

SESSION OF 2021

**SUPPLEMENTAL NOTE ON SENATE SUBSTITUTE FOR
HOUSE BILL NO. 2074**

As Recommended by Senate Committee on
Financial Institutions and Insurance

Brief*

Senate Sub. for HB 2074 would enact the Technology-enabled Fiduciary Financial Institutions Act (Act), which will be part of and supplemental to Chapter 9 of the *Kansas Statutes Annotated* (the Kansas Banking Code). On July 1, 2022, the bill would require the State Bank Commissioner issue a charter to The Beneficient Company and establish a fidfin fiduciary institution pilot program with an economic growth zone designated in Harvey County. The bill would also establish an income and privilege tax credit beginning in tax year 2021 for trust banks in an amount equal to such fiduciary financial institution's qualified charitable distributions during such taxable year if the trust bank maintained such fiduciary financial institution's principal office in an economic growth zone.

***Technology-Enabled Fiduciary Financial Institution
Defined***

Under the bill, a "technology-enabled fiduciary financial institution" [referred to generally as TEFFI] or "fiduciary financial institution" would mean any limited liability company, limited partnership, or corporation that:

- Is organized to perform any one or more of the activities and services authorized by this act;

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Has been authorized to conduct business as a fiduciary financial institution under this chapter (the Kansas Banking Code) pursuant to the provisions of Section 2;
- Has made, committed to make, or caused to be made a qualified investment; and
- Has committed, in or as part of the application provided in Section 2, and amendments thereto, to conduct any fidfin transactions in accordance with Section 11, and amendments thereto, including the distributions required therein.

Designation of Act; Definitions (Section 1)

The bill would also establish definitions for the following terms:

- “Alternative asset” would mean professionally managed investment assets that are not publicly traded, including, but not limited to, private equity, venture capital, leveraged buyouts, special situations, structured credit, private debt, private real estate funds, and natural resources, including any economic or beneficial interest therein;
- “Alternative asset custody account” would mean an account created by the owner of an alternative asset that designates a fiduciary financial institution as a custodian or agent and into which the client transfers, electronically or otherwise, content, materials, data, information, documents, reports, and contracts in any form, including without limitation evidence of ownership, subscription agreements, private placement memoranda, limited partnership agreements, operating agreements, financial statements, annual and quarterly reports, capital account statements, tax

statements, correspondence from the general partner, manager, or investment advisor of the alternative asset, an investment contract as defined in KSA 17-12a102(28)(E) [in the Uniform Securities Act] and any digital asset as defined in KSA 58-4802 [the Revised Uniform Fiduciary Access to Digital Assets Act], whether such information is in hard copy form or a representation of such information that is stored in a computer readable format;

- “Charitable beneficiaries” would mean one or more charities, contributions to which are allowable as a deduction pursuant to Section 170 of the federal Internal Revenue Code, that are designated as beneficiaries of a fidfin trust;
- “Custodial services” would mean the safekeeping and management of an alternative asset custody account, including the execution of customer instructions, serving as agent, fund administrative services, and overall decision-making and management of the account by a fiduciary financial institution; “custodial services” would be deemed to involve the exercise of fiduciary and trust powers;
- “Economic growth zone” would mean an incorporated community with a population of not more than 5,000 people located within one of the listed 78 counties (those counties, with the exception of Harvey County, are currently designated as Rural Opportunity Zone counties);
- “Excluded fiduciary” would mean a fiduciary financial institution in its capacity as a trustee of a fidfin trust, provided that a fiduciary financial institution shall only be deemed an “excluded fiduciary” to the extent the fiduciary financial institution is excluded from exercising certain powers under the instrument that may be exercised

by the trust advisor or other persons designated in the instrument;

- “Fidfin trust” would mean a trust created to facilitate the delivery of fidfin services by a fiduciary financial institution;
- “Fiduciary” would mean a trustee, a trust advisor, or a custodian of an alternative asset custody account appointed under an instrument that is acting in a fiduciary capacity for any person, trust, or estate;
- “Qualified investment” would mean the purchase or development, in the aggregate, of at least 10,000 square feet of commercial, industrial, multiuse, or multifamily real estate in the economic growth zone where the fiduciary financial institution maintains its principal office pursuant to requirements in the bill (Section 9), provided that such community has committed to develop the necessary infrastructure to support a qualified investment.

