



March 17, 2023

Consumer Protection Act Review
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Submitted via email: consumerpolicy@ontario.ca

The Canadian Prepaid Providers Organization (“**CPPO**”) would like to take the opportunity to express the view of our members in response to the consultation launched by the Government of Ontario (the “**Consultation**”) to review the Ontario *Consumer Protection Act, 2002* (the “**CPA**”).

The CPPO is a not-for-profit organization and the collective voice of the open-loop prepaid payments industry in Canada. It is the only association solely focused on this growing industry and includes the major players in open-loop prepaid in Canada. An item of priority that has been identified by the CPPO membership is the desire to achieve a national, harmonized regulatory framework for “open loop cards” that properly distinguishes open loop cards from “closed loop cards”.

Although the subject of prepaid card regulation was not raised specifically in the Consultation, the CPPO would like to make this submission as a suggestion for reform to CPA regulations as has been invited in the Consultation, namely in respect of sections 25.1 to 25.5 of the *General* regulation made under the CPA (the “**General Regulation**”) which govern gift cards and gift card agreements in Ontario.

As the Government stated when the Consultation was released, it has been over 15 years since a full review of the CPA has been undertaken, and the CPA needs updating to work better in the new marketplace. The CPPO submits that this is especially so in respect of the regulation of open loop cards given the growth and innovation that has taken place in the prepaid payments industry over that 15-year time span. Updating the regulation of open loop cards in Ontario would benefit Ontario consumers and would encourage new business and innovation in the payments sector in the province.

In particular, the CPPO is proposing legislative amendments that would exempt all open loop cards from the fee restrictions currently set out in the General Regulation, on the condition that any fees charged in relation to an open loop card comply with the federal regulatory regime that governs prepaid payment products.

If implemented, these amendments would create a level playing field among all issuers of open loop cards in Ontario without compromising the protection of Ontario consumers, and would also be a significant step towards creating a harmonized regime that would facilitate national prepaid card programs, making Canada a place where innovative prepaid payments products can compete and thrive.

Open Loop vs. Closed Loop

Open loop cards and closed loop cards are different products with different functionality that are supplied and distributed under different business models. The regulation of these products should recognize these differences, as the Ontario legislation does.

The General Regulation already makes a distinction between closed loop and open loop, defining “open loop gift card agreement” as follows (at section 23):

“open loop gift card agreement” means a gift card agreement that entitles the holder of a gift card to apply it towards purchasing goods or services from multiple unaffiliated sellers.

“Closed loop cards” are not defined in the legislation but we use that term in this submission to refer to traditional gift cards that entitle the holder to use the card to make purchases at one merchant or brand (e.g., an Indigo, Tim Horton’s or mall gift card).

In Appendix 1 we discuss additional differences between open and closed loop functionality, for your information.

Growth in Open-loop Prepaid

Open-loop prepaid payments products serve as a catalyst for financial services innovation in Canada and represent one of the biggest growth segments in the industry. The Canadian open-loop prepaid card market continues to grow at a rapid pace and is expected to exceed CA\$17 billion in annual loads by 2025. Total loads on all Canadian open-loop prepaid card accounts grew from an estimated CA\$7.2 billion in 2020 to about CA\$8.5 billion in 2021, an 18 per cent increase and up 76 per cent since 2019. This growth is expected to continue, with the prepaid market project to exceed CA\$17 billion in annual loads by 2025.¹

While the COVID-19 pandemic and prepaid providers’ quick pivot to digital use cases and e-commerce were key drivers for prepaid growth, it is expected that many of these trends will continue post-pandemic to meet the expectations of the digital-savvy Canadian consumer. Certain digital-first programs, such as consumer-funded general purpose reloadable (GPR) prepaid card programs leveraged by Canadian digital challenger banks continue to gain traction among Canadian consumers looking for chequing account alternatives or for a better, cost-effective way to bank. Coupled with next generation features and functionality such as earned wage access (EWA), quick and efficient digital account opening (DAO), accessible fee and rate offers, and creative, forward-thinking money management capabilities, Canadian digital challenger banks are becoming more competitive with incumbent financial institutions.

