



Proposed Regulations Relating to the Expiry of Rewards Points

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Submitted by: The Ontario Bar Association, Business Law Section, Consumer Law Subcommittee



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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to make this submission to the Ministry of Government and Consumer Services Policy, Planning and Oversight Division (the “Ministry” or “MGCS”) in respect of the proposed amendments to the General Regulation (O. Reg 17/05) of the *Consumer Protection Act, 2002* related to the expiry of rewards points (the “Regulations”).¹

Our overarching concern is clarity. We anticipate that this framework will have a material impact on retailers and suppliers currently engaged in or contemplating the introduction of loyalty programs, and related businesses that service them. We also anticipate that a lack of certainty could result in businesses curtailing the creativity and flexibility of programs now offered, with a negative impact on or limiting the options and breadth of benefits available to consumers. In the submission that follows, we provide specific examples of potential revisions and areas where we hope additional precision in language may bring greater certainty to those seeking to comply.

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission has been developed by the Consumer Law Subcommittee of the OBA’s Business Law Section. The OBA Business Law Section has nearly 1500 members, and includes leading experts in business law issues who advise a broad range of retailers and suppliers in respect of loyalty programs.

Rewards Points Regulation Consultation Proposal

The submission that follows responds to the document posted by the Ministry requesting input on proposed regulatory amendments to help define what are and are

¹ Proposal Number 17-MGCS005



not rewards points (parts A and B below), clarify what is “time-alone expiry” (part C), prevent suppliers from using contract termination and renewal simply as a disguised means to expire points (part D), and finally, providing some additional comments (part E).

A. What Are Rewards Points?

MGCS proposed text:

“For the purpose of the definition of ‘rewards points’ in section 1 of the Act, ‘rewards points’ means any way of expressing partial progress that must be accumulated before a benefit is accessible, whether earned across multiple transactions or through spending a certain amount and whether described as points, dollars spent, stars, or using any similar term, provided that such progress is capable of being accumulated across transactions.”

COMMENTS:

(a) Throughout the proposed text of the Regulations, the defined term “rewards points” is not always consistently used. “Rewards points” is sometimes interchanged with other terms like “rewards offers”. We suggest only using the defined term “rewards points” so as to limit confusion and ensure consistency.

(b) We also suggest including a definition of “transaction” to inform the meaning of the defined term. The amendments to the *Consumer Protection Act, 2002* (the “Act”, or the “CPA”) provide that a “consumer agreement” will include an agreement to provide rewards points “when the consumer purchases goods or services or otherwise acts in a manner specified in the agreement”. The proposed text above provides that rewards points will be “earned across multiple transactions or through spending a certain amount”. We feel that it is important to define what might “otherwise” constitute activity intended to be captured, including what constitutes a “transaction”. As discussed below, in our view, the term “transaction” used in the proposed text above should be defined in a manner that does not capture “transactions” in which the consumer makes no monetary payment to the supplier. Where a consumer earns rewards points through a “transaction” where no monetary payment is made, this should remain outside of the scope of when a consumer “otherwise acts in a manner specified in the agreement”. We provide further details in Section B below.



(c) We further suggest including a definition of “benefit” as the term could be interpreted broadly.

OBA proposed text:

“For the purpose of the definition of ‘rewards points’ in section 1 of the Act, ‘rewards points’ is limited to any way of expressing partial progress that must be accumulated before a benefit is accessible, whether earned across multiple transactions or through spending a certain amount and whether described as points, dollars spent, stars, or using any similar term, provided that such progress is capable of being accumulated across transactions.”

B. What Should Not Be Considered Rewards Points?

MGCS proposed text:

“For greater certainty, rewards offers that:

- (1) propose to provide a consumer with one specific good or service after a certain amount of partial progress occurs; and*
- (2) where the good or service is identified at the outset of the offer are not ‘rewards points’.”*

COMMENTS:

(a) Certain rewards for which rewards points may be redeemed are, in themselves, subject to redemption terms and conditions (e.g. coupons, gift cards, vouchers, discounts, etc.). We recommend adding clarity that such are not captured by *Bill 47, Protecting Rewards Points Act (Consumer Protection Amendment), 2016* or the Regulations.

(b) Paragraph (2) captures programs where the terms are clear, for example, if you have X points you will receive one coffee. However, the text seems to also capture tier programs where the specific good/service received changes (either in size, variety or value) depending on the number of points. We assume that these tier programs were



intended to be captured (e.g. 50 points earns one specific reward; 100 points earns a different reward, etc.). If this is not the intention, we recommend clarification.

