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Testimony on SB 42
Senate Commerce Committee
Bryon Schlosser, Chair
Kansas Real Estate Commission
February 12, 2019

Good morning Chairman Lynn and members of the committee. On behalf of the Kansas Real Estate Commission, thank you for the opportunity to present proponent testimony on SB 42.

SB 42 would amend the Kansas Real Estate Brokers' and Salespersons' License Act to provide a definition of a rebate. The bill defines "rebate" as the return of all or part of the purchase price of real estate, whether by cash or cash equivalent, that is promised or agreed to by a licensee and a client or customer before closing and is contingent on the transaction closing. A rebate would also include the return of all or part of any commission or compensation paid to a licensee in any transaction that has as its purpose the purchase of real estate at a price different from the price specified in the closing statement. For the purposes of defining "rebate," "cash equivalent" means gift cards, prepaid credit cards and any other item with a value equal to a specific amount of money that can be used in the same manner as cash.

K.S.A. 2018 Supp. 58-3062 states that: (a) No licensee, whether acting as an agent, transaction broker or a principal, shall:

- (3) Accept, give or charge any rebate or undisclosed commission.
- (4) Pay a referral fee to a person who is properly licensed as a broker or salesperson in Kansas or another jurisdiction or who holds a corporate real estate license in another jurisdiction if the licensee knows that the payment of the referral fee will result in the payment of a rebate by the Kansas or out-of-state licensee.

The longstanding Kansas law that prohibits offering against rebates was put in place for three primary reasons.

1. To discourage buyers and sellers from inflating the contract price so the seller could rebate a portion of the selling price to the buyer after closing. Such schemes were used to misrepresent to lenders the true amount of the down payment by buyer in order to get a higher loan to value ratio than what lenders were led to believe by the contract terms.
2. To discourage licensees from participating in schemes to increase the contract price and the commission earned so that the licensee could rebate a portion of the commission back to buyer to reduce the cash investment by the buyer, or to make a repair or improvement that buyer lacked enough funds to perform after making the down payment required by buyer's lender.
3. To keep Kansas licensees on an equal playing field, and to reduce misrepresentations by out-of-state brokerages over which we have no authority to regulate. Allowing out-of-state licensees to offer rebates to Kansas consumers promotes their use of advertising tactics that are unlawful for Kansas licensees to perform.

By way of background, in August 2016, the Commission rescinded a guidance document that allowed for a gift card to be provided by a licensee to a client in a transaction if the value of the gift card did not exceed 0.5% of the purchase price of the property as shown on the closing statement. The Commission rescinded the guidance document because it directly conflicted with current law that prohibits licensees from offering rebates in real

estate transactions. This resulted in several questions from licensees regarding what constituted a prohibited rebate.

To provide clear legal parameters, the Commission proposed a regulation to define rebates. The language in the proposed regulation is nearly identical to the proposed definition of rebate on pg. 3, lines 1-10 of SB 42. The Commission solicited input from the industry and discussed various drafts of the regulation during Commission meetings between August 2016 and February 2017. The Commission conducted a public hearing on the proposed regulation in June 2017. Several individuals affiliated with USAA provided testimony opposing the regulation due to the provision that considered gift cards to be cash equivalent. The Commission tabled further discussion to give parties time to provide further comments and possibly offer changes to the proposed regulation.

In October 2017, the Commission tabled consideration of the regulation indefinitely to explore an option to define an unlawful rebate in statute. This was based on concerns that the Federal Trade Commission would sue the Commission over alleged antitrust violations. The Commission worked with USAA to come to a compromise on possible statutory language that would not fundamentally alter the longstanding Kansas policy against rebates. USAA and the Commission could not come to a compromise, so the Commission decided to seek an Attorney General's opinion to get an independent opinion on whether USAA's referral program violated the provisions of Kansas law with respect to providing unlawful rebates in real estate transactions. The Attorney General's opinion is attached as pg. 3 to this testimony.

The AG's opinion concluded that a rebate is something that is returned to a purchaser out of the purchase price of goods to accomplish a reduction of the purchase price. It further concluded that the conveyance of the gift card would violate current law if it is intended to reduce the amount paid by the referred client as the broker's commission or fee or the real property's purchase price.

The Commission feels that the definition proposed in SB 42 provides legal clarity to licensees and the public on what is an unlawful rebate and is supported by the AG's opinion.

The Commission thanks you for the opportunity to provide comments on SB 42 and respectfully request approval of the amendments proposed in the bill.

