WHAT BUSINESSES NEED TO KNOW ABOUT AMENDMENTS TO CANADIAN CONSUMER PROTECTION LAWS IN 2017

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Information presented in this document is intended to provide our general comments on developments in the law. It is not intended to be a comprehensive review nor is it intended to provide legal advice. You should not act on any information presented without first seeking specific advice on a particular matter. The firm will be pleased to provide additional details or discuss how this information is relevant to a specific situation.

INTRODUCTION

The past year has been a busy one for provincial governments and consumer protection laws in Canada. Several provinces have been busy closing gaps and loopholes that had resulted in some businesses being caught by consumer protection legislation while other similar ones fell outside the scope of the legislation. Other provinces have entered into whole new areas of commerce that had been previously untouched by regulatory authorities.

This paper provides important updates for businesses involved in:

- Home inspections;
- Debt collection;
- Door-to-door sales;
- Government cheque-cashing;
- Payday loans and other "high-cost credit products"; and
- Travel services.

HOME INSPECTIONS REGULATION

I. ONTARIO

Regulation over home inspectors has been a long time coming in Ontario. In 2013, a blue ribbon panel produced a report that concluded:

- Home inspections performed by unqualified home inspectors pose significant risks to consumers;
- The standards for home inspections varied greatly, causing confusion to consumers;
- Qualifications to be home inspectors were not clear and varied from association to association; and
- Additional consumer protection legislation was needed in the area of home inspections.

Former Government and Consumer Services Minister Marie-France Lalonde said that the lack of regulation over home inspectors "can lead to serious consequences to consumers. If potential homebuyers or sellers end up getting a substandard inspection report they are at risk of being left with unexpected costs, the loss of a sale, or, worse, potentially health and safety risks." With more than 65% of home sales involving a third-party inspection, a significant amount of business activity would be captured by any such regulation.

On November 3, 2016, the Ontario government introduced for first reading Bill 59, *Putting Consumers First Act* ("Bill 59"). Bill 59 reintroduced a number of measures found in Bill 156, *Alternative Financial Services Statute Law Amendment Act*, 2016, which died on the order paper when the Ontario legislature was prorogued. Schedule I of Bill 59 is entitled *Home Inspection Act, 2016* (the "*HIA*"), which creates a regulatory regime overseeing the home inspection industry.

Under the *HIA*, the Ontario cabinet is authorized to designate a not-for-profit corporation to be the "administrative authority," charged with the responsibility of overseeing the administration of all the provisions of the *HIA*. Once established, a variety of administrative officials can be appointed, including: (a) the board of the administrative authority; (b) an administrator of the administrative authority; (c) deputy directors of the administrative authority; (d) registrars and deputy registrars of the administrative authority; and (f) advisory councils to the administrative authority. It also authorizes the creation of a disciplinary tribunal, and a disciplinary appellate body.

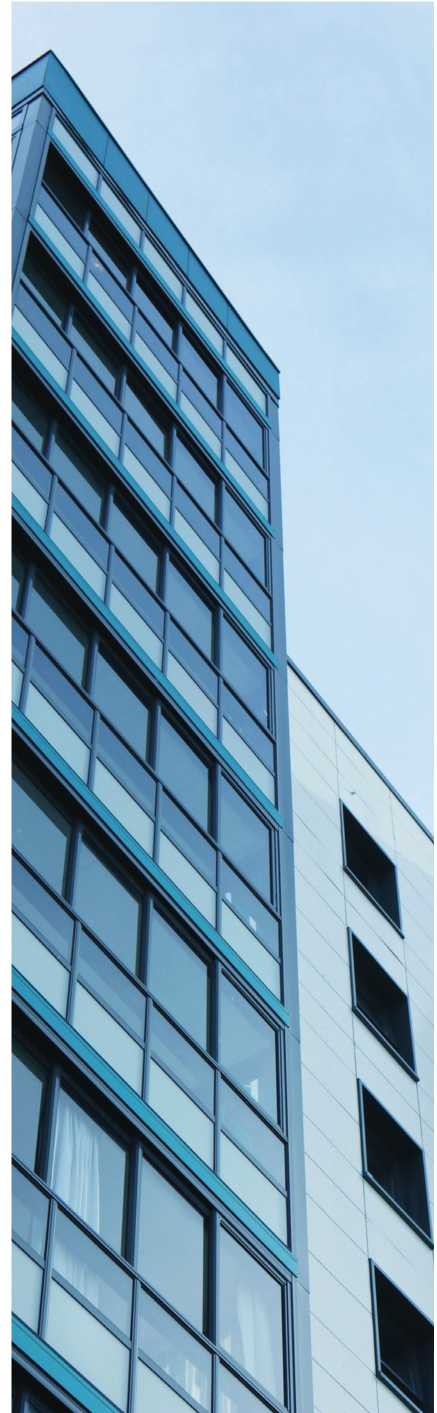
As is the case with other industry sectors such as payday lending, the *HIA* creates a licensing regime for performing home inspections, prohibiting anyone from conducting home inspections without a licence. Licences will not be provided to persons who: (a) cannot reasonably be expected to be financially responsible in being a home inspector; (b) will not perform home inspection activities with "integrity and honesty"; or (c) makes a false statement in an application for a licence, among other things. Licensees be subject to whatever conditions are imposed by the registrar or the tribunal.

