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Dear Reader:

Traditional business models are changing almost overnight with the global emergence of e-commerce. Our province's regulatory regimes must be able to change with them. The fundamental challenge facing Ontario regulators today is to find balanced solutions that simultaneously strengthen consumer protection, facilitate the development of e-commerce and improve the competitive position of our province.

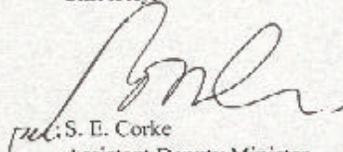
With this in mind, on December 14, 1999, the Ontario Ministry of Consumer and Commercial Relations hosted a roundtable discussion on regulatory regimes and the impact of electronic commerce, facilitated by renowned e-commerce author and consultant, Professor Michael A. Geist. The attached report, authored by Professor Geist, represents the outcome of the roundtable discussion and is presented as an independent assessment of the implications of electronic commerce for the future of regulatory regimes. It does not represent the policies of the Government of Ontario.

Professor Geist's report focuses primarily on regulatory regimes in four Ontario regulated sectors: travel, auto sales, collection agencies and real estate. The lessons learned from the review may be relevant to other sectors as well.

Comments on this report from interested parties are invited and encouraged, as are recommendations for future Ministry actions in this area.

I hope you enjoy it.

Sincerely,


S. E. Corke
Assistant Deputy Minister
Business Division

**CONSUMER PROTECTION AND LICENSING REGIMES REVIEW:
THE IMPLICATIONS OF ELECTRONIC COMMERCE**

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Completed for Ontario Ministry of Consumer and Commercial Relations

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INTRODUCTION

As we enter the dawn of a new century, the sun begins to set on conventional business models. The rapid development of the Internet is causing businesses to embrace the advantages and efficiencies of e-commerce. New Internet-based business models will reshape the 21st century marketplace, providing consumers with increased choice, convenience, and price competition.

E-commerce is consequently experiencing exponential growth. International Data Corporation (IDC) predicts that the worldwide Internet economy will reach US\$2.8 trillion by 2003.¹ The Globe and Mail estimates that Canadian online sales totaled to US\$1.14 billion in 1999; a 422 percent increase from 1997.² As the estimates climb, it is apparent that e-commerce is not a passing fad but an increasingly integral part of the world economy.

As business rushes online, it leaves, in its wake, a legal infrastructure never designed for an electronic economy. Laws enacted decades earlier, which provide for regulation of physical premises, paper-based signatures, and provincially located businesses, are the rule rather than the exception. Although the regulations can occasionally be interpreted to include modern e-commerce models, certain provisions challenge the viability of our regulatory framework, leaving consumers in a potentially precarious position as they engage in e-commerce transactions without the security afforded by existing law.

This study focuses on the regulations in four provincially regulated sectors: travel, collection agencies, real estate, and motor vehicle sales. The regulatory framework of each of these sectors is premised on largely the same goal - consumer protection through informational disclosure, licensing of service providers, and the creation of bond and compensatory programs to aid consumers where unforeseen losses occur.

Although the regulatory framework of each sector is similar, the underlying business models vary considerably, particularly within the e-commerce environment. Accordingly, a single solution is impractical. Rather, a detailed examination of both the underlying e-commerce business models and the applicability of the existing regulatory framework is essential in order to craft an appropriate action plan that both facilitates e-commerce and maintains the consumer protection goals enshrined in the legislation.

This study assesses these issues in a three part format. Part one considers the e-commerce business models employed in each sector. Part two identifies potential conflicts and shortcomings found in the current Ontario legislation. Part three provides recommendations for change at both the legislative and enforcement levels.

¹ Maryanne Jones Thomson, "Forecasters Are Bullish on the Internet Economy", *The Industry Standard* (24 November 1999) <<http://www.thestandard.com/metrics/display/0,2149,1059,00.html>> (date accessed: 24 November 1999).

² Mark Evans, "E-shopping trickles into mainstream" *The Globe and Mail* (16 September 1999), online: *The Globe and Mail* <<http://www.globetechnology.com>> (date accessed: 7 November 1999).

PART ONE - BUSINESS MODELS

Travel

Travel services is one of the leading e-commerce sectors,³ with travel e-commerce expected to reach \$4.2 billion in Canada by 2004, up from \$662 million in 1999.⁴ Rapid growth in this sector has become the norm. For example, Air Canada expects online ticket sales to comprise 15 percent of its bookings within five years, up from only one percent today.⁵ The trend is even more pronounced in the U.S., where during the 1999 U.S. Thanksgiving holiday, 38 percent of Internet users who booked travel did so online, a larger share than either traditional travel agents or travel providers such as airlines experienced.⁶

The majority of large travel Web sites function as full service travel agencies providing all the same services a traditional travel agency offers. These sites feature comprehensive user interfaces that allow the user to effortlessly research, compare and then book travel, transportation, and accommodation with the simple click of a mouse.

Many of the leading travel Web sites such as TheTrip (www.thetrip.com) or 1travel (www.1travel.com) currently restrict their booking services to residents of the United States. There are a growing number of sites, however, that target the Canadian marketplace, including Microsoft Expedia (www.expedia.ca) and Travelocity (www.travelocity.ca), two of the largest online travel service providers.

In order to clearly distinguish that such sites serve Canadian clientele, both Expedia and Travelocity have registered domain names under the .ca top-level domain. In addition, these sites quote prices in Canadian dollars. Curiously, although these sites target Canadian consumers, U.S. law may apply to contracts entered into by Canadian consumers, if consumers are informed of and agree to the terms and conditions.⁷

Collection Agencies

³ Paul Nicholls, "Report: Consumer E-Commerce Will Jump to \$26 Billion by 2002" *internetnews.com* (20 May 1998), online: [internetnews.com <http://www.internetnews.com/ec-news/article/0,1087,4_27691,00.html>](http://www.internetnews.com/ec-news/article/0,1087,4_27691,00.html) (date accessed: 7 November 1999).

