March 18, 2024

GENERAL RESPONSE TO FINDINGS AND RECOMMENDATIONS PERTAINING TO THE KANSAS INSURANCE DEPARTMENT

The draft report provided by the Office of the Medicaid Inspector General ("MIG") to the Kansas Department of Insurance ("Department") on March 1, 2024, lacks foundation in fact, reaches flawed conclusions based upon unreliable extrapolations, demonstrates a lack of understanding of the realities of the senior care market, misinterprets and misapplies the law, demonstrates a lack of understanding of the authority of the Department, is overreaching in scope, and should be discounted nearly in its entirety. Rather than exhaustively respond to each problematic element of the draft report, the Department provides the following comments to illustrate why the report should be disregarded and not be published.

The Department believes that the MIG's audit was initiated following a memorandum dated June 15, 2023 ("Memo"), sent by the Commissioner of Insurance to Representative Brenda Landwehr and Laura Howard, the Secretary for the Kansas Department for Aging and Disability Services ("KDADS"), outlining concerns with certain aspects of the CCP registration statutes, which were first enacted in 1989. In the Memo, which is available in its entirety for public inspection, the Department identified inadequacies in the definition of continuing care contract, as well as the ability of providers to *voluntarily* apply for registration as a CCP to be potential issues when considered in light of statutes enacted in 2010 establishing quality care assessment ("QCA") or bed tax rates for skilled nursing beds. Subject to a few exceptions, the QCA rates differ significantly for those operated by registered CCPs and those operated by non-CCPs. Because of the definitional ambiguities and incongruity between the CCP registration statutes and the intent of the QCA taxation scheme, the Department suggested in the Memo, "some legislative change may need to be considered to bring things into sync." The Memo also noted a legislative solution to the timing of the submission of the required annual audit might be appropriate, in that many registrants found the timing to be difficult to achieve and burdensome.

Rather than recognizing the issues and solutions offered by the Department by looking for entities that were registered as CCPs contrary to the perceived legislative intent regarding facility type or provision of services, the MIG did a 100% review of CCP registration files and conducted such review through the lens of strict compliance for technical requirements like timely submission of an annual audit. The MIG's February 15, 2024, testimony before the House Committee on Health and Human Services

committee suggests the audit's conclusions were already reached at that time – before the Department had seen the audit or was afforded an opportunity to respond. Upon receiving a copy of the audit draft on March 1, 2024, the Department learned the MIG somehow now places $88 million in blame on the Department for the statutory problems which the Department first identified. The number entirely lacks reasonableness.

The audit lists the first objective as: "Are there currently issues within the legislative language that are allowing these facilities to falsely claim they are part of a CCRC?"[1] The Department objects to this characterization of the issue. The issue is not whether an entity *falsely* claims to be a part of a CCRC. This assumes there is always a "correct" claim to be a CCRC. Assigning falsity of any given registration is conclusory and portrays an assumption of ill-intent on behalf of the registrants. This is especially the case because of the ambiguity in current law. A better statement of the issue is "Does current law allow for an entity to obtain a registration as a continuing care provider in contravention of what is commonly understood as a CCRC, thereby allowing entities to pay lower QCA assessments?" The Department also disagrees with the MIG's summary to the audit's second objective, "Are there currently proper procedures in place to monitor compliance within the CCRC and CCP registrations?" The Department disagrees that proper procedures are not being followed. The MIG's assertion that procedures were not being followed is founded on an unduly harsh and unreasonable interpretation and application of the CCP registration statutes.

The executive summary quickly reveals the absurdity of the MIG's main, headline-seeking conclusion. The MIG incredulously claims the State lost more than $88 million in QCA revenue and interest over the course of four years because CCP registrations were incorrectly issued to Skilled Nursing Facilities, mainly because the entities lacked an annual audit report from a CPA. There are several problems with the MIG's simplistic, yet overly harsh approach used to reach this conclusion. Under the MIG's strict methodology and analysis, if an audit was provided to the Department on the 121st day after the end of a Provider's fiscal year end – meaning one day late, the entity should not have been initially registered as a CCP or had its registration renewed. As a consequence of this draconian change in status, the entity would be subject to the 6x QCA bed tax of $4,908 instead of the lower $818 rate applicable to skilled nursing beds which are part of an entity operated by a registered CCP.

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[1] The acronym "CCRC," is not defined or used anywhere in Kansas statutes or regulations. Instead, statutes in Chapter 40 refer to Continuing Care Providers ("CCPs"). The term "Community Care Retirement Facilities" is utilized in K.S.A. 75-7435 and regulations pertaining to the QCA (K.A.R. 129-10-31(b)(1)(A)).