The *HIA* requires any agreements with consumers relating to home inspections to be in writing, and there are disclosure requirements contained in such contracts. Upon completion of the home inspection, the *HIA* requires the inspector to provide a home inspection report, which again must comply with ministerial directives as to its contents. The *HIA* prohibits false statements in home inspection reports or other documents.

The registrar and disciplinary tribunal have a number of remedial powers that can be applied to licensees upon hearing a complaint and making determinations associated with that complaint. These remedies range from requiring the licensee to take educational

courses, to imposing fines, to suspending or revoking the home inspection licence. The registrar also has inspection powers, which can be exercised without a warrant or court order.

Bill 59 passed second reading on November 30, 2016 and is currently before the Standing Committee on Social Policy. Hearings commenced on February 21, 2017.



2. BRITISH COLUMBIA

BC was the first province to require home inspectors to be licensed, with the *Home Inspector Licensing Regulation* introduced in 2009. The regulation was revamped in 2014 by way of Order-in-Council (the "2014 Amendments"), and those changes took effect on September 1, 2016.

The 2014 Amendments

- totally changed the qualifications required to obtain a licence. As originally enacted, the regulations deferred to industry association standards for licensing requirements. The 2014 Amendments provide detailed qualification requirements, including educational programs, examinations, apprenticeship, and recommendation letters;
- permitted the director to impose as a condition to a licence, the requirement that the licensee take periodic instruction or training, and obtain and maintain E&O insurance and general liability insurance as approved by the director;
- required the licensee to keep a copy of each home inspection entered into for a two-year period, and documentation of the licensee's insurance if it is required[1]; and
- prescribed certain required contents of any home inspection contract and of any home inspection report.

[1] Strangely, the existing regulations only required the licensee to have a business location where records are maintained, but it was never stated which business records were to be retained and for how long.

DEBT COLLECTIONS (ONTARIO)

Ontario has had legislation governing debt collection in the province for decades. Initially governed by the *Collections Agency Act*, debt collection is now principally regulated through the *Collection and Debt Settlement Services Act* ("*CDSSA*"). If enacted, Bill 59 will introduce certain modifications.

First, Bill 59 makes it clear what activities are not captured by the *CDSSA*. The existing definition of debt "collector" was somewhat broad and arguably could have caught activities not originally intended by the legislature. Subject to the regulations (which have been neither proposed nor enacted), the following would not be subject to the *CDSSA*:

(a) Persons who purchase debts through acquiring or merging with a business in a transaction that includes the transfer of accounts receivable;

(b) Persons who acquire debts through the seizure of A/R under a security agreement;

(c) Persons who acquire debts by taking an assignment of the contract that gave rise to the debt for the purposes of financing a transaction;

(d) Persons who purchase a financing agreement or group of financing agreements or the payments due thereunder;

(e) Persons who purchase a debt that permits the persons to collect the debt under the name of the original creditor; and

(f) Persons who enter into an agreement to finance the purchase of goods or services and who assign the rights to payments under the agreement to a third party, even if the persons continue to collect those payments on behalf of the third party.

The other major item of note with respect to debt collectors and Bill 59 is that the *CDDSA* will be amended to provide for administrative penalties at an amount not exceeding $10,000 to be set by the Minister. These administrative penalties can be imposed even if the person took all reasonable steps to prevent the contravention, or had an honest and reasonable belief in a mistaken set of facts that, if true, would not have led to a contravention (in other words, this will be an absolute liability regime).