STATE OF KANSAS
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December 12, 2018

ATTORNEY GENERAL OPINION NO. 2018- 17

Erik Wisner, Executive Director
Kansas Real Estate Commission
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700 S.W. Jackson
Topeka, KS 66603-3785

Re: Personal and Real Property—Real Estate Brokers and Salespersons; Licensing—Prohibited Acts; Rebate; Referral Fee: Gift Certificate

Synopsis: A licensee does not violate K.S.A. 2018 Supp. 58-3062(a)(3) or (4) when a portion of the commission or fee paid to the licensee is used to purchase a gift card that is conveyed to the licensee's client, provided the proceeds of the gift card do not reduce the amount of commission, fee or purchase price paid by the licensee's client. Cited herein: K.S.A. 40-966; 40-2403; K.S.A. 2018 Supp. 40-2404; K.S.A. 40-3513; K.S.A. 2018 Supp. 58-3034; 58-3035; 58-3062; K.S.A. 65-1516; 65-2837; L. 2008, Ch. 155, § 5; L. 2004, Ch. 180, § 6; L. 1995, Ch. 252, § 20; L. 1991, Ch. 153, § 5; L. 1989, Ch. 167, § 7; L. 1980, Ch. 164, § 29.

* * *

Dear Mr. Wisner:

On behalf of the Kansas Real Estate Commission, you request our opinion regarding whether a licensee's participation in a particular referral scenario would constitute accepting or giving a rebate or paying a referral fee in violation of K.S.A. 2018 Supp. 58-3062(a)(3) or (4). You set out the scenario as follows:

> A Kansas real estate licensee has entered into an agreement with an out-of-state company, which holds a corporate real estate license in another state, to be included in that company's referral network. As part of the referral agreement, the licensee agrees to pay the company a percentage of the licensee's commission from each referral that results in a closed sales transaction. The out-of-state company keeps a portion of that payment and forwards the rest to another company, which also holds a corporate real estate license in another state. The second company uses those funds to provide a gift card to the licensee's referred client upon closing. The amount of the gift card depends on the purchase price of the property; the greater the purchase price, the greater the amount of the gift card. The gift card is redeemable at hundreds of vendors but is not a universally-accepted form of payment such as cash. Because of their respective business relationships with the referral company, both the referred client and the Kansas licensee know the client will receive a gift card from the affiliated company if the transaction closes.[1]

The Real Estate Brokers' and Salespersons' License Act[2] (Act) provides for the licensure and regulation of brokers and salespersons who, for compensation, engage in the business of buying, selling, exchanging or leasing real estate.[3] Prohibited activities are set forth in K.S.A. 2018 Supp. 58-3062. The statute provides, in part:

> (a) No licensee,[4] whether acting as an agent, transaction broker or a principal, shall:
>
> . . . .
>
> (3) Accept, give or charge any rebate or undisclosed commission.
>
> (4) Pay a referral fee to a person who is properly licensed as a broker or salesperson in Kansas or another jurisdiction or who holds a corporate real estate license in another jurisdiction if the licensee knows that the payment of the referral fee will result in the payment of a rebate by the Kansas or out-of-state licensee.[5]

In the scenario presented, the issue is whether conveyance of the gift card to the referred client is payment of a "rebate" to the referred client of any commission, fee or purchase price paid by the referred client.

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[1] Eric Wisner, Correspondence, February 19, 2018.
[2] K.S.A. 58-3034 *et seq.*
[3] *See* K.S.A. 2018 Supp. 58-3035(c), (f), (k) and (o).
[4] "'Licensee' means any person licensed under this act as a broker or salesperson." K.S.A. 2018 Supp. 58-3035(k).
[5] K.S.A. 2018 Supp. 58-3062(a).

The prohibition against accepting, giving or charging any rebate or undisclosed commission has been in existence since the inception of the Act.[6] The provision precluding payment of a referral fee that results in the payment of a rebate was added nine years later.[7] The Act, however, has never defined "rebate." In determining the meaning of "rebate," we follow the rules of statutory construction.