Many of the entities identified by MIG as noncompliant were simply late in providing the audit. Providing the audit within 4 months of the completion of the entity's fiscal year is a challenge. The problem is further complicated by the fact that many providers are part of a larger holding company or management structure involving several registered providers with different fiscal years. In these instances, the holding or management company has consolidated financials reflecting complex accounting and organizational structures, and the audit takes longer than what is contemplated by the statute.

More often than not, the Department's files reflect a CPA audit was provided with the renewal application, or within the extension granted by the Department to the applicant who sought additional time due to incongruity between annual renewal dates and the end of the provider's fiscal year.

The MIG identified a large, well-known not for profit facility in Topeka, Kansas as being incorrectly registered as a CCP. The entity is a 240-unit independent living facility, 28-unit assisted living facility, 97-bed health care facility where short-term rehab and nursing care are provided. The entity was first registered as a CCP in 1989. As an illustration of the process for registration, the following occurred:

o October 17, 2022- Department issues letter to Entity for Continuation of Certificate of Registration through August 29, 2023.

o August 29, 2023 – Entity submits Application for Renewal for annual period ending August 29, 2024, and pays $25 renewal fee. The entity also submits the required materials, including the annual disclosure statement and an Independent Auditor's Report and Combined Financial Statements for December 31, 2022, and 2021. According to the MIG, the entity should not have been allowed to renew its CCP registration and instead paid $396,730 more in bed taxes for 2023.

Admittedly, there are a few instances of applications being approved without a CPA audit. But that has not deprived the State of $88 million. Further, the Department recognized this as an issue prior to the MIG audit. CCP registrations date back to 1989, and, as the industry would testify, previous administrations had not enforced the annual audit requirement. In recent years, however, the Department – under the direction of this Commissioner – has more closely scrutinized applications and have required CPA audited financials to be provided as a condition of new and renewal applications. Indeed, as the MIG points out, the Department has issued administrative action against entities that have failed or refused to provide CPA audited financials.

Recognizing, however, that CPA audits often cannot be completed as quickly as the MIG claims is strictly required by K.S.A. 40-2233, and many entities had been

registered for years without providing CPA audits, the Department does exercise forbearance and latitude to the heavily regulated industry to allow time to come into compliance. In a few instances, as a pathway to compliance, the Department accepted less formal financial statements, but has also required proof of an engagement to obtain a CPA audit. The MIG's standard of strict compliance on the other hand, would cause serious disruption to the industry, would drive up the cost of care, and would reduce the supply of critically needed care for Kansas seniors. To assign a 68%, $88 million error rate is astronomically unreflective of reality. The MIG audit's overly broad assignment of error ignores the nuances of each registrant's application history.

There is an additional, fundamental weakness with MIG's conclusion in that it fails to consider that Kansas law recognizes a constitutional, due-process protected property interest in a license, of which a CCP registration is closely analogous. Because an entity that possesses a registration is entitled to a due process hearing prior to deprivation of that registration, both in terms of the 14th Amendment to the United States Constitution, Section 18 of the Bill of Rights of the Kansas Constitution, and explicitly in K.S.A. 40-2235, it is inaccurate to assert that a CCP loses its registration automatically upon the slightest of technical violations. Instead, once issued a registration, the operative statute requires that upon payment of the $25 continuation fee and notification of intent to renew, such certificate *shall* be issued to a continuing care provider or continued by the Commissioner *unless* the Commissioner after due notice and hearing shall have determined that the continuing care provider is not in compliance with this act. See also, *Kansas Racing Mgmt., Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 354, 770 P.2d 423, 431–32 (1989)(applying Constitutional due process principles to an agency's licensing decisions once an entity possesses a license).

The MIG's audit findings fail to consider the procedural reality that an entity would have at least 18 days after notice of nonrenewal to request an administrative hearing to challenge the Department's decision. Under the Kansas Administrative Procedures Act, the nonrenewal of the entity's registration would not become final until after a hearing was conducted and a final order imposing a nonrenewal was rendered by the presiding officer. The MIG audit is premised largely on the position that the Department has no authority to renew a registration if the entity does not provide an audit within 120 of the entity's fiscal year end. In essence, this position means there is no mechanism or possibility for the entity to cure an untimely filing, even if the required audit is provided prior to the hearing. If this is true, it renders meaningless the due process notice and opportunity for a hearing set forth in K.S.A. 40-2235, even though the audit has been provided.

