

Testimony on HB 2494
House Commerce and Economic Development Committee
Erik Wisner
Executive Director
Kansas Real Estate Commission
February 12, 2018

Good afternoon Chairman Mason and members of the committee. On behalf of the Kansas Real Estate Commission, thank you for the opportunity to present neutral testimony on HB 2494.

HB 2494 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 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. The bill would allow a real estate licensee to accept, give, or charge any rebate if the rebate is disclosed. The bill would allow a real estate licensee to pay a referral fee to a person licensed in Kansas or another jurisdiction knowing that referral fee will result in the payment of a rebate by the Kansas or out-of-state licensee if these actions are disclosed.

By way of background, in August 2016, the Commission rescinded a guidance document that allowed for a gift card to be provided by a licensee to a principal in a transaction if the value of the gift card did not exceed 0.5%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 The Commission rescinded the guidance document because it directly conflicted with K.S.A. 58-3062(a)(3) and (a)(4) that prohibits licensees from offering rebates. This resulted in a number of questions from licensees regarding what constituted a prohibited rebate.

To provide clear legal parameters, the Commission promulgated the regulation, attached as page 3 of this testimony, to define rebates. The Commission solicited input from the industry and discussed the 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 Commission appreciates USAA's attempt to define rebate in statute but would like to recommend several changes to the proposed definition to clarify important details. Because the Commission is charged with enforcing these statutes, it is imperative that the rules are clear and specific.

The Commission would like language clarifying that rebate shall mean the return of all or part of the purchase price of real estate, or commission earned by licensees that is promised or agreed to by a licensee and a client or customer before closing and is contingent on the transaction closing. This statement helps to clarify that any monetary consideration or gift given by a licensee or principal to another principal or licensee that is not promised or agreed to by the licensee and the client or customer in advance is not a rebate. It is also consistent with the Black's Law Dictionary definition of "gift," which is "the voluntary transfer of property to another without compensation." If the legislature chooses to define the term "rebate" in statute but maintain the current prohibition on a licensee offering rebates, the Commission recommends also clarifying both cash and cash equivalent rebates are prohibited as defined in the proposed regulation attached as page 3 of this testimony.

In addition, this legislation does not make clear where, to whom, and when the disclosure of that rebate should occur. Based on communications with USAA representatives, they indicated this would be provided by the licensee offering the rebate and that it would be an attachment to the purchase contract. Currently, the federal Real Estate Settlement Procedures Act (RESPA) requires that every buyer and seller signs a statement at closing stating that there are no financial promises made that are not reflected on the closing statement. To make sure the disclosure occurs and buyers and sellers are not in violation of any federal requirements we recommend adding language saying the disclosure should disclose the amount of the rebate and should be included in the purchase contract so that if a lender or appraiser is involved they are fully aware of all financial consideration in order to accurately assess the contract price and risk.

While not a federal requirement, the Commission would also recommend that if there is a referral fee being paid to a third party by the brokerage representing the buyer or seller in the transaction, and that referral fee is being used by a third party to offer a rebate to the buyer or seller, that it should be included in the purchase contract and closing statement. The purpose of this recommendation is to prevent a brokerage from avoiding the disclosure requirement by using a third party.

Should the Committee decide to support this bill, which would overturn several decades of state policy against rebates, the Commission will need the proposed changes offered to provide clarity to licensees and the public with respect to the legal requirements for offering rebates.

The Commission thanks you for the opportunity to provide comments on HB 2494 and respectfully requests the changes proposed in our testimony be considered by the committee.

86-3-32. Rebate; definition. As used in K.S.A. 58-3062 and amendments thereto, "rebate" shall mean 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. "Rebate" shall include the return of all or part of any commission or compensation paid to a licensee and any transaction that results in, or has as its purpose, the purchase of real estate at a price different from the price specified in the closing statement. "Rebate" shall not include any gift given by a licensee to a client or customer that is not promised or agreed to by the licensee and the client or customer in advance. For the purposes of this regulation, "cash equivalent" shall mean 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 that for cash. (Authorized by K.S.A. 2016 Supp. 74-4202; implementing K.S.A. 2016 Supp. 58-3062; effective P-_____.)

