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SUMMARY OF 2020 SB 493 AND HEALTH CARE PROVIDER INSURANCE AVAILABILITY ACT BACKGROUND INFORMATION

This memorandum summarizes the amendments to the Health Care Provider Insurance Availability Act (HCPIAA) proposed by 2020 SB 493 and provides background information on the HCPIAA and the Health Care Stabilization Fund (HCSF) and recent actions that could impact the HCSF, the HCSF Board of Governors (Board), and health care providers required to carry professional liability insurance coverage.

SB 493 Brief

Beginning January 1, 2021, SB 493 would increase the required minimum professional liability insurance coverage (termed “basic coverage”) maintained by a defined healthcare provider from \$200,000 per claim and \$600,000 per year aggregate to \$500,000 per claim and \$1,500,000 per year aggregate. [Note: Professional liability insurance is medical malpractice or medical liability insurance and is defined in KSA 40-3401 as “insurance providing coverage for legal liability arising out of the performance of professional services rendered or that should have been rendered by a healthcare provider.”] The number of options for coverage levels limiting the liability of the HCSF would be reduced from three to two. The bill would amend provisions concerning the membership on the Board and its powers, duties, and function under certain conditions. Additionally, the bill would address the elimination of medical liability insurance requirements prescribed in the HCPIAA for certain healthcare providers on July 1 following a Supreme Court decision overturning the medical malpractice noneconomic damages cap in statute and resulting dissolution of the HCSF through a delinquency proceeding by the Commissioner of Insurance (Commissioner).

The bill also would delete an expired provision and make technical amendments relating to form and style.

Required Healthcare Provider Medical Liability Insurance Coverage (KSA 2019 Supp. 40-3402)

The bill would clarify the current levels of medical liability insurance coverage required to be maintained by a healthcare provider under the HCPIAA would continue in effect through December 31, 2020. As a condition of active licensure or other statutory authorization to render professional service as a healthcare provider in Kansas on and after January 1, 2021, each resident healthcare provider would be required to maintain a policy of professional liability insurance approved by the Commissioner and issued by an insurer duly authorized to transact business in Kansas in which the limit of the insurer’s liability would be no less than \$500,000 per

claim and subject to an annual aggregate of not less than \$1,500,000 for all claims during the policy period. Self-insured healthcare providers and those healthcare providers to whom the current coverage requirements do not apply would be exempt from this coverage limit.

HCSF Board of Governors Function and Membership (KSA 2019 Supp. 40-3403)

Board Powers, Duties, and Functions

If the Supreme Court declared the statutory noneconomic damages cap in KSA 60-19a02 unconstitutional in an action for personal injury or death arising out of the rendering or failing to render professional services by a healthcare provider, the bill would expand the powers, duties, and functions of the Board under the HCPIAA to require:

- Board cooperation with the Commissioner in developing and executing a plan for a delinquency proceeding under the Insurers Supervision, Rehabilitation, and Liquidation Act (Act); and
- Board consent, if requested by the Commissioner, to any action deemed by the Commissioner to be in the best interest of the public, including any action under the Act.

Board Membership

The bill would amend Board membership provisions to require at least two of the three members appointed by the Commissioner from a list of nominees submitted to the Commissioner by the Kansas Medical Society to be doctors of medicine who are licensed to practice medicine and surgery in Kansas.

HCSF Liability (KSA 2019 Supp. 40-3403)

Coverage Options

Each healthcare provider subject to the HCPIAA must choose among HCSF coverage options. The three current HCSF coverage options would remain available through December 31, 2020, and would limit the HCSF liability with respect to judgments or settlements relating to injury or death arising from the rendering of or failure to render professional services from July 1, 1989, and prior to January 1, 2021.

On and after January 1, 2021, every healthcare provider would be required to choose one of two HCSF coverage options limiting the HCSF liability for judgments or settlements relating to injury or death arising from the rendering of or failure to render professional services, as follows:

- \$500,000 for any one judgment or settlement against a healthcare provider, subject to an aggregate limit of \$1,500,000 for all judgments and settlements arising from all claims made in the fiscal year against such healthcare provider; or

- \$1,500,000 for any one judgment or settlement against a healthcare provider, subject to an aggregate limit of \$4,500,000 for all judgments and settlements arising from all claims made in the fiscal year against such healthcare provider.

Inactive Healthcare Provider Tail Coverage

The bill would delete a subsection that expired on July 1, 2014, limiting HCSF liability for inactive healthcare providers to those healthcare providers in compliance with HCSF requirements for not less than five years or those who remedy non-compliance as provided in statute. [Note: 2014 law authorized this “tail coverage” immediately upon the cancellation or inactivation of a Kansas license and that provider’s professional liability insurance policy.]