Corporate-funded prepaid programs are also expected to become more relevant post-pandemic. The use cases that have gained prominence within the market employ a wide range of value propositions while laying the foundation for further innovative offerings. In B2C and B2B instances, this includes using prepaid for payroll, employee benefits and incentives, insurance claims, accounts payable and on-demand delivery. Without effective regulatory oversight of these products, however, their continued emergence could be stifled.

¹ The Canadian Open-Loop Prepaid Card Market: 2021 Results and Forecast Update, Aite-Novaverica Group, April 2022.

Canada still lags behind global efforts generally when it comes to adopting innovative payments technologies, but in respect of prepaid products in particular, the patchwork of varying provincial rules governing open loop cards in Canada has held back the growth of this industry on a national basis and remains an issue that needs to be addressed in key jurisdictions. Provincial gift card regulation needs to be modernized and harmonized with the federal regime in order for this industry to realize its full potential and totally serve the needs and demands of Canadian business and consumers.

Fee Restrictions

Under the General Regulation, suppliers of gift cards under a gift card agreement that is not an open loop card agreement are not permitted to charge any fees in relation to the card. In comparison, suppliers of gift cards under an open loop card agreement are permitted to charge certain, limited, fees. This is entirely appropriate given the different functionality of open loop cards (see Appendix 1). However, the functionality of open loop cards has continued to expand, and therefore the costs of providing open loop programs has continued to expand. The limited fees that are permitted under an open loop gift card agreement, together with the fact that there is no consistency in fee regulation across the provinces, means that it is difficult for an issuer of open loop cards to run a profitable national program. The current regulation is discouraging prepaid providers from carrying on business in Canada.

This issue was previously considered and addressed in Ontario, to a degree, when the General Regulation was amended in 2018 to create a complete exemption from sections 25.2 to 25.5 of the General Regulation for “a gift card issued by a financial institution” (subsection 25.1(1)(c)). “Financial institution” is defined in subsection 25.1(2) as, essentially, regulated banks, credit unions and trust companies (the “**2018 Amendment**”).

Historically, open loop cards in Canada have been issued only by financial institutions because until very recently, only financial institutions have been members of the payment card networks that sponsor open loop cards (e.g. Mastercard and Visa). Therefore, when the 2018 Amendment was brought into force, it was essentially recognition that open loop cards were not intended to be regulated as “gift cards” under the General Regulation. The 2018 Amendment effectively carved all open loop cards out of the gift card provisions of the General Regulation, since in practice at that time, all open loops cards were issued by financial institutions.

Expansion of Open Loop Card Issuers

However, the payment card networks have recently started admitting non-financial institutions as members (on the basis that they meet stringent criteria that are practically equivalent to a financial institution – we could discuss this with you further if that would be helpful), and the expectation in the industry is that the pool of open loop card issuers will expand to include such non-financial institutions. These issuers would not benefit from the current exemption in the General Regulation because they will not meet the definition of “financial institution”. A goal of the CPPO is to achieve equal treatment for all open loop cards, regardless of whether the issuer is a “financial institution”.

One challenge in achieving this goal is that federally-regulated financial institutions are subject to the federal financial institution statutes and the regulations made thereunder, including the *Prepaid Payment Product Regulations* made under the *Bank Act* and *Trust and Loan Companies Act* (“**Federal Prepaid Regulations**”).² Therefore although “financial institutions” are exempt from the

² <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-209/FullText.html>

General Regulation in Ontario, they are nonetheless subject to the Federal Prepaid Regulations, which have robust disclosure requirements, prohibit the expiry of funds, and contain certain fee restrictions. From a policy perspective, it is appropriate to carve these federally-regulated issuers and their products out of the provincial regulation – i.e., there is no risk to Ontario consumers in doing so – since they are covered by the Federal Prepaid Regulations.

A non-financial institution issuer would not be federally-regulated, and therefore would not be subject to the Federal Prepaid Regulations. As such, it would not be appropriate to wholly carve these types of issuers and their products out of the provincial regulation, as that would potentially compromise the protection of Ontario consumers.

To address this, the CPPO proposes that open loop cards not otherwise exempt from the General Regulation (i.e., those issued by non-financial institutions) remain subject to the General Regulation, but that the fee restrictions in the General Regulation be amended to provide that fees will be permitted on any open loop card provided that the fee would not be prohibited to be charged by a financial institution under the Federal Prepaid Regulation.