DOOR-TO-DOOR SALES

1. ONTARIO

There have been restrictions on door-to-door sales in Ontario since 2002. The Ontario government is proposing to take things one step further in Bill 59, outright banning door-to-door sales that result in a contract being formed, unless the consumer has initiated contact and specifically requested that the supplier attend the consumer's home for the purposes of entering into the agreement. Any agreements entered into contrary to these provisions are void, as are any related agreements.

If enacted, Bill 59 will also level the playing field for water heater suppliers and anyone else conducting door-to-door sales. Previously, consumers that purchased water heaters were given a 20-day "cooling off" period to cancel the agreement after signing it, whereas all other "direct agreements" gave consumers only a 10-day cooling off period. Now all contracts, including water heater contracts, are subject to the 10-day cooling off period.

2. ALBERTA

On November 30, 2016, the Alberta government announced that it would ban unsolicited door-to-door sales of household energy products, effective January 1, 2017. The prohibition would apply to furnaces, air conditioners, water heaters, windows, and energy audits. Under the *Door-to-Door (Energy Sales) Amendment Regulation*, enacted December 6, 2016, only persons who have been expressly invited by phone, email, text or electronic communication, or in person at the place of business of the seller, may sell such products at the consumer's home. And, persons performing energy audits (upon invitation) are prohibited from selling furnaces, air conditioners, water heaters, or windows while attending at the consumer's home.

PAYDAY LOANS AND "HIGH-COST CREDIT" PRODUCTS

Several provinces passed or proposed new laws or regulations relating to payday loans in 2016.

1. ONTARIO

Ontario reduced the maximum allowable cost of borrowing under a payday loan, through the introduction of Regulation 358/16 ("Reg 358"). Previously, payday lenders could charge up to $21 for each $100 advanced. As of January 1, 2017, payday lenders will only be allowed to charge up to $18 for each $100 advanced. That amount will be further reduced to $15 per $100 advanced as of January 1, 2018. Reg 358 makes consequential amendments to the advertising provisions, requiring the updated maximum amounts to be contained in payday loan advertising.

2016 also saw the following proposed changes to payday loan regulation through the introduction of Bill 59:

(a) **Municipal No-Fly Zones**: Toronto recently tried to introduce a bylaw regulating where payday loans could operate in the city. Bill 59 would give effect to such bylaws, by prohibiting licensees from operating anywhere prohibited by Toronto or any other municipality.

(b) **Greater Restrictions on Rollover Loans**: Previously, payday lenders were prohibited from offering a concurrent or replacement payday loan until seven days had passed since the borrower repaid the full balance of the first payday loan. Bill 59 proposes to give the provincial cabinet the power to increase (or reduce) the number of days to more (or less) than seven.

(c) **Inspecting Non-Licensees**: The payday loan registrar always had the power to inspect licensees for non-compliance with the Act; however, it did not have the power to inspect non-licensees – persons who are not licensed, but who are carrying on payday loan businesses. Bill 59 would expand the inspection power to include non-licensees.

(d) **More Powers to Regulate**: Finally, Bill 59 would empower the cabinet to pass regulations governing, among other things: advertising or signage for payday loan businesses; the requirements for entering into a payday loan agreement; lenders entering into more than the prescribed number of payday loan agreements in a one-year period; exempting classes of payday loan agreements; and information licensees are required to provide to borrowers.

(e) **Goods and Services Other Than Payday Loans**: Importantly, the province now proposes to empower the cabinet to specify which individual products and services, *other than payday loans*, that payday lenders are allowed to offer to consumers. Therefore, businesses that offer products to be sold by payday lenders need to also pay attention to upcoming regulations, as Ontario is shifting from regulating payday *loans* to regulating payday *lenders*.

2. BRITISH COLUMBIA

The maximum allowed borrowing costs associated with payday loans have been going down across Canada. In BC, the government enacted Order-in-Council No. 676 on September 20, 2016, which reduced the maximum borrowing cost of payday loans from $23 per $100 loaned to $17 per $100 loaned.

3. ALBERTA

Payday lenders were squarely in the Alberta government's sights in 2016, first faced with *Bill 15, An Act to End Predatory Lending* ("Bill 15"), followed by Regulation 183/2016, *Payday Loans Amendment Regulation* ("Reg 183").