⁴ Tyler Hamilton, "Internet Travel Market Expected to Grow Sixfold" *The Globe and Mail* (7 January 2000) B2.

⁵ Sheldon Gordon, "Cleared for Takeoff" *eBusiness* (December 1999), online: <http://www.ebusiness.ca/news.html?CONTENT=news/eb011211a> (date accessed: 6 December 1999).

⁶ Craig Bicknell, "A Big Ticket Online Trend" *Wired News* (23 November 1999), online: [Wired News <http://www.wired.com/news/business/0,1367,32701,00.html>](http://www.wired.com/news/business/0,1367,32701,00.html) (date accessed: 23 November 1999).

⁷ Expedia, *Expedia Disclaimer*, online: [Expedia.ca <http://www.expedia.ca/daily/home/legal.asp>](http://www.expedia.ca/daily/home/legal.asp) (date accessed: 24 November 1999); Travelocity, *Terms and Conditions*, online: [Travelocity.ca <http://www2.travelocity.com/ttools/terms.html?Service=TCYCA&SEQ=94355949589099>](http://www2.travelocity.com/ttools/terms.html?Service=TCYCA&SEQ=94355949589099) (date accessed: 24 November 1999).

The majority of collection agency Web sites are used exclusively for marketing and promotional purposes. The Collection Group of Canada (www.collectiongroup.com) and the AAA International Debt Collection Agency (www.debt-collection-agency.com) are good examples of how certain agencies are using the Web to present an overview of the services they provide.

Although specific data is difficult to obtain, a growing trend in this sector is the introduction of active Web sites that provide existing or prospective clients the opportunity to submit complete information for any of their delinquent accounts. Examples of these sites include Alexander and Hamilton, Inc. (www.alhamco.com), Burt & Associates (www.burt1.com), and Canadian-based Nor-Don Collection Network Inc. (www.ncn.ca).

Alexander and Hamilton Inc. is a good example of this sector's evolving business model. The Louisiana-based firm prides itself on the fact that it "provides on-the-spot debt recovery locally, nationally and internationally."⁸ Its site allows the prospective client to initiate a claim from anywhere in the world by submitting an online form. After agreeing to certain contractual terms, the first section of the form requests the client's contact information and the manner in which they would prefer to be contacted (email is the first option). The second half of the form requires debtor information, including the debtor's coordinates, the amount owing in one of five major currencies, and specific questions pertaining to the relationship between the client and the debtor. Since the firm "take(s) all our accounts seriously, no matter how they are placed,"⁹ by submitting the form, the prospective client assents to all the terms of the online agreement and authorizes the commencement of the collection process.

Real Estate

Studies indicate that the Internet has emerged as a critical research tool for many in the market for real estate with recent surveys suggesting that nearly two-thirds use online resources to assist in their purchase.¹⁰

The importance of e-commerce to this sector has resulted in several business models. The most common is the use of Web sites for traditional marketing and promotional purposes by licensed real estate brokers. Many national real estate organizations such as Remax (www.remax.ca), Century 21 (www.century21canada.com), and Coldwell Banker (www.coldwellbanker.ca) have enhanced their traditional promotional approach by creating interactive sites that enable users to search their listings, view video tours of their properties, and directly contact their agents.

⁸ Alexander and Hamilton, Inc., *Collection Services of Alexander and Hamilton, Inc.*, online: Alhamco.com <<http://www.alhamco.com/NewFiles/english/collections.html>> (date accessed: 21 November 1999).

⁹ Alexander and Hamilton, Inc., *Terms of the Agreement*, online: Alhamco.com <<http://www.alhamco.com/NewFiles/english/terms.html>> (date accessed: 21 November 1999).

¹⁰ "Real Estate in Cyberspace" *eMarketer* (19 July 1999), online: eMarketer <http://www.emarketer.com/estats/071999_travel.html> (date accessed: 7 November 1999).

Web sites that essentially replicate the classified section of a newspaper constitute a second model. Agents, brokers, and private sellers can post information about their specific listings for a fee. An example of this type of service is You Do It! (www.youdoit.com).

A third model, based largely on a referral approach, has recently surfaced. Real estate referral sites can be classified as either “agent promotional sites” or “listing promotional sites.” Agent promotional sites, such as The Canadian Real Estate Pages (www.realestate-canada.com) and Real Estate Canada (www.realcanada.com), focus their referrals to specific agents in a particular area. Agents purchase advertising space on the site to promote their services in a given geographic region such as Ottawa, Kingston, or Toronto. These sites are typically useful if the prospective buyer requires an agent.

Listing promotional sites are similar to the classified section of a newspaper with agents purchasing advertising space for their listings. These sites, however, add a high-tech variation to the traditional model. For example, LoopNet (www.loopnet.com), a site specializing in commercial real estate, allows the prospective buyer to search for properties in different regions of the United States or Canada. The buyer specifies particular features in order to limit the scope of their property search. After submitting their request, the site returns a number of listings that satisfy their criteria. From these listings, the buyer can obtain the listing agent’s contact information as well as a brief description of the property.

Motor Vehicles

In the first quarter of 1999, 40 percent of new car buyers used the Internet before purchasing a car, up from 25 percent in the previous year.¹¹ By 2001, it is estimated that the figure will grow to more than 65 percent of all new cars sold.¹² Although the number of online purchases is presently negligible, some analysts estimate that 500,000 new cars will be sold directly online by 2003.¹³

In Canada, a recent survey indicated that 63 percent of dealerships maintain Web sites but less than 10 percent actually sell vehicles online since most use the sites strictly for promotional and marketing purposes.¹⁴ Given the impact of the Internet on motor vehicle sales, it is not surprising to find that several alternative business models have emerged that extend the potential of the Web beyond mere promotion.

