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To: House Commerce, Labor and Economic Development Committee
From: Patrick Vogelsberg
Date: February 12th, 2018
Subject: Opposition to HB 2494

Honorable Chairman Mason and members of the House Commerce, Labor and Economic Development Committee, thank you for the opportunity to appear in front of you today on behalf of the Kansas Association of REALTORS® (KAR) in opposition to the provisions of HB 2494. Through the comments provided in our testimony, we hope to provide some additional legal and public policy content on this issue.

KAR represents over 9,500 members involved in both residential and commercial real estate and has been an advocate 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 on Rebates in Real Estate Transactions

It is illegal in Kansas for a real estate broker or salesperson to accept, give or charge a rebate in a transaction under the Kansas real estate brokers' and salespersons' license act (KREBSLA).

K.S.A. 58-3062 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" for the purposes of KREBSLA.

History of Rebate Prohibition in Kansas

Legislation to enact the KREBSLA¹ was first introduced in 1979's SB 198. 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 the interim study, legislation was reintroduced in the 1980 Legislative Session in SB 519. Both 1979 SB 198 and 1980 SB 519 contained a prohibition on rebates in real estate transactions. Unlike the statute as it exists today, the language as introduced read, "No licensee shall: ...[a]ccept, give or charge any undisclosed commission or rebate." A committee amendment moved the term "rebate" ahead of the term "undisclosed" in the statute, showing the Legislature's intent of making rebates illegal regardless of whether they were disclosed or undisclosed.² Ultimately, 1980 SB 519 passed and was enacted into law.³ Therefore, rebates have been illegal in Kansas for almost 40 years. This prohibition was expanded to include rebates connected with referral fees in 1989, reflected in the statute as it exist today in K.S.A. 58-3062(a)(4)⁴.

At no point did the Legislature find the need to define the term "rebate" in statute. In 2004 the prohibition on licensees offering prizes, gifts, and gratuities was repealed⁵, thereby creating the need to distinguish between a legal gift, prize or gratuity and an illegal rebate.

To give the industry guidance, the Kansas Real Estate Commission (KREC), which has jurisdiction to enforce KREBSLA on its licensees, issued non-legally binding guidance on the subject which indicated that anything of value provided to a principal in a real estate transaction 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. It is our belief that KREC did this because of a concern by the Commission that it lacked the necessary statutory authority to make such a distinction.

Regulatory Efforts

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 the Commission would consider an illegal rebate and what would continue to be considered a permissible gift or gratuity. With this in mind, the Commission proposed a regulation that would define "rebate" as it pertains to K.S.A. 58-3062(a)(3) and (4). (See Attached). Our association reviewed and supported the proposed regulatory definition of "rebates".

KREC held a public hearing on the proposed regulation on June 19th, 2017. At the public hearing objections were raised from some in attendance. Over the following months the Commission revisited the issue, but

¹ K.S.A. 58-3034 through 58-3085.

² Minutes from Kansas Federal and State Affairs Committee, March 6th, 1980.

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

⁴ 1989 Kan. Sess. Laws Ch. 167 §7 (codified today at K.S.A. 58-3062(a)(4)).

⁵ 2004 Kan. Sess. Laws Ch. 180 §6.

ultimately decided to table consideration of the regulation indefinitely and pursue a statutory definition in the Legislature.

In December of 2017, the Commission decided request a Kansas Attorney General's Opinion on the matter before introducing legislations of its own. Our association supports seeking the Attorney General's opinion as it will provide guidance to the interested parties on whether a legislative remedy is needed.

HB 2494

The 110 members of the KAR Board of Directors voted unanimously to oppose HB 2494 at their February 8th, 2018 board meeting.

First, KAR would advise the Legislature that any consideration of this issue is premature until the Attorney General's Opinion on the matter is issued. This is not likely to occur until after the 2018 Session. It is our belief that the Attorney General's Opinion will provide guidance to both the interested parties and the Legislature as to what changes, if any, are needed to KREBSLA.

Our reason for this approach is that it remains questionable whether legislation is needed at all to define "rebates." In considering Kansas statutory construction, K.S.A. 77-201 tells us, "[w]ords and phrases shall be construed according to the context and the approved usage of the language, but technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings." We are not aware of any Kansas case law that would provide us with a peculiar or appropriate meaning for "rebate" as K.S.A. 77-201 suggests.

Our Kansas Supreme Court has told us, "[w]hen called upon to interpret a statute, the intent of the legislature expressed through the language in the statute governs. When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. Ordinary words are given their ordinary meanings. A statute should not be read to add language that is not found in it or to exclude language that is found in it."⁶

The word "rebate" appears quite common in today's society and consulting dictionaries one finds consistent elements to its definition. "Rebate" has been defined as, "[a] return of part of a payment, serving as a discount or reduction."⁷ Another definition is, "a refund or deduction of part of a payment, price, or charge."⁸

Given that consistent definitions of "rebate" are within grasp, it is reasonable to assume the Attorney General's Office would likewise use a substantially similar definition when analyzing the question presented. In doing so, the industry would be provided guidance on how the Attorney General's counsel assigned to KREC would pursue complaints involving rebates. On the other hand, the Attorney General's Opinion could indicate that the term "rebate" is vague and want of legislative clarity. In either scenario, all concerned will be better advised on how to proceed.

⁶ *Kansas v. Paul*, 285 Kan. 658, 660 (2008) (citations omitted).

⁷ *Black Law Dictionary* 1381 (9th ed. West 2009).

⁸ Merriam-Webster Dictionary, *Rebate*, <https://www.merriam-webster.com/dictionary/rebate#legalDictionary> (accessed February 9, 2018).

Second, KAR believes that if any legislative solution is seriously considered at present, that solution is to define the term “rebate” only and not upend decades of policy by making illegal rebates, legal. This could be accomplished by striking the amendments on lines 29 and 34 on page 3 of the bill. Substantively, this would leave the new definition of “rebate” on pages 2-3 of the bill remaining. If the committee chose to pursue this path, KAR would request the committee to consider for guidance the proposed regulation that defines rebates. See attached.

Lastly, if the committee desires to move forward with the substance of HB 2494, then significant technical issues with the bill will need to be addressed. Specifically, it would need to be clear who is responsible for making the disclosure, the manner of the disclosure (separate form or party of the sales contract), the timing of the disclosure (at the time of offer or closing), and the substance of the disclosure (the amount of rebate and who is it paid to – buyer or seller). Further, in the situation where a referral is paid to an out of state licensee, what accountability or assurances exist that the rebate will be properly handled? Lastly, what consideration should be given to whether the current prohibition on paying a commission or compensation to unlicensed individuals (including buyers and sellers) would need to be accommodated for when considering that proceeds of a commission will be used to pay for the rebate. See K.S.A. 58-3062(a)(10).

Conclusion

As the committee can see, many considerations still need to be deliberatively pursued. KAR has had ongoing discussions with interested parties on this issue since the summer of 2017 and we expect to have continued, positive dialogue as we seek the mutual desire of bringing clarity to the issue of rebates. However, at this point KAR request the committee not take further action on HB 2494.

Thank you for the opportunity to provide comments on this very important issue.

Respectfully submitted,



Patrick Vogelsberg
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Kansas Association of REALTORS®

Attachment

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

FEB 14 2017

APPROVED BY



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