



February 28, 2014

## **Submission to Finance Canada re: Canada's Financial Consumer Protection Framework**

The Consumers Council of Canada (the Council) welcomes the opportunity to provide comments and recommendations in answer to the consultation on the proposed Financial Consumer Protection Framework.

The Council also looks forward to meeting the Minister of Finance and senior political and public service staff on these recommendations and to working with the Government of Canada to advance their implementation when this is appropriate.

### **Summary**

The Council embraces the efforts of the Government of Canada to develop and enact a fulsome and complete Financial Consumer Protection Framework to protect Canadian citizen and resident consumers in their usage of the Canadian financial system.

The Council also endorses the concept that the system will be flexible to embrace new and, also, as yet unanticipated technologies and services, new private suppliers and service providers while providing consumers with full protection at least comparable to that provided to consumers when using credit cards offered by Canada's major financial institutions today.

There should be no dilution of protections to achieve this end, but rather that all consumer usage of services and technologies should receive the same or a higher level of protection. As well, the Council urges the government to ensure that the Consumer Financial Framework is enshrined in legislation and related regulations to ensure proper, full and robust capacity to enforce the provisions of the framework through the use of criminal and civil sanctions.

### **The Council and the Consumer Lens**

The Consumers Council of Canada is a not-for-profit, fact-based, volunteer-based policy advocacy organization that works collaboratively with consumers, business and government in support of consumers' rights and responsibilities, seeking an efficient, equitable, effective and safe marketplace for consumers. The Council is a member of the [Canadian Consumer Initiative](#) and seeks as a matter of principle to collaborate with other consumer organizations where this will advance consumer policy advocacy in Canada.

The Council advocates for the [charter of International Consumer Rights](#), each of which has an accompanying responsibility, to which it has added a ninth, the Right to Privacy:

The right to safety.

The right to choose.

The right to be heard.

The right to be informed.

The right to consumer education.

The right to consumer redress.

The right to a healthy environment.

The right to basic needs.

The right to privacy.

These rights and matching responsibilities are the lens through which the Council conducts its research, analysis, policy development and policy advocacy. These rights are practical human rights that meet requirements for human dignity, an effective, efficient marketplace and the obligation of governments and businesses to demonstrate respect for Canadian citizens and residents.

## **The Council's Response and Recommendations**

The Council's recommendations respond to each specific consultation question.

*Should the government adopt a set of principles to govern financial consumer protection that would be applicable even where specific regulations have not been enacted? If so, how should a set of principles be administered?*

In short, the answer is ‘yes.’ This set of principles should be enacted in law and be accompanied with regulations. The wording of the law and regulations should establish as the standard for consumer protection the minimum provided currently to users of credit cards with improvements in the transparency of contracts and the removal of onerous elements in contracts such as those that require consumers to pay interest on credit card advances that are in fact being used by consumers to eliminate overpayments on their cards. At no time should consumers be required to carry the risks of new technology such as “flash” cards that may not be as secure as pin-authorized cards or other emerging technologies.

The Council states unequivocally that the Framework should not be volunteer-driven as a code but needs to have full enforcement authority behind it, including criminal and civil sanctions for breaches, with the proportionality principle applying as to whether it is a criminal or civil sanction and the degree of sanction to be applied.

Differences in levels of consumer protection currently in play for the various financial services products, if known to consumers in a fully transparent way, will no doubt have an impact on the nature of competition and innovation. One can recall the damage done to technologies such as

genetically modified organisms (GMO) because of a lack of transparency and the risks, real or imagined, that are perceived by consumers and the marketplace in general. And, to prevent harm to consumers these differences must be disclosed and made clear in a timely, transparent and clear fashion. This being the case, the only acceptable standard for consumer protection is, as has been previously stated, that established for PIN-verified credit cards (and including improvements to transparency and contract provisions there as well). The principles of transparency, consistency and uniformity of legal rights should apply to all elements of the payments system regardless of who is providing the service and needs to take into account all of the players, including anticipating new forms of players as the payment system changes through technology and new service offerings.

The framework must apply federally, provincially and locally; otherwise the effectiveness of the framework will be diluted. This includes service providers, non-federally regulated financial institutions, non-banks, telecommunications companies and any new types of providers and technologies that may arise, as exemplified by Pay-Pal and other systems. As well, any player operating in Canada needs to be subject to Canadian rules, regardless of country of origin or headquartered.

It should also be noted that there are new forms of "currency" that need to be addressed and which create risks for consumers. These include "Bitcoins" and the various types of loyalty programs, which become in themselves forms of payments for which the consumer has in fact already paid in higher prices for goods and services. Examples known to many Canadians include Aeroplan and Air Miles, under which the consumer has paid higher prices for goods and services to pay for these loyalty points, which are then, one could argue, unreasonably restricted as to usage and which may arbitrarily expire and have hidden and unexpected charges to their use.

