Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, KS 67203

Nola Foulston
District Attorney

Sharon Werner
Chief Attorney
Consumer Fraud Division

Testimony Opposing SB 106 Submitted On Behalf of the Office of District Attorney Nola Foulston 18th Judicial District

To: The Honorable Thomas C. Owens, Chairperson and Members of the Senate Committee on Judiciary.

On behalf of the Office of District Attorney Nola Foulston, 18th Judicial District, thank you for the opportunity to submit written testimony to this committee regarding Senate Bill 106.

Our office desires to bring to this committee's attention certain concerns regarding Senate Bill 106 which proposes amendments to the Kansas Consumer Protection Act (KCPA) specifically K.S.A. 50-623, 50-634 and 50-636 and K.S.A. 2010 Supp. 50-626 repealing the existing sections.

Section I. Brief Overview

Senate Bill No. 106 contains five sweeping revisions to the KCPA which represents a clear step in the wrong direction for consumer protection in this State.

Section II. Brief Historical Perspective

Since its inception, the Kansas Consumer Protection Act ("KCPA"), which was closely modeled after the Federal Trade Commission Act, has been under attack by unscrupulous suppliers decrying the act is overly broad and should be limited or preempted by other federal and state legislation.

The current proposal for new legislation found in Senate Bill No. 106 (SB 106) is no different, and ostensibly denotes a step back in time toward Kansas' old Buyer Protection Act of 1968 ("BPA") which limited protection to consumers.

In 1973, after a nationwide push spearheaded by the Federal Trade Commission ("FTC"), Kansas, like the majority of States, adopted its version of the newly proposed uniform consumer protection laws. This new legislation was codified under K.S.A. 50-623 *et seq.*, and became known as the Kansas Consumer Protection Act (KCPA).

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The KCPA currently extends its reach to protect Kansas consumers in many different areas of commerce including: (1) receipt of unsolicited merchandise and credit cards; (2) the sale of merchandise or services; (3) waivers or agreements to forego legal rights; (4) unbargained-for warranty disclaimers; (5) unconscionable practices; (6) advertising; (7) telemarketing; (8) home solicitations; (9) real estate transactions; (10) automobile lemon law; (11) collision damage waivers; (12) invention promotion services; (13) handling of credit card information; (14) no-call list; (15) lease-purchase agreements; (16) prize notifications; (17) assistive devices for major life activities; (18) slamming and cramming by telecommunication providers; (19) profiteering from disasters; (20) commercial electronic mail; (21) sale of cigarettes; (22) fair credit reporting; (23) loan brokers; and (24) credit services organizations.[1]

The KCPA provides that the Attorney General or the District or County Attorney shall have the authority to enforce its provisions. Virtually all of the provisions listed under the KCPA contain subject matter that is also regulated to some degree by other state and federal statutes and/or agency regulation, including by the FTC. This overlap was contemplated by both the FTC and our legislature when enacting our consumer protection law. The version intentionally chosen by our legislature did not include the language now proposed under SB 106[2], but rather enjoined "all types of deceptive trade practices. . . [and declared unlawful] false, misleading, or deceptive acts or practices in the conduct of any trade or commerce," not just those prohibited or declared to be a violation of Section 5(a) (1) of the FTC Act (15 U.S.C. 45(a) (1), as HB 2795 ostensibly now seeks to accomplish.

At the time of the creation of the KCPA, our legislature understood and incorporated this important interplay between state and federal statutes and agencies and the KCPA.

Section III. Question Presented:

Would passage of SB 106 adversely impact protections afforded to consumers under the Kansas Consumer Protection Act?

Yes, these provisions literally eviscerate consumer protection in this state. Each of these newly proposed sections is discussed below.

Section IV. Analysis

It is important to understand there is established law that states have the right and authority to police deceptive and unfair business practices existing or coming within their borders, irrespective of what the FTC or federal courts ultimately decide. There is a ceiling on state regulation when in conflict with federal law which precludes states

[1] See K.S.A. 50-617 through K.S.A. 50-1132.

[2] "[I]t is the intent of the legislature in construing this act [KCPA], courts shall be guided by the policies of the Federal Trade Commission and interpretations given by the Federal Trade Commission and federal courts to section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1)."

from abrogating federal law by lessening standards, not setting stricter standards.

As discussed above, in 1973 our legislature adopted its own version of a uniform consumer protection law as encouraged by the FTC. Now our legislature, through proposed Section 2(b) and (c), wants to do exactly the opposite of what our legislature intended in 1973 by (1) giving deference to the policies and interpretations of the FTC and (2) essentially giving back to the FTC regulation of consumer issues in Kansas by providing that the KCPA shall not apply to transactions otherwise regulated by the FTC or any other regulatory body acting under authority of the United States.

A. Section 2(b)

Section 2 (b) provides:

> *It is the intent of the legislature than in construing the Kansas consumer protection act, courts shall be guided by the policies of the federal trade commission and interpretations given by the federal trade commission and the federal courts to section 5(a) (1) of the federal trade commission act, 15 US.C. section 45 (a) (1).*

The word "guided" when read in conjunction with proposed Section 2 (c) looks more like "bound" by the policies and interpretations of the FTC. FTC rules and decisions are only guiding, not binding. States are not prohibited from adopting consumer protection legislation or rules that are more restrictive that those of the FTC. Thus, the proposed language is not needed. Additionally, the FTC has the tall task of reviewing deception and unfair trade practices on a national level. The policies and interpretations issued by the FTC are shaped not by the need to protect consumers within the borders of a particular state but by sweeping enforcement of "big picture" issues. Only the Kansas legislature and Kansas courts are appropriately positioned to "guide" the protection of Kansas consumers.

