

Report of the Health Care Stabilization Fund Oversight Committee to the 2018 Kansas Legislature

CHAIRPERSON: Gary Hayzlett

LEGISLATIVE MEMBERS: Senators Laura Kelly and Vicki Schmidt; and Representatives Eber Phelps and Richard Proehl

NON-LEGISLATIVE MEMBERS: Darrell Conrade, Dennis George, Dr. Jimmie Gleason, and Dr. James Rider (two health care provider provisions are vacant)

CHARGE

This Committee annually receives a report on the status of the Health Care Stabilization Fund and makes recommendations regarding the financial status of the Fund.

Health Care Stabilization Fund Oversight Committee

ANNUAL REPORT

Conclusions and Recommendations

The Health Care Stabilization Fund Oversight Committee considered two items central to its statutory charge: whether this committee should continue its work and whether a second, independent analysis of the Health Care Stabilization Fund (HCSF or the Fund) is necessary. This oversight committee continues in its belief that the Committee serves a vital role as a link among the HCSF Board of Governors, the health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the HCSF in providing stability in the professional liability insurance marketplace, which allows for more affordable coverage to health care providers in Kansas. The Committee is satisfied with the actuarial analysis presented and did not request the independent review.

The Committee considered information presented by the Board of Governors' representatives, including its required statutory report, the Board of Governors' actuary, and health care provider and insurance company representatives. The Committee agreed on the following recommendations and comments:

- **Actuarial report and health of the HCSF; provider surcharge rate recommendations.** The Committee notes the report provided by the Board of Governors' actuary reviewed the financial performance of the HCSF and outlined positive indicators, including a strong balance sheet and a solid income statement. The actuary reviewed options considered by and the recommendation made by the Board, which will result in a decrease in most surcharge rates for health care providers. The actuary indicated this rate reduction, a decline of about 2.6 percent from calendar year 2017 rates, will become effective January 1, 2018.
 - The Committee supports continued monitoring of indicators associated with enactment of 2014 law, including the relative loss experience among provider classes and rating by years of compliance for tail coverage. (As a result of 2014 law, tail coverage for inactive health care providers became effective immediately upon inactivation of the provider license and cancellation of professional liability insurance coverage.)
 - The Committee appreciates the constant effort on behalf of the Board of Governors and its staff to monitor the cash balance of the HCSF. The Committee notes the laddered investment strategy prescribed by statute and delegated to the Director of Investments at the Pooled Money Investment Board, which allows the Board of Governors to maintain its fiduciary duty as protector of the fiscal integrity of the Fund and its statutory duty to assure sufficient liquidity to pay claims in a timely manner.
- **Reimbursement of the HCSF.** The Committee notes the fulfillment of the reimbursement schedule established by 2010 SB 414. This law allowed for

reimbursement of deferred payments to the HCSF for administrative services provided to the self-insurance programs at the University of Kansas (KU) Faculty and Foundations and the University of Kansas Medical Center and Wichita Center for Graduate Medical Education (WCGME) residents for state fiscal years 2010, 2011, 2012, and 2013. The Committee notes normal reimbursements occurred starting July 1, 2013, and 20 percent of the accrued receivables (totaled \$7,720,422.23 on June 30, 2013) were paid each July 1, pursuant to the statutory schedule. The final payment of \$1,544,084.45 was received on July 1, 2017.

- **Telemedicine and *locum tenens*.** The Committee recognizes two contemporary issues of concern to the Board of Governors and Kansas health care providers. The Committee notes information presented by the Board of Governors and discussed with health care provider representatives and the Board's decision that non-resident telemedicine providers and *locum tenens* should be held to the same standards of accountability as any Kansas resident health care provider and, therefore, should be required to comply with the Health Care Provider Insurance Availability Act (HCPIAA). The Committee further notes the Legislative Coordinating Council assigned telemedicine legislation to the 2017 Special Committee on Health for its consideration and recommendations.
- **Health Care Provider Insurance Availability Act.** The Committee notes no amendments to this Act were submitted for its consideration.
- **Fund to be held in trust.** The Committee recommends the following language to the Legislative Coordinating Council, the Legislature, and the Governor regarding the HCSF:
 - The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the State General Fund (SGF). The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on behalf of each individual health care provider. Those payments made to the HCSF by health care providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the HCPIAA, the HCSF is required to be "held in trust in the state treasury and accounted for separately from other state funds"; and
 - Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the HCSF shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such Fund shall remain therein and not be credited to or transferred to the SGF or to any other fund.

