



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT  
ATTORNEY GENERAL

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.AG.KS.GOV

December 12, 2018

ATTORNEY GENERAL OPINION NO. 2018- 17

Erik Wisner, Executive Director  
Kansas Real Estate Commission  
Jayhawk Tower, Suite 404  
700 S.W. Jackson  
Topeka, KS 66603-3785

Re: Personal and Real Property—Real Estate Brokers and  
Salespersons; Licensing—Prohibited Acts; Rebate; Referral Fee:  
Gift Certificate

Synopsis: 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. Cited herein: K.S.A. 40-966; 40-2403; K.S.A. 2018 Supp. 40-2404; K.S.A. 40-3513; K.S.A. 2018 Supp. 58-3034; 58-3035; 58-3062; K.S.A. 65-1516; 65-2837; L. 2008, Ch. 155, § 5; L. 2004, Ch. 180, § 6; L. 1995, Ch. 252, § 20; L. 1991, Ch. 153, § 5; L. 1989, Ch. 167, § 7; L. 1980, Ch. 164, § 29.

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Dear Mr. Wisner:

On behalf of the Kansas Real Estate Commission, you request our opinion regarding whether a licensee's participation in a particular referral scenario would constitute accepting or giving a rebate or paying a referral fee in violation of K.S.A. 2018 Supp. 58-3062(a)(3) or (4). You set out the scenario as follows:

A Kansas real estate licensee has entered into an agreement with an out-of-state company, which holds a corporate real estate license in another state, to be included in that company's referral network. As part of the referral agreement, the licensee agrees to pay the company a percentage of the licensee's commission from each referral that results in a closed sales transaction. The out-of-state company keeps a portion of that payment and forwards the rest to another company, which also holds a corporate real estate license in another state. The second company uses those funds to provide a gift card to the licensee's referred client upon closing. The amount of the gift card depends on the purchase price of the property; the greater the purchase price, the greater the amount of the gift card. The gift card is redeemable at hundreds of vendors but is not a universally-accepted form of payment such as cash. Because of their respective business relationships with the referral company, both the referred client and the Kansas licensee know the client will receive a gift card from the affiliated company if the transaction closes.<sup>1</sup>

The Real Estate Brokers' and Salespersons' License Act<sup>2</sup> (Act) provides for the licensure and regulation of brokers and salespersons who, for compensation, engage in the business of buying, selling, exchanging or leasing real estate.<sup>3</sup> Prohibited activities are set forth in K.S.A. 2018 Supp. 58-3062. The statute provides, in part:

(a) No licensee,<sup>4</sup> whether acting as an agent, transaction broker or a principal, shall:

.....

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

(4) 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.<sup>5</sup>

In the scenario presented, the issue is whether conveyance of the gift card to the referred client is payment of a "rebate" to the referred client of any commission, fee or purchase price paid by the referred client.

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<sup>1</sup> Eric Wisner, Correspondence, February 19, 2018.

<sup>2</sup> K.S.A. 58-3034 *et seq.*

<sup>3</sup> See K.S.A. 2018 Supp. 58-3035(c), (f), (k) and (o).

<sup>4</sup> "Licensee" means any person licensed under this act as a broker or salesperson." K.S.A. 2018 Supp. 58-3035(k).

<sup>5</sup> K.S.A. 2018 Supp. 58-3062(a).

The prohibition against accepting, giving or charging any rebate or undisclosed commission has been in existence since the inception of the Act.<sup>6</sup> The provision precluding payment of a referral fee that results in the payment of a rebate was added nine years later.<sup>7</sup> The Act, however, has never defined “rebate.” In determining the meaning of “rebate,” we follow the rules of statutory construction.

[T]he fundamental goal of statutory construction is to ascertain the intent of the legislature. But in determining legislative intent, the starting point is not legislative history; rather, we first look to the plain language of the statute, giving common words their ordinary meaning. If the plain language of a statute is unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.<sup>8</sup>

“Rebate” is defined as: “a) to give back (part of an amount paid) b) to make a deduction from (a bill)”<sup>9</sup> and constitutes “1. [a] return of part of a payment, serving as a discount or reduction. 2. [a]n amount of money that is paid back when someone has overpaid.”<sup>10</sup> The Wisconsin Court of Appeals applied the definition from Black’s Law Dictionary when it determined that “the words ‘rebates,’ ‘refunds,’ and ‘discounts’ mean essentially the same thing – a reduction or credit that is tied to the price of the good or service being purchased by the recipient of the reduction or credit.”<sup>11</sup> “[T]o be a ‘discount,’ the ‘payment or allowance’ must be a reduction from the price that would be paid if the ‘discount’ were not given.”<sup>12</sup> “A rebate is something that is returned to a purchaser out of the purchase price of goods to accomplish a reduction of the purchase price.”<sup>13</sup> Payment of a portion of the price, even though unknown by the purchaser, has also been found to be a rebate.<sup>14</sup> Therefore, conveyance of the gift card in the scenario described above would violate K.S.A. 2018 Supp. 58-3062(a)(3) and (4)

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<sup>6</sup> See L. 1980, Ch. 164, § 29(a)(4). See also L. 2008, Ch. 155, § 5.

<sup>7</sup> See L. 1989, Ch. 167, § 7(a)(4). See also L. 1995, Ch. 252, § 20(a); L. 2008, Ch. 155, § 5.

