the product's terms and conditions, and a description of how the product holder can verify the balance of the funds loaded on the product. It is not clear from the Proposed Regulations if these disclosures can be set out in the terms and conditions themselves.

Split payments: Also included in the list of disclosures that are required upon issuance of the product is a description of "split payments" and a statement that the product may, in certain circumstances, be used for making split payments. "Split payments" is not defined, although it likely refers to a product holder's ability to pay for goods or services using both the product and at least one other payment method. It is unclear what the circumstances are in which split payments may be used. The wording of the Proposed Regulations suggests that an FRFI may not prohibit split payments but that it may exercise its discretion in determining the circumstances in which they may be used.

CONT'D ON PAGE 2

CONT'D FROM PAGE 1

Disclosures on the product: Specific disclosures are required on the product, including the name of the issuer, a toll-free number for making inquiries and complaints, a website address where the required disclosures can be found, the product expiry date, if any, and the funds expiry date (permissible only for a “promotional product”, which is defined as a prepaid payment product that is purchased by an entity and distributed by that entity as part of a promotional, loyalty or award program). These “on card” requirements may prove challenging where FRFIs want to issue bilingual cards.

Plain language requirements: All disclosures must be made in a manner that is clear, simple and not misleading.

No expiry of funds: Funds loaded on the product cannot expire, except if the product is a promotional product. However, the product itself may have an expiry date. FRFIs will need to ensure that they set up a process where, upon expiry of the product, a product holder will be able to receive a replacement product or otherwise have access to any remaining funds.

Restrictions on maintenance fees: FRFIs are prohibited from charging maintenance fees for at least one year after the product has been activated, except if the product is a promotional product. A “maintenance fee” is defined as a fee in relation to a product that is charged *after* the product has been purchased, other than a fee associated with the holder’s use of the product or of any service related to it. There are no restrictions in the Proposed Regulations on fees other than maintenance fees, and as such, use, currency conversion, and other types of service fees are permitted.

No new fees or increases without notice: FRFIs may not impose new fees or increase existing fees unless, among other things, the FRFI provides the *product holder* with at least 30 days’ prior notice of the new fee or increase. It is interesting to note that this requirement focuses on the product holder and not on the purchaser of the product. Accordingly, FRFIs that want the flexibility to

impose new fees or increase existing fees will have to establish systems that enable them to obtain information on the ultimate holder of the product. This may pose interesting challenges from a practical implementation perspective.

The FRFI must also display the notice on its website for at least 60 days prior to the effective date of the new or increased fee but website disclosure alone is not sufficient.

No overdraft or interest charges without consent: FRFIs may not charge overdraft fees or interest without the express consent of the product holder. Given the FCAC’s interpretation of “express consent” for the purposes of other regulations, we expect that the use of the product will not constitute express consent under the Proposed Regulations.

The FCAC will have administrative oversight of the Proposed Regulations, consistent with its role respecting other consumer provisions applicable to FRFIs.

FRFIs should review the Proposed Regulations carefully and determine if there are any provisions of the Proposed Regulations that are unworkable or impractical and if so, consider submitting comments on the Proposed Regulations. The deadline for comments is November 26, 2012.

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