ATTORNEY GENERAL

APPROVED

FEB 14 2017

FEB 09 2017

3

APPROVED BY

DEPT. OF ADMINISTRATION

HOUSE BILL No. 2494

By Committee on Commerce, Labor and Economic Development

1-18

1 AN ACT concerning real estate brokers and salespersons; prohibited acts;
2 rebates; amending K.S.A. 2017 Supp. 58-3035 and 58-3062 and
3 repealing the existing sections.

4
5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. K.S.A. 2017 Supp. 58-3035 is hereby amended to read as
7 follows: 58-3035. As used in this act, unless the context otherwise
8 requires:

9 (a) "Act" means the real estate brokers' and salespersons' license act.

10 (b) "Advance listing fee" means any fee charged for services related
11 to promoting the sale or lease of real estate and paid in advance of the
12 rendering of ~~such~~ the services, including any fees charged for listing,
13 advertising or offering for sale or lease any real estate, but excluding any
14 fees paid solely for advertisement or for listing in a publication issued for
15 the sole purpose of promoting the sale or lease of real estate wherein
16 inquiries are directed to the owner of the real estate or to real estate
17 brokers and not to unlicensed persons who publish the listing.

18 (c) "Associate broker" means an individual who has a broker's license
19 and who is employed by another broker or is associated with another
20 broker as an independent contractor and participates in any activity
21 described in subsection (f).

22 (d) "Branch broker" means an individual who has a broker's license
23 and who has been designated to supervise a branch office and the activities
24 of salespersons and associate brokers assigned to the branch office.

25 (e) "Branch office" means a place of business other than the principal
26 place of business of a broker.

27 (f) "Broker" means an individual, other than a salesperson, who
28 advertises or represents that ~~such~~ the individual engages in the business of
29 buying, selling, exchanging or leasing real estate or who, for
30 compensation, engages in any of the following activities as an employee
31 of, or on behalf of, the owner, purchaser, lessor or lessee of real estate:

32 (1) Sells, exchanges, purchases or leases real estate.

33 (2) Offers to sell, exchange, purchase or lease real estate.

34 (3) Negotiates or offers, attempts or agrees to negotiate the sale,
35 exchange, purchase or leasing of real estate.

36 (4) Lists or offers, attempts or agrees to list real estate for sale, lease

1 or exchange.

2 (5) Auctions or offers, attempts or agrees to auction real estate or
 3 assists an auctioneer by procuring bids at a real estate auction.

4 (6) Buys, sells, offers to buy or sell or otherwise deals in options on
 5 real estate.

6 (7) Assists or directs in the procuring of prospects calculated to result
 7 in the sale, exchange or lease of real estate.

8 (8) Assists in or directs the negotiation of any transaction calculated
 9 or intended to result in the sale, exchange or lease of real estate.

10 (9) Engages in the business of charging an advance listing fee.

11 (10) Provides lists of real estate as being available for sale or lease,
 12 other than lists provided for the sole purpose of promoting the sale or lease
 13 of real estate wherein inquiries are directed to the owner of the real estate
 14 or to real estate brokers and not to unlicensed persons who publish the list.

15 (g) "Commission" means the Kansas real estate commission.

16 (h) "Exchange" means a type of sale or purchase of real estate.

17 (i) "Interest" means: (1) Having any type of ownership in the real
 18 estate involved in the transaction; or (2) an officer, member, partner or
 19 shareholder of any entity that owns ~~such~~ *the real estate involved in the*
 20 *transaction*, excluding an ownership interest of less than 5% in a publicly
 21 traded entity.

22 (j) "Lease" means rent or lease for nonresidential use.

