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To: Senate Commerce Committee  
From: Mark Tomb, VP of Governmental Affairs  
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Re: Background Briefing on Rebates in Real Estate Transactions; Kansas Attorney General Opinion 2018-17; 2019 SB 42; and Possible Amendment Regarding Disclosure and Capping Rebates at 0.5%.

### **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), Kansas, 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.”

### **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 (KREC) and the Kansas Association of REALTORS®. After study, the legislation was reintroduced in the 1980 Legislative Session as 1980 SB 519. Both early bills 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.” 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>

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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>.

<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)).

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 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).

### **Prior Regulatory Approach to a Definition of Rebates Abandoned**

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 KREC would consider an illegal rebate and what would continue to be considered a permissible gift or gratuity. With this in mind, the KREC requested their legal counsel to draft a proposed regulation that would define “rebate” as it pertains to K.S.A. 58-3062(a)(3) and (4). Over the first half of 2017, the draft regulation advanced through the regulatory approval process, which requires approval by the Kansas Department of Administration and Attorney General, as well as review by the Joint Committee on Administrative Rules and Regulations of the Kansas Legislature. Following the public hearing on the regulations, KREC decided to hold off on this approach and instead pursued a Kansas Attorney General’s Opinion on whether a hypothetical scenario of a referral fee being paid to a third party licensee where a principal in a transaction then received a gift card from the third party or a closely affiliated entity would violate the prohibition on rebates. This opinion was released in December of 2018.<sup>6</sup>

### **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 use of gift cards as long as the gift card cannot be used to pay for the commission or purchase price. This practically opens the door on providing money back to a principal in a real estate transaction as long as the exchange is consummated after closing.

### **SB 42**

At its December 2018 meeting, KREC felt that it remained necessary to provide a statutory definition and directed staff to introduce legislation doing such. Gifts, prizes and gratuities are legal under Kansas license law. Rebates are illegal, though the AG’s Opinion arguably opens the door for gift cards. The statute should reflect clear parameters as to what is a rebate. Senate Bill 42 was introduced on January 24, 2019. SB 42 had a hearing on February 12, 2019 in Senate Commerce, but did not advance out of committee last year. SB 42 provides the following definition:

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

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

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

*"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.*

KAR supports SB 42 as written, but if an alternative approach was needed, then KAR would offer compromise language that would require disclosure of rebates, with rebates being capped at 0.5% of the purchase price of the property. Possible Framework: Cap "rebates" at 0.5% by amending K.S.A. 58-3062(a)(3) and (4).

58-3062(a) No licensee, whether acting as an agent, transaction broker or principal shall: ...

(a)(3) Accept, give or charge any ~~rebate or~~ undisclosed commission

(a)(4) [amended] Provide a rebate more than 0.5% of the purchase price as reflected in the contract for sale or 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 that exceeds 0.5% of the purchase price as reflected in the contract for sale.

### **Conclusion**

The Kansas Association of REALTORS® would urge members of the Senate Commerce Committee to support **SB 42**, in order to clarify what is a rebate in Kansas law.