

KANSAS OFFICE of
REVISOR of STATUTES

LEGISLATURE of THE STATE of KANSAS
Legislative Attorneys transforming ideas into legislation.

300 SW TENTH AVENUE ■ SUITE 24-E ■ TOPEKA, KS 66612 ■ (785) 296-2321

MEMORANDUM

To: Chairman Kelly and members of the Joint Committee on Fiduciary Financial Institutions Oversight
From: Office of Revisor of Statutes
Date: December 7, 2021
Subject: **Review of 2021 Senate Substitute for HB 2074, The Technology-enabled fiduciary financial institutions act**

2021 Senate Substitute for House Bill No. 2074 enacted the technology-enabled fiduciary financial institutions act. The act creates a new type of financial institution under Kansas law known as a technology-enabled fiduciary financial institution under the supervision of the office of the state bank commissioner (OSBC).

The bill passed the Senate 39-0 on April 8, 2021, the House 103-20 on April 9, 2021, and was approved by the Governor on April 21, 2021. The bill became effective on July 1, 2021.

Section 1 provides the citation and definitions of terms relating to the act.

Sec. 2 requires a technology-enabled fiduciary financial institution (TEFFI) to apply for a certificate of authority from the state banking board. This section also provides requirements a TEFFI shall satisfy before a charter is issued. The state banking board may require fingerprinting and a criminal history record check of any officer, director or other person associated with the TEFFI. Actions of the state banking board in approving or disapproving a TEFFI application shall be subject to review in accordance with the Kansas judicial review act. Under this section a TEFFI shall make a distribution of cash or other assets to the department of commerce and to one or more qualified charities. The state banking board shall not approve any application until Beneficiary's conditional charter (*see section 25*) has been converted to a full charter and the commissioner has completed a regulatory examination.

Sec. 3 establishes the fee structure for TEFFIs. The initial fee is \$500,000 and for inactive TEFFIs an amount not to exceed \$10,000. Of such fees, 75% would be remitted to the bank commissioner fee fund and 25% to the technology-enabled fiduciary financial institutions development and expansion fund of the department of commerce created in section 24. This section also provides for the assessment of examination fees by the commissioner.

Sec. 4 states that except as provided by this act, the provisions of the state banking code apply to TEFFIs in the same manner as such provisions apply to trust companies. This section also incorporates certain terms specific to a TEFFI into the definitions of various terms already defined in the banking code.

Sec. 5 provides capitalization requirements for TEFFIs.

KANSAS OFFICE *of*
REVISOR *of* STATUTES

LEGISLATURE *of* THE STATE *of* KANSAS

Sec. 6 provides that a TEFFI shall be managed and controlled by a board of directors. The board shall consist of at least five and not more than 25 members. At least one director must be a resident of Kansas. This section also provides requirements relating to board meetings, director vacancies and director oaths.

Sec. 7 requires a TEFFI to make a report to the commissioner concerning such TEFFI's transactions pursuant to generally accepted accounting principles and calculating such TEFFI's capital solvency. This section also provides standards for the commissioner to evaluate a TEFFI's safety and soundness.

Sec. 8 establishes naming and advertising requirements for TEFFIs. A TEFFI may not use the word "bank" or "trust company" without reference to fidfin (fiduciary finance) trusts or use any other term that tends to imply that the TEFFI is holding out to the public that the TEFFI engages in the business of banking unless the commissioner gives written approval after finding the use will not be misleading. Naming restrictions under this section shall not reduce or eliminate the trust powers granted to a TEFFI as a trust company under this act. Other than indicating that a TEFFI is headquartered and chartered in Kansas, no TEFFI's name or advertising shall infer or imply that such TEFFI is endorsed by, an affiliate of or otherwise connected with the government of the state of Kansas.

Sec. 9 requires a TEFFI to maintain office space in an economic growth zone (defined as a community with a population of 5,000 or less located in a rural opportunity zone county or Harvey county) and to employ, engage or contract with at least three employees to provide services for the TEFFI in Kansas and to facilitate the examinations required by the act.

Sec. 10 provides a TEFFI with the authority to exercise powers relating to fidfin transactions, receiving and managing alternative asset custody accounts and engaging in trust business.

Sec. 11 provides additional powers, duties and responsibilities for TEFFIs specifically relating to extending financing or credit to a fidfin trust. This section also requires distributions in an amount equal to 2.5% of such TEFFI's fidfin transactions during the calendar year. The distributions shall be made to the department of commerce and to qualified charities in the same manner as provided in section 2.

Sec. 12 allows TEFFIs to employ various professionals to advise and assist the TEFFI in performing such TEFFI's business. TEFFIs are also permitted under this section to employ agents to perform acts of fidfin transactions, custodial services or trust business and to license internet-related services, software, mobile applications, technology-enabled platforms and processes to or from affiliates, third parties or other TEFFIs.

Sec. 13 allows a TEFFI to serve as a custodian of an asset custody account and establishes the requirements a TEFFI shall satisfy in performing custodial services under the act.

Sec. 14 provides that any instrument providing for a trust advisor may also provide such trust advisor with some, none or all of the rights, powers, privileges, benefits, immunities or authorities available to a trustee under Kansas law or under such instrument. Unless the instrument provides otherwise, a trust advisor has no greater liability to any person than would

a trustee holding or benefiting from the rights, powers, privileges, benefits, immunities or authority provided or allowed by the instrument to such trust advisor.