Expiration of Statutes Requiring Healthcare Provider Liability Insurance (KSA 2019 Supp. 40-3403)

If the statutory noneconomic damages cap outlined in KSA 60-19a02 is declared unconstitutional by the Supreme Court in an action for personal injury or death arising out of the rendering of or failure to render professional services by a healthcare provider, the provisions of KSA 2019 Supp. 40-3402 and any other provisions of law requiring healthcare providers to maintain professional liability insurance and pay a surcharge to the HCSF would expire on July 1, following such Supreme Court ruling. Upon such ruling, the HCSF would be deemed an insurer under the Insurance Code (*Kansas Statutes Annotated*, Chapter 40) and would be subject to any actions deemed by the Commissioner to be in the best interest of the public, including the delinquency proceedings outlined in the Act.

Liability of Insurer for HCSF-Covered Provider or Self-Insurer (KSA 2019 Supp. 40-3408)

The statutory provision limiting liability for an insurer for a healthcare provider covered by the HCSF or a self-insurer to the first \$200,000 of a claim for personal injury or death arising out of the rendering of or failure to render professional services by such healthcare provider, subject to an annual aggregate of not less than \$600,000 for all such claims, would remain in place through December 31, 2020. On and after January 1, 2021, the liability for an insurer for a healthcare provider covered by the HCSF or a self-insurer would be limited to the first \$500,000 of such a claim, subject to an annual aggregate of \$1,500,000 for all such claims against the health care provider.

Application of the Insurers Supervision, Rehabilitation, and Liquidation Act (KSA 40-3606)

The bill would add the HCSF to the list of entities to which the Act applies.

Background

SB 493 was requested for introduction by the Senate Committee on Ways and Means at the request of Senator Suellentrop and was referred to the Senate Committee on Public Health and Welfare on March 11, 2020. A hearing scheduled for March 18, 2020, was canceled, and the Legislature adjourned on March 19.

The HCPIAA (enacted in 1976) created the Health Care Stabilization Fund in an effort to stabilize the availability of medical professional liability coverage for healthcare providers. The law created a basic liability requirement for certain healthcare providers and established an availability plan in order to provide required basic professional liability insurance coverage for those providers of health care in Kansas unable to obtain such coverage from the commercial market. The HSCF receives revenue from professional liability coverage surcharge payments made by healthcare providers. Responding to a medical malpractice liability crisis, the 1988 Legislature conducted an interim study and authorized significant changes to the HCPIAA in 1989 SB 18. Among those changes, the bill created three different options for healthcare providers to supplement their basic \$200,000 per claim coverage purchased from a commercial insurer or the Health Care Provider Insurance Availability Plan: \$100,000, \$300,000, or \$800,000 per claim (with annual aggregate limits three times the per claim coverage).

During the 2019 Interim, the Special Committees on Financial Institutions and Insurance and Judiciary, as well as the Health Care Stabilization Fund Oversight Committee, received updates from staff and conferees on the June 14, 2019, Kansas Supreme Court decision in *Hilburn v. Enerpipe Ltd.* [Note: Please see the [Hilburn](#) memorandum for additional details.]

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the Health Care Stabilization Fund (agency) states the fiscal impact of enactment of SB 493 is unclear. Current law allows providers to choose among three options for levels of coverage. The proposed change would allow for two options for levels of coverage, and the coverage provided by both options would more than double the current levels. The HCSF would collect higher surcharge rates from providers, and expenditures would increase if the changes result in higher judgments and settlements. The cost of attorney and attorney-related expenses would most likely increase. It is not possible to accurately estimate future revenues or expenditures. The change would require an additional actuary study to be conducted to determine the fiscal effect this bill would have on the agency.

The Kansas Insurance Department states that if under the provisions of the bill the Commissioner were required to institute a delinquency proceeding involving the HCSF, the Department would need one additional staff attorney and one additional administrative support position. First-year costs for salaries and other operating expenditures are estimated at \$138,600 from the agency fee fund.

The Office of Judicial Administration (OJA) estimates the bill could increase expenditures for the Judicial Branch from additional cases filed in district courts. This would increase the time spent by court personnel to process and research the petitions. Also, any cases filed under the provisions of the bill could increase revenues received from docket fees. However, the OJA is unable to estimate the number of cases that would occur under the bill; therefore, the fiscal effect on the Judicial Branch is unknown. Any fiscal effect associated with SB 493 is not reflected in *The FY 2021 Governor's Budget Report*.