It is recognized that the borderless world in which consumers operate creates some challenges to applying Canadian rules, but two steps clearly can be taken: international treaty arrangements enshrined in law and a program of automatically created warnings to Canadians when they are going outside the Canadian system when no treaty protections apply (The difficulties and time needed to negotiate such treaties are recognized, as well as the reality that there are numerous rogue-type states for which there may be no sensible treaty possible). Thus, there is a need in the framework to recognize the international and trans-border realities of the Canadian financial and payments system and to make certain consumers are made aware of the risks just immediately before these transactions and through consumer education programs.

*What should be included in a set of principles that would form the basis for financial consumer protection? What elements should be set out under each principle to ensure that the principles are meaningful, measurable and fair to consumers and financial institutions?*

The Consumers Council embraces the principles set out in the consultation paper in regard to access to financial services, disclosure, business conduct and redress, but would add transparency, clarity and timeliness of disclosure. Disclosure must be done in such a manner that

information overload and complex wording do not detract from or obscure the essential and core disclosure messages. It should be enshrined in law that disclosure should be at no more than a certified grade 10 readability level. The purpose of this requirement should be clear in the law: that in a complex society important information re the payments system for people leading busy lives needs to be immediately visible, clear and accessible and should not be obscured by complex language or by poor placement. This is not just a matter for “vulnerable people,” because in a complex world all people are vulnerable even if some people are more vulnerable than others. Research has shown for example, that younger people in the 19 to 15 age bracket can in some circumstances be the most vulnerable, given familiarity with technology and a propensity to overlook privacy and security concerns.

Redress is also an important principle, and it must be easily accessible and ensure that consumers do not absorb the risks of the offered technologies. One payment technology must offer redress at the same order of magnitude as others. Mention can be made of emerging mobile technologies, Internet payment mechanism offerings and emerging currencies, such as “bitcoins” and loyalty points. There should be one point of final redress and that should be as envisaged in the mid to late 1990s when the Office of the Ombudsman for Banking Service and Investments was first instituted.

With the emergence of mobile technologies, the small size of the screens and keyboards presents another vulnerability, as does the potentially increased risk of security breaches in a wi-fi and cellular world in which the security against hacking varies from mobile device supplier to supplier and by network.

*What are the unique challenges faced by vulnerable populations? How should the consumer code address these challenges?*

The Council recognizes that seniors and other groups of Canadians such as immigrants with imperfect command of the two official languages can be affected particularly, but at the same time the payments system needs to protect the vulnerabilities that exist for all Canadians in a specialized and time-limited society.

With the emergence of mobile technologies, the small size of the screens and keyboards presents another vulnerability as does the potentially increased risk of security breaches in a wi-fi and cellular world, in which security against hacking varies from mobility device supplier to supplier and by network.

So there are two types of vulnerability to be addressed: those inherent in particular groups of people and those inherent in differing technologies.

*What tools and authorities will the FCAC need in order to effectively supervise and enforce the implementation of a principles-based financial consumer protection framework? Should consumers have greater access to recourse, beyond the FCAC, in the federal consumer protection framework?*

The Council finds that the principles-based regulation and the research-based criteria for that principles-based regulation outlined in the submission of the Canadian Payments Association, which submission has been reviewed by their Stakeholder Advisory Committee (on which is represented the Consumers Council of Canada), would form a basis for the FCAC's role in supervision and enforcement of the Framework. Essentially the FCAC might become the first real recourse for consumers beyond their financial service providers. At the same time, most consumers do not have the resources to contest cases through the Courts. As a result, the FCAC will need to have clear authority to defend its decisions before the Courts. Meanwhile, to be effective, FCAC will need authority to issue administrative remedial orders, especially where the consumer is immediately out of contested funds.

As well, the FCAC now has a role in supervising the Ombudsman system, in which two banks have failed to embrace the existing Ombudsman for Banking Services and Investments (OBSI), creating a situation which is confusing to consumers. The Framework should provide for OBSI to be the permanent and only Ombudsman for Banking Services and Investments and the Ombudsman should be enshrined into law, as it is clear that the voluntary system that was established initially in lieu of a legislated OBSI is not working. The overall accountability of the Ombudsman should be as an independent person funded by the government and having only administrative oversight organization under the Department of Finance. To be clear with respect to this role, the administrative arrangements for the Competition Bureau of Canada come to mind as the appropriate model within the Industry Canada portfolio; so OBSI under the Department of Finance portfolio.

It is also clear that because the OBSI currently is a voluntary arrangement of the banks that it has no legal clout to enforce its case resolutions. This is not an acceptable state of affairs. The OBSI should have powers of enforcement of its resolutions and that being the case, perhaps, the FCAC could be the first level of administrative appeal. It is clear that timeliness is important to consumers and this should be defined within the law to reflect the stress to consumers and their families when unexpected and unfair events affecting their bank accounts. Furthermore, in respect to debit arrangements, the protections need to meet the level of that for credit cards, especially since consumers could be forced to give out PIN numbers by coercion.

It is also clear that the law needs to reflect the realities of the new technologies and anticipate new technologies by being technologically neutral and it must enable FCAC to effect consumer education on its own and by financial institutions.