(c) We recommend that rewards points issued to a consumer for free (e.g. as a benefit for joining a mailing list, won in a contest, or otherwise gratuitously gifted by the program operator) should not be captured by Bill 47, the *Protecting Rewards Points Act* (Consumer Protection Amendment), 2016 or the Regulations.

There are a number of reasons for providing such an exemption. First and foremost, this would treat rewards points provided to a consumer for free in the same way as gift cards provided to a consumer for free. Section 23 of the Regulation defines “gift card agreement” such that it only includes those in which the consumer makes payment in full. Thus, gift cards given away for promotional purposes are not subject to the no-expiry and other rules. Section 25.1 of the Regulation exempts ‘gift cards’ that are issued for a charitable purpose, or that cover only a specific good/service, from the regime.

Secondly, in general there are exemptions from the application of potentially burdensome requirements when goods or services are provided for free, for the obvious reason that if suppliers are required to spend a lot of money in compliance costs, they are less likely to offer such free goods or services. In addition to the gift card exemptions pointed out above, we note that the CPA does not require suppliers to comply with the remote, direct, internet, and personal development services requirements if the cost to the consumer is under \$50. Indeed, while Bill 47 and the proposed regulation are meant to protect a real consumer interest, we do not see any valid consumer interest in providing a disincentive for suppliers to issue free rewards points to consumers.

This exemption can be achieved by (i) including a definition of transaction which would exclude transactions where no monetary amount is required from the consumer or (ii) include a provision expressly exempting these types of rewards points from Bill 47, the *Protecting Rewards Points Act* (Consumer Protection Amendment), 2016 or the Regulations.



OBA proposed text:

For greater certainty, expression of partial progress towards a benefit in a program that:

(1) proposes to provide a consumer with one specific good or service (or a substitute specific good or service of equal or lesser value) after a certain amount of partial progress occurs; and

(2) where the good or service (or value of the good or service) is identified at the outset of the offer

are not 'rewards points'.

For greater certainty, any vouchers, coupons, certificates, gift cards, goods, or services received in satisfaction of the redemption of rewards points, even if redeemable for goods and services, are not rewards points.

Rewards points for which no monetary payment was made by the consumer to the supplier at the time of issue, including, without limitation, rewards points provided to a consumer in exchange for joining a mailing list or providing personal information, are not 'rewards points'.

C. Clarification of time-alone expiry

MGCS proposed text:

"Time-alone expiry means the expiry of points based solely on reaching a certain point in time or based solely on when a certain amount of time has elapsed."

and

"For greater certainty with respect to the interpretation of s. 47.1(1) of the Act, a consumer agreement under which rewards points are provided that states rewards points expire due to the passage of time unless a consumer actively requests the points to not expire or the points be reinstated after that period of time contravenes s. 47.1(1)."

and



“For greater certainty, the credit back obligation in section 47.1(5) of the Act applies only to rewards points that were expired in the relevant time period due to the passage of time alone.”

and

“Consumer agreements under which rewards points are provided may provide for expiry due to reasons other than the passage of time alone, subject to any limits that may be prescribed.”

COMMENTS:

(a) For consistency, we recommend mirroring the language “due to the passage of time alone”, instead of a new term “time-alone expiry” or “passage of time” when explaining what is meant.

(b) We recommend that the Regulations expressly carve out that rewards points are permitted to expire due to the combination of the passage of time and consumer inactivity or otherwise as described below.



OBA proposed text:

“Expiry due to the passage of time alone means the expiry of points based solely on reaching a certain point in time or based solely on when a certain amount of time has elapsed.”

and

“For greater certainty with respect to the interpretation of s. 47.1(1) of the Act, a consumer agreement under which rewards points are provided that states rewards points expire due to the passage of time alone unless a consumer actively requests the points to not expire or the points be reinstated after such passage of time contravenes s. 47.1(1).”

and

“For greater certainty, the credit back obligation in section 47.1(5) of the Act applies only to rewards points that were expired in the relevant time period due to the passage of time alone.”

and

“For greater certainty, notwithstanding s. 47.1 of the Act, rewards points may expire due to consumer inactivity over time, including, but not limited to, failure of consumer to engage in transactions.