We have set out our proposed amendments to the General Regulation in Appendix 2. This approach requires minimal changes to the General Regulation and achieves the goal of ensuring that open loop cards issued by non-financial institutions are appropriately regulated. In particular, it ensures that the fee provisions in the Federal Prepaid Regulations, which currently apply to open loop cards in Ontario issued by financial institutions, will apply to all open loop cards in Ontario. The existing provisions in the General Regulation regarding disclosure requirements and the prohibition on expiry would continue to apply.

This would put financial institutions and non-financial institutions that issue open loop cards in Ontario on an even playing field in terms of being able to offer a profitable program, making Ontario a more attractive province for all issuers to do business. Such an approach would not compromise the protection of consumers in Ontario since they will still benefit from the other protections in the General Regulation (e.g., disclosure requirements and prohibition on expiry) as well as the fee provisions in the Federal Prepaid Regulations.

Precedent for Approach

The Government of Ontario is already relying on the Federal Prepaid Regulations as a basis for exempting financial institutions from the gift card provisions in the General Regulation. We note that this type of reliance on another regulatory regime to ensure consumer protection has been seen in other contexts as well.

For example, public companies have an obligation to send management proxy circulars and other materials to shareholders in connection with shareholder meetings. For many companies this has always resulted in significant printing and mailing costs. Several years ago, provincial securities rules were amended to provide for a “notice and access” regime, which is a process that allows public companies to send a shorter notice to shareholders and to provide access to the meeting materials online.³ However, companies can only avail themselves of the notice and access regime if permitted by their governing corporate statute. The *Canada Business Corporations Act* was amended to allow companies incorporated under that statute to satisfy their disclosure obligations

³ The notice and access regime is set out in National Instruments 54-101 and 51-102.

to shareholders by complying with the notice and access regime. Other statutes have not been amended.

For example, the federal *Bank Act* and *Insurance Companies Act* require banks and insurance companies (respectively) to send meeting materials to shareholders, but do not give the option of using the notice and access regime. However, the Superintendent of Financial Institutions (“**Superintendent**”) has in recent years granted exemptions to banks and insurance companies from the obligation to send meeting materials to shareholders, on the basis that the bank or insurance company complies with the notice and access regime. These exemption orders are published in the *Canada Gazette*.⁴

In those cases the Superintendent is exempting federal banks and insurance companies from compliance with a federal statutory provision on the basis that the bank or insurance company complies with a provincial securities rule. The CPPO is essentially proposing that the Ontario Government amend the General Regulation to exempt all open loop cards from the fee restriction provisions on the basis that the card issuer comply with the Federal Prepaid Regulations.

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The CPPO would like to thank you for your time in considering the CPPO’s proposal in respect of this critical issue in the Canadian prepaid payments industry. We would welcome an opportunity to discuss this with you further.

CANADIAN PREPAID PROVIDERS ORGANIZATION

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⁴ An exemption was granted to Sun Life Financial Inc. in January, 2017 (<http://www.gazette.gc.ca/rp-pr/p1/2017/2017-01-28/html/notice-avis-eng.php#nc7>), Canadian Western Bank in January, 2017 (<http://www.gazette.gc.ca/rp-pr/p1/2017/2017-01-28/html/notice-avis-eng.php#nc6>) and National Bank of Canada in December, 2016 (<http://www.gazette.gc.ca/rp-pr/p1/2017/2017-01-07/html/notice-avis-eng.php#ne2>).

Appendix 1

Additional Background

Distinction Between Open Loop and Closed Loop

In addition to the ability to use the card at a single merchant vs. multiple merchants, open loop products are further distinguishable from closed loop cards in that they can function in a similar way to a bank account. A cardholder can use an open loop product:

- like any debit or credit card by presenting it at point of sale, including using contactless point-of-sale technology, which has been particularly advantageous during the pandemic;
- for online purchases, enabling access to the benefits of ecommerce, which has proven to be a critical channel for the purchase of goods when access to retail stores has been reduced or discouraged;
- if enabled, to access funds at ATMs, thereby avoiding the need to cash cheques through alternative money services businesses; and
- as a contactless method of payment embedded in a mobile wallet.