However, it needs to be clear that FCAC needs to have clout in its exercise of authority and should clearly have access to administrative monetary penalties as well as administrative orders to carry out its duties.

*How should the consumer protection framework accommodate emerging technologies and financial products?*

The fundamental principle to accommodate emerging technologies and financial products is to have a consumer protection framework that is technology neutral. All forms of technology

should offer the same level of protection to consumers, even though this may be difficult during transitions to new technologies or offerings. In these cases, consumers need to be immediately warned at the point of transaction (sale/purchase) of the risks involved in using one technology over another. As a general principle the protections for all technologies should be the same.

The other issue is protections for Canadians using financial services such as Pay Pal offered over the Internet and perhaps resident in jurisdictions outside Canada and using new services not operated by traditional financial institutions. The same protections for consumers will be needed as found in other payments systems. The new currency forms such as Bitcoins and loyalty points need to be covered as well. So what is really needed is a framework that is technology, service and currency neutral and adaptably applicable to new methods.

It is worth repeating that where this cannot be achieved, consumers need to be fully warned that the new technology, service or currency equivalent does not provide the protections they have come to expect. Preferably emerging services must be brought into conformity with the neutral framework. One key element is transparency: requiring that the risks, benefits, responsibilities of the new technology or service be fully made clear to consumers in a timely fashion. Preferably, however, each new innovation and service needs to be brought into conformity with the neutral framework.

*What key information do consumers need and how should it most effectively be presented to allow consumers to make informed financial decisions? Are there particular products or circumstances in which disclosure is not sufficient to provide consumers with the information needed to make responsible financial decisions? What enhancements to disclosure would provide Canadians with information to make responsible financial decisions?*

It is clear that plain language disclosure in a timely fashion is important to consumers to receive and absorb the risks, benefits, liabilities and responsibilities about a particular technology and service prior to use of the new technology and service. The mobile environment is one that presents issues of timely disclosure of this important information. The small screens in this environment, combined with issues of security need to be addressed. In addition, new service offerings, new service providers (e.g. Pay Pal) that are outside the usual definition of financial institutions, and all jurisdictions within Canada need to be covered. And, as mentioned previously, the issue of protecting consumers in using foreign service sources accessed through the Internet, mobile devices and other electronic means needs to be addressed by way of timely and well-placed, quickly noticed and prominent disclosure of risks as well as by treaty arrangements that protect Canadian consumers in a global economy. Consumers should not bear the risks of innovations and new services or service providers, and the framework needs to ensure that they do not bear these risks.

It is also important that it be required that contact information be clearly and readily available along with an easily accessible dispute mechanism with a clear path of stages through each financial and equivalent institution up to the OBSI level of dispute resolution.

*What needs to be included in order to achieve the objective of a comprehensive financial consumer code?*

The code needs to be comprehensive across the entire financial sector and all financial products at federal, provincial and local levels and cover similar products in the same fashion. It needs to provide, also, protection to consumers who use financial services from abroad that are accessible through electronic means. This will eventually mean appropriate treaty negotiation.

The Council prefers that all unregulated institutions and service providers be regulated, but in the transition they should be encouraged to adopt regulated standards and procedures and, as well, should be subject to clear and timely warnings to consumers at the point of use.

*Should the government consider mechanisms for enhancing engagement among stakeholders in regulatory, supervisory and compliance process related to consumer protection? How could consumers and consumer groups best contribute to these processes, and what might their role be?*

The Council endorses that there should be enhanced and ongoing engagement in the regulatory, supervisory and compliance process related to consumer protection. The Council notes that the Canadian Payments Association itself has had a Stakeholder Advisory Committee that could be a model for continuing engagement with respect to the consumer financial framework. The Council notes that the mechanisms for such engagement need to be legislated and a diverse representation of competent stakeholder representatives to the process also needs to be legislated. To this end, bone fide consumer groups need to be consulted about the consumer representation. Consumer representatives should be properly trained to play their roles. The Consumers Council of Canada offers such training to its representatives. One key aspect of such Advisory Committees that should be enshrined in law is non-attribution of comments made in their deliberations, to encourage frank exchanges of views.

## **Other Considerations**

The Council commends the Canadian Payments Association consultation submission to the Government as many of its points complement the Council's views, noting that it has had the input of Council and other consumer organization representatives on the Canadian Payments Association Stakeholder Advisory Committee. The Council also commends to the Government the OECD Digital Economy Paper No. 204, "Report on Consumer Protection in Online and Mobile Payments" and the Financial Consumer Agency of Canada, "Mobile Payments and Consumer Protection in Canada," Research Paper, December 2013.

## **Conclusion**

The Council welcomes ongoing dialogue with the Department of Finance as this development of the Consumer Financial Framework unfolds. The Council is pleased to have one-on-one dialogue

but urges the Department of Finance to set up a properly funded Stakeholder Advisory Committee that will use modern technology for its consultations and fund occasional travel for consumer representatives to the location of the consultation meetings.

## **Contacts**

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