Proposed Legislation: None.

BACKGROUND

The Committee was created by the 1989 Legislature and is described in KSA 2017 Supp. 40-3403b. The 11-member Committee consists of 4 legislators; 4 health care providers; 1 insurance

industry representative; 1 person from the general public at large, with no affiliation with health care providers or with the insurance industry; and the Chairperson of the HCSF Board of Governors or another member of the Board designated by the Chairperson. The law charges the Committee to report its activities to the Legislative Coordinating

Council (LCC) and to make recommendations to the Legislature regarding the Health Care Stabilization Fund (HCSF or the Fund). The reports of the Committee are on file in the Legislative Research Department.

The Committee met October 2, 2017.

COMMITTEE ACTIVITIES

Report of Willis Towers Watson

The Willis Towers Watson actuarial report serves an addendum to the report to the Board of Governors dated March 6, 2017, provided to the HCSF Board of Governors based on HCSF data as of December 31, 2016. The actuary addressed forecasts of the HCSF's position at June 30, 2017, and June 30, 2018, based on the company's annual review, along with the prior estimate for June 2017. The HCSF's position at June 30, 2017, was as follows: the HCSF held assets of \$285.87 million and liabilities of \$236.42 million, with \$49.45 million in reserve. The projection for June 30, 2018, is as follows: assets of \$290.41 million, liabilities of \$240.95 million, with \$49.45 million in reserve. The actuary stated the forecasts of unassigned reserves assume an estimate of surcharge revenue in fiscal year (FY) 2018 of \$28.1 million, a 2.0 percent interest rate for estimating the tail liabilities on a present-value basis, a 3.1 percent yield on HCSF assets for estimating investment income, continued full reimbursement for University of Kansas/Wichita Center for Graduate Medical Education (KU/WCGME) (generally referred to as the residents in training program) claims, and no change in current Kansas tort law or HCSF law. The actuary noted, based on the analysis provided to the Board of Governors in March, the HCSF could reduce its calendar year (CY) 2018 surcharge rates by 2.0 percent and still maintain its unassigned reserves at approximately \$50 million. It was also suggested the Board of Governors consider a modest reduction in rates for CY 2018, perhaps by continuing to lessen the difference in rates by years of compliance (YOC) and making adjustments by specialty.

The actuary stated the company remains pleased with the HCSF's financial performance both in terms of having a strong balance sheet and

a solid income statement, with the latter allowing the HCSF to lower most surcharge rates that will become effective January 1, 2018. The actuary indicated there will be an overall rate reduction of about 2.5 percent from CY 2017 rates.

The actuary reviewed the HCSF's liabilities at June 30, 2017. The liabilities highlighted included claims made against active providers as \$75.4 million; associated defense costs as \$13.3 million; claims against inactive providers, as known on June 30, 2017, as \$7.9 million; tail liability of inactive providers as \$128.1 million; future payments as \$9.8 million; claims handling as \$8.1 million; and other, which is mainly plaintiff verdicts on appeals, as \$2.2 million. Total gross liabilities were \$244.8 million; the HCSF is reimbursed \$8.4 million for the KU/WCGME programs, for a final net liability of \$236.4 million. The actuary stated the gross liabilities includes the KU/WCGME claims without reimbursement, explaining that if there should be another situation in which those reimbursements were held temporarily, the vulnerability to the HCSF is \$8.4 million. The actuary further discussed the tail liability of inactive providers, noting this amount is difficult to estimate and has grown due to the 2014 change in law that allowed any provider who has been in the HCSF to be covered for claims after the provider becomes inactive. The actuary explained the liability is recognized today even though those claims may not occur for another 10 to 20 years or paid for another 20 to 30 years.