¹¹ Carrie Lee, “Car Buyers Find They Don’t Always Get Great Deals Online” *The Wall Street Journal Interactive Edition* (23 November 1999), online: The Wall Street Journal Interactive Edition <http://interactive.wsj.com/articles/SB943365843390568351.htm> (date accessed: 23 November 1999).

¹² *Ibid.*

¹³ Alex Lash, “Shifting Gears” *The Industry Standard* (24 September 1999), online: The Industry Standard <http://www.thestandard.net/article/display/0,1151,6518,00.html> (date accessed: 4 November 1999).

¹⁴ Dawn Walton, “Auto dealers not lured to Web” *The Globe and Mail* (22 November 1999), online: The Globe and Mail <<http://www.globetechnology.com/archive/gam/News/19991122/RCARS.html>> (date accessed: 22 November 1999).

The most popular business model for online motor vehicle sales is the referral Web site. These “brokers” guide prospective buyers through the research process. Frequently, the sites refer prospective buyers to local dealers who pay a finders fee for the referral or a small percentage if a sale ultimately occurs. Typically, a prospective buyer will specify their desired make and model, along with their postal or zip code. The information is then forwarded to one or more local dealers in the referral network. The dealer usually responds within 24 hours, by either telephone or email, with a price quote for the desired vehicle. The actual transaction occurs between the dealer and the prospective buyer since the role of the Web broker is simply to refer the customer to the dealer. Autobytel (www.autobytel.ca) and Autoweb (www.autoweb.com) are examples of two of the more popular referral services on the Web. Each of these sites has been tailored to the Canadian marketplace.

A slight variation on the traditional referral site allows for an online price negotiation for a vehicle. Also known as a “reverse-auction,” the Web site searches for the automobile that satisfies the user’s criteria such as manufacturer, model, options, and price. Once the site finds a suitable match, it contacts the user to confirm the transaction. A licensed dealer then completes the purchase by selling the automobile to the user at the pre-negotiated price. Priceline.com (www.priceline.com), which does not currently operate in Canada, is a good example of the “reverse auction” model.

As automobiles are increasingly treated as fungible goods,¹⁵ the direct online sale business model seems like a viable alternative to the traditional purchase from a dealer. Although currently unavailable in Canada, CarsDirect.com (www.carsdirect.com) has become a leader in promoting this new approach in the U.S. CarsDirect.com provides the prospective buyer with a price based upon the selected model and options. By referring to the complete dealer invoice pricing, information not readily available in Canada, CarsDirect.com quotes a reasonable selling price for the vehicle and guarantees it for a fully refundable \$50 holding fee. Once it has found the requested vehicle (which it purchases from local dealerships), payment and delivery arrangements are completed. In certain states, such as Texas and Arkansas, state law limits the ability of CarsDirect.com to provide its full range of services. In such cases, the company functions strictly as a referral service.

Manufacturers may also be tempted to circumvent their dealers and sell vehicles directly to the public. Ford recently attempted to capitalize on the e-commerce fervor by constructing Fordpreowned.com, a used-car Web site catering to the Houston market. Ford was subsequently denied a dealer’s licence due to Texas franchise laws, a decision it is appealing in U.S. Federal Court.¹⁶ In fact, “protection exists in 35 U.S. states, whose franchise law forbid factories to influence the selling price of a vehicle.”¹⁷ Although

¹⁵ *Supra* note 14.

¹⁶ Sholnn Freeman, "Ford Asks Court to Upend Texas Ruling Banning It From Used-Car Sales on Web" *Wall Street Journal Interactive Edition* (7 December 1999), online: Wall Street Journal Interactive Edition <http://interactive.wsj.com/articles/SB944523947793675152.htm> (date accessed: 7 December 1999).

¹⁷ Dave Webb, “Car Wars” *eBusiness* (November 1999), online: eBusiness <<http://www.ebusiness.ca/news.html?CONTENT=news/eb011111a>> (date accessed: 4 November 1999).

Canadian provinces do not have similar legislation, the Big Three auto makers have indicated that they have no plans to sell directly to their customers.¹⁸ On the other side of the Atlantic, Vauxhall, a British subsidiary of General Motors, claims to offer direct sales through their BuyPower Web site (www.vauxhall.co.uk). In reality, however, purchases are delegated to one of Vauxhall's dealers and do not occur directly through the site.

Lastly, another business model is the individual sale. These sales, which occur largely through online auction sites such as eBay.com (www.ebay.com), are private transactions and seldom, if ever, involve a dealer. These transactions may raise concerns, however, where an unlicensed seller uses online auctions as a means of circumventing existing licensing requirements.

PART TWO - E-COMMERCE AND THE CURRENT REGULATORY STRUCTURE

Travel

The travel sector is governed in Ontario by the *Travel Industry Act*.¹⁹ The Act's primary goal is consumer protection, which is achieved through fair advertising and disclosure requirements as well as the maintenance of trust accounts and a compensation fund for support against fraud and business failure.

Of the four sectors examined in this study, travel poses the greatest challenge. As discussed in part one, the travel sector has embraced e-commerce with many sites effectively functioning as full travel service providers. The present regulatory framework is ill-suited for online providers, however, as the legislation clearly envisions travel service providers who maintain a physical presence in the province.

