

# **TRAVEL INDUSTRY ACT, 2002 REVIEW**

## **Phase 2 Report – Response**

**TRAVEL INDUSTRY COUNCIL OF ONTARIO**

**July 24, 2017**



Travel Industry Council of Ontario

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## Executive Summary

On June 23, 2017, the Ministry of Government and Consumer Services (“Ministry”) released the *Travel Industry Act, 2002 Review – Phase 2 Report* (Phase 2 Report) requesting input on the proposals from all stakeholders by July 24, 2017. The following is the Travel Industry Council of Ontario’s (“TICO”) submission on the *Phase 2 Report* proposals.

Overall, we think that the *Phase 2 Report* is very well written and presented. The Ministry launched the comprehensive review of the *Travel Industry Act, 2002* (“Act”) with the following three objectives:

1. Improve consumer protection;
2. Reduce regulatory burden;
3. Improve regulatory efficiency.

In support of the three objectives, TICO would like to reiterate our key goals as presented in our original submission.

- Expansion of Compensation Fund coverage
- Introduction of a consumer pay model
- Individual travel counsellor registration and continuing education requirements
- Regulation of advertising by out-of-province sellers of travel targeting Ontarians
- Strengthen disclosure requirements and increase consumer awareness
- Allow TICO to levy administrative monetary penalties to ensure compliance
- Eliminate trust accounting
- Eliminate review engagements for registrants with sales of less than \$2 million
- Require positive working capital and introduce additional financial tests
- Enhance security requirements ensuring consumer monies will be protected
- Clarification of key definitions to enable better understanding by stakeholders

The *Phase 2 Report* has addressed the stated goals and the proposals are generally supported by TICO and the TICO Board. However, there are a few areas where further analysis is recommended; additional information and clarity on those specific issues has been provided below.

TICO has modified our original proposal on the sports team exemption and added detail and clarity to a number of the other proposals. We have also included two new recommendations that have been identified since our original submission.

## Definitions and Registration Requirements

### Registration Categories

TICO agrees with the two new classes of registration that have been proposed – travel seller and travel counsellor. However, we think that the exclusion for family and friends as outlined on page 19 of the *Phase 2 Report* is very broad and may be misunderstood. TICO does not disagree that “true” friends and family travel arranging should be excluded, but we encourage families that are inviting others to join their trip to refer them to a registered travel seller to take advantage of all the consumer protection benefits offered by TIA. We are concerned that too many people will consider themselves as falling into this category and argue that the group they are travelling with are all their friends and they are, therefore, exempt from regulation. TICO already has compliance issues with social media posts. In drafting legislation, it will be important to add some parameters to ensure that the intent is clearly understood and allows TICO to regulate as intended.

For example: is posting an offer on your Facebook page to recruit participants for your trip considered friends and family travel since the message only reaches your Facebook “friends”? Or the girls trip to the spa for the weekend “grows” and you make a social media post or put the word out to find enough people to fill a bus? We have had the situation where a person posted a notice of a trip on the bulletin board of their tennis club and claimed that all the members of the club were their friends. These scenarios and many others are regularly encountered by the TICO Compliance Team. Without clear parameters in the new legislation, there is an increased potential for compliance issues. TICO recommends that the legislation remain silent on the issue of family and friends travel and allow the definitions of “travel seller” and “selling” to define who needs to be registered. Alternatively, it will be necessary to devise a very narrow definition of what is considered “family and friends”.

### Travel Counsellor

TICO strongly supports individual registration for travel counsellors. Combined with increased educational requirements, consumers will receive greater protection when purchasing travel services. It is important to ensure that individuals continue to be required to have a documented relationship with a registered travel seller. The intent is to capture all individuals that are selling travel services on behalf of the registrant, including out-of-province registrants. If an independent contractor sets up as a corporation, we would expect that the individual would register as a travel counsellor and all their employees would also be registered. It is possible for a counsellor to be both an individual and a corporation – both entities would need to be registered in the TICO database to ensure consumers can assure themselves they are dealing with a legitimate travel counsellor. However, the details of how the registration would be structured is yet to be determined.