Bill 15 received royal assent on May 25, 2016. It begins with a clear signal that Alberta is looking to drive out payday loans altogether: first, by requiring the Minister to promote the development of alternatives to payday loans; second, by requiring the Minister to prepare an annual report on the status of the development of alternatives to payday loans; and, third, by requiring all payday lenders to charge no more than 60% per annum interest on payday loans at a time to be chosen by the Alberta government. Considering that a typical payday loan is $200 and issued for only two weeks, a payday lender would only be allowed to charge $4.62 interest for the loan, an amount far below the average transaction cost. If this 60% prohibition is ever put into force, payday loans will effectively be banned in Alberta, like they are in Quebec. Bill 15 says that this would only happen where alternative options to payday loans are available.

Bill 15 then strengthened Alberta's existing regulations over payday loans, found in Regulation 157/2009, *Payday Loans Regulation*. The formula for what constitutes a "payday loan" is similar to that found in other provinces; it covers advances of money where the principal is $1,500 or less and for a term of 62 days or less, made in exchange for a post-dated cheque, pre-authorized debt or similar future payment. Like legislation in other provinces, excluded from the definition are guarantees, suretyships, overdraft protection, security on property, margin loans, pawnbrokers' lines of credit, and credit cards.

Bill 15 sets the maximum allowable cost of borrowing to be 15% of the principal amount of the payday loan (down from 23% in the prior regulations). It contains 26 prohibited practices, ranging from granting rollover loans to prohibited debt collection practices. Tied selling (coupling the provision of a payday loan with other goods or services) is prohibited. Financial literacy information must be displayed and provided to borrowers pursuant to regulations. Prescribed signs and notices must be posted. There is a two-day cooling off period in favour of the consumer. Agreements must be in plain language and understandable.

Following Bill 15, the Alberta government enacted Reg 183 on November 22, 2016. Reg 183 makes only minor changes to the Alberta legislative regime over payday loans.

First, Reg 183 permits the Director, with the approval of the Minister, to establish the form and content of "financial literacy information" to be provided to prospective borrowers. This reflects the continuing tension in payday loans between providing credit to persons in an income bracket that need credit and controlling the worst abuses of payday loans. Many think that this type of credit should be advanced, so long as disclosure is clear, and the provision of "financial literacy information" is simply an extension of that line of thought.

Second, Reg 183 requires that instalment payments are due on each payday during the term of the agreement. If the borrower is paid on a monthly basis, an instalment payment can fall on a different day, so long as it does not exceed 50% of the total repayment amount owed, and the final payday loan instalment payment be at least 25% of the total repayment amount owed.

Third, Reg 183 prohibits the practice of "scaling down" efforts to clear pre-authorized debits that have been dishonoured. So, if the payment is $200, and the bank declines the payment, the payday lender will no longer be allowed to try again at $100. Second attempts must be for the same amount as the first attempt, plus allowed NSF fees, unless the borrower provides express written consent to the contrary.

4. MANITOBA

In 2014, Manitoba enacted the *Consumer Protection Amendment Act (High-Cost Credit Products)* (the "*CPAA*"), which seeks to regulate "high-cost credit products." These are different than payday loans, on which provincial governments have historically focused. However, the *CPAA* did not actually define "high-cost credit products." Rather, that was something that was to be later prescribed by regulation. That definition came in 2016.

The *High-Cost Credit Products Regulation* ("*HCCPR*") passed under the *CPAA* has been approved by the Government of Manitoba and the effective date for the legislation was September 1, 2016.

The *HCCPR* contemplates three types of loans that will be deemed as "high-cost credit products":

(a) **High Interest Loans:** Loans of any kind that include an annual interest rate that exceeds 32%;

(b) **Unsecured Loans with High-Cost Credit Fees and Interest:** Unsecured loans for less than $5000 and which have terms for less than two years that include interest at any rate up to 32% and which include "high-cost credit fees," defined as any fee, charge, penalty or other amount that includes:

  (1) any brokerage fee;

  (2) any credit assessment or approval fee;

  (3) any administrative or processing fee;

  (4) any advance or draw fee;

  (5) any other fee or charge for accessing the funds, including any account set-up fee, transfer fee and cash card fee;

  (6) any charge or penalty for exceeding the credit limit; or

  (7) any default charge or penalty; and

(c) **Secured Loans with High Cost Credit Fees:** Loans that are secured by personal property and pledged as collateral, where the security interest is registered under the Manitoba *Personal Property Security Act* ("*PPSA*"), and which contain one or more high-cost credit fees, except where the loan proceeds are used to purchase that secured personal property.