This regulatory approach is embodied in numerous provisions in both the legislation and its accompanying regulations. The Act specifically contemplates travel agents operating out of a physical office,²⁰ that is open to the public,²¹ and where a licensing certificate is displayed.²² The provision of travel services must always be through a licensed, Ontario resident agent,²³ and a suitably knowledgeable agent must always be readily available during office hours.²⁴ For disclosure purposes, the Act prescribes a series of advertising requirements which, though not explicitly indicated, likely apply to Internet advertising.²⁵

¹⁸ David Steinhart, "Automakers using Net to steer customers" *National Post Online* (24 November 1999), online: National Post <<http://www.nationalpost.com/financialpost.asp?s2=canadianbusiness&f=991124/134826.html>> (date accessed: 25 November 1999).

¹⁹ *Travel Industry Act*, R.S.O. 1990, c. T-19 [hereinafter *TIA*]; O.Reg. 806/93 [hereinafter *TIA Regulations*].

²⁰ *TIA*, s. 3(3) and *TIA Regulations* 11.

²¹ *TIA Regulations*, s.12.

²² *TIA Regulations*, s.15.

²³ *TIA Regulations*, ss. 8 and 14.

²⁴ *TIA Regulations*, s.20(1).

²⁵ *TIA Regulations*, ss.38 - 42.

For consumers, the danger created by the current regulatory framework when applied to e-commerce lies in the fact that unlike services purchased from licensed local agents, who must comply with Ontario law, services purchased from out-of-province operators do not include the financial and information disclosure protections found in the Ontario regulations. In the e-commerce environment, many consumers are unable to distinguish between local and out-of-province providers and are thus unaware that they may be forfeiting statutory protections.

From an industry perspective, the problems created by the current regulatory framework when applied to e-commerce can be grouped into two categories. First, local travel agents wishing to establish an online presence may find themselves unable to do so for fear of violating local law. For example, the legislation does not contemplate online display of licensing certificates and the online agent cannot readily guarantee availability of a knowledgeable agent 24 hours a day. The physical nature of the existing regulatory framework effectively creates an uncomfortable level of uncertainty that may inhibit local providers from venturing online.

Second, out-of-province travel agents are clearly incapable of providing services to local travelers without running afoul of local law. An online agency based outside the province would be providing services without meeting the requirements for a local physical office staffed by a local Ontario resident agent.

Collection Agencies

Collection agencies are governed in Ontario by the *Collection Agencies Act*.²⁶ The Act's twin goals are debtor protection and creditor protection. Debtor protection is achieved by regulating the permissible collection tactics that can be employed by agencies against a debtor. Creditor protection is achieved by ensuring that only locally regulated collection agencies provide services in Ontario. Moreover, creditors who engage or use the services of unlicensed collection agencies (which would include any Web-based non-Ontario agency) violate the Act²⁷ and may be subject to a fine and/or imprisonment.²⁸

In common with other sectors, the Act also contemplates a physical presence. This is manifested in a requirement to maintain a permanent place of business open to the public²⁹ and the need for a local address for service.³⁰

The problems created by the current framework when applied to e-commerce stem primarily from the global nature of the Internet. Given the ability of collection agencies

²⁶ *Collection Agencies Act*, R.S.O. 1990, c. C-14 [hereinafter *CAA*]; R.R.O. 1990, Reg. 74 [hereinafter *CAA Regulations*].

²⁷ *CAA*, s. 24 (1).

²⁸ *CAA*, s. 28 (1).

²⁹ *CAA Regulations*, s.13 (10).

³⁰ *CAA Regulations*, s.13 (2).

from around the world to solicit clients and track debtors within the province, the Ontario regulations are severely undermined if not rendered completely ineffectual. This is particularly problematic in the case of creditors who may retain an unlicensed agency they locate online without regard for its physical location and thus violate the law in doing so.

Real Estate

The real estate sector is governed in Ontario by the *Real Estate and Business Brokers Act*.³¹ The Act's primary goal is consumer protection, which is achieved through the licensing, testing, and bonding of real estate agents.

In light of current e-commerce business models in this sector, there appear to be few significant regulatory issues. Although the Act provides for local licensing³² it is important to note that real estate e-commerce does not typically eliminate the local broker from the sale process. Rather, most e-commerce real estate businesses function as online referral systems to existing local brokers either through an agency or listing referral. In both instances, the sale transaction is still completed by a local agent who must comply with the Act.

Although the regulatory structure provides the protection of dealing with a local licensed broker before completion of the transaction, misleading or fraudulent referrals may cause decreased consumer confidence in the marketplace and may therefore warrant a targeted legislative response. The Act currently prohibits the payment of a commission by a broker to an unlicensed person trading in real estate.³³ A "trade in real estate" includes:

"a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and act, advertisement, conduct, or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt..."³⁴

Since this definition may capture online referrals, compensation payments to unlicensed persons would be a violation of the Act. However, the Act's other consumer protection provisions, including advertising and information disclosure requirements, are not presently addressed in the context of referral services.

Motor Vehicles

³¹ *Real Estate and Business Brokers Act*, R.S.O. 1990, c. R-4 hereinafter *REBBA*]; R.R.O. 1990, Reg. 986 [hereinafter *REBBA Regulations*].

³² *REBBA*, s. 3 (1).

³³ *REBBA*, s. 29.

³⁴ *Ibid.*

The automobile sales sector is governed in Ontario by the *Motor Vehicles Dealers Act*.³⁵ The Act's primary goal is consumer protection, which is achieved through informational disclosure requirements, licensing, and the creation of compensation funds for victimized consumers.

The Act contemplates a physical presence for motor vehicle dealers³⁶ that is both subject to inspection³⁷ and a condition of licensing.³⁸ Moreover, all motor vehicle dealer advertising is required to identify the name and address of the dealer.³⁹ The Act is also the only regulation of those surveyed that includes an explicit writing requirement,⁴⁰ found in the requirements pertaining to the final sales contract.