The actuary also reviewed the HCSF's rate level indications for CY 2018, noting the indications assume a break-even target. The actuary highlighted payments, with settlements and defense costs of \$29.63 million; change in liabilities of \$5.49 million; administrative expenses of \$1.81 million; and transfers to the Health Care Provider Insurance Availability Act (HCPIAA) Availability Plan and the Kansas Department of Health and Environment assumed at \$200,000 (this amount assumes no transfer to the Availability Plan); in total, the cost for the HCSF to "break even" for another year is \$37.12 million. The actuary stated the HCSF has two sources of revenue: an investment income assumption of \$8.80 million based on a 3.1 percent yield on those assets; and surcharge payments from providers of \$28.32 million. The actuary also

noted, if the Board of Governors did nothing with its surcharge rates, it is believed the HCSF would have collected more than that at \$28.86 million. Therefore, there would be a negative rate level indication, which provides an opportunity to lower rates overall to the providers for CY 2018; the Board of Governors chose to do so. (*Note:* see information on indications by provider class for the surcharge rates approved by the Board.) In response to a Committee member's questions about administrative expenses, the Executive Director for the Board of Governors clarified those expenses would include routine state operations such as salaries, rent, fees to the Office of Information Technology, and other similar state agency operating expenses such as human resources support.

The actuary discussed trends in the HCSF's loss experience and investment income indicating the HCSF has had a remarkably favorable situation regarding the inflation in its business, because basically it has been 0 for about 13 years. The actuary provided an assumption of going forward at a 210 basis point spread (that is assuming an investment yield of 3.1 percent and inflation of 1.0 percent). He then reported on trends in the HCSF's experience for active and inactive providers by program year and also reported on the HCSF's investment yield, indicating it continues to show a gradual decline. The actuary indicated his company may have to lower the assumption from 3.1 percent when it completes its review in a few months.

The actuary provided an overview on the rating by YOC. With the enactment of 2014 HB 2516, the HCSF provides tail coverage at no additional cost to all providers upon becoming inactive. He stated that changed the amount to be charged to providers who are new to the system versus the amount charged before. The actuary indicated the HCSF Board of Governors has moved over the past few years to normalize those rates by YOC. He stated now the rate for a new provider is up to 35 percent of the rate for someone who has been in for 5 years, up from only 20 percent 3 years ago. The actuary indicated he is comfortable the Board has made a lot of progress on this issue and may be able to retain the current rate for a year or two. The actuary stated he can see the benefits of having a lower first-year

and second-year rate from the company's perspective to attract new providers to the state.

The actuary provided an overview regarding indications by provider class. This report indicates the analysis of experience by HCSF class continues to show differences in relative loss experience among classes. The actuary explained the rate structure of the HCSF and the different classes that are charged and segregated for each type of health care provider, stating from an outside actuarial perspective, the goal is having each class stand on its own (equitable rates across the classes, rather than one class subsidizing another class' loss experience). The actuary noted more classes are in the middle range for loss experience (an increase or decrease of less than 15 percent). Classes with decreases or increases greater than 15 percent are noted below:

- Decrease greater than 15 percent: Class 13 (registered nurse anesthetists); Class 8 (surgery specialty – general, plastic, emergency room with major); Class 24 (nursing facilities); Class 18 (mental health centers); and Class 3 (physicians, minor surgery); and
- Increase greater than 15 percent: Class 9 (surgery specialty – cardiovascular, orthopedic, traumatic); Class 11 (surgery specialty – neurosurgery); Class 22 (nurse midwives); and Class 15 (Availability Plan insureds).

Committee discussion topics included differences between classes, with some classes' rates set as a dollar amount, while other provider classes pay a percentage-based rate. The actuary noted Classes 1 through 14 pay set dollar amounts; Classes 15 and above pay a percentage of the underlying basic coverage premium that these providers pay for the first \$200,000. For example, a nurse midwife, Class 22, paying \$10,000 in premium for a basic coverage policy would pay the HCSF 38 percent of that \$10,000. The actuary commented the percentage rate would be based on what the underlying insurance company is charging, not a set dollar amount. It was noted established loss experience would be needed before some current percentage-based rates could transition to set dollar amounts. The discussion

also included the Availability Plan insureds and this class' loss experience. The Executive Director for the Board of Governors explained the Legislature chose to have a relationship between the HCSF and the Availability Plan where, if the Availability Plan experiences losses in a particular fiscal year, money is transferred from the HCSF to the Availability Plan to offset those losses. If, however, the Availability Plan collects more premiums than it suffers in losses, then they transfer that surplus to the HCSF. The Availability Plan guarantees all health care providers, as defined in HCPIAA, will have access to the basic layer, \$200,000 per claim, \$600,000 annual aggregate, basic coverage.