The *HCCPR* also contemplates that the following *lines of credit* will also constitute "high-cost credit products":

(a) **High Interest Lines of Credit**: Lines of credit that include interest rates that exceed 32%; and

(b) **Unsecured Lines of Credit with High Cost Credit Fees and Interest**: Lines of credit for less than $5,000, except lines of credit that are secured by personal property pledged as collateral, and that contain one or more of the following terms:

  (1) the borrower is or may be required to pay one or more high-cost credit fees;

  (2) the borrower must have authorization from the lender to access the funds (regardless of whether there is a fee for that authorization);

  (3) the borrower must repay the principal or any other amount on a schedule that is tied to the borrower's payday; or

  (4) the repayment amount in any 30-day period includes one or more repayments totaling at least 10% of the advance or outstanding balance of the principal; and

(c) **Secured Lines of Credit with High-Cost Credit Fees:** Secured lines of credit that contain the following terms will constitute a "high-cost credit product":

  (1) The line of credit is secured by personal property owned by the borrower and pledged as collateral;

  (2) The grantor registers a security interest under the *PPSA*;

  (3) The funds advanced through the line of credit are not used to purchase that personal property; and

  (4) The high-cost credit agreement terms include the payment of one or more high-cost credit fees.

The *HCCPR* exempts credit cards and margin loans.

Persons who offer high-cost credit products must be licensed by the province. There are disclosure requirements prescribed that must be provided to the borrower at the time the product is offered. The *HCCPR* requires lenders to give the borrower

a copy of the agreement before it is signed, and there are prescribed items that must be on the first page of the agreement. There is a two-day cooling off period for high-cost-credit product agreements. There are signage requirements for locations where high-cost credit products are offered. And there is a list of prohibited practices, ranging from charging prepayment fees, making unauthorized withdrawals from the borrower's accounts, to making unauthorized disclosure of the borrower's personal information to third parties. The *HCCPR* goes even further to dictate the form (right down to the colour!) and content of any websites where high-cost credit products are offered to borrowers in Manitoba.

5. NEWFOUNDLAND

Bill 52, *An Act to Amend the Consumer Protection and Business Practices Act* ("Bill 52") received royal assent on December 14, 2016, and will come into force on a date set by the Lieutenant-Governor in Council. If enacted in its current form, Bill 52 would add Part VII.1 to the *Consumer Protection and Business Practices Act* ("*CPBPA*") which largely mirrors legislation in other provinces.

Bill 52 applies to persons who offer, arrange, or provide payday loans to or for consumers. A "payday loan" is defined by Bill 52 as an advance of money: (a) with a principal of $1,500 or less; (b) a term of 62 days or less; (c) made in exchange for a post-dated cheque, a pre-authorized debt of a future payment of a similar nature; but not (d) a guarantee, suretyship, overdraft protection or security on property; and not (e) through a margin loan, pawnbrokering, a line of credit or a credit card. This is the standard definition of payday loans in most provinces, although Ontario has realized some of the difficulties with this definition as payday lenders shift their product offering to effectively include payday loans offered by means of a "line of credit" or a "credit card."

Bill 52 creates a licensing regime, whereby any payday lenders are required to apply for, obtain, and maintain a licence to be issued by the Director of Consumer Protection and Business Practices. Like other provinces, Newfoundland will empower the cabinet to set by regulation the maximum total cost of borrowing that may be charged by a payday lender, and the payday loan business practices that are prohibited. Bill 52 contains a two-day cooling off period, permitting the consumer to cancel the payday loan. It also prescribes the contents of payday loan agreements.

Overall, the Newfoundland legislation mirrors only the initial phases of payday loan legislation found in other provinces. It creates no administrative bodies with inspection powers. It creates no tribunal to hear complaints, nor any appellate tribunal to hear appeals from the lower tribunal. Remedies for breaches of Bill 52 are limited, and there is limited authority for the cabinet to pass sufficient regulations to catch payday lenders that adjust their business practices to comply with the letter – and not the spirit – of the law.