A “qualified investment”:

- Could include, as part of satisfying the square footage requirements, the suitable office space of such fiduciary financial institution, as provided in Section 9 of the bill, if owned by the fiduciary financial institution;
- Would be exempt from the provisions and limitations on holding real estate of KSA 9-1102;
- Could be retained by a fiduciary financial institution for as long as the fiduciary financial institution operates in this state; and
- Could be sold, transferred, or otherwise disposed of, including a sale or transfer to an affiliate of the fiduciary financial institution, if the fiduciary financial institution continues to

maintain its principal office in an economic growth zone.

The bill would also provide for qualified investment criteria in the instance a fiduciary financial institution leases any portion of a qualified investment made by another fiduciary financial institution as the lessee fiduciary financial institution's suitable office space; and

- "Trust advisor" would mean a fiduciary granted authority by an instrument to exercise, consent, direct, including the power to direct as provided in KSA 58a-808 (pertaining to duties of trustees), or approve all or any portion of the powers and discretion conferred upon the trustee of a fidfin trust, including the power to invest the assets of a fidfin trust or make or cause distributions to be made from such fidfin trust.

The bill would also define the terms "act"; "fidfin", "fidfin services" or "fidfin transactions"; and "instrument." The bill would also state the definitions applicable to supervision provisions of the Kansas Banking Code apply to fiduciary financial institutions except as otherwise provided in the Act.

***Certificate of Authority and Charter; Office of the State
Bank Commissioner; Department of Commerce
(Section 2)***

***Certificate of Authority; Application Form and Approval of the
Board***

The bill would state no fiduciary financial institution shall be organized under the laws of this state nor engage in fidfin transactions, custodial services, or trust business in this state until the application for such fiduciary financial institution's organization and the application for certificate of authority have been submitted to and approved by the State Banking

Board (Board). The form for making this application would be prescribed by the Board, and the bill would require any application to the Board to contain such information as the Board may require.

The bill would further provide no bank, trust company, or fiduciary financial institution could engage in fidfin transactions in Kansas unless an application had been submitted under the Act and had been approved by the Board.

Requirements on Fiduciary Financial Institution Applicants

The bill would provide the Board could not accept an application for a fiduciary financial institution unless the:

- Fiduciary financial institution is organized by at least one person;
- Name selected is different or substantially dissimilar from that of any other bank, trust company, or fiduciary financial institution doing business in this state;
- Fiduciary financial institution's articles of organization contain the names and addresses of the fiduciary financial institution's members and the number of units subscribed by each. The articles of organization would be permitted to contain other provisions as are consistent with the Kansas Revised Limited Liability Company Act, the Kansas Revised Uniform Limited Partnership Act, or the Kansas General Corporation Code;
- Fiduciary financial institution has made, committed to make, or caused to be made a qualified investment, as defined by the bill;
- Fiduciary financial institution has committed to structure any fidfin transaction to ensure that

qualified charitable contributions, as defined in the bill, are made each calendar year that the fiduciary financial institution conducts fidfin transactions; and

- Fiduciary financial institution has consulted or agrees to consult with the Department of Commerce (Department) regarding the economic growth zones to be selected.

Role of the State Banking Board

The Board would be allowed to deny the application if it makes an unfavorable determination with regard to the:

- Financial standing, general business experience, and character of the organizers; or
- Character, qualifications, and experience of the officers of the proposed fiduciary financial institution.

The Board would not be permitted to make membership in any federal government agency a condition precedent to granting the authority to do business.

The Board would be permitted to require fingerprinting of any officer, director, organizer, or any other person of the proposed fiduciary financial institution related to the application deemed necessary by the Board. The bill would provide language to allow the fingerprints to be submitted to the Kansas Bureau of Investigation and the Federal Bureau of Investigation for the purposes of conducting a state and national criminal history record check. Should the Board require fingerprinting, the bill would provide that any associated costs be paid by the applicant or parties to the application.

The Board or the State Bank Commissioner (Bank Commissioner) would be required to notify a fiduciary financial institution of the approval or disapproval of an

application. Any final action of the Board approving or disapproving an application would be subject to review in accordance with the Kansas Judicial Review Act.

Applicable Distribution, Compliance by Approved Applicants

The bill would provide, in the event the application is approved, the fiduciary financial institution would be issued a charter upon compliance with the Act's requirements and upon demonstrating to the satisfaction of the Bank Commissioner that an applicable distribution has been made. An "applicable distribution" would mean a distribution of cash, beneficial interests, or other assets having an aggregate value equal to the greater of:

- 2.5 percent of the aggregate financing balances to be held by the fiduciary financial institution immediately upon issuance of the fiduciary institution's charter, as reflected in its application; or
- \$5.0 million in accordance with the applicable distribution amount specified in the bill, except that if the fiduciary financial institution is chartered to provide only custodial services, the applicable distribution amount would be \$500,000.