> [T]he fundamental goal of statutory construction is to ascertain the intent of the legislature. But in determining legislative intent, the starting point is not legislative history; rather, we first look to the plain language of the statute, giving common words their ordinary meaning. If the plain language of a statute is unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.[8]

"Rebate" is defined as: "*a*) to give back (part of an amount paid) *b*) to make a deduction from (a bill)"[9] and constitutes "1. [a] return of part of a payment, serving as a discount or reduction. 2. [a]n amount of money that is paid back when someone has overpaid."[10] The Wisconsin Court of Appeals applied the definition from Black's Law Dictionary when it determined that "the words 'rebates,' 'refunds,' and 'discounts' mean essentially the same thing – a reduction or credit that is tied to the price of the good or service being purchased by the recipient of the reduction or credit."[11] "[T]o be a 'discount,' the 'payment or allowance' must be a reduction from the price that would be paid if the 'discount' were not given."[12] "A rebate is something that is returned to a purchaser out of the purchase price of goods to accomplish a reduction of the purchase price."[13] Payment of a portion of the price, even though unknown by the purchaser, has also been found to be a rebate.[14] Therefore, conveyance of the gift card in the scenario described above would violate K.S.A. 2018 Supp. 58-3062(a)(3) and (4)

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[6] *See* L. 1980, Ch. 164, § 29(a)(4). *See also* L. 2008, Ch. 155, § 5.
[7] *See* L. 1989, Ch. 167, § 7(a)(4). *See also* L. 1995, Ch. 252, § 20(a); L. 2008, Ch. 155, § 5.
[8] *Univ. of Kansas Hospital Authority v. Bd. of County Comm'rs of the Unified Gov't of Wyandotte County/Kansas City*, 301 Kan. 993, 998-99 (2015) (internal citations and quotation marks omitted).
[9] Webster's New World College Dictionary 1211 (5th ed. 2016).
[10] Black's Law Dictionary 1458 (10th ed. 2009).
[11] *Tele-Port, Inc. v. Ameritech Communications, Inc.*, 248 Wis. 2d 846, 861-62, 637 N.W.2d 782, 790 (Wis. Ct. App. 2001).
[12] *Id.* at 862.
[13] *Shinn v. Oklahoma Alcoholic Beverage Control Bd.*, 1964 Ok. 63, 397 P.2d 157, 160 (Okla. 1964). *See also Prosperity Tieh Enterprise Co., Ltd. v. United States*, 42 CIT ____, 284 F.Supp.3d 1364, 1369 (2018) and *Papierfabrik August Koehler AG v. U.S.*, 38 CIT ____, 971 F.Supp.2d 1246, 1252 (2014) (19 C.F.R. § 351.102(b)(38) includes "rebate" as "any change in the price charged for . . . the foreign like product" that was "reflected in the purchaser's net outlay").
[14] *McGuire v. American Family Mutual Ins. Co.*, 448 Fed.Appx. 801 (10th Cir. 2011) (unpublished opinion) (insurance agent paid portion of annual premium on term life insurance policy unbeknown to insured; constituted an unfair method of competition or an unfair or deceptive act or practice in the business of insurance under K.S.A. 40-2403 and 40-2404(8)).

if it is a reduction of the amount paid by the referred client as the broker's commission or fee or the real property's purchase price.

In the scenario presented, there is no indication that the gift card may be applied towards the payment of the broker's commission or fee or the real property's purchase price. Under such circumstances, there is no reduction in the amount of commission, fee or purchase price paid by the referred client. Since the commission, fee or purchase price is not reduced, there is no rebate in violation of K.S.A. 58-3062(a)(3) or (4).

We note that a provision precluding the "[o]ffer[ing] or giv[ing] of prizes, gifts or gratuities which are contingent upon a client's listing, purchasing or leasing property" was included in the original Act.[15] In 1991, the provision was amended to state, "No licensee . . . shall: . . . (17) Offer or give prizes, gifts or gratuities that are contingent upon an agency agreement or the sale, purchase or lease of real estate."[16] The prohibition against conferring prizes, gifts or gratuities "demonstrate[d] a clear expression of public policy by a Legislature committed to outlawing any form of prize, gift or gratuity by a real estate broker as an inducement to attract clients."[17] The scenario presented by the Kansas Real Estate Commission would likely have violated these provisions. The statutory prohibition of offering or giving prizes, gifts or gratuities, however, was repealed in 2004.[18] Courts generally presume that when the Legislature revises an existing law, it intends to make a substantive change.[19]

Further evidence of such a change is found in legislative acts pertaining to other professions that include similar restrictions regarding the payment of rebates.[20]

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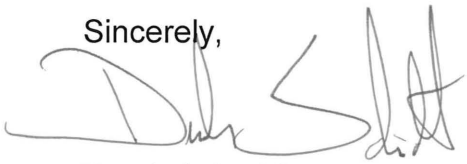
[15] *See* L. 1980, Ch. 164, § 29(a)(12).
[16] L. 1991, Ch. 163, § 5(a).
[17] Attorney General Opinion No. 98-53.
[18] L. 2004, Ch. 180, § 6.
[19] *State v. Pulliam*, 430 P.3d 39 (Kan. 2018).
[20] *See, e.g.*, K.S.A. 40-966 (fire and casualty insurance; "No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow to give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance, except to the extent provided for in an applicable filing."); K.S.A. 2018 Supp. 40-2404 (insurance agents; "The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance: . . . (8) *Rebates.* (a) Except as otherwise expressly provided by law, knowingly permitting, offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon; paying, allowing, giving or offering to pay, allow or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, selling, purchasing or offering to give, sell or purchase as inducement to such insurance contract or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract."); K.S.A. 40-3513