TICO expects that stakeholders may raise objections to the individual registration proposal due to a concern about how the Canada Revenue Agency and other employment legislation defines an employee. Many registrants have relationships with contractors that are not employees and will not want those relationships identified as employment relationships. TICO is aware and acknowledges that many corporate registrants will not support individual registration and have raised concerns about the potential financial burden and counsellor privacy rights, but we feel that the benefits of individual registration outweigh the increased burden.

### Consumer vs Customer

TICO would like further discussion on whether the definitions of consumer and customer should be included in the Act or in the Regulation.

## Exemptions

TICO does not support expanding the exemptions for school boards, domestic travel/tours, small businesses operating travel services as a small portion of their business or for cottage rental agencies as outlined in Proposal 2.2 of the *Phase 2 Report*. TICO's original submission recommended changes to the wording of Ontario Regulation 26/05 s. 2.2 (2) and (3) for purposes of clarity. Our main recommendation was the removal of exemptions for special interest groups in Ontario Regulation 26/05 s. 2.2 (8) and (9) to ensure a level playing field. All special interest groups should only be exempt for one-day tours.

## Sports Teams

TICO has reconsidered its original position on maintaining an exemption for sports teams and recommends that all organizations be treated equally to ensure a level playing field. Therefore, our recommendation is that all special interest groups, religious organizations, sports teams and cultural groups receive the same treatment and only be exempt for one-day tours. (Ontario Regulation 26/05 s. 2.2 (8) – (9))

## Gift Cards

TICO recognizes that this is a complex issue that requires further consideration and we would like to provide clarity and further detail on our previous submission. In addition to registrants selling their own gift cards, there are businesses that sell only gift cards for travel services that they do not own – their entire business model is based on selling gift cards for third-party travel services. In some cases, the company issuing the gift cards collect and hold the money until the consumer redeems the card for travel services with one of the card issuer's members. These businesses should be registered and consumers should receive the benefit of protection under *TIA*. TICO does not intend to regulate non-travel retailers that facilitate the sale of gift cards by passing-through funds and only include travel gift cards as part of their merchandise. It may be necessary to consider an exemption for those non-travel retailers selling gift cards that are not intended to be captured (Canada Post, big box retailers, drug stores, etc.) rather than exclude the entire gift card industry from regulation.

## Consumer Protection Issues

TICO is in strong agreement with the disclosure, advertising and pricing proposals listed under *Consumer Protection Issues* in the *Phase 2 Report* such as requiring registrants to prominently/clearly display the TICO logo and registration number and that the proceeds of any new financial penalties will be used to promote public awareness and/or education. TICO also agrees that maintaining the existing travel insurance requirements under *TIA* are in the best interest of both registrants and consumers.

## Continuing Education

TICO supports the proposal to provide an enabling provision for education requirements with the details to be developed by TICO with further registrant consultation. Continuing education is closely connected to individual registration (and enforcement thereof) of travel counsellors and TICO's ability to strengthen consumer protection in a changing marketplace.

## Regulatory Burden on Industry

TICO supports Proposals 4.1 – 4.5 on financial reporting, working capital, trust accounting, security deposits and access to and storage of financial records as outlined in the *Phase 2 Report* with a request to consider the following additions:

### Security

**New Request** – Similar to trust accounting, it is recommended that the registrar be provided with the authority to require registrants to provide a greater amount of security if they are deemed to be a financial risk.

### Risk-based Decisioning

At the heart of much of the input received by industry/registrants is the issue of risk profile. Registrants represent a large spectrum of business models and served markets. These different business models may give rise to different risk profiles, which may result in compliance measures reflective of the underlying risk. The intent of risk-based decisioning is to assess individual registrants based on a future pre-determined risk matrix. At its most basic level, TICO requests that further consideration be given to including the enabling ability for risk-based pricing along with other risk-based decisions. This would allow registrants to be given reductions in various fees, reductions in inspections or reduced reporting obligations (filing annually vs. quarterly or biennial vs. annual renewals) as a reward if they have good ratio scores or compliance history.