The Act contains several other provisions, which, though surmountable, might challenge online motor vehicle dealers. For example, the Act requires all motor vehicle dealers to maintain a repair facility or have a continuing agreement with an authorized repair garage.⁴¹ Out-of-province dealers would be unlikely to establish their own repair facilities within Ontario but could instead establish agreements with local dealers.

A close examination of the e-commerce business models in this sector reveals that most online auto Web sites do not run afoul of the existing regulations. The Act defines a "motor vehicle dealer" as:

"a person who carries on the business of buying or selling motor vehicles...or holds himself, herself or itself out as a carrying on the business of buying or selling motor vehicles."⁴²

The referral Web sites, which comprise the largest segment of online motor vehicle sites, do not buy or sell motor vehicles but rather refer customers to dealers who do. Therefore, such referral activity does not fall within the scope of the Act. Although the statutory framework provides consumers with some protection by ensuring that transactions are consummated by a licensed local dealer, fraudulent referrals and other misleading activities are a cause for concern.

Sales that occur on an individual basis on sites such as eBay are typically exempt from the Act under a personal use sales exemption.⁴³ Not exempt from the Act would be the equivalent of "online curbsiding," where sellers use the Internet to sell large volumes of cars without a proper dealer license. The Internet poses a particular challenge in such

³⁵ *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M-42 [hereinafter *MVDA*]; R.R.O. 1990, Reg. 801 [hereinafter *MVDA Regulations*].

³⁶ *MVDA*, s. 3 (3).

³⁷ *MVDA*, s. 10 (1).

³⁸ *MVDA Regulations*, s.13 (4).

³⁹ *MVDA Regulations*, s.18 (1).

⁴⁰ *MVDA Regulations*, s.16 (4). It should be noted, however, that all sectors include provisions with a writing component such as invoice and informational disclosures. The use of electronic documents is therefore an issue that cuts across all sectors.

⁴¹ *MVDA Regulations*, s.13 (7).

⁴² *MVDA*, s. 1.

⁴³ *MVDA Regulations*, s.14.5.

instances, however, as tracking these activities in the online environment is a time consuming and difficult process.

The prospect for direct car sales from Web sites, a model used by CarsDirect.com in the United States, raises significant regulatory issues. In such instances, the Web site is clearly functioning as a motor vehicle dealer and such activities would be caught by the current legislation. CarsDirect.com appears to acknowledge this by refraining from offering direct car sales in certain states. Should car manufacturers alter their current plans and begin to sell cars directly online, such activity would similarly be caught by the regulatory framework, resulting in manufacturers being treated as dealers for the purposes of the Act.

PART THREE - RECOMMENDATIONS

Given the common goals found in the regulatory frameworks of all sectors examined in this study, there is the potential for several universal recommendations that apply equally within each business sector. Supplementing the universal recommendations are a series of sector-specific recommendations tailored to the particular challenges posed by each sector.

UNIVERSAL RECOMMENDATIONS

i. Adoption on an online seal of approval program

Widespread acceptance of e-commerce by Ontario consumers depends upon assurances that online transactions carry the equivalent safeguards as those found offline. This is particularly the case given the dizzying array of Web sites and the difficulty of identifying precisely with whom consumers are dealing.

Existing legislation fosters consumer confidence offline by providing the public with a clear indicator at the place of business that the dealer or agent is properly licensed and qualified to provide the services in question. In fact, the combination of aggressive prosecution of unlicensed activity and easy public access to licensing credentials form the cornerstone of a legislative framework that seeks to reassure consumers while it creates a level-playing field for service providers.

The best method for transferring this framework to the e-commerce environment would be through the establishment of a regulator-sponsored online seal of approval program. Under such a program, online dealers and agents would be required to obtain and display a regulator-issued seal on their Web site which would be instantly recognizable by consumers and provide them with a heightened level of assurance that the site in question meets provincial licensing and regulatory requirements. In fact, given the shared interests and goals of the sectors examined in this study, a single Ontario seal, such as a Trillium

Trust seal, might be the most effective means of developing consumer awareness and trust in the new program.

Although the establishment of a regulator-sponsored seal program might well be a first, there are numerous examples of privately sponsored online seal of approval programs currently in use across North America. The Better Business Bureau (www.bbbonline.com) administers three seal programs that promote full compliance with their privacy, children's privacy, and reliability standards. TRUSTe (www.truste.com) offers seals that promote privacy and children's privacy compliance. VeriSign (www.verisign.com) uses their seal to promote the security and authenticity of a Web site. The Canadian Institute of Chartered Accountants (www.cica.ca) maintains the WebTrust seal program. It provides comprehensive coverage in the areas of business practices disclosure, transaction integrity, and information protection.

Since privately sponsored seal programs face the inherent conflict of relying upon the very sites they monitor for funding, some analysts have expressed skepticism about such programs' willingness to deal harshly with non-compliant sites. These concerns have been borne out by several instances of lax enforcement in the face of privacy violations.⁴⁴ A regulator-sponsored seal program would face no such conflict since regulators do not depend upon clients for funding. Moreover, a regulator-sponsored seal program would enjoy significant cost advantages over privately sponsored programs since regulators are already engaged in many of the functions and duties of a seal program.