TRAVEL INDUSTRY (ONTARIO)

Travel agents and wholesalers are regulated under the *Travel Industry Act*, which was last updated in 2002. To reflect changes in the industry, most notably the proliferation of online travel bookings, the Ontario government has commenced a province-wide consultation with stakeholders and consumers to consider how, if at all, the legislation should be amended to reflect a changing travel market. Phase 1 (issue identification) is complete, and phase 2 began on February 22, 2017 and will continue through to April 14, 2017.

But the Ontario government did not wait for public input before passing Regulation 170/16 on June 1, 2016, which is designed to ensure that any advertising that includes the price of travel be inclusive of all taxes and fees, as of January 1, 2017. While the total price of the travel always had to be disclosed prior to entering the agreement, these rules will presumably target "bait and switch" practices, where for example a trip is advertised at $299, marked perhaps with a small asterisk, and consumers will then find the total price to be in excess of $750 after taxes and fees are added.

Nor did the Ontario government wait to pass a private member's bill that amends the *Consumer Protection Act*. Bill 47 prohibits any consumer agreements under which reward points are provided and where such reward points expire "due to the passage of time alone." Any provision that contravenes these prohibitions is unenforceable. Bill 47 was a reaction to consumer backlash relating to the December 31, 2016 expiry deadline for Air Miles program members who had Air Miles that were more than five years old.

THINGS TO COME IN ONTARIO: REGULATIONS OVER GOVERNMENT CHEQUE-CASHING, LEASING, AND CREDIT AGREEMENTS

1. GOVERNMENT CHEQUE-CASHING

The Ontario government has continued what some describe as a war on payday lenders by going after other services typically offered by payday lenders. Under Bill 59, persons engaged in cashing government cheques will be subject to regulations that: (a) set the maximum fee for such services; (b) require the display of prescribed information at the place of business; and (c) require provision of a statement to consumers containing prescribed information. What constitutes the maximum fee or "prescribed information" is not known today: this would be subject to regulations passed sometime in the future. Historically, the Ministry of Government and Consumer Services has sought public input with respect to any draft regulations, and that would likely take place within a year after Bill 59 passes.

2. LEASING

Another proposed amendment to the *Consumer Protection Act*, 2002 (the "*CPA*") is found in Bill 59, which could have a significant impact on leasing businesses. The *CPA* contains disclosure requirements for leases, regulation over representations made in connection with leases, and provisions capping compensation for the termination of leases by lessees. But the *CPA* was also clear as to its application. These provisions only applied to:

(a) Leases for a fixed term of four months or longer;

(b) Leases for an indefinite term that are renewed automatically until one of the parties takes positive steps to terminate them; and

(c) Residual obligation leases.

Bill 59 proposes to add one more category: "such other leases that are prescribed." Matters are "prescribed" by regulation, and no regulations have been proposed yet. However, businesses operating in the leasing space should pay close attention to any proposed regulations, if Bill 59 passes, because there is no limit on the types of leases that the Ontario government could target in the future.

Also, Bill 59 would clothe the provincial cabinet with the power to pass regulations that:

(a) Govern and require the use of tags or other markers on goods that are to be leased;

(b) Govern penalties to which a lessee is subject for making late payments under a lease; and

(c) Govern the rights of lessors to terminate a lease.

Again, such regulations have not yet been proposed, but businesses operating in the leasing space should pay close attention to any proposed regulations from the Ontario government in the future, after Bill 59 is passed.

3. CREDIT AGREEMENTS

Bill 59 lastly seeks to clothe the Ontario cabinet with more regulation-making powers that relate to credit agreements, which would expand an already lengthy list of powers. Specifically, if Bill 59 is passed, the cabinet will be allowed to pass regulations:

(a) Governing the factors a lender must consider prior to entering into a credit agreement;

(b) Setting the maximum quantum of loans and excusing borrowers from repayment of any loans offered in contravention of that maximum;

(c) Requiring a lender to disclose the consideration of the factors set out in (a);

(d) Prohibiting a lender from initiating contact with a borrower for the purpose of refinancing a credit agreement; and

(e) Prescribing the maximum amounts for charges that are not included in the cost of borrowing under a credit agreement.

LOOKING AHEAD

2016 was a busy year for legislative drafters in the consumer protection area, and retail businesses and lenders need to pay close attention to the proposed legislative changes and watch for available opportunities for industry consultation. Some of these consultations are currently underway and there may still be time for the government to consider further input.

Please contact the author if you have any concerns on how the proposed changes may affect your business.

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