## Compliance & Enforcement

### Administrative Monetary Penalties

TICO supports the proposal to allow the registrar to levy administrative monetary penalties and the ability for registrants and non-registrants to appeal the registrar's decision. We are in agreement with using the Ontario License Appeal Tribunal to administer the appeals process.

### Complaints

**New Request** – Section 16 of the *Travel Industry Act* allows the registrar to request information from a registrant in relation only to a complaint. This provision is too narrow and restricts the regulator's ability to ensure compliance from registrants. TICO requests that registrants be required to respond to any request from the registrar. TICO staff regularly send out letters to registrants regarding compliance issues and we do not have the authority to require a response.

## Travel Industry Compensation Fund

The Compensation Fund plays a key role in protecting consumers from monetary loss when a registrant fails and is often the first thing that both consumers and registrants think of when TICO is discussed. However, due to the changing landscape in the travel industry many stakeholders indicated a need to expand the scope of coverage available to include all end suppliers and to increase the maximum amounts covered per person/per incident to reflect the true value of travel purchases.

For clarity, TICO does not support expanding the Compensation Fund coverage to reimburse consumers that have been defrauded by a non-registrant. The fundamental eligibility for claims on the Fund is the failure of a registrant or end supplier. However, in cases of fraud by a non-registrant, TICO would continue to ensure compliance with the legislation and initiate enforcement activities, such as prosecuting an individual for operating without registration, and assistance with consumer complaints. In addition, TICO envisions an

enhanced Consumer Awareness Campaign which, among other things, will identify potential illegal activities consumers should be aware of and the tools available to consumers to avoid falling prey to a travel scam.

The Key Findings in the *Deloitte Actuarial Study and Financial Assessment* indicate that the current funding mechanism and size of losses is resulting in a year-over-year loss for the Fund and if the current environment were to continue the Fund would not be large enough to continue supporting Ontario consumers in 10 – 15 years. Deloitte's recommendation based on projections is that the Target Fund size should be \$50 million and the only way to practically achieve this is by introducing a consumer protection fee.

The \$50 million Target Fund size is based on Deloitte's recommendation that TICO consider a reinsurance plan. Reinsurance would be attached at the Target Fund level so as not to leave any gaps in consumer protection. The consumer protection fee would cover the costs of premiums. Reinsurance coverage offers an additional layer of protection against catastrophic losses.

Many industry stakeholders have suggested that the Compensation Fund is unnecessary due to the availability of credit card chargebacks. Deloitte addressed the issue of credit card chargebacks and their research on multiple credit cards concluded that there is a “significant risk that leading credit card and reward programs General Terms and Conditions will eventually exclude liabilities arising due to the failure, insolvency or inability to perform a service from a travel agent, tour operator, accommodation provider, airline or other carrier”<sup>1</sup>.

### **Online Sales**

The entire issue of online sales is more complex than the statistics reflect and there is a general misconception among consumers as to what booking online really means. TICO believes that the percentage of “pure” online sales is lower than the 79% stated in the *Phase 2 Report*<sup>2</sup>. Deloitte conducted a study with CATO and found that “the percent of transactions paid through online booking has been consistently in the range of 29-31% over the past five years.”<sup>3</sup> The difference is likely due to:

- High percentage of online air only and hotel only bookings;
- Consumers researching and beginning a transaction online but then calling an agent to complete the transaction;
- Corporate travel online booking tools.

The importance of clarifying online sales statistics is linked directly to decisions about how Ontario Gross Sales are defined and who is required to register.

### **Place of Business/Residency/Ontario Gross Sales**

The recommendation to include a residency provision as mentioned on page 55 of the *Phase 2 Report*, needs further analysis as the issue is more complex than just limiting coverage to non-Ontario residents. The premise of this initial recommendation was to provide flexibility to registrants paying into the Fund, either on their total travel sales, or for those sales to Ontarians or passengers departing from Ontario (the latter is easily determined from the point of embarkation). Claims against the Fund from non-Ontarians have been

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<sup>1</sup> Travel Industry Council of Ontario, Actuarial Study and Financial Assessment, Compensation Fund, Deloitte, May 31, 2017.