<sup>8</sup> *Univ. of Kansas Hospital Authority v. Bd. of County Comm’rs of the Unified Gov’t of Wyandotte County/Kansas City*, 301 Kan. 993, 998-99 (2015) (internal citations and quotation marks omitted).

<sup>9</sup> Webster’s New World College Dictionary 1211 (5th ed. 2016).

<sup>10</sup> Black’s Law Dictionary 1458 (10th ed. 2009).

<sup>11</sup> *Tele-Port, Inc. v. Ameritech Communications, Inc.*, 248 Wis. 2d 846, 861-62, 637 N.W.2d 782, 790 (Wis. Ct. App. 2001).

<sup>12</sup> *Id.* at 862.

<sup>13</sup> *Shinn v. Oklahoma Alcoholic Beverage Control Bd.*, 1964 Ok. 63, 397 P.2d 157, 160 (Okla. 1964). See also *Prosperity Tieh Enterprise Co., Ltd. v. United States*, 42 CIT \_\_\_\_, 284 F.Supp.3d 1364, 1369 (2018) and *Papierfabrik August Koehler AG v. U.S.*, 38 CIT \_\_\_\_, 971 F.Supp.2d 1246, 1252 (2014) (19 C.F.R. § 351.102(b)(38) includes “rebate” as “any change in the price charged for . . . the foreign like product” that was “reflected in the purchaser’s net outlay”).

<sup>14</sup> *McGuire v. American Family Mutual Ins. Co.*, 448 Fed.Appx. 801 (10th Cir. 2011) (unpublished opinion) (insurance agent paid portion of annual premium on term life insurance policy unbeknown to insured; constituted an unfair method of competition or an unfair or deceptive act or practice in the business of insurance under K.S.A. 40-2403 and 40-2404(8)).

if it is a reduction of the amount paid by the referred client as the broker's commission or fee or the real property's purchase price.

In the scenario presented, there is no indication that the gift card may be applied towards the payment of the broker's commission or fee or the real property's purchase price. Under such circumstances, there is no reduction in the amount of commission, fee or purchase price paid by the referred client. Since the commission, fee or purchase price is not reduced, there is no rebate in violation of K.S.A. 58-3062(a)(3) or (4).

We note that a provision precluding the “[o]ffer[ing] or giv[ing] of prizes, gifts or gratuities which are contingent upon a client's listing, purchasing or leasing property” was included in the original Act.<sup>15</sup> In 1991, the provision was amended to state, “No licensee . . . shall: . . . (17) Offer or give prizes, gifts or gratuities that are contingent upon an agency agreement or the sale, purchase or lease of real estate.”<sup>16</sup> The prohibition against conferring prizes, gifts or gratuities “demonstrate[d] a clear expression of public policy by a Legislature committed to outlawing any form of prize, gift or gratuity by a real estate broker as an inducement to attract clients.”<sup>17</sup> The scenario presented by the Kansas Real Estate Commission would likely have violated these provisions. The statutory prohibition of offering or giving prizes, gifts or gratuities, however, was repealed in 2004.<sup>18</sup> Courts generally presume that when the Legislature revises an existing law, it intends to make a substantive change.<sup>19</sup>

Further evidence of such a change is found in legislative acts pertaining to other professions that include similar restrictions regarding the payment of rebates.<sup>20</sup>

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<sup>15</sup> See L. 1980, Ch. 164, § 29(a)(12).

<sup>16</sup> L. 1991, Ch. 163, § 5(a).

<sup>17</sup> Attorney General Opinion No. 98-53.

<sup>18</sup> L. 2004, Ch. 180, § 6.

<sup>19</sup> *State v. Pulliam*, 430 P.3d 39 (Kan. 2018).

<sup>20</sup> See, e.g., K.S.A. 40-966 (fire and casualty insurance; “No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow to give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance, except to the extent provided for in an applicable filing.”); K.S.A. 2018 Supp. 40-2404 (insurance agents; “The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance: . . . (8) *Rebates*. (a) Except as otherwise expressly provided by law, knowingly permitting, offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon; paying, allowing, giving or offering to pay, allow or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, selling, purchasing or offering to give, sell or purchase as inducement to such insurance contract or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.”); K.S.A. 40-3513

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As is the situation with the Real Estate Brokers' and Salespersons' License Act, none of the acts includes a definition of "rebate." Unlike the Real Estate Brokers' and Salespersons' License Act, the prohibitions in those acts are not limited to the payment of rebates, but include prohibitions against offering gifts, prizes and other inducements.<sup>21</sup> "[W]hen legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any items not expressly included in the specific list."<sup>22</sup>

The Legislature has shown that it is able to preclude licensees from engaging in conduct as set forth in the scenario. The provisions that would preclude such conduct are not currently included in the Act. 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.

Sincerely,

Derek Schmidt  
Attorney General

Richard D. Smith  
Assistant Attorney General

DS:AA:RDS:sb

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(mortgage insurance; "(c) Any mortgage guaranty insurance company which pays any commission or makes any unlawful rebate in violation of the provisions of this article shall be subject to the penalties prescribed in K.S.A. 40-2407 and 40-2411."); 65-1516 (optometrists; "(b) "Unprofessional conduct" means: . . . "(10) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations or associations."); 65-2837 (healing arts; "(b) 'Unprofessional conduct' means: . . . (19) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations, limited liability companies or associations.").

<sup>21</sup> See, *supra*, footnote 20.

<sup>22</sup> *In re Lietz Const. Co.*, 273 Kan. 890, 911 (2002).