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To: Senate Commerce Committee  
From: Patrick Vogelsberg, VP of Governmental Affairs  
Date: February 12th, 2019

Re: Testimony in support of SB 42, defining the term “rebate” for the purposes of the Kansas Real Estate Brokers’ and Salespersons’ License Act.

Honorable Chairwoman Lynn and members of the Senate Commerce Committee:

On behalf of the Kansas Association of REALTORS® (KAR), thank you for the opportunity to appear before you today in support of SB 42, which would provide a definition of the term “rebate” for the purposes of the Kansas Real Estate Brokers’ and Salespersons’ License Act (KREBSLA). Through the comments expressed herein, we hope to provide additional legal and public policy context to the discussion on this issue.

KAR represents nearly 10,000 members involved in residential, agricultural and commercial real estate and has advocated on behalf of the state’s property owners for over 95 years. REALTORS® serve an important role in the state’s economy and are dedicated to working with our elected officials to create better communities by supporting economic development, a high quality of life and providing affordable housing opportunities while protecting the rights of private property owners.

#### Current Law

Kansas is one of ten states that ban rebates in real estate transactions. The others are Alabama, Alaska, Iowa (when two or more brokers are used), Louisiana, Mississippi, Missouri, Oklahoma, Oregon, and Tennessee.<sup>1</sup>

The statute states:

Prohibited acts. (a) No licensee, whether acting as an agent, transaction broker, or a principal, shall...(3) [a]ccept, give or charge any rebate or undisclosed commission.

Furthermore, K.S.A 58-3062(a)(4) goes on to state that it is unlawful for a licensee to:

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 Legislature has not provided in statute a definition of “rebate.”

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<sup>1</sup> The U.S. Department of Justice Anti-Trust Division has a section of their website dedicated to rebates in real estate transactions: <https://www.justice.gov/atr/rebates>.

## History of Rebate Prohibition in Kansas

The Kansas real estate brokers' and salespersons' license act (KREBSLA)<sup>2</sup> was first discussed in 1979 with the introduction of 1979 SB 198. This legislation was put forth by the Kansas Real Estate Commission and the Kansas Association of REALTORS®. This legislation did not pass in 1979, but was sent for further study by the Special Committee on Federal and State Affairs during the summer of 1979.

After study, the legislation was reintroduced in the 1980 Legislative Session as 1980 SB 519. Both 1979 SB 198 and 1980 SB 519 contained a prohibition on rebates in real estate transactions. Unlike the statute as it exist today, the language as introduced read, “No licensee shall:...[a]ccept, give or charge any undisclosed commission or rebate.” It was only after amendment in committee that “rebate” was moved ahead of the term “undisclosed” in the statute, making rebates illegal regardless of whether they were disclosed or undisclosed.<sup>3</sup> Ultimately, 1980 SB 519 passed in the 1980 Session and was enacted into law.<sup>4</sup>

When the prohibition on rebates was expanded in 1989 to reference the payment of referral fees as we see today in K.S.A. 58-3062(a)(4), the Kansas Legislature did not see the need to define “rebate”.<sup>5</sup> Furthermore, no legislative intent on what is or is not a rebate can be gleaned from reviewing the testimony and committee minutes from the 1979 and 1980 Kansas Legislative Sessions as KREBSLA was being worked on at the Legislature.

In 2004 the prohibition on licensees offering prizes, gifts, and gratuities was repealed. As a result, the question of what constituted a permitted gift or gratuity and what constituted an illegal rebate arose. To give the industry guidance, KREC issued non-legally binding guidance on the subject which indicated that anything of value provided to a principal in a real estate contract under 0.5% of the purchase price would not be considered a rebate.

However, KREC revised its guidelines for permissible gifts and gratuities effective August 29, 2016. In doing so, the Commission eliminated the previous 0.5% threshold for rebates (anything under 0.5% of the purchase price of a home would not be considered a rebate).

## Regulatory Approach to a Definition of Rebates

It is apparent that the lack of a precise definition of “rebate” as it pertains to KREBSLA has left many in the industry without clear legal parameters as to what would be considered an illegal rebate and what would continue to be considered a permissible gift or gratuity.

With this in mind, KREC pursued promulgating a regulation defining the term. KAR supported the regulatory definition during the approval process. However, in October of 2017, KREC decided to indefinitely table the proposed regulation defining “rebate” and instead pursue the legislative option of a definition. Before seeking legislation, KREC decided to request a Kansas Attorney General’s Opinion. This opinion was released in late 2018.<sup>6</sup>

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<sup>2</sup> K.S.A. 58-3034 through 58-3085.

<sup>3</sup> Minutes from Kansas Federal and State Affairs Committee, March 6<sup>th</sup>, 1980.

<sup>4</sup> 1980 Kan. Sess. Laws Ch. 164 §29 (codified today at K.S.A. 58-3062(a)(3)).

<sup>5</sup> 1989 Kan. Sess. Laws Ch. 167 §7.

<sup>6</sup> Kan. Att’y Gen. Op. No. 2018-17 (December 12, 2018).

## 2018 HB 2494 and SB 425

During the 2018 legislative session, interested party USAA introduced 2018 HB 2494. HB 2494 would have provided a definition for the term “rebate,” but significantly, would have legalized rebates as long as they were disclosed.

KAR ultimately opposed HB 2494 at the time, instead wanting to wait for the AG’s opinion in hopes that it would provide guidance on what, if any, legislative action was needed.

Similarly, 2018 SB 425 was a version is largely a similar to 2018 HB 2494 in legalizing disclosed rebates. 2018 SB 435 definition mirrored the draft regulation defining "rebate" that was proposed by KREC (and supported by KAR). 2018 SB 425 also specified the timing and manner of the disclosure in either the purchase agreement or listing agreement or addenda thereto. 2018 SB 425 did not have a hearing during the 2018 session.

## Attorney General’s Opinion

In December 2018, the Kansas Attorney General’s Office issued its opinion on the request from KREC. The opinion states that, “[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.”<sup>7</sup>

This opinion seemingly permits the unlimited use of gift cards as long as the gift card cannot be used to pay for the commission or purchase price.

## KREC Response to Attorney General’s Opinion

At its December 2018 meeting, KCREC felt that it remains necessary to provide a statutory definition and directed staff to introduce legislation doing such. Senate Bill 42 is this legislation.

SB 42 provides the following definition:

*"Rebate" means 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" includes 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.*

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<sup>7</sup> Kan. Att’y Gen. Op. No. 2018-17 at 5.

KAR's Position on SB 42

KAR believes that there is legal uncertainty in regards to rebates. This uncertainty needs to be eliminated because it clouds competition in the real estate industry leading to an unequal playing field. While the AG's opinion does provide guidance, it should be noted that an attorney general's opinion is not law similar to a court of jurisdiction's opinion. Therefore, we believe it would be best to have a codified definition. KAR supports SB 42. The definition is substantively similar to previous versions that KAR has supported.

Thank you for the opportunity to appear and provide testimony on our support for SB 42. KAR request that the committee act on SB 42 favorably.

Respectfully submitted,

A handwritten signature in black ink that reads "Patrick Vogelsberg". The signature is written in a cursive, flowing style.

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