The bill would state if the amount provided in accordance with the applicable distribution amount exceeds the amount provided as a percentage of the aggregate financing balances, the fiduciary financial institution would be entitled to a credit against the amount of the distribution under Section 11 of the bill.

The bill would provide the distribution schedule for the required applicable distribution to the Department as follows:

| Applicable distribution amount | Percentage to Department (%) |
|--------------------------------|------------------------------|
| \$0 to \$500,000 | 90.0% |
| \$500,001 to \$1,000,000 | 50.0% |
| Above \$1,000,000 | 10.0% |

The bill would specify these distribution amounts would apply to fiduciary financial institutions chartered prior to January 1, 2023. For fiduciary financial institutions chartered after this date, the Department would be authorized to publish one or more schedules in the *Kansas Register* as it deems reasonably necessary to facilitate economic growth and development in one or more economic growth zones. The Department would be required to timely submit any published schedule to the Bank Commissioner. The Bank Commissioner would be required to provide a copy of such schedule(s) to any applicant for a fiduciary financial institution charter prior to the issuance of such charter. A fiduciary financial institution would be subject to the schedule in existence on the date its charter is issued.

The bill would require the Department to remit all distributions made to the State Treasurer. Upon receipt of such remittances, the State Treasurer would be required to deposit the entire amount to the credit of the Technology-enabled Fiduciary Financial Institutions Development and Expansion Fund. The bill would further provide the balance of the applicable distribution must be distributed to one or more qualified charities, as defined in the bill, as would be selected by the fiduciary financial institution. The bill would further state nothing in this section shall preclude a distribution to one of more qualified charities in excess of the amounts provided in this section.

The bill would also provide an economic growth zone or qualified charity shall have no obligation to repay any distributions received under the Act or to make any contributions to a fiduciary financial institution.

Fees and Assessments (Section 3)

Initial Fee and Expenses

The bill would require every fiduciary financial institution be assessed an initial fee of \$500,000 to be remitted concurrently with the issuance of such fiduciary financial institution's charter. The bill would require the expense of every annual regular fiduciary financial institution examination, together with the expense of administering fiduciary financial institution laws, including salaries, travel expenses, supplies and equipment, to be paid by the fiduciary financial institutions of Kansas.

Annual Assessment

The bill would require the Bank Commissioner, prior to the beginning of each fiscal year, to make an estimate of fiduciary financial institution expenses to be incurred by the Office of the State Bank Commissioner (OSBC) during such fiscal year in an amount not less than \$1.0 million. The bill would require the Bank Commissioner to allocate and assess each fiduciary financial institution on the basis of such institution's total fidfin transaction balances, consisting of the aggregate fidfin financing balances of the fiduciary financial institution reflected in the last December 31 report filed with the Bank Commissioner, filed pursuant to reporting provisions of KSA 9-1704. The bill would provide a separate assessment allocation for those entities that have no fidfin transaction balances but are providing custodial services or trust services. The bill would further provide a fiduciary financial institution that has no fidfin transaction balances and no alternative asset custody accounts reflected in its last December 31 report may be granted inactive status. An inactive fiduciary financial institution could be assessed an annual assessment in an amount not to exceed \$10,000. The bill would require the annual fee be first assessed in the year immediately following the year the fiduciary financial institution received a certificate of authority to engage in fidfin

transactions, custodial services, and trust business and for each year thereafter.

The bill would require the statement of each assessment to be transmitted by the Bank Commissioner on December 1 or the next business day to each fiduciary financial institution. The bill would further permit the assessment to be collected as needed and in such installments as the Bank Commissioner deems appropriate. The Bank Commissioner would be permitted to impose a penalty in the amount of \$50 for each day past due, when the annual assessment is more than 15 days past due.

The Bank Commissioner would remit all moneys received from such fees and assessments to the State Treasurer. The State Treasurer would deposit the entire amount in the State Treasury and credit 75.0 percent of each remittance to the Bank Commissioner Fee Fund and 25.0 percent to the Technology-enabled Fiduciary Financial Institutions Development and Expansion Fund.