It is a long-standing maxim of statutory construction that where the application of statutes would produce an absurd result even if they are otherwise clear, they are to be construed to avoid the absurd result.[2] The due process and hearing requirements of the CCP Act are rendered meaningless and produce an absurd result under the MIG's interpretation that there is no remedy or cure available for an untimely filed audit. The same absurd result occurs under the MIG's position that the Department staff do not have implied authority to grant extensions of time for filing audits when the registrant's annual renewal date is badly out of sync with the timely filing of an audit.

Taking the foregoing example further, if the entity provided the audit prior to the requested hearing, and the hearing officer issued a Final Order denying the registration or renewal in accordance with the position espoused by the MIG, the registrant would have the right to appeal the decision under the Kansas Judicial Review Act. In such a situation, the Department asserts a court would overturn the agency decision under K.S.A. 77-621(c)(8) as being unreasonable, arbitrary or capricious. Kansas courts have held agency action to be unreasonable if it is: "taken without regard to the benefit or harm of all interested parties which is so wide of the mark that its unreasonableness lies outside the realm of fair debate." *In re Emporia Motors, Inc.,* 30 Kan. App. 2d 621, 624, 44 P.3d 1280, 1282–83 (2002).

Alternatively, the entity could avoid the MIG's proposed imposition of more than $4,000 per bed tax by simply converting its renewal application to a new application and paying the $50 registration fee. When considering the history of CCP registrations and the practical realities of the industry, i.e., incongruity between renewal dates and timing of fiscal years and the number of consolidated entities, it is reasonable and fair for the Department to grant entities flexibility in the timeliness of submitting audited financials. Conversely, it is unreasonable to assume $88 million in fictious or hypothetical bed tax revenue because the Department exercised discretion and fairness in determining it was in the best interest of the residents of continuing care facilities to allow flexibility in the timeliness of filing of audited financial statements.

MIG's claim that $32 million in tax revenue is missing because certain registrants did not offer a continuum of care is flawed for multiple reasons. First, as the MIG recognizes, the definition of continuing care as it relates to registered entities is ambiguous. K.S.A. 40-2235 requires that no "provider" shall act as or hold themselves out to be a continuing care provider, as defined in this act, in this state, unless the provider shall hold a certificate of registration as a continuing care provider issued by the Commissioner of Insurance. "Provider" or "continuing care provider" means the

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[2] *N. Nat. Gas Co. v. ONEOK Field Servs. Co.,* 296 Kan. 906, 918 (2013).

person, corporation, partnership, association or other legal entity which agrees to provide *continuing care* to residents in a home. K.S.A. 40-2231(d).

What constitutes "continuing care" is not defined in Kansas statute or regulation.[3] Thus, it is improper to conclude a Skilled Nursing Facility ("SNF") is not a continuing care provider and thus not eligible for the reduced CCP bed tax, because the entity does not offer a "continuum of care", which the MIG contends – without statutory support – means different levels of care. It appears to be improper to assign error based upon a failure to provide something that is not clearly defined in statute.

Assuming, however, that continuing care equates to different levels of care, it appears MIG's conclusion is still wrong because it assumes a provider has to have skilled nursing and some other level of care in order to be a CCP. This is wrong because there are different levels of care within skilled nursing. MIG does not appear to have considered this, instead concluding that a CCP that MIG found to only have a SNF license could not be a CCP eligible for the reduced QCA rate.

MIG's analysis is also off track because it further assumes that each level of care requires a different licensure. But this is also not in line with Kansas licensing laws. Independent living, for example does not require licensure by KDADS. Thus, a provider could provide non-licensed independent living and skilled nursing, and thus, only show up as skilled nursing on the KDADS website, yet still be a CCP under the MIG standard.

The MIG's unfounded assertion that KDADs and the Department lacked appropriate oversight because of a perceived failure to confirm each provider provided a continuum of different levels of care is also off the mark because there is no clear statutory requirement the Department independently verify an entity's levels of care. There is a more than fair probability that the industry would not support MIG's conclusion on this, and it is an unreasonable expectation that is not contemplated by the CCP registration statutes or administrative law, for the Department conduct inspections to verify services providers provide. Indeed, the MIG's position is contrary to well-established principle of administrative law that agencies are creatures of statute and their power is dependent upon authorizing statutes; therefore any exercise of authority must come from within the statues either expressly or by clear implication.[4] There is absolutely no authority in the statutes governing the CCP registration process which conveys on the Department the requirement or authority to confirm levels of care or verify services offered by a CCP.