The actuary provided both a history of surcharge rate changes since 2004 and an overview of the three options for CY 2018 surcharge rates that were provided to the Board of Governors. The actuary highlighted the Board of Governors' decision on the surcharge rate changes and indicated the estimated overall impact of these changes to be a 2.6 percent decrease in surcharge revenue. In response to a Committee question, the actuary indicated this will be the fourth year the rate changes take place on January 1. He explained that historically surcharge rates were determined on a July 1 to June 30 basis.

Comments

In addition to the report from the HCSF Board of Governors' actuary, the Committee received information from Committee staff detailing resource materials provided for its consideration, including a bill summary from the Kansas Legislative Research Department (KLRD) and copy of the enrolled version of 2017 HB 2118 (L. 2017, ch. 35); an updated memorandum on the HCSF and medical malpractice law; information from the KLRD *Appropriations Report* detailing the approved Board of Governors' expenditures for FY 2017, FY 2018, and FY 2019, including any recommendations the Governor made or changes to the budget on the Governor's behalf and on the Legislature's behalf; and the Committee's conclusions and recommendations contained in its most recent annual report.

Committee staff briefly highlighted HB 2118, which amended and created law supplemental to the HCPIAA and amended the Nurse Practice Act

to address requirements and exclusions from coverage pertaining to the liability of the HCSF and charitable providers and certain exempt licensees of the Board of Nursing. Further comment was provided by the Executive Director for the Board of Governors.

Chief Counsel's Update

The Deputy Director and Chief Counsel for the Board of Governors addressed the FY 2017 medical professional liability experience (based on all claims resolved in FY 2017, including judgments and settlements). Of the 16 cases involving 23 Kansas health care providers tried to juries during FY 2017, 14 were tried to juries in Kansas courts and 2 cases were tried in Jackson County, Missouri. The trials were held in the following jurisdictions: Johnson County (5); Saline County (3); Brown County (1); Cloud County (1); Cowley County (1); Douglas County (1); Sedgwick County (1); Wilson County (1); and Jackson County, Missouri (2). Of those 16 cases tried, 14 resulted in defense verdicts, including both tried in Jackson County, Missouri.

The Chief Counsel noted 2 more cases went to trial than during the previous year, but the number of trials has gone down in the past 15 to 20 years. She indicated that in FY 2018 to date, two cases have gone to trial and further stated, over the next few years, more cases are likely to be filed in Missouri due to the KU Hospital Authority and the KU Cancer Center having a number of clinics in Missouri.

The Chief Counsel highlighted the claims settled by the HCSF, noting in FY 2017, 64 claims in 53 cases were settled involving HCSF moneys and describing FY 2017 as an "average year." Settlement amounts incurred by the HCSF for the fiscal year totaled \$21,745,583; the primary insurance carriers contributed \$11,057,500 to these claims. In addition, excess insurance carriers provided coverage for 4 of these claims for a total of \$1,425,000. So, for these 64 claims involving the HCSF, the total settlement amount was \$34,228,083. The Chief Counsel noted this is 12 fewer cases and about \$1.8 million less than in the previous fiscal year. She stated it was a good year in terms of the total amount of settlements, but it is always important to keep in mind the severity of claims and settlements. The Chief Counsel noted

that in FY 2017, 13 claims were in the “large” category of settlement over \$600,000. Of the 64 claims in which the HCSF is involved, 8 involved inactive health care providers for which the HCSF has first-dollar coverage. In addition to the settlements involving HCSF contributions, the HCSF was notified primary insurance carriers settled an additional 82 claims in 74 cases. The total amount of these reported settlements was \$8,622,021. The Chief Counsel’s testimony also included a historical report of HCSF total settlements and verdicts, from FY 1977 to FY 2017. She stated, in addition to the \$21,745,583 in settlements, there was one verdict for \$800,000 from the HCSF, totaling 65 claims this past year involving \$22,545,583 from the HCSF.