23 (k) "Licensee" means any person licensed under this act as a broker
 24 or salesperson.

25 (l) (1) "Office" means any permanent location where one or more
 26 licensees regularly conduct real estate business as described in subsection
 27 (f) or a location that is held out as an office.

28 (2) "Office" does not mean a model home office in a new home
 29 subdivision if the real estate transaction files are maintained in the primary
 30 office or branch office.

31 (m) "Primary office" means a supervising broker's principal place of
 32 business for each company created or established by the broker.

33 (n) "Real estate" means any interest or estate in land, including any
 34 leasehold or condominium, whether corporeal, incorporeal, freehold or
 35 nonfreehold and whether the real estate is situated in this state or
 36 elsewhere, but does not include oil and gas leases, royalties and other
 37 mineral interests, and rights of way and easements acquired for the
 38 purpose of constructing roadways, pipelines, conduits, wires and facilities
 39 related to these types of improvement projects for private and public
 40 utilities, municipalities, federal and state governments, or any political
 41 subdivision. For purpose of this act, any rights of redemption are
 42 considered to be an interest in real estate.

43 (o) "Rebate" means the return of all or part of any commission or

^
 Insert definition from draft regulation on pg. 3 of testimony.

1 *compensation paid to a licensee in any transaction that has as its purpose*
 2 *the purchase of real estate at a price different from the price specified in*
 3 *the closing statement.*

4 (p) "Salesperson" means an individual, other than an associate broker,
 5 who is employed by a broker or is associated with a broker as an
 6 independent contractor and participates in any activity described in
 7 subsection (f).

8 (q) "Supervising broker" means an individual, other than a branch
 9 broker, who has a broker's license and who has been designated as the
 10 broker who is responsible for the supervision of the primary office of a
 11 broker and the activities of salespersons and associate brokers who are
 12 assigned to ~~such~~ *the* office and all of whom are licensed pursuant to
 13 ~~subsection (b) of~~ K.S.A. 58-3042(b), and amendments thereto.
 14 "Supervising broker" also means a broker who operates a sole
 15 proprietorship and with whom associate brokers or salespersons are
 16 affiliated as employees or independent contractors.

17 Sec. 2. K.S.A. 2017 Supp. 58-3062 is hereby amended to read as
 18 follows: 58-3062. (a) No licensee, whether acting as an agent, transaction
 19 broker or a principal, shall:

20 (1) Fail to account for and remit any money which comes into the
 21 licensee's possession and which belongs to others.

22 (2) Misappropriate moneys required to be deposited in a trust account
 23 pursuant to K.S.A. 58-3061, and amendments thereto, convert ~~such~~ *the*
 24 moneys to the licensee's personal use or commingle the money or other
 25 property of the licensee's principals with the licensee's own money or
 26 property, except that nothing herein shall prohibit a broker from having
 27 funds in an amount not to exceed \$100 in the broker's trust account to pay
 28 expenses for the use and maintenance of ~~such~~ *the* account.

29 (3) Accept, give or charge any ~~undisclosed~~ rebate ^{or undisclosed}
 30 commission. that is not disclosed in the purchase contract

31 (4) Pay a referral fee to a person who is properly licensed as a broker
 32 or salesperson in Kansas or another jurisdiction or who holds a corporate
 33 real estate license in another jurisdiction if the licensee knows that the
 34 payment of the referral fee will result in the payment of a ~~an undisclosed~~
 35 rebate by the Kansas or out-of-state licensee. unless disclosed in the purchase contract and

36 (5) Represent or attempt to represent a broker without the broker's closing
 37 express knowledge and consent. statement.

38 (6) Guarantee or authorize any person to guarantee future profits that
 39 may result from the resale of real property.

40 (7) Place a sign on any property offering it for sale or lease without
 41 the written consent of the owner or the owner's authorized agent.

42 (8) Offer real estate for sale or lease without the knowledge and
 43 consent of the owner or the owner's authorized agent or on terms other