



U.S. Department of Justice

Antitrust Division

RFK Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20001

June 16, 2017

Via Email

Erik Wisner
Kansas Real Estate Commission
Three Townsite Plaza
120 SE 6th Ave., Suite 200
Topeka, KS 66603
Erik.wisner@ks.gov

Re: Proposed Regulation K.A.R. 86-3-32

Dear Mr. Wisner:

I write to provide the views of the Antitrust Division of the U.S. Department of Justice regarding proposed regulation K.A.R. 86-3-32. It is our understanding that the Kansas Real Estate Commission will hold a public hearing on K.A.R. 86-3-32 on June 19, 2017. The Department is concerned that this regulation will cause significant harm to the competitive process and home buyers in Kansas.

Kansas state law bars real estate brokers and other licensees from offering "rebates," a term that is not defined by statute.¹ This ban on rebating part of a broker's commission impedes real estate brokers from competing on price, which in turn causes home buyers in Kansas to pay more in real estate broker commissions.²

While Kansas law prevents brokers from offering rebates, Kansas real estate brokers do compete by offering home buyers gift cards that are redeemable at specified retailers, like home

¹ See Kan. Stat. Ann. 58-3062(a)(3) ("No licensee, whether acting as an agent, transaction broker or a principal, shall: . . . [a]ccept, give or charge any rebate or undisclosed commission.").

² See generally United States Department of Justice, Antitrust Div. & Fed'l Trade Comm'n, Competition In the Real Estate Brokerage Industry, at 49-53 (April 2007), <https://www.justice.gov/atr/competition-and-real-estate-0>. The Department's previous investigations into rules restricting rebates have found that brokers often support these rules precisely because they restrict competition. Evidence uncovered during the Department's investigation into the Kentucky Real Estate Commission's rebate ban showed, for example, that brokers opposed repealing or modifying that ban because they believed that would result in a "bidding war" and "could lead to competitive behavior." Complaint at 3, *United States v. Kentucky Real Estate Comm'n*, 3:05-cv-00188 (March 30, 2005).

improvement or furniture stores. These gift cards provide significant value to home buyers as they often amount to several hundred dollars' worth of savings.

Proposed regulation K.A.R. 86-3-32 could significantly curtail this practice. As currently drafted, K.A.R. 86-3-32 would bar brokers and other licensees from offering gift cards and other similar gifts to home buyers, at least where the gift is agreed to by the broker and home buyer.³ If enacted, this rule could significantly impair competition, and increase the cost of purchasing a home for many home buyers in Kansas. Because Kansas law already prevents brokers from offering rebates, K.A.R. 86-3-32 could restrict one of the few remaining mechanisms by which brokers can compete on price.⁴

We understand that the Kansas Real Estate Commission may believe that it has the authority to adopt K.A.R. 86-3-32 as part of a duty to clarify the Kansas law prohibiting rebates. To the extent that the Commission does have this authority, we encourage it to use that authority to adopt a definition that does not further restrain an important dimension of price competition that benefits home buyers in Kansas.⁵

If you have any questions or require further information, please do not hesitate to contact Jeff Vernon at (202) 598-8197.

Respectfully Submitted,



Andrew Finch
Acting Assistant Attorney General

³ Under K.A.R. 86-3-32, "rebate" is defined to include "cash equivalent[s]," which in turn are defined as "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." The proposed regulation also states that "'rebate' shall not include any gift . . . that is not promised or agreed to by the licensee and the client or customer in advance."

⁴ Under antitrust law, restrictions on price competition are generally viewed with great skepticism. Agreements prohibiting price competition are normally treated as *per se* illegal—even where the agreement forbids one form of price competition (like rebates or gift cards) but not *all* forms of price competition. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648-49 (1980) (holding that agreement by wholesalers to eliminate interest-free credit was illegal *per se*). Such restrictions are not exempt from the antitrust laws when they are effectuated by state boards controlled by active market participants that did not receive active supervision from the state's government. *North Carolina Bd. of Dental Exam'rs v. F.T.C.*, 135 S.Ct. 1101, 1110 (2015).

⁵ We also note that Kansas law previously contained a separate provision that barred licensees from offering "gifts or gratuities which are contingent upon an agency agreement or the sale, purchase or lease of real estate." S. 404, 80th Leg. §3(11) (Kan. 2004). The Kansas legislature repealed this prohibition in 2004. *Id.* Proposed regulation K.A.R. 86-3-32 seems to have the same effect as the prohibition that the legislature has already eliminated. This legislative history offers another consideration that may counsel in favor of interpreting Kansas law to allow brokers to offer gift cards to home buyers, even when those gift cards are agreed to in advance by the broker and home buyer.