Application of Provisions, Chapter 9 (Section 4)

The bill would provide, to the extent a conflict does not exist between this act and the Kansas Banking Code, the provisions of the Code (Chapter 9) shall apply to a fiduciary financial institution in the same manner as it applies to a trust company except that references in Chapter 9 to:

- “Capital stock” would include membership capital and partner capital;
- “Stock” would include membership units and partnership interests;
- “Common stock” would include common units and common interests;

- “Preferred stock” would include preferred units and preferred interests;
- “Stockholders” would include members and partners;
- “Articles of incorporation” would include articles of organization and articles of limited partnership;
- “Incorporation” would include organization;
- “Corporation” would include company and partnership;
- “Corporate” would include company and partnership; and
- “Trust business” and “business of a trust company” would include fidfin and fiduciary financial institution business.

The bill would state KSA 9-901a(a) means Section 5 of this bill (pertaining to capital). The bill would also provide if any conflict exists between any provision of Chapter 9 (the Kansas Banking Code) and this act, the provisions of this act would control.

Capital (Section 5)

The bill would define “capital” to mean the total of the aggregate par value of a fiduciary financial institution’s outstanding membership units, its surplus, and its undivided profits. The bill would provide the required capital for fiduciary financial institutions must be \$250,000 when:

- The fiduciary financial institution does not accept deposits, other than alternative asset custody accounts;

- The fiduciary financial institution maintains no third-party debt except debts owed to the members of the fiduciary financial institution or its affiliates; and
- The fiduciary financial institution has secured an agreement from its members whereby such members agree to contribute additional capital to the fiduciary financial institution if needed to ensure its safety and soundness. A fiduciary financial institution that fails to satisfy the capital requirements would be subject to the capitalization requirements of KSA 9-901a, as applicable to trust companies.

The bill would provide the capital of a fiduciary financial institution shall be divided, with 60.0 percent of the amount as aggregate par value of outstanding membership units, 30.0 percent as surplus, and 10.0 percent as undivided profits.

***Business of Fiduciary Financial Institutions,
Management and Control (Section 6)***

The bill would require the business of any fiduciary financial institution to be managed and controlled by such fiduciary financial institution's board of directors. The bill would provide this board must consist of not less than 5 nor more than 25 members who are elected by the members at any regular annual meeting. The bill would specify at least one director must be a resident of Kansas. The bill would also provide provisions pertaining to holding meetings that cannot occur on the date specified in the operating agreement or bylaws and meeting notice requirements.

The bill would require annual meetings of fiduciary financial institutions to be held in Kansas. The bill would permit any other meetings of such institution's management or directors, including the meeting required by KSA 9-1116 (quarterly meetings), to be held in any location determined by the fiduciary financial institution's officers or directors.

*Changes in Directorship; Vacancies on the Board of
Directors; Administration of Oath*

The bill would require any new directorship to be approved and elected by members in the manner provided in the fiduciary financial institution's organizational documents or, in the absence of such provisions, in the manner provided by the Kansas Revised Limited Liability Company Act, the Kansas Revised Uniform Limited Partnership Act, or the Kansas General Corporation Code. The bill would permit the convening of a special meeting at any time for such purpose. The bill would also provide that any vacancy in the board of directors could be filled by the board of directors in the manner provided in the fiduciary financial institution's organizational documents or, in the absence of such provisions, pursuant to the Kansas laws previously referenced.

The bill would require, within 15 days after the annual meeting, the president or cashier submit to the Bank Commissioner a certified list of members and the number of units owned by each member. The Bank Commissioner would be allowed to require the list be filed *via* electronic means.

The bill would require each director to take and subscribe an oath to administer the affairs of the fiduciary financial institution diligently and honestly and to not knowingly or willfully permit any of the laws relating to fiduciary financial institutions to be violated. The bill would require a copy of each oath to be retained and would permit the Bank Commissioner to require oaths to be filed *via* electronic means.

The bill would require every fiduciary financial institution to notify the Bank Commissioner of any change in the chief executive officer, president, or directors, including in its report a statement of the past and current business and professional affiliations of the new chief executive officer, president, or directors.

Reporting to the Bank Commissioner; Evaluation of Safety and Soundness (Section 7)

The bill would require a fiduciary financial institution to make a report to the Bank Commissioner pursuant to the provisions of the Kansas Banking Code applicable to requiring reports of banks and trust companies, upon request of the Bank Commissioner (KSA 9-1704). In making such report, the bill would require a fiduciary financial institution to:

- Report the fiduciary financial institution's fidfin transactions pursuant to generally accepted accounting principles (GAAP); and
- Calculate such fiduciary financial institution's capital solvency by including the value of all tangible and intangible assets owned by the fiduciary financial institution, regardless of use.