Sec. 15 exempts an excluded fiduciary from liability, either individually or as a fiduciary, for any loss that results from compliance with a direction of the trust advisor or that results from a failure to take any action proposed by an excluded fiduciary that requires prior authorization of the trust advisor. In any action against an excluded fiduciary the burden of proof is on the person seeking to hold the excluded fiduciary liable under the clear and convincing evidence standard.

Sec. 16 provides that a trust advisor is presumed to be a fiduciary when exercising such trust advisor's authority under this act. This section also states that the trust advisor submits to the jurisdiction of Kansas and that an instrument may appoint an individual, corporation or LLC as the trust advisor.

Sec. 17 exempts an entity appointed as a trust advisor from the provisions of the article 8 of chapter 9 of the Kansas Statutes Annotated (organization under the state banking code) upon satisfaction of the specific conditions listed in this section.

Sec. 18 provides that an instrument may relieve and indemnify a TEFFI serving as trustee from liability for a breach of fiduciary duty if any such provision is unenforceable to the extent that it relieves the trust advisor or TEFFI from liability for a breach of fiduciary duty committed in bad faith, intentionally or with reckless indifference to the interest of a beneficiary.

Sec. 19 provides requirements governing the compensation of a trustee.

Sec. 20 protects the privacy of those who have established a fidfin trust or alternative asset custody account in any court proceeding upon petition to the court by the acting trustee, custodian, trustor or any beneficiary. Upon the filing of such petition, documents relating to such trust and all court orders issued thereon shall be sealed and shall not be made a part of the public record of the proceeding, except that such petition shall be available to the court, the trustor, the trustee, the custodian, any beneficiary, their attorneys and to such other interested persons as the court may order upon a showing of need.

Sec. 21 provides that the commissioner may, upon written request from a TEFFI prior to form submission, offer to review a form and reply with informational comments only. Such informational comments shall not constitute approval or endorsement of such form, and the TEFFI shall not represent that such form has been approved by the OSBC.

Sec. 22 requires the commissioner to adopt rules and regulations on or before January 1, 2022, as are necessary to administer this act and allows the OSBC to enter into contracts for technical assistance and professional services as necessary to administer the act and meet the deadline for adopting rules and regulations.

Sec. 23 provides that no maximum interest rate or charge or usury rate restriction shall be applied between a TEFFI and a fidfin trust if the interest rate is established by written agreement.

Sec. 24 establishes the technology-enabled fiduciary financial institution development and expansion fund in the state treasury to be administered by the secretary of commerce. Expenditures from the fund shall be for the purposes of distributing to economic growth zones

KANSAS OFFICE *of*
REVISOR *of* STATUTES

LEGISLATURE *of* THE STATE *of* KANSAS

for the purposes of economic development projects or opportunities and promoting and facilitating the development, growth and expansion of TEFFIs, fidfin activities and custodial services in the state and to locate such TEFFIs' office space in an economic growth zone. The fund also receives interest earnings.

Sec. 25 requires that on July 1, 2021, the commissioner shall grant a conditional TEFFI charter to Beneficient and shall establish a pilot program with Beneficient with a \$1,000,000 initial fee and \$9,000,000 distribution requirement for Beneficient under such pilot program. A community in Harvey county, selected by Beneficient, would be the first economic growth zone. Upon issuance of the conditional charter, Beneficient may not commence fidfin transactions in the state until the earlier of December 31, 2021, or the date the commissioner adopts rules and regulations pursuant to section 22. The commissioner may extend that date for a period not to exceed 6 months if the commissioner submits a report on or before January 10, 2022, to the Senate Financial Institutions and Insurance Committee and to the House Financial Institutions and Rural Development Committee identifying the specific reasons for which such extension is necessary.

Beneficient may satisfy the applicable distribution requirement in section 2 and the required distribution amount in section 11 by placing assets in escrow with one or more qualified charities with such funds being released when Beneficient is permitted to commence fidfin transactions.

On or before January 10, 2022, the OSBC shall provide a report to the above Senate and House Committees updating on the progress of the pilot program. Such report shall include recommendations from OSBC for any legislation necessary to implement the provisions of the act.

Sec. 26 provides that no interest held in a fidfin trust shall be void or invalid by reason of any common law rule, including, but not limited to, the rule against perpetuities or rule limiting the duration of trusts.

Sec. 27 provides that for state tax purposes a TEFFI that serves as trustee under the act shall be classified as a corporation, an association, a partnership, a trust or otherwise, as shall be determined under the federal internal revenue code.

Sec. 28 establish an income and privilege tax credit beginning tax year 2021 for TEFFIs in an amount equal to such TEFFI's qualified charitable distributions during such taxable year if the TEFFI maintained such TEFFI's principal office in an economic growth zone. The credit could be carried forward for up to five taxable years following the year in which the credit is first allowed. Tax credits under this section shall not be sold, assigned, conveyed or otherwise transferred. In any taxable year, a TEFFI shall pay the greater of the qualified charitable distributions made during such year or the tax liability imposed pursuant to the Kansas income tax or privilege tax.

Sec. 29 establishes the Joint Committee on Fiduciary Financial Institutions Oversight.