<sup>2</sup> Page 7 of the Phase 2 Report - referenced to the Pulse Omnibus Brand Awareness Survey conducted for TICO.

<sup>3</sup> Deloitte Actuarial Study, page 18.

negligible over the years. Stakeholders will be very concerned about how the proposed changes are going to affect what will and will not be captured as an Ontario Gross Sale.

The proposal to restrict Compensation Fund coverage to only residents of Ontario is not necessarily an effort to exclude coverage for out-of-province consumers. TICO recommends that place of business/residency/Ontario Gross Sales be considered as a whole rather than individually as the three topics are very closely related in how they will affect business operations going forward. For example, online retailers may be reluctant to hire individuals based in Ontario to handle reservations if they must include all their sales as Ontario Gross Sales; businesses may also decide to not operate in Ontario to avoid being regulated if there is no way to separate sales made to non-Ontarians who do not know what TICO is and are not aware of the benefits of the Compensation Fund.

On the other hand, we also need to consider the impact of getting rid of the distinction between travel agents and travel wholesalers with the “travel seller” class. While in-bound tour operators have argued that it is unfair to require them to register and pay into the Compensation Fund when their consumers are not able to currently claim on the Compensation Fund, this could potentially change in the future if the requirement is simply that the consumer dealt with a registered travel seller and paid the customer protection fee. Historically, when Ontario registered wholesalers have failed, TICO has received complaints from people who were not protected because they bought their services from a travel agency outside the province.

### **Travel Seller Business Models – Examples**

Given that TICO’s original recommendation involves expanding jurisdiction outside of Ontario, it is important to be aware of the different business models that may give rise to the discussions of place of business/residency/Ontario gross sales. The following matrix outlines some of the many different business models that are currently in operation, which may require registration:

Travel Seller Model	Business Model	Examples
Out-of-Province Travel Seller	<ul style="list-style-type: none"> <li>• No place of business in Ontario</li> <li>• No travel counsellors in Ontario</li> </ul>	<ul style="list-style-type: none"> <li>• Online travel agency advertising in Ontario</li> </ul>
Out-of-Province Travel Seller	<ul style="list-style-type: none"> <li>• No place of business in Ontario</li> <li>• Travel counsellors located in Ontario</li> <li>• Selling<sup>4</sup> to Ontarians</li> </ul>	<ul style="list-style-type: none"> <li>• Virtual home offices in Ontario</li> </ul>
Out-of-Province Travel Seller	<ul style="list-style-type: none"> <li>• Place of business in Ontario</li> <li>• No travel counsellors in Ontario</li> <li>• Selling travel to Ontarians</li> </ul>	<ul style="list-style-type: none"> <li>• Travel seller wants the protections of TIA</li> </ul>
In-Province selling out-of-province	<ul style="list-style-type: none"> <li>• Place of business</li> <li>• Travel counsellors in Ontario</li> <li>• Selling to non-Ontarians</li> </ul>	<ul style="list-style-type: none"> <li>• Call centres</li> <li>• Inbound tour operators</li> </ul>
In-Province	<ul style="list-style-type: none"> <li>• Administrative offices in Ontario</li> </ul>	<ul style="list-style-type: none"> <li>• Sales are through a website based outside of Ontario</li> </ul>

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<sup>4</sup> All references to “selling” in the Business Model Matrix are based on the definition of “selling” proposed by TICO in the original submission. “To attempt to cause, influence or induce a customer or another travel seller to purchase travel services. To arrange travel services for a customer or another travel seller in exchange for payment.”

## Other Recommendations Not Addressed in the Phase 2 Report

TICO recognizes that the *Phase 2 Report* is an accumulation of all stakeholder submissions and addresses the issues and recommendations that are relevant to everyone, but there are many other important proposals made by TICO which support the underlying goals of the comprehensive review. We have included a list of recommendations in Appendix A that are extracted from TICO's April 13, 2017 "Recommendations for Modernization" submission and have not been directly addressed in the *Phase 2 Report*. Further consideration should be given to which of the recommendations involve legislative versus regulatory reform.