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[3] See footnote 1, *supra.*

[4] *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, 378, 673 P.2d 1126 (1983)

The MIG's solutions for identifying "real" CCPs aren't fool proof. The MIG identifies three ways it attempted to, and therefore suggest the Departments use, to verify an entity is providing multiple levels of care. None of which are actually determinative. First, the MIG suggests a review of an entity's financial statements. But there is no requirement an entity identify each level of care it provides in its financial statements. The absence of evidence in financial statements is not evidence of absence of multiple levels of care.

Second, review of floor plans provided by KDADS would not necessarily identify multiple levels of care. Entities are not required to submit floor plans to the Department, and even if they were, the Department would not be able to identify different levels of care. The Department understands that a floor plan would reflect licensure, not levels of care. As indicated earlier, multiple levels of care can be provided within one class of license, i.e. skilled nursing. Floor plans, while possibly helpful, are not conclusive evidence to establish whether a provider is providing multiple levels or continuing care.

As a whole, the MIG's findings and conclusions regarding providers' duties and abilities to register as a CCP would have a devastating effect on the critical senior care industry. Many providers would not be able to afford the 6-fold bed tax increase MIG believes is warranted and would be forced to close. Removing options for seniors to obtain the residential care they need because of a bureaucratic technicality is not good public policy. It is difficult to conceive the industry or the Legislature desire the result suggested by MIG.

Finally, MIG suggests a review of providers' websites. There are several problems with this approach. Providers aren't required to have a website, nor keep it updated. Providers aren't required to list all their services on a website. An entity can have a website that simply says, "We are a skilled nursing facility." But if the provider also provides a different level of care, the website could be true, accurate, but not complete. Thus, a website cannot conclusively demonstrate whether a provider is a CCP.

Nevertheless, the Department asked the MIG to identify the entities MIG claimed provided what it considered only a single level of care, i.e., skilled nursing. The Department reviewed available websites for many of those entities and found that the websites tended to show that the providers did, in fact, provide multiple levels of care. For example, an entity in Emporia claims it "offers a full continuum of care, from temporary respite stays, to short-term rehabilitation, to long-term skilled nursing

care, as well as a broad array of specialty programs and services." The MIG would also impose the $4900 per bed tax on an award winning, non-profit senior living community in Johnson County that, according to its website, provides short term rehabilitation, long-term care, and respite care. The MIG asserts this facility should have paid nearly $1,000,000 in QCA assessments.

Finally, with respect to the definitional issues, K.S.A. 40-2231 also permits that a continuing care contract shall also mean an agreement of any other provider who *voluntarily applies for a certificate* pursuant to K.S.A. 40-2235. Thus, under current law, a provider does not even have to provide different levels of care. It can voluntarily apply for a certificate. This is a public policy issue requiring statutory revision; the Department did not commit fraud, waste, or abuse by allowing such voluntary applications.

RESPONSE TO FINDING #6

Finding # 6 is also uncalled for. MIG claims that state resources were wasted on processing unnecessary applications. This claim assumes that an entity's only reason to register is to get a lower QCA. However, Kansas law requires registration if an entity acts as or wants to hold itself out as a CCP. The services encompassed within continuing care are not necessarily synonymous with those in a skilled nursing facility. A provider could provide continuing care, but not be subject to the QCA if the provider is not a skilled nursing facility. They would, however, still be required to be registered as a CCP. The MIG's claim of waste here also ignores the fact that providers may want a CCP registration for marketing purposes. And, importantly, it is not the province of the MIG to weigh in on the efficiency of the Department's processes if there is no nexus to Medicaid.

RESPONSE TO FINDING # 9

The MIG continues its peripheral pursuits by recommending the Commissioner of Insurance review other decisions made by the General Counsel to ensure other statutes have not been ignored. MIG has no justification or jurisdiction suggesting review of other decisions not pertaining to Medicaid. The Department, based upon the General Counsel's advice, has made many difficult decisions to correctly apply the law, contrary to prior administrations' practices. That will continue.

CONCLUSION:

The Department asserts the MIG audit was misguided and does not reflect the practicalities of administrating a flawed registration scheme. To the extent registrants were not incompliance with the law, as reasonably interpreted and applied by the

Department, the Department had already begun processes to enforce the CPA audit requirement prior to the MIG audit and report, contrary to the practice of previous administrations. Those efforts continue.

The Department disagrees with the ultimate conclusion that more than $88 million in bed tax revenue was lost by the state.