The Chief Counsel also reported 276 new cases during FY 2017. She indicated from FY 2009 to FY 2014 there was a five-year decrease in the number of claims and since then a small increase. She stated the increase was to be expected due to the 2014 Legislature adding five new categories of health care providers under the HCSF coverage provisions in the HCPIAA: physician assistants, nurse midwives, nursing homes, assisted living facilities, and residential health care facilities. The Chief Counsel reported claims are starting to come in on the added health care providers. For FY 2017, there were 28 more cases than for FY 2016. The Chief Counsel indicated 27 new claims were in regard to adult care homes and pointed out the increase in the number of new claims was mostly due to the new health care providers and stated, considering this factor, there has not really been an increase in the number of new claims this past year.

In response to a Committee question, the Chief Counsel indicated health care providers that live in Kansas are covered wherever they may practice. She noted a health care provider who lives in Kansas and practices in Missouri must pay an additional 30 percent surcharge due to claims tending to be higher; the Missouri tort laws are not as favorable as those in Kansas. She stated some health care providers practice in Nebraska, Oklahoma, or Colorado and indicated there is no additional surcharge for practicing in those states. In response to a question, the Chief Counsel stated doctors helping in disaster areas are covered by the HCSF; if there were any claims from health care providers who go out of state, their primary

coverage in the HCSF would provide coverage. She added that previously when WCGME residents wanted to assist with a disaster in another state, they were told if their program declared the residents’ assistance in that area as part of their residency training program, they would be covered if any claims arose from providing assistance in those areas. Responding to a question about claims payment and resolution, the Chief Counsel indicated a primary carrier may determine a claim is beyond \$200,000 and will tender its limits to the HCSF. The HCSF will continue with the defense of the case, most often with the same attorney, and continue with the defense until resolution of the case, whether it goes to trial or is settled. She noted, on occasion, some health care providers, usually hospitals, will have coverage in excess of HCSF. The Chief Counsel also indicated there are instances when it is determined a claim needs to be resolved and the HCSF Board of Governors determines the claim would more than likely exceed the HCSF’s \$800,000 coverage and the \$200,000 that was tendered to the HCSF; in those circumstances, the Board of Governors will tender onto the excess insurance carrier.

The Chief Counsel addressed the self-insurance programs and reimbursement for the KU Foundation and Faculty program and medical residents. She stated the FY 2017 KU Foundations and Faculty program incurred \$2,673,879 in attorney fees, expenses, and settlements; \$500,000 came from the Private Practice Reserve Fund and \$2,173,879 came from the State General Fund (SGF). The Chief Attorney indicated the \$2.7 million was an increase from the past several years primarily because of the number of settlements; there were ten settlements involving KU full-time faculty members this past year. That compares to four the year before and seven in 2015. This past year there were two big cases involving a number of KU providers in these claims, accounting for \$1.0 million of the \$1,730,000 in settlements. The Chief Counsel noted, with more settlements, there will be increased attorney fees and expenses; these expenses increased about \$300,000 this past year.

In regard to the self-insurance programs for the residents in training at the KU Medical Center in Kansas City and affiliated programs in Wichita and Salina, there have not been any settlements for the past couple of years involving residents. For the third year in a row, there has been a decrease in

the total amounts spent on these programs of \$642,342. However, for FY 2018, the Chief Counsel reported, at least two settlements involving residents for \$400,000 are already anticipated.

The Chief Counsel report also listed the historical expenditures by fiscal year for the KU Foundations and Faculty and the residents in training. The Chief Counsel indicated the ten-year average for the faculty self-insurance program is about \$1.6 million, which is running above the historical average. For the residency program, that ten-year average is about \$862,000, which for four years has been below average. She also provided information about moneys paid by the HCSF as an excess carrier, stating for those claims involving the KU faculty members, the HCSF paid \$1,766,666 out of its excess coverage. The Chief Counsel stated \$1.5 million of that came from one large case. She anticipates next year that amount will decrease.