Safety and Soundness

The bill will would require the Board and Bank Commissioner, when evaluating the safety and soundness of a fiduciary financial institution, to:

- Consider that collateral or underlying assets associated with fidfin transactions are volatile in nature and that such volatility has been accepted by the members and customers of the fiduciary financial institution;
- Respect the form, treatment, and character of fidfin transactions under the laws of this state, notwithstanding the treatment or characterization of such transactions under GAAP or for tax purposes;
- Evaluate the soundness based on whether available capital, including the members' contribution to capital (section 5 of the bill),

exceeds the institution's obligations, determined in accordance with GAAP; and

- Evaluate the safety based on the background and qualifications of the fiduciary financial institution's executive officers and directors and its internal controls and audit processes to ensure adherence to the policies and procedures of the institution.

Profitability. The bill would state profitability shall not be a consideration in evaluating the safety and soundness of a fiduciary financial institution if sufficient capital and equity exist in the business, including, without limitation, membership capital, surplus, undivided profits, and commitments by members to contribute additional capital to the fiduciary financial institution.

Advertising, Use of Name (Section 8)

The bill would permit a fiduciary financial institution to use in its business name or advertising the words "fiduciary financial institution" or any similar term or phrase, but such institution would not be permitted to use "bank," "trust company," or any term that tends to imply that the business is holding out to the public that it engages in the business of banking or engages in the business of a trust company, unless the Bank Commissioner has approved the use in writing after finding that such use will not be misleading.

Economic Growth Zone, Requirements on Office Space, Employment, and Business Performed in Kansas (Section 9)

The bill would require fiduciary financial institutions to maintain suitable office space in an economic growth zone; employ, engage, or contract with at least three employees; and perform fidfin transactions, custodial services, and trust business in Kansas. The bill would also permit a fiduciary financial institution to engage in fidfin transactions, custodial

services, and trust business in other states to the extent permitted by applicable law. The term “suitable office space” would mean at least 2,000 square feet of class A office space located in an economic growth zone selected by the fiduciary financial institution that the fiduciary financial institution utilizes as its principal office. The bill would also place requirements on the principal office of the fiduciary financial institution, including that such office must be located in an economic growth zone selected by the trust bank and have a secure computer terminal or other electronic device that provides access to such records necessary to facilitate an efficient and effective examination.

Business Performed in Kansas

The bill would deem fidfin transactions, custodial services, and trust business to have been performed in Kansas if such transaction or custodial service agreements are approved or signed in this state on behalf of the fiduciary financial institution and at least three of the following acts are performed by a technology platform wholly or partly operated in this state: annual account reviews, annual investment reviews, trust or custodial accounting, account correspondence, reviewing and signing trust account or custodial account tax returns, or distributing account statements.

Fiduciary Financial Institution Powers; Fidfin Transactions (Section 10)

The bill would authorize a fiduciary financial institution to exercise by its board of directors or duly authorized officers or agents, subject to law, the following powers:

- To engage in fidfin transactions in accordance with the bill (Section 11, powers and duties pertaining to extension of credit or credit to a fidfin trust);

- To receive, retain, and manage alternative asset custody accounts in accordance with the bill (Section 13, custodial services); and
- To engage in trust business as defined in provisions of the Kansas Banking Code applicable to supervision (KSA 9-701).

***Additional Powers, Duties, and Responsibilities—
Extension of Credit and Financing; Required
Distribution Amount (Section 11)***

The bill would permit, if authorized by the terms of an instrument (as provided in Section 1), a fiduciary financial institution to:

- Extend financing or extensions of credit to a fidfin trust when:
 - The fiduciary financial institution serves as trustee of the borrowing fidfin trust;
 - The financing is collateralized or supported by the assets of the fidfin trust;
 - The financing is nonrecourse as to the fiduciary financial institution's customer and is not otherwise guaranteed by such customer;
 - The fiduciary financial institution agrees, in the applicable financing agreement or other written document, that the fiduciary financial institution is providing financing in a fiduciary capacity; and
 - The fiduciary financial institution agrees that such institution is providing financing in a fiduciary capacity; and
- Acquire or invest in an alternative asset on behalf of and through a fidfin trust.

Fidfin Transactions

The bill would further specify the financing of a fidfin trust would be considered a fiduciary finance or fidfin transaction. The bill would also state, if authorized or directed by the terms of an instrument, a fiduciary financial institution would not be deemed to have a conflict of interest, have violated a duty to a fidfin trust or the beneficiaries thereof, or have engaged in self-dealing by entering into a fidfin transaction.