As is the situation with the Real Estate Brokers' and Salespersons' License Act, none of the acts includes a definition of "rebate." Unlike the Real Estate Brokers' and Salespersons' License Act, the prohibitions in those acts are not limited to the payment of rebates, but include prohibitions against offering gifts, prizes and other inducements.[21] "[W]hen legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any items not expressly included in the specific list."[22]

The Legislature has shown that it is able to preclude licensees from engaging in conduct as set forth in the scenario. The provisions that would preclude such conduct are not currently included in the Act. A licensee does not violate K.S.A. 2018 Supp. 58-3062(a)(3) or (4) when a portion of the commission or fee paid to the licensee is used to purchase a gift card that is conveyed to the licensee's client, provided the proceeds of the gift card do not reduce the amount of commission, fee or purchase price paid by the licensee's client.

Sincerely,



Derek Schmidt
Attorney General

Richard D. Smith
Assistant Attorney General

DS:AA:RDS:sb

(mortgage insurance; "(c) Any mortgage guaranty insurance company which pays any commission or makes any unlawful rebate in violation of the provisions of this article shall be subject to the penalties prescribed in K.S.A. 40-2407 and 40-2411."); 65-1516 (optometrists; "(b) "Unprofessional conduct" means: . . . "(10) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations or associations."); 65-2837 (healing arts; "(b) 'Unprofessional conduct' means: . . . (19) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations, limited liability companies or associations.").

[21] *See*, *supra*, footnote 20.

[22] *In re Lietz Const. Co.*, 273 Kan. 890, 911 (2002).

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GOVERNOR JEFF COLYER, M.D.
ERIK WISNER, EXECUTIVE DIRECTOR

February 19, 2018

Kansas Attorney General Derek Schmidt
120 SW 10th Ave, 2nd Floor,
Topeka, KS 66612-1597

Dear Attorney General Schmidt:

I write to you on behalf of the Kansas Real Estate Commission, which requests an Attorney General Opinion regarding whether certain real estate practices are in violation of the Kansas Real Estate Brokers' and Salespersons' License Act ("Act"), K.S.A. 58-3034 *et seq*. Specifically, we seek your opinion on the following scenario:

A Kansas real estate licensee has entered into an agreement with an out-of-state company, which holds a corporate real estate license in another state, to be included in that company's referral network. As part of the referral agreement, the licensee agrees to pay the company a percentage of the licensee's commission from each referral that results in a closed sales transaction. The out-of-state company keeps a portion of that payment and forwards the rest to another company, which also holds a corporate real estate license in another state. The second company uses those funds to provide a gift card to the licensee's referred client upon closing. The amount of the gift card depends on the purchase price of the property; the greater the purchase price, the greater the amount of the gift card. The gift card is redeemable at hundreds of vendors but is not a universally-accepted form of payment such as cash. Because of their respective business relationships with the referral company, both the referred client and the Kansas licensee know the client will receive a gift card from the affiliated company if the transaction closes.

Our question is as follows: in the above scenario, does the Kansas licensee violate K.S.A. 2017 Supp. 58-3062(a)(3) or (a)(4) by paying a percentage of each referral sale to the out-of-state company?

To aid in your analysis, we note the term "rebate" as used in K.S.A. 2017 Supp. 58-3062(a)(3) and (a)(4) is not defined in the Act or in the Commission's regulations. Our research indicates that according to the Merriam-Webster Dictionary, the ordinary meaning of "rebate" is "a return of part of a payment." It has been suggested that the gift card described in the scenario above is an unlawful rebate because it is contingent on the transaction closing and therefore not simply a gift, and because it is based on the purchase price of the property and therefore intended to be a return of money used to purchase the property. It has also been suggested that the gift card is not a rebate because it is a conditional gift and it cannot be used in the same manner as cash. The Commission does not have a formal position on the issue, but it is concerned that this type of arrangement would violate Kansas law.

I would be happy to provide any additional information you may require. Thank you for your consideration.

Sincerely,

Erik Wisner
Executive Director
for the Kansas Real Estate Commission