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Testimony in Opposition to Senate Bill 106
Presented to the Senate Judiciary Committee
By Jim Welch, Deputy Attorney General for Consumer Protection

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My name is Jim Welch. I am the Deputy Attorney General for the Division of Consumer Protection in the office of Attorney General Derek Schmidt. I submit written testimony in opposition to Senate Bill 106.

Senate Bill 106 proposes several dramatic changes to the Kansas Consumer Protection Act. Our office opposes this legislation for several reasons:

- It would substantially reduce the universe of Kansans whose consumer transactions are protected by the requirements of the KCPA by narrowing the definition of "consumer." Under this proposed new definition, even a mom-and-pop business that attempts to seek protection under the KCPA, either through a complaint to the attorney general or through a private cause of action, would be denied relief. Moreover, because even "sole proprietorship" would be eliminated from the definition of "consumer," any future consumer protection actions filed by our office would be necessarily subject the court to investigating the conduct of the consumer to ascertain whether he or she was acting in a business capacity or not.
- This bill also would have the effect of prohibiting the attorney general from prosecuting any consumer protection action against an out-of-state supplier. That is because, almost by definition, an out-of-state supplier who sells to a Kansas consumer is engaged in interstate commerce and subject to the jurisdiction of the Federal Trade Commission. Transactions within the FTC's jurisdiction are excluded from KCPA enforcement actions under this proposed bill. It seems rather peculiar to restrict the attorney general to prosecuting only Kansas companies or other suppliers for KCPA violations – while excluding out-of-state companies from the attorney general's enforcement.
- It would impede the State of Kansas from participating in most multi-state consumer protection actions. That is because the proposed bill provides that the KCPA does not apply to entities that also are regulated by the Federal Trade Commission – as most multi-state entities are. Most of the consumer recoveries the attorney general's office has received in recent years have come from multi-

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state actions and, consequently, the negative fiscal impact of this proposal on both Kansas consumers and the State of Kansas is substantial.

- It raises serious constitutional questions arising under the doctrine of separation of powers. The bill attempts to cause Kansas state courts to use federal common law and the actions of a federal agency in interpreting the Kansas Consumer Protection Act. If this provision is to have any meaning, it necessarily has the effect of causing Kansas courts to delegate to federal government entities the authority to interpret Kansas law. It is likely that constitutes an unlawful delegation of Kansas sovereign authority.
- The bill also substantially limits the ability of Kansas consumers to bring private causes of action under the KCPA. While that does not have a direct effect on the enforcement efforts of the Office of the Attorney General, it is likely that the office will see an increased number of complaints as private remedies become less available.

Our office was not aware of this proposal until after it was introduced. Consequently, we are not aware of what has motivated it or what its intent is. To the extent that concerns exist about the current KCPA or its application, we would be happy to visit with interested parties. The Attorney General makes that sort of communication with Kansans a priority.

We would ask, however, that this committee not advance this proposal.