She next addressed the reimbursement of expenses for administrative services provided by the Board of Governors noting, in 2010, the Legislature reached a compromise (SB 414; L. 2010, ch. 55) that for four fiscal years (FY 2010, FY 2011, FY 2012, and FY 2013), the HCSF would not be reimbursed. Beginning with FY 2014, two things would occur: quarterly reimbursements were to begin and, for five fiscal years (FY 2014 through FY 2018), the HCSF was to be reimbursed 20 percent of the accrued receivables for those four years the HCSF was not reimbursed. At the end of June 30, 2013, the amount of accrued receivables was \$7,720,422.23 for which the HCSF had not been reimbursed. The Chief Counsel indicated that on July 1, 2017, which was the beginning of FY 2018, the fifth and final installment payment was received.

In response to Committee questions regarding attorney fees, the Chief Counsel stated there are claims in which a lot of money is spent to defend the case, and then the case is dismissed. She indicated most cases that are filed are dismissed and do not go to settlement, but those cases still need defended. The Chief Counsel stated the attorney fees listed are to defend all claims that have been made against the Foundations and Faculty program or residents, not just those that went to trial or resulted in settlement.

Medical Malpractice Insurance Marketplace; Update on Availability Plan

The President and CEO for the Kansas Medical Mutual Insurance Company (KaMMCO) indicated the marketplace in Kansas and across the country is pretty healthy and stable. He stated many companies are writing this business and rates are at all-time lows. The KaMMCO conferee indicated the companies are well-capitalized and, while the results are not quite as good as they were a few years ago, overall the industry is profitable and, as a result, there is no difficulty in finding coverage for most lines of professional liability insurance. The conferee highlighted two marketplace concerns: more claims being filed and more complex cases, along with more obstetrical claims. He provided approximate numbers of those in the HCPIAA Availability Plan (Availability Plan): 201 either MDs or DOs; 31 corporations or other types of providers; 3 hospitals; 4 long-term-care facilities; 10 other facilities, such as surgical centers; and 35 moonlighting residents (mostly covering rural emergency rooms, according to the conferee). In response to a Committee question about a separate plan for moonlighting residents, the Executive Director clarified that residents in training are self-insured by the State of Kansas and do not have a basic policy in place.

The KaMMCO conferee also provided an outlook for the industry, stating this is a very robust, competitive market, and he believes it is going to stay that way for a while. The conferee addressed some of the things KaMMCO will be watching that can have an impact on the industry and the HCSF, such as the Affordable Care Act, the Medicare Access and CHIP [Children's Health Insurance Program] Reauthorization Act, and the opioid crisis in America and Kansas, described as the next set of professional liability insurance litigation. The conferee discussed his perspective on the health care provider groups that asked to come into the HCSF a few years ago following *Miller v. Johnson*, and what drove them to seek coverage by the HCSF. The conferee concluded by noting it is a pretty stable industry environment and has been that way for a number of years, benefiting health care providers.

In response to a question regarding telemedicine, the KaMMCO conferee stated he does not think there is enough experience yet to learn all the ramifications. He indicated KaMMCO will have to wrestle with the policy questions of what to do when care is being provided outside of state borders and what that means in terms of not just compliance with the HCSF but where liability for those acts or omissions may land. He stated the KaMMCO will pay close attention and be part of the conversation. A Committee member noted telemedicine is similar to mail-order pharmacies where out-of-state pharmacists provide all the care an in-state pharmacist does. The member indicated the issue was addressed, and the providers must be licensed in the state to which the medication is being delivered or where the patient resides. The member stated it is a similar path of continuity of care and taking care of the patient. There was some discussion regarding the opioid crisis and the health care community, including restriction of the days' supply and upcoming studies, including one conducted by the Kansas Hospital Association. The KaMMCO conferee indicated everyone in the health care community views this as something for which they all have roles in trying to help fix.

Comments from Health Care Provider Representatives

The Executive Director of the Kansas Medical Society (KMS) commented that HCPIAA is doing exactly what it was intended to do: provide stability and structure to health care malpractice coverage for Kansas physicians. He noted the present is a time of active change, reform, and upheaval in the practice of medicine. He stated Kansas physicians sincerely appreciate the stability and the leadership demonstrated not only by the Legislature but by the Oversight Committee to provide stability for this environment. The KMS conferee urged the continuation of this Committee, noting the Committee sees trends over periods of time and issues that might be coming, and it has the foresight and experience to be able to act on those. He also stated KMS does not see the need for an additional actuarial service. The KMS conferee concluded by stating the KMS encourages a continuation of the Committee in its current structure.