Open loop cards are typically network-branded (e.g., MasterCard or Visa) and offer the cardholder ubiquitous acceptance worldwide wherever the relevant payment network is accepted. Prepaid functionality is particularly attractive to younger consumers who seek out digital payment and budgeting solutions, and to consumers in underserved or remote communities. Canada has significant unbanked and underbanked populations and access to new, innovative prepaid functionality will foster improved financial inclusion.

Closed loop cards – which as mentioned are classified as traditional store branded gift cards - function like cash and it is appropriate for closed loop card regulations to protect a consumer's rights to use the full card value in perpetuity, and without paying any fees or penalties to use those funds. Closed loop card programs are beneficial for retailers despite not being able to charge card fees because they generate front-end velocity on sales and increase spend on high-margin consumer good/services.

Open loop card programs run on an entirely different business model. The functionality that open loop cards provide comes at a cost to the card issuer, including card network expenses, expenses related to the back-end processing and account functionality, customer service, compliance, distribution and sales commissions. Unlike the retail issuer of a closed loop card, an open loop issuer cannot offset its program costs by driving increased sales of goods and services. An issuer can only recover these costs, and make a margin, by charging the cardholder for the use and functionality of the card.

While there is no restriction or regulation around the account and service fees that a financial institution can charge to its account holders (as long as such fees are disclosed), prepaid card issuers are significantly restricted by provincial gift card regulation in the fees they can charge in relation to prepaid cards, including open loop cards, despite the functionality that they provide. This discourages prepaid providers from carrying on business in Canada, thus stifling the innovation and competition that is needed to empower consumers with innovative financial services that improve their financial experiences.

Appendix 2

Proposed Amendments to the General Regulation under the Ontario *Consumer Protection Act, 2002*

CPA Section 1: *[Included for reference]*

“supplier” means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, including the supply of rewards points, and includes an agent of the supplier and a person who holds themselves out to be a supplier or an agent of the supplier;

General Regulation: *[Definitions included for reference]*

23. In the Act and this Part,

“gift card” means a voucher in any form, including an electronic credit or written certificate, that is issued by a supplier under a gift card agreement and that the holder is entitled to apply towards purchasing goods or services covered by the voucher;

“gift card agreement” means a future performance agreement under which the supplier issues a gift card to the consumer and under which,

- (a) if the card is not reloadable, the consumer makes payment in full when entering into the agreement, or
- (b) if the card is reloadable, the consumer makes payment in an amount equal to the initial value of the card when entering into the agreement;

“open loop gift card agreement” means a gift card agreement that entitles the holder of a gift card to apply it towards purchasing goods or services from multiple unaffiliated sellers.

“reloadable gift card” means a gift card to which the holder can add value after the initial purchase of the card.

GIFT CARD AGREEMENTS

Application of sections

25.1 (1) Sections 25.2 to 25.5 apply to every gift card agreement entered into on or after the day this section comes into force and to every gift card issued under that agreement, but do not apply to,

- (a) a gift card that a supplier issues for a charitable purpose;
- (b) a gift card that covers only one specific good or service;
- (c) a gift card issued by a financial institution; or
- (d) the gift card agreement under which a gift card described in clause (a), (b) or (c) is issued.

(2) In subsection (1),

“financial institution” means,

- (a) a bank, authorized foreign bank or federal credit union as defined in section 2 of the *Bank Act* (Canada),

(b) a credit union or a league as defined in section 1 of the *Credit Unions and Caisses Populaires Act, 1994*, or

(c) a trust corporation or loan corporation registered under the *Loan and Trust Corporations Act*.

(3) For greater certainty, subject to subsection (1), sections 25.2 to 25.5 apply to a gift card agreement and a gift card issued under it if the holder of the card purchased it for themselves or received it from another person.

Exemption

25.2 A gift card agreement is exempt from subsection 21 (1), section 26 and subsection 96 (2) of the Act.

No expiry dates

25.3 (1) No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement.

(2) A gift card agreement with an expiry date on its future performance shall be effective as if it had no expiry date if the agreement is otherwise valid.