In the context of provincially regulated services, an online seal of approval program provides the opportunity to improve upon the existing regulatory framework in several respects. First, standards for obtaining the seal need not match offline licensing requirements. Rather, the online seal program could establish minimum technical and security requirements, privacy protections, training, as well as compensation fund payment contributions as part of the online seal certification process. Moreover, the seal program could provide certainty to the issue of where online transactions occur by mandating that all licensed providers attorn to the jurisdiction of the purchaser.⁴⁵

Second, the online seals should be linked into a database maintained by the regulator, which would provide consumers with full disclosure of a site's location and license status. Such a click-through system would provide consumers with the information they require to make informed decisions instantly and would allow for the effective creation of an online equivalent that meets or exceeds current offline standards. In addition, proper implementation of the click-through system would limit fraudulent creation and display of seals by directly linking the seals to a secure database.

⁴⁴ Chris Oakes, "TRUSTe Declines Real Probe" *Wired News* (9 November 1999); online: [Wired News <http://www.wired.com/news/technology/0,1282,32388,00.html>](http://www.wired.com/news/technology/0,1282,32388,00.html) (date accessed: December 30, 1999).

⁴⁵ The thorny issue of where an online transaction occurs has been the source of considerable debate between industry groups, consumer advocates, and regulators. Industry groups have lobbied for the adoption of a law of the seller approach, while consumer groups have lobbied for adoption of a law of the purchaser approach. The courts, meanwhile, have yet to weigh in conclusively on the issue. Christian Buck, "Big Business Boost for E-Biz" *Wired News* (11 September 1999); online: [Wired News <http://www.wired.com/news/business/0,1367,21693,00.html>](http://www.wired.com/news/business/0,1367,21693,00.html) (date accessed: January 18, 2000).

Third, an online seal program would meet the twin goals of consumer protection and the facilitation of e-commerce. Rather than imposing an additional burden on online businesses, the program would provide Ontario businesses with a competitive advantage against unlicensed out-of-province competition, by providing an unequalled level of assurance and trust. The adoption of a seal program is particularly well suited in this regard since unlike licensing regimes, which rely primarily on coercive statutory power for their effectiveness, seal programs rely primarily on open markets and the importance of branding and consumer identity for their effectiveness.

Widespread adoption of a seal program might persuade out-of-province businesses to accede to Ontario jurisdiction by applying for their own seals. Such a development would have the effect of creating a greater level of competition among licensed providers, a boon to consumers. The extension of the Ontario regulatory structure to out-of-province providers would create a challenge to the existing regulatory model, however, and might therefore require further consideration. For example, the inclusion of out-of-province providers in the program would create the need to conduct occasional audits of out-of-province operations to ensure financial stability. The additional costs involved in such audits could be reflected in a higher annual cost of online seals for out-of-province providers or might lead to increased coordination between provincial regulators and the potential development a national seal program that cuts across provincial boundaries.

ii. Public education programs

The effectiveness of an online seal of approval program would depend, to a significant extent, on the establishment of a province-wide education program to educate the public on both the opportunities and dangers of e-commerce as well as the existence of the online seal program. Many consumers have trouble distinguishing between trustworthy and untrustworthy sites and thus shy away from fully embracing e-commerce. The government and the sectoral regulatory agencies must take a leadership position in facilitating e-commerce in the province through public education in much the same manner as the Federal Trade Commission in the United States has played a leading role in educating the U.S. public on the opportunities and dangers of e-commerce.⁴⁶

iii. Online Enforcement programs

With the geographic indeterminacy of the Internet, online providers can easily target the Ontario market without a physical presence and without complying with local laws. Although seal and education programs will improve the status quo, both initiatives must be complemented by an aggressive enforcement program that identifies non-compliant businesses by monitoring online activity and uses all available means to protect Ontario consumers by demanding a cessation of unlicensed or non-compliant activities.⁴⁷

⁴⁶ Federal Trade Commission Consumer Protection E-Commerce and the Internet, <http://www.ftc.gov/bcp/menu-internet.htm>, (date accessed: 24 November 1999).

⁴⁷ The U.S. Federal Trade Commission and the U.S. Securities and Exchange Commission provide excellent models for aggressive online enforcement programs.

Admittedly, this may meet with only occasional success. However, Ontario regulators must adopt the position that illegal activities will not be tolerated within the province in order to avoid turning the existing regulatory framework into a paper tiger. Aggressive enforcement will inevitably result in overall market confidence. Through this confidence, consumers may take it upon themselves to aid with the enforcement by acting as public watchdogs.⁴⁸ Moreover, other provinces and states face the same challenges and will share similar interests in maintaining their own consumer protection frameworks. These shared interests bode well for national and international cooperation and for the possibility of harmonized enforcement programs.

The creation of an online enforcement program will likely necessitate the establishment of an Internet compliance office, an approach successfully employed by both the Securities and Exchange Commission and Federal Trade Commission in the United States.⁴⁹ In order to minimize the duplication of programs and reduce costs, a universal office could act on behalf of the four business sectors. Personnel at the Internet compliance office would receive special training in Internet searching techniques, fraud identification, as well as the technical and computer skills necessary to efficiently respond to industry concerns. Given its expertise, the office would also be well suited to administer the online seal program, particularly if a single provincial seal is adopted.

SECTOR SPECIFIC RECOMMENDATIONS

Travel

As discussed in part two, the travel sector poses the greatest challenge of those examined in this study. Even with the implementation of the programs described above, the travel regulatory framework still suffers from a fundamental disconnect from the realities of e-commerce. A seal program will help identify licensed providers, but with the current regulatory structure inextricably linked with physical presence, a deeper re-examination may be necessary.

Those rules that hamper local travel agents from venturing online, such as rules pertaining to the display of licensing certificates and the guaranteed availability of a knowledgeable agent 24 hours a day, should be reconsidered or amended to suit the online environment. In the case of certificate display, the online seal would make for an effective alternative. However, the knowledgeable agent requirement may need to be modified since it was enacted at a time when 24 hour travel services were not contemplated.