Written testimony submitted by the Kansas Association of Osteopathic Medicine stated

support for the operation of the HCSF and success of the public-private partnership established under the HCPIAA. The testimony supported the continuation of the Committee and indicated a separate, independent actuarial analysis was not necessary. The testimony also indicated support for the Fund's investment strategy and payment of claims in a timely manner.

Board of Governors' Statutory Report

The Executive Director provided the Board of Governors' statutory annual report (as required by KSA 2016 Supp. 40-3403(b)(1)(C)). These were among the items detailed in the FY 2017 report:

- Net premium surcharge revenue collections amounted to \$28,121,164. The lowest surcharge rate for a health care provider was \$100 (for a first-year provider, opting for lowest coverage option) and the highest surcharge rate was \$16,510 for a neurosurgeon with four or more years of HCSF liability exposure (selecting the highest coverage option). Application of the Missouri modification factor for this Kansas resident neurosurgeon (if licensed in Missouri) would result in a total premium surcharge of \$21,463 for this health care practitioner;
- The average compensation per settlement (53 cases involving 64 claims were settled) was \$339,775. These amounts are in addition to compensation paid by primary insurers (typically \$200,000 per claim). The report states amounts reported for verdicts and settlements were not necessarily paid during FY 2017 and total claims paid during the fiscal year amounted to \$23,976,127; and
- The balance sheet, as of June 30, 2017, indicated total assets of \$286,690,985 and total liabilities of \$238,059,073.

The Executive Director provided a brief history of the HCPIAA and its three principal features that remain intact: a requirement that all health care providers, as defined in KSA 2016 Supp. 40-3401, maintain professional liability

coverage; creation of a joint underwriting association, the “HCPIAA Availability Plan”, to provide professional liability insurance coverage for those health care providers who cannot purchase coverage in the commercial insurance market; and creation of the HCSF to provide excess coverage above the primary coverage purchased by health care providers and to serve as reinsurer of the Availability Plan.

The Executive Director also provided an update regarding 2017 HB 2118 that clarifies, if an incident giving rise to a medical malpractice claim is the result of professional services rendered by a charitable health care provider (as defined in the Kansas Tort Claims Act), or if the claim is covered under the Federal Tort Claims Act, the HCSF is not liable. He indicated the law also allows the commercial insurance carriers to exclude coverage for such claims in their basic insurance policies. The Executive Director stated the Board of Governors is unaware of any problems or flaws in the 2017 bill that need to be addressed by the Legislature in the 2018 Session.

The Executive Director highlighted contemporary issues for the Board of Governors and health care providers—telemedicine and *locum tenens*—commenting on two distinct concerns: organizations employing physicians to provide online medical care directly to consumers or *via* provider participation agreement with health insurers (telemedicine) and companies offering to provide temporary physician staffing support. He noted the Board of Governors has made its one-page nonresident certification form as simple as possible and allows proration of the annual surcharge if a nonresident works in Kansas part-time or on an intermittent basis. For Kansas resident health care providers who are employed by either telemedicine or *locum tenens* companies, professional liability insurance coverage must be obtained in compliance with the HCPIAA (the insurance carrier must be approved to sell such coverage) or the provider must choose to change his or her Kansas license to inactive status. The Executive Director indicated these topics have been discussed with the Board of Governors and ultimately it decided that non-resident telemedicine providers and *locum tenens* should be held to the same standards of accountability as any Kansas resident health care provider and therefore,

those providers should be required to comply with the HCPIAA.