Limit on fees

25.4 (1) No supplier under a gift card agreement that is not an open loop gift card agreement shall,

(a) issue a gift card for less than the value of the payment made by the consumer when entering into the agreement or hold out that the supplier can provide such a gift card;

(a.1) add value to a reloadable gift card if the value added is less than the value of the payment made by the holder of the card to reload the card; or

(b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card or a fee to customize a gift card.

~~(2) No supplier under an open loop gift card agreement shall,~~

~~(a) issue a gift card for less than the value of the payment made by the consumer when entering into the agreement less \$1.50 or hold out that the supplier can provide such a gift card;~~

~~(a.1) add value to a reloadable gift card if the value added is less than the value of the payment made by the holder of the card to reload the card; or~~

~~(b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card, a fee to customize a gift card or a dormancy fee in accordance with subsection (2.1).~~

[Commentary: The effect of the above deletion is to remove the existing restrictions that apply to open loop cards in respect of activation fees and other fees.]

(2.4) The supplier under an open loop gift card agreement:

(a) may charge any dormancy fee to the holder of the gift card in relation to the card if such fee would not be prohibited to be charged by a financial institution in relation to a prepaid payment product under the *Prepaid Payment Products Regulations* made under the *Bank Act* (Canada) or the *Trust and Loan Companies Act* (Canada);

(b) may not increase any fee, or impose a new fee, in relation to a gift card that is issued to a natural person unless:

(i) a person has, in their capacity as holder of the gift card, provided the supplier with their name and mailing or email address;

(ii) the holder of the gift card has been given the opportunity to modify the information referred to in paragraph (a); and

(iii) the supplier discloses the new or increased fee by:

1. sending a notice to the most recent address provided for the holder of the gift card at least 30 days before the effective date of the new or increased fee, and

2. displaying a notice on the supplier's website for a period of at least 60 days immediately before the effective date of the new or increased fee.

[Commentary: The effect of the above new subsections 2(a) and (b) is to replicate the fee provisions under the federal *Prepaid Payment Product Regulations* for open loop cards, regardless of the issuer: <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-209/FullText.html>]

The effect is that:

- Maintenance fees are permitted beginning 12 months following activation, or earlier with express consent of the cardholder [s. 10 of Federal Regulation]**
- Overdraft fees are not permitted without express consent of the cardholder [s. 11 of Federal Regulation]**
- No new or increased fees are permitted without notice to the cardholder [s. 8 of Federal Regulation]**

The existing provisions in the ON CPA regarding prohibition on expiry (25.3) and card disclosure (25.5) are unchanged and would continue to apply.]

~~(a) the fee is charged no earlier than,~~

~~(i) 15 months after the end of the month that the consumer entered into the agreement, if the holder does not request the supplier for an extension in that 15th month, or~~

~~(ii) 18 months after the end of the month that the consumer entered into the agreement, if the holder requests the supplier for an extension in the 15th month after the end of the month that the consumer entered into the agreement;~~

~~(b) the fee does not exceed \$2.50 per month;~~

~~(c) the card has a notice on the front of the card in 10 point font indicating that there is fee information on the back of the card;~~

~~(d) the card has a notice on the back of the card setting out, clearly and prominently, the information mentioned in clauses (a) and (b); and~~

~~(e) the supplier discloses the information mentioned in clauses (a) and (b) to the consumer at the time that the consumer enters into the agreement.~~

[Commentary: The effect of the above deletion is to remove the existing dormancy fee restrictions that apply to open loop cards.]

(3) If a supplier or a seller has charged a fee or an amount in contravention of subsection (2), the consumer or the holder of a gift card who paid the fee or the amount may demand a refund by giving notice to the supplier in accordance with section 92 of the Act within one year after making the payment.

(4) A supplier who receives a notice demanding a refund under subsection (3) shall provide the refund within 15 days of receiving the notice.

Requirements for agreements

25.5 For the purpose of section 22 of the Act, a future performance agreement that is a gift card agreement shall set out the following information:

1. The fees that the supplier may charge under clause 25.4(2)~~(b)~~.
2. All restrictions, limitations and conditions that the supplier imposes on the use of the gift card.

[Commentary: The above change is a corresponding change.]