B. Section 2(c)

Section 2 (c) curbs state consumer protection enforcement as it provides:

> "The Kansas consumer protection act shall not apply to actions or transactions otherwise permitted or regulated by the federal trade commission or any other regulatory body or officer acting under statutory authority of this state or the United States." (Emphasis supplied).

First, proposed Section 2 (c) takes away our State Attorney General's and District and County Attorneys' enforcement powers in any instances where the FTC or any other regulatory agency or officer acting under color of state or federal statute has authority. **This is far reaching and will have a greater impact than can be addressed herein**. Many consumers within our state will simply slip through the cracks. **The KCPA was designed with FTC input, to help create a safety net for consumer protection at the state level.** The FTC and other state agencies are not equipped to do much more than administrative enforcement which often requires a compliant supplier. The KCPA gives authority to the State Attorney General or District or County Attorney to file a civil action with an injunction in local courts in order to quickly stop predatory business practices. This process is relatively swift and provides for immediate consumer redress. The proposed language eliminates much of the individual consumer remedy and consumers would be relegated to filing independent civil actions against wrongdoers.

Second, proposed Section 2 (c) which provides the KCPA shall not apply in transactions otherwise regulated by the FTC or other regulatory body or officer of the United States, represents an affirmative nod to preemption even though where state consumer protection is concerned, there is widely held presumption **against** federal preemption because this is an area falling within states' traditional police powers. In areas that states have traditionally occupied, their police powers are generally not superseded absent clearly expressed and manifest purpose of Congress to do so.

Third, The Federal Trade Commission Act of 1914 (15 U.S.C §§ 41-58, *as amended*) started the Federal Trade Commission, a bi-partisan body of five members appointed by the President, authorized to issue cease and desist orders to large corporations to curb unfair trade practices. The Federal Trade Commission Act does not give individuals a private cause of action. Despite no private cause of action for individuals under the FTC Act, proposed Section 2(c) would not allow individual consumers to file an action under the KCPA because it is an area regulated by the FTC.

Fourth, the FTC Act and many other federal and state statutes regulate business practices that involve consumers but may not necessarily provide redress or restitution for the individual consumer and may not provide a private cause of action. Thus, because Section 2 (c) provides that the KCPA "shall not apply to actions or transactions otherwise permitted or regulated by the federal trade commission or any other regulatory body or officer acting under statutory authority of this state or United States" a Kansas consumer would have no action under the KCPA and may have no private cause of action whatsoever; or, if a private cause of action was allowed, the consumer would be required to file a private federal or state action – the cost of which is generally prohibitive to individual consumers who are victims of deceptive or unconscionable practices by a supplier.

C. Section 3

Section 3 further amends K.S.A. 50-624 eliminating all provisions relating to agriculture and protection of our farmers, husband and wife transactions, family partnerships, sole proprietorships and all transactions for any purpose other than person, family or household purposes. Kansas in an agricultural state. These consumers are currently included in the KCPA as often they do not have the necessary resources to fight scam artists.

D. Section 4

Section 4 amends K.S.A. 50-634 (2) (b) and limits individual consumer remedies predicated only upon suffering an actual loss as a result of a violation. This is further defined as the difference between the amount paid by the consumer for the goods or service and the actual market value of the good or service that the consumer actually received. This provision also eliminates suits against suppliers who commit unconscionable acts or practices "before or after the transaction" as currently allowed under K.S.A. 50-627.

This is bad public policy as it eliminates the ability of the Kansas Attorney General or any District or County Attorney to stop violations until consumers are actually damaged. An example is a remodeling or roofing company who engages in door to door sales but fails to include in its contract the mandatory three day right to cancel. These events could not be the subject of a KCPA action stopping such practices unless and until a consumer actually signed a contract and suffered actual damages.

Additionally, this hurts the consumer because often times a supplier's conduct is quite egregious and widespread, yet an individual consumer's loss might be minor or difficult to quantify. In such instances, consumers are reluctant to report and pursue enforcement against the supplier because they know there will be little to compensate them for their time and effort in pursuing and helping to police such conduct.

E. <u>Section 5</u>

Proposed Section 5 repeals the current K.S.A. 50-636 (Civil penalties) and makes a violator only liable to pay civil penalties to the state or county, rather than to either the aggrieved consumer or state or county. Often, a consumer's actual damages are nominal but it is the prospect of a civil penalty that convinces the supplier to suspend its deceptive practices. Where a consumer files a private KCPA action, there would be no award of civil penalties to the state or county as neither is a party and a nominal award to the consumer would do little to stem pervasive deceptive practices and, thus have a chilling factor on a consumer's decision to pursue an action against an unscrupulous supplier. This results in bad policy for all consumers, upstanding Kansas businesses, and the state as a whole.

<u>VI. Conclusion</u>

These proposed amendments are not innocuous. Make no mistake about this legislation - it undercuts and/or eliminates our State courts' ability to declare what acts or practices constitute unfair and deceptive acts within our own borders; instead those at the federal level will decide what constitutes unfair or deceptive business practices within our state. Passage undoubtedly eviscerates the ability of the Kansas Attorney General, the District and County Attorneys to police unfair and deceptive trade practices affecting our local consumers by virtually conceding preemption by the FTC or other state agencies where there exists any regulation of a particular consumer matter.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Sharon Werner
Assistant District Attorney
Chief Attorney, Consumer Fraud Division
Eighteenth Judicial District