The Executive Director discussed the HCSF’s cash-flow management, stating it is important to keep in mind the statutory obligation to pay claims in a timely manner. He also stated the Board of Governors carefully watches the cash balance to ensure enough cash is on hand to pay those claims that the Chief Counsel has identified must be paid within the succeeding couple of weeks. The Executive Director stated the Board of Governors makes a diligent effort to ensure sufficient surcharge revenue is collected, so it will never experience unfunded liabilities. He highlighted the Board of Governors’ investment strategy and related statutory requirementls (KSA 2016 Supp. 40-3406; KSA 2016 Supp. 40-3403(a)), noting investments are laddered over a ten-year period to assure reliable cash flow. He also commented in support of maintaining this conservative investment strategy as the Board has a fiduciary duty to protect the fiscal integrity of the Fund. His testimony indicated the Board does not believe the Legislature should amend this investment law to allow the Board to pursue higher risk investments.

HCPIAA Amendments

No amendments were brought before the Committee.

CONCLUSIONS AND RECOMMENDATIONS

The Committee considered two items central to its statutory charge: whether this committee should continue its work and whether a second, independent analysis of the HCSF is necessary. This oversight committee continues in its belief that the Committee serves a vital role as a link among the HCSF Board of Governors, the health care providers, and the Legislature and should be continued. Additionally, the Committee recognizes the important role and function of the HCSF in providing stability in the professional liability insurance marketplace, which allows for more affordable coverage to health care providers in Kansas. The Committee is satisfied with the actuarial analysis presented and did not request the independent review.

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- The Committee supports continued monitoring of indicators associated with enactment of 2014 law, including the relative loss experience among provider classes and rating by YOC for tail coverage. (As a result of 2014 law, tail coverage for inactive health care providers became effective immediately upon inactivation of the provider license and cancellation of professional liability insurance coverage.)
- The Committee appreciates the constant effort on behalf of the Board of Governors and its staff to monitor the cash balance of the HCSF. The Committee notes the laddered investment strategy prescribed by statute and delegated to the Director of Investments at the Pooled Money Investment Board which allows the Board of Governors to maintain its fiduciary duty as protector of the fiscal integrity of the Fund and its statutory duty to assure sufficient liquidity to pay claims in a timely manner.
- **Reimbursement of the HCSF.** The Committee notes the fulfillment of the reimbursement schedule established by 2010 SB 414. This law allowed for reimbursement of deferred payments to the HCSF for administrative services provided to the self-insurance programs at the KU Faculty and Foundations and the KU Medical Center and WCGME residents for FY 2010, FY 2011, FY 2012, and FY 2013. The Committee notes normal reimbursements occurred starting July 1, 2013, and 20 percent of the accrued receivables (which totaled \$7,720,422.23 on June 30, 2013) were paid each July 1, pursuant to the statutory schedule. The final payment of \$1,544,084.45 was received on July 1, 2017.
- **Telemedicine and *locum tenens*.** The Committee recognizes two contemporary issues of concern to the Board of Governors and Kansas health care providers. The Committee notes information presented by the Board of Governors and discussed with health care provider representatives and the Board's decision that non-resident telemedicine providers and *locum tenens* should be held to the same standards of accountability as any Kansas resident health care provider and, therefore, should be required to comply with the HCPIAA. The Committee further notes the LCC assigned telemedicine legislation to the 2017 Special Committee on Health for its consideration and recommendations.
- **HCPIAA.** The Committee notes no amendments to this Act were submitted for its consideration.
- **Fund to be held in trust.** The Committee recommends the following language to the LCC, the Legislature, and the Governor regarding the HCSF:

- The Health Care Stabilization Fund Oversight Committee continues to be concerned about and is opposed to any transfer of money from the HCSF to the SGF. The HCSF provides Kansas doctors, hospitals, and the defined health care providers with individual professional liability coverage. The HCSF is funded by payments made by or on behalf of each individual health care provider. Those payments made to the HCSF by health care providers are not a fee. The State shares no responsibility for the liabilities of the HCSF. Furthermore, as set forth in the HCPIAA, the HCSF is required to be “held in trust in the state treasury and accounted for separately from other state funds” (KSA 2016 Supp. 40-3203(a)); and
- Further, this Committee believes the following to be true: All surcharge payments, reimbursements, and other receipts made payable to the HCSF shall be credited to the HCSF. At the end of any fiscal year, all unexpended and unencumbered moneys in such Fund shall remain therein and not be credited to or transferred to the SGF or to any other fund.