⁴⁸ Todd Woody, "The SEC's Internet Ranger" *The Industry Standard* (16 November 1998), online: The Industry Standard <<http://www.thestandard.com/article/display/0,1151,2490,00.html>> (date accessed: 2 December 1999).

⁴⁹ Note 48, *supra*, and Mary Hillebrand, "Feds to Take More Active Role Policing E-Commerce" *E-Commerce Times* (13 May 1999), online: E-Commerce Times <<http://www.ecommercetimes.com/news/articles/990513-6.shtml>> (date accessed: 2 December 1999).

Similarly, the physical presence and advertising requirements must be clarified. With the adoption of a seal program linked to a compliance database, a physical presence may no longer be necessary to provide consumers with a reasonable level of assurance of the safety of transacting online. An online seal program might even bring out-of-province businesses within provincial jurisdiction voluntarily, particularly if the regulatory framework is eased to better accommodate e-commerce businesses. Online advertising, meanwhile, should be subject to the same conditions as offline advertising.

Alternatively, the establishment of an e-license that entitles the holder to sell travel services electronically might effectively supplement the seal program and provide a viable means of regulating out-of-province providers. The criteria for such a license would create a substitute for the physical presence requirements by requiring agents to post a bond and to accede to Ontario's jurisdiction for sales to local consumers. The creation of an e-license would foster increased competition in the marketplace, better protect consumers, and ensure a level licensing playing field.

Collection Agencies

The seal, education, and enforcement programs will go a long way to effectively address the challenges posed by online collection agencies. Seals would eliminate the possibility of client confusion with regard to retaining out-of-province agencies. Further, an aggressive enforcement program would likely persuade many legitimate agencies from refraining from operating within the province.

An additional step that would further clarify the status of online collection agencies would be the development of a disclaimer policy. The policy would require agencies to post which jurisdictions they target directly on their site. Such an approach has been used with great success in the securities industry, where regulators have little interest in regulating activity that has no effect on their jurisdiction.⁵⁰

The establishment of an e-license that entitles the holder to conduct collection agency activities electronically might also be an effective solution. As with the travel and motor vehicle e-license, the requirements for such a license would substitute the physical presence requirements by requiring dealers to post a bond and to accede to Ontario's jurisdiction for local activity.

Real Estate

As discussed in part two, the e-commerce real estate sector poses few problems for the existing regulatory framework. Moreover, the establishment of the seal and education

⁵⁰ SEC Interpretative Release Re: Use of Internet Web Sites To Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore (23 March 1998) <http://www.sec.gov/rules/concept/33-7516.htm> (date accessed: 24 November 1999).

programs should further assure the public of the safety of using the Web when purchasing real estate.

The legal discussion did highlight the incomplete nature of referral Web site regulation. Since consumer protection interests in the purchase and sale of real estate are admittedly largely protected in referral situations given the use of a local licensed broker in consummating the final transaction, consumers are generally well protected in this sector. However, the growing importance of online referrals and the potential for misleading or fraudulent information suggests that some legislative response may be appropriate.

A suitable approach may be the establishment of statutory standards for referrals that protect consumer and industry interests. The Act can be interpreted to cover online referrals and therefore addresses compensatory payments for referrals. However, the Act clearly does not address issues such as misleading advertising and informational disclosure in the context of referral sites.

The State of Texas Motor Vehicle Commission, which recently enacted provisions pertaining to referral services, provides an effective model for addressing the twin interests of consumer protection and market fairness for industry participants. The new referral regulations provide that “a buyer referral service, program, plan, club, or any other entity that accepts fees for arranging a transaction involving the sale of a motor vehicle is a broker. The payment of a fee to such an entity is aiding and abetting brokering.”⁵¹ The Code permits such activity provided the referral service complies with broker advertising regulations and meets a series of criteria designed to foster a competitive marketplace.⁵² With appropriate modifications, the Texas model would provide the Ontario real estate sector with a regulatory regime that protects consumers from misleading referral services while simultaneously assuring a competitive online referral marketplace.

Motor Vehicles

Since consumer purchases in this sector are ultimately completed with a local dealer, consumers enjoy current statutory protections prior to the final consummation of the sales transaction. Moreover, the establishment of seal and educational programs would provide the public with greater assurance that they are dealing with provincially licensed dealers.

Given the potential for misleading or abusive conduct in the online referral market, however, the motor vehicle sector should also consider the adoption of referral regulations similar to those discussed for the real estate sector. As discussed above, the State of Texas Motor Vehicle Commission Code provides an effective model for addressing the twin interests of consumer protection and market fairness for industry

⁵¹ Texas Motor Vehicle Commission Code, §103.10 (b). Online at http://www.namvbc.org/brokering_in_texas_pending_rule_change.htm.

⁵² *Ibid.*

participants in its recently enacted referral regulations. They ensure that businesses that receive payments for referring prospective purchasers to auto dealers comply with existing advertising regulations and meet the following conditions:

- (1) There are no exclusive market areas offered to dealers by the program. All dealers are allowed to participate on equal terms.
- (2) Participation by dealers in the program is not restricted by conditions such as limiting the number of franchise lines or discrimination by size of dealership or location. Total number of participants in the program may be restricted if the program is offered to all dealers at the same time with no regard to the franchise line.
- (3) All participants pay the same fee for participation in the program that shall be a weekly, monthly, or annual fee, regardless of the size, location or line-make of the dealership.
- (4) A person is not to be charged a fee on a per referral fee basis or any other basis that could be considered a transaction-related fee.
- (5) The program does not set or suggest to the dealer any price of vehicles or trade-ins.
- (6) The program does not advertise or promote its plan in the manner that implies that the buyer, as a customer of that program, receives a special discounted price that cannot be obtained unless the customer is referred through that program.⁵³

These standards effectively ensure non-discrimination within the referral industry while simultaneously enhancing consumer protection in the online environment.