## Appendix A

### TICO Recommendations Not Directly Addressed in the MGCS Phase 2 Report

#### Definitions

Problem Statement	Page of TICO Submission
(i) Consumer definition	9
(ii) Customer definition	9
(v) Resident definition	11
(vi) Package definition	12
(vii) Travel Services definition	13
(viii) Registrant definition	13
(ix) Transportation definition	13
(x) Accommodation definition	13
(xi) Sales in Ontario	14

#### Exemptions

Problem Statement	Page of TICO Submission
(i) s. 2 (2) – requiring clarity	16
(ii) x. 2 (3) – addressing consistency of wording	16
(iii) inconsistent approach to not-for-profits, associations and clubs	16

#### Registration

Problem Statement	Page of TICO Submission
(iii) Restricted Travel Agent	20

#### Enforcement

Problem Statement	Page of TICO Submission
(ii) Production Orders	21
(iv) Removal of Posted Notices for revoked or suspended registrants	23
*NEW* Add a requirement that registrants must respond to any request from the registrar.	

**Disclosure** (possible that the following have been addressed generally in proposal 3.3)

Problem Statement	Page of TICO Submission
(i) Pre-travel changes to scheduled air departure	24
(ii) in-destination changes to accommodations and other key components	24
(iii) e-commerce overlay missing for key documentation (s. 43 amendments)	26
(iv) Price increases beyond the control of the registrant	26
(v) Requirement to advise the customer of the travel documents needed for each traveller	27
(vi) Disclosure of the Consumer Protection Fee at time of booking	28
(viii) 3 <sup>rd</sup> Party Card Processors – disclosure and financial covenants generally not known	29

**Invoicing** (possible that the following have been addressed generally in proposal 3.3)

Problem Statement	Page of TICO Submission
(i) Lack of flexibility for invoice disclosure	29
(ii) Invoice addresses – (we did not recommend a change but addressed why address is important)	29
(iii) Form of Payment – included on all invoices	30
(iv) Detailed breakdown of fees, taxes, levies and charges – clarify requirement to keep in line with current interpretation for a <u>reasonable</u> breakdown	30
(v) identification of refundability of each item on invoice	31
(vii) Fair and accurate description of travel services purchased – amendment to s. 38 to require key components to be listed	32
(viii) Point of departure to be indicated – to support residency recommendation	32
(ix) Government imposed taxes/fees after customer has paid in full – allow changes to be passed on to customer (s. 38 (1) (j) )	33
(x) Identification of travel agent	33
(xi) Unique identifier on all invoices and receipts	33
(xi) Customers are sometimes not given invoices/receipts for all payments	34
(xii) documentation in foreign languages	34

**Financial Requirements**

Problem Statement	Page of TICO Submission
*NEW* Registrar should be provided the authority to require registrants to provide a greater amount of security if they are deemed a financial risk.	

## Compensation Fund

Problem Statement	Page of TICO Submission
(i) – (vii) pending decision on a consumer protection fee these items may or may not be addressed	39 – 45
(viii) no specific provision excluding the ability for subrogated claims against the Comp. Fund	46
(ix) Residency provision for claims	46
(x) Lack of provision to potentially mitigate risk to consumers and provide timely consumer protection in an effective manner as Ontario's Travel Regulator	47
(xi) Eliminate s. 64 – recall of commission	48

## Education

Problem Statement	Page of TICO Submission
(ii) Removal of grandfathering for exam	50

## Governance

Problem Statement	Page of TICO Submission
(i) elimination of the Compensation Fund and TICO Asset and move to reserve accounting	51
(ii) Change of control provisions allow for new ownership without regulatory oversight	51
(iii) Responsibilities of Registrar and Statutory Director drive inefficiency	51

## Other

Problem Statement	Page of TICO Submission
(ii) Registrants change the URL of websites without notifying TICO	52
(iii) Determination of the expiry date on a temporary suspension order	53
(iv) Deemed service provisions of s. 36 Act	53