

**Testimony before House General Government Budget Committee  
HB 2660 – fee sweep prohibition  
Mike O’Neal, Kansas Chamber CEO  
February 17, 2012  
(Testimony in Support)**

Mr. Chairman and members of the Committee

On behalf of the Kansas Chamber, I appreciate the opportunity to appear in support of HB 2660, dealing with the prohibition against certain fee agency fund sweeps. Our 2016 Kansas Chamber Legislative Agenda specifically references this issue:

**“The Kansas Chamber encourages government reform aimed at lowering the overall cost of state government so it is more affordable to Kansas businesses and residents through policies that: oppose state or local government diversion of taxes or fees away from their statutory purpose to fund general government.”**

The phenomena of the state diverting fee funds into the state treasury has been an ongoing concern for decades. The Kansas Supreme Court addressed the issue as far back as 1958 in *Panhandle Eastern v. Fadely*, 183 Kan. 803. There the Legislature had diverted funds from the Natural Gas Conservation fund into the state treasury. The fund, administered by the KCC, contained assessments paid in by producers to fund the operations of the Conservation Division of the KCC. Following the sweep into the SGF, the KCC assessed producers again for the loss of funds. The Court struck down the transfer noting:

“It is clear that under its police power the state may reimburse itself for the costs of an otherwise valid regulation and supervision by charging the necessary expenses to the businesses or persons regulated. A statute, however, is void if it shows on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation, or if more than adequate remuneration is secured.” (emphasis added)

Even though K.S.A. 75-3036 has been on the books since 1937, its intent has been ignored by a number of administrations over time. Fee agency fund sweeps were a source of controversy in 2002, when Workers Compensation Fee fund balances were swept into the SGF to help balance the books during the last recession, giving rise to an Attorney General’s opinion stating:

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*“...to continually strive to improve the economic climate for the benefit of every business and citizen and to safeguard our system of free, competitive enterprise”.*

“If an assessment is determined to so exceed the cost of regulation that it is apparent the legislature is using it as a general revenue raising measure, the overage cannot stand on police power authority. If the assessment is in fact a revenue raising measure, it must be analyzed as such, which may include a determination as to whether it meets Commerce Clause and Equal Protection requirements, as well as any state constitutional requirements applicable to the type of tax it is.” (A.G. Opinion 2002-45)

In 2009, the Sebelius administration proposed sweeping some \$29M of fee agency fund balances into the SGF to balance the books in the aftermath of the 2008 crash. The Legislature eventually swept a little over \$20M from Workers Compensation Fee Fund entities, bankers, consumer lenders, oil & gas producers and realtors were affected, among others. These groups filed suit to recover the amounts swept and for a court order finding the sweeps to be an unconstitutional tax. That case is still pending although the Kansas Supreme Court last August issued a ruling that all but finds that the Plaintiffs will prevail, stating:

“Not all moneys deposited into the State Treasury represent public moneys subject to unfettered general appropriation by the legislature. Moneys received or to be used under constitutional or statutory provisions or under the terms of a gift or payment for a particular a specific purpose are to be kept as separate funds within the State Treasury and shall not be placed in the State General Fund.” *Kansas Building Industry Workers Compensation Fund, et al. v. State* (Docket #108,607)

The Court cited the statute amended in HB 2660 (K.S.A. 75-3036). HB 2660 would reinforce the prohibition already contained in KSA 75-2660, a prohibition that has been repeatedly ignored by the Legislature in the past.

The bill, however, is not broad enough to protect all entities similarly situated. The bill is limited to state agencies and while it appears to be intended to capture all similarly situated entities, it would not, in our view, protect those who pay into the Workers Compensation Fee Fund, e.g., since that fund is administered by the Kansas Insurance Department. KID would be the appropriate entity to give notice to regulated businesses paying assessments into the fund, not the Department of Administration. It would also make more sense to us to have the agency affected by the sweep, and who would have the authority to reassess a regulated entity, to make the notification. Rather than sweeping funds and reassessing regulated businesses and industries, the remedy for fund balances in excess of the amount need to regulate is to refund the excess, thereby reducing the cost of regulation and the cost of doing business.

While we support HB 2660, given the past tendency of the Legislature to ignore this statute, we would prefer that protective language also be inserted into every statute whereby a fee

fund exists or is created, making it clear that the funds are held in trust for the sole purpose for which they are intended and may not be diverted to the SGF. By way of example, such language is contained in HB 2596, which would create a state school district finance fund. On page 5, beginning on line 41 the following language is utilized:

“(b) The state school district finance fund shall be used for the purpose of school district finance and for no other governmental purpose. It is the intent of the legislature that the fund shall remain intact and inviolate for such purpose...”

Cross-referencing language of this nature with KSA 75-3036 would be ideal.