Several additional changes to the legislation may be required. First, the provisions mandating written signatures should be amended to provide for an electronic equivalent. Second, the potential growth of the direct car sale market must also be addressed. Such sales are clearly caught by the legislation yet an online seal program would not effectively solve the issue since out-of-province dealers would be unable to comply with certain regulatory requirements, particularly those that focus on a physical presence.

The establishment of an e-license that entitles the holder to sell motor vehicles electronically might also be an effective solution. As with the travel and collection agency e-license, the requirements for such a license would substitute the physical presence requirements by requiring dealers to post a bond and to accede to Ontario's jurisdiction for sales to local consumers.

Another alternative to the physical presence requirements would be statutory amendments to include the delivery of motor vehicle within the province from an out-of-province provider. Similar amendments are under consideration in other North American jurisdictions.⁵⁴

⁵³ *Ibid.*

⁵⁴ For example, the State of Wisconsin recently proposed changes that would amend the definition of motor vehicle sales to include:

CONCLUSIONS

The power of the Internet to revolutionize well-established business norms is leaving many businesses feeling threatened by e-commerce. Developing successful e-commerce businesses is difficult, particularly for those accustomed to traditional business models. However, e-commerce also presents businesses with an unparalleled opportunity to expand markets, improve efficiencies, and develop new ways of doing business.

The Internet dramatically changes two pillars of business. First, it alters the traditional business-consumer paradigm by placing the power of information and choice with the consumer as never before. Although travelers could research travel or accommodation options independently before the arrival of the Internet, travel agents provided an effective service by accessing information not readily available to the typical consumer. Similarly, comprehensive real estate information was largely the exclusive domain of licensed real estate agents, while motor vehicle dealers zealously guarded information such as dealer invoice costs to preserve profit margins.

This exclusivity of information is quickly becoming a thing of the past. As emerging e-commerce business models illustrate, consumers now have ready access to previously unavailable informational tools. Individual consumers can research travel with the speed and comprehensiveness of licensed travel agents, scan the same real estate listings accessible to licensed real estate agents, and negotiate car purchases with complete market information.

Second, the Internet breaks down jurisdictional barriers. The geographic indeterminacy of the Internet means that buyers and sellers can locate one another regardless of their respective location. This creates a further challenge to local businesses who can no longer rely on their local market to guarantee customers. Rather, customers will often seek out the best service provider regardless of location, since e-commerce turns distant businesses into local ones.

The power of information and choice leaves many service providers highly vulnerable to change. Traditional travel agents will have little choice but to embrace e-commerce or develop new services to retain their existing client base. Absent such change, consumers will gravitate to online travel providers who can provide comprehensive travel services tailored to individual preferences. As online travel services provide consumers with customized information, email alerts of travel specials, and develop detailed traveler

“The acceptance or negotiation of an order to purchase a vehicle placed by fax, telephone, the Internet, mail, or some other means from within this state, whether or not the person accepting or negotiating the order is located in this state, if the vehicle purchased as a result of the order is delivered to the purchaser at a location within this state.”
WisDOT Regulation of Internet Vehicle Sales,
http://www.namvbc.org/wisdot_regulation_of_internet_ve.htm (visited December 24, 1999).

profiles (frequent flier numbers, seating and meal preferences, etc.), consumers will gradually grow to depend on online services for their travel needs.

Although e-commerce is unlikely to eliminate the need for licensed real estate agents in the residential real estate market, agents will face increased pressure to improve service and reduce commissions as consumers' reliance on agents for market information diminishes. In the commercial real estate market, the Internet will increasingly become the medium of choice for real estate investors who can effectively locate desired properties worldwide without the need for costly travel and professional assistance. The growing popularity of the Internet will force real estate agents to provide a complete online informational package on their listings, including online video tours and cost comparison data. Moreover, agents will have little alternative but to align themselves with online referral sources which will become the first and most important information source for prospective purchasers.

Sales of motor vehicles are likely to follow the path of consumer electronics and books, where online sales are driven primarily by price. Local motor vehicle dealers will face increasing competition from online car dealers who can better guarantee car availability for "hot" car models and, unencumbered by fixed dealership costs, offer lower prices. Despite claims to the contrary, motor vehicle manufacturers will find the lure of online consumer sales irresistible. The motor vehicle marketplace of the future is thus likely to include local dealers, online dealers, and manufacturers, who will all compete for customers based on price, availability, and service.

The power of information and choice also has important implications for traditional regulatory structures. With consumers empowered by greater access to information, informational disclosure regulatory protections may become unnecessary since the market will create a race to the top whereby those that do not meet consumer informational needs will not survive in the electronic economy. Moreover, physical presence requirements will be viewed with increasing suspicion as consumers question whether such requirements merely serve to impede consumer choice and protect local businesses.

The Internet's jurisdictional implications place a special burden on regulators to develop new regulatory solutions that address the need for consumer protection in the online environment. Consumers will experiment with e-commerce in growing numbers over the next few years. However, if regulators wait for the inevitable problems of fraud and consumer victimization to occur, new solutions may come too late to regain consumer trust. Accordingly, regulators must act now to develop regulatory frameworks that meet the twin goals of facilitating e-commerce and protecting online and offline consumers equally.

The rapid growth of e-commerce places both businesses and regulators at an important crossroads. For success in the 21st century, business must recognize that the Internet is not a passing fad by working to develop online counterparts to their offline businesses. Regulators, meanwhile, must develop solutions that facilitate e-commerce, improve the

competitive position of Ontario businesses, and ensure that existing consumer protection policy goals do not become lost in the process.