D. Rewards Plan Termination Permitted Subject to Limit to Prevent Abuse

MGCS proposed text:

“If within 12 months, a supplier terminates a consumer agreement under which rewards points are provided and then:

(a) reinstates that agreement or a previous agreement; or

(b) otherwise creates a new agreement that is substantially similar to any prior terminated consumer agreement under which rewards points are provided,



then under any such reinstated or new agreement, the supplier shall credit back the consumer with the same number of points the consumer had upon the termination of the most recent agreement described above.”

and

Despite [the above provision], a supplier may terminate a consumer agreement under which rewards points are provided and expire the rewards points provided under that agreement upon such termination if:

- (i) the term of the consumer agreement is not more than 275 days;*
- (ii) the rewards points are associated only with one seasonal consumer agreement and cannot be acquired from other suppliers; and*
- (iii) at least 90 days would elapse between the termination of one such agreement and the entering into of any next such agreement.”*

and

“For the purposes of section 47.1 of the Act, termination of a consumer agreement under which rewards points are provided occurs when:

- (i) a supplier terminates the portions of a consumer agreement that relate to rewards points without terminating the portions of a consumer agreement that do not relate to rewards points; or*
- (ii) a supplier terminates the entire consumer agreement.”*

COMMENTS:

(a) The term “seasonal” is specific to certain program operators, but ambiguous. It also implies that a limited time period must align with a particular season, instead of it simply being a limited time offer. We assume that this more program-neutral approach was intended. We suggest an exemption for programs whose end terms are fixed and whose consumer agreements have a term shorter than one year.

(b) Further clarification is required for the statement that “the rewards points are associated only with one seasonal consumer agreement and **cannot be acquired from other suppliers**”. It is not clear what is meant by the statement in bold. It is also not



clear what would happen in the case of a corporate acquisition, when the supplier of a program may change.

(c) The restriction on terminating the consumer agreement is too broad. The objective of preventing a business from operating an ongoing series of rewards plans that it terminates and then starts anew simply as another way of implementing time-alone expiry can be achieved with narrower language.

OBA proposed text:

“If within 12 months, a supplier terminates a consumer agreement under which rewards points are provided and then:

(a) reinstates that agreement or a previous agreement; or

(b) otherwise implements a new agreement that is substantially similar to any prior terminated consumer agreement under which rewards points are provided,

then under any such reinstated or new agreement, the supplier shall credit back the consumer with the equivalent number of points the consumer had upon the termination of the most recent consumer agreement described above.”

and

Despite [the above provision], a supplier may terminate a consumer agreement under which rewards points are provided and expire the rewards points provided under that agreement upon such termination if:

(i) the term of the consumer agreement is not more than 365 days;

(ii) the rewards points are associated with a consumer agreement with a fixed end date and cannot be acquired from other suppliers; and

(iii) at least 90 days would elapse between the termination of one such agreement and the entering into of any next such agreement.”

and

“For the purposes of section 47.1 of the Act, termination of a consumer agreement under which rewards points are provided occurs when:



- (i) a supplier terminates the portions of a consumer agreement that relate to rewards points without terminating the portions of a consumer agreement that do not relate to rewards points; or
- (ii) a supplier terminates the entire consumer agreement.”

E. Additional Comments

Transition: crediting back, supplier termination of consumer agreement

(6) If a supplier terminated a consumer agreement under which rewards points were provided on or after October 1, 2016, and before the date this section came into force, the previously terminated agreement shall be deemed to not have been terminated and the supplier shall, within 15 days of this section coming into force, credit back to the consumer all rewards points that expired upon that termination.

COMMENTS:

We would also like to bring the Ministry’s attention to part of Bill 47 which may produce unintended consequences.

(a) The above text of Bill 47 implies that consumer agreements that combine rewards points terms with terms unrelated to rewards points, such as credit card agreements, may be deemed not to have been terminated. If this is the intended interpretation, this could mean that credit card agreements that have been lawfully terminated (for example, due to missed payments) will remain active.

(b) In addition to our concern specific to credit agreements above, it should be clarified that notwithstanding that rewards points agreements are “consumer agreements” under the CPA, rewards points agreements are not also subject to the CPA’s provisions regulating future performance agreements, internet agreements, remote agreements and direct agreements.

Conclusion

The OBA supports a vibrant business sector operating within an appropriate legislative and regulatory framework. We thank you for considering these proposals for revisions to the proposed regulations. We would be pleased to discuss these recommendations further directly with the Ministry.