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Legal Update: New Rules on Loyalty Programs in Ontario and Quebec

Loyalty programs are frequently used by various companies in many industries. This tool gives consumers the opportunity to receive goods and services for free or at a discounted price by remaining loyal to a specific merchant. In return, consumers' purchasing habits become easily accessible for companies, which are able to assemble valuable data. Companies also strengthen their consumer base by offering such programs.

Provincial legislatures, namely in Ontario and Quebec, have responded to the growth of loyalty programs by enacting new frameworks governing the way in which companies operate such incentives. As is generally the case with consumer protection legislation, the objective of these measures is to address the power imbalance between merchants and consumers.

Ontario

On December 8, 2016, Ontario's *Consumer Protection Act*¹ ("**Ontario CPA**") was amended by Ontario's *Protecting Rewards Points Act*² and the *Regulations*³ ("**Ontario Regulations**") which were enacted on October 20, 2017. Pursuant to these legislative amendments, the definition of "consumer agreement" under the Ontario CPA has been expanded to include contracts under which a merchant agrees to provide rewards points to a consumer.⁴

These amendments prohibit rewards points from expiring due to the passage of time alone,⁵ although the Ontario Regulations prescribe an exception that allows rewards points to expire due to a consumer's inactivity.⁶ The prohibition on expiry applies only if the rewards points at issue can be redeemed for a product or service valued at more than \$50.⁷

Certain exceptions are also contemplated; for example, accumulated rewards points may expire upon termination of a consumer contract if specifically provided for in the contract itself. The Ontario Regulations also allow for the expiry of an offer to a consumer for one specific product after the consumer achieves certain progress milestones;⁸ therefore, the new prohibition on expiry will not extend to stamps or punch-style incentive cards often provided by merchants.

On January 1, 2018, the Ontario CPA amendments came into force, retroactively taking effect as of October 1, 2016.

Quebec

On April 18, 2018, the draft *Regulations*⁹ ("**Quebec Regulations**") following the 2017 *Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs*¹⁰ ("**Bill 134**") were introduced before the Quebec National Assembly. Bill 134 and the Quebec Regulations are expected to amend the *Quebec Consumer Protection Act*¹¹ ("**Quebec CPA**") upon their coming into force, although no date has been set for their implementation.

Pursuant to the projected amendments in their current form, loyalty program contracts will be regulated in Quebec and the collected incentives referred to as exchange units (similar to "rewards points" under the Ontario CPA), which may not have an expiry date.

Exchange units will, however, be permitted to expire in cases where all of the following conditions are satisfied:

- a stipulation in the contract provides for expiry in the event of inactivity by the consumer;

- the period of inactivity specified is not less than 1 year;
- the merchant provides notice of the consumer's inactivity and the fact that it will result in the expiry of the consumer's exchange units, indicating the expected date of expiry; and
- the advance notice of expiry due to inactivity is sent to the consumer at least 30 days (but not more than 60 days) before the expected date of expiry of the exchange units.¹²

The foregoing requirements provide for more stringent conditions in order for loyalty program rewards points to expire, as compared to the amendments to the Ontario CPA.

Under the Quebec Regulations, a merchant may unilaterally amend an essential term of a loyalty program contract if the consumer is notified of the amendment and is provided with clarifications regarding the amendment 60 to 90 days before it enters into force.¹³ However, the merchant may not amend a loyalty program contract to alter the number of exchange points already *received* by the consumer or the *conversion factor* used to convert the exchange units previously earned by the consumer.¹⁴

These new rules have not yet entered into force in Quebec. It is currently uncertain whether the proposed amendments to the Quebec CPA will be approved in their entirety or revised prior to their adoption.

Conclusion

Organizations conducting business and offering loyalty programs in both Ontario and Quebec will be pleased with the forthcoming harmonization of the provinces' respective rules. These similar legislative changes should bring consistency to companies' practices, and simplify the process of complying with each province's rules on rewards regimes. The close symmetry in the amendments may encourage other provinces to follow suit.

Merchants affected by these amendments to the Ontario CPA and Quebec CPA should review their current loyalty program practices and procedures in order to ensure compliance and seek guidance from specialized legal counsel where appropriate.

7. *Ibid.*, art. 43.3 (1).
8. *Ibid.*, art. 43.1 (2).
9. *Draft Regulations (Amendment to Consumer Protection Act) (project)*, (2018) n° 16 G.O. II, 2651.
10. *An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs*, Bill n° 134, Adopted – November 15, 2017, 1st sess., 41st legis. (Qc).
11. *Consumer Protection Act*, RLRQ, c. P-40.1.
12. *Supra* note 9, art. 46.
13. *Ibid.*
14. *Ibid.*

The content of this newsletter is intended to provide general commentary only and should not be relied upon as legal advice.

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1. *Consumer Protection Act*, 2002 S.O., c. 30.
2. *Protecting Rewards Points Act (Consumer Protection Amendment)*, 2016 L.O., c. 34.
3. *O. Reg. 17/05: General (under Consumer Protection Act)*, L.O. 2002, c. 30.
4. *Supra* note 1, art. 1.
5. *Ibid.*, art. 47.1.
6. *Supra* note 3, art. 43.6 (2).