The bill would provide that the combination rules of KSA 9-1104(f) (limitations on loans and borrowing) would not be applicable to a fiduciary financial institution's fidfin transactions regardless of the identify of the fidfin trust beneficiary if:

- The borrower is a fidfin trust; and
- The fiduciary financial institution serves as trustee of the borrowing fidfin trust.

The bill would further state a fiduciary financial institution that engages in a fidfin transaction shall be a fiduciary and specify when such fiduciary financial institution would be deemed to be exercising fiduciary powers.

The bill would again specify the required distribution, percentage of distribution to the Department, and requirement on publication of the schedule as it applies to the fidfin transactions of a fiduciary financial institution (outlined in Section 2 of the bill).

The bill would also provide an economic growth zone or qualified charity shall have no obligation to repay any distributions received under the Act or to make any contributions to a fiduciary financial institution.

The bill would also state the form, treatment, and character of fidfin transactions under the laws of this state

shall be respected for all purposes of this act, notwithstanding the treatment or characterization of such transactions under GAAP for tax purposes.

***Employment of Professionals; Professional Services
(Section 12)***

The bill would allow a fiduciary financial institution to employ and engage various professionals to advise and assist the fiduciary financial institution in its business. A fiduciary financial institution would be permitted, among those activities outlined in the bill, to:

- Employ one or more agents to perform any act of fidfin transactions, custodial services, or trust business; and
- License internet-related services, including web services, software, mobile applications, technology-enabled platforms and processes to or from affiliates, third parties, other fiduciary financial institutions, and their affiliates.

The bill would also specify a party engaged by a fiduciary financial institution would not be deemed to have engaged in fidfin transactions by reason of providing services to a fiduciary financial institution or licensing products, platforms, systems, or processes of the fiduciary financial institution.

Use of Technology-enabled Platform

The bill would specify if a fiduciary financial institution offers its platform to provide fidfin services to residents of other states, neither the marketing, use, and deployment of such platform by parties in other states nor the origination of fidfin services through such platform would constitute an out-of-state trust facility under State Banking Code provisions applicable to trust companies (KSA 9-2111), if the fiduciary

financial institution complies with provisions of the bill (office space and employment or contracting).

The fiduciary financial institution would be required to provide notice to the Bank Commissioner if it engages a party under the bill's provisions for employment of a professional for advice and assistance.

Custodian of an Asset Custody Account (Section 13)

The bill would permit a fiduciary financial institution to serve as a custodian, which includes serving as a qualified custodian (as defined by the U.S. Securities and Exchange Commission) of an asset custody account. In providing such services, a fiduciary financial institution would be required to:

- Implement all accounting, account statement, internal control, notice, and other standards specified by applicable state or federal law and rules and regulations for custodial services;
- Maintain information technology best practices relating to alternative assets held in custody;
- Fully comply with applicable federal anti-money laundering, customer identification, and beneficial ownership requirements; and
- Take other actions necessary to comply with the requirements of the bill.

The bill would provide a fiduciary financial institution performing custodial services would be deemed to be serving as a fiduciary and exercising fiduciary powers.

Instrument of the Trust Advisor (Section 14)

The bill would provide that any instrument providing for a trust advisor may also provide such 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 would have 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.

Excluded Fiduciaries; Exemption from Liability (Section 15)

The bill would provide for the exemption from liability of an excluded fiduciary, either individually or as a fiduciary, from:

- Any loss that results from compliance with a direction of the trust advisor; or
- Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor.

The bill would provide for instances when the excluded fiduciary would be relieved from obligations to review or evaluate a direction from a trust advisor and the duty to communicate with the trust advisor. The bill would also provide, in any action against an excluded fiduciary, the burden of proof would be on the person seeking to hold the excluded fiduciary liable under the clear and convincing evidence standard.

Trust Advisors; Presumption of Acting as Fiduciary (Section 16)

The bill would state a trust advisor is presumed to be a fiduciary when exercising such trust advisor's authority under the Act. The bill would specify that by accepting appointment to serve as a trust advisor to a fidfin trust or an alternative asset custody account, a trust advisor submits to jurisdiction

of the courts of Kansas even if agreements provide otherwise.

The bill would also provide an instrument may appoint an individual, corporation, or limited liability company as the trust advisor of a fidfin trust or an alternative asset custody account.

***Exemption from Article 8 of the State Banking Code
(Section 17)***

The bill would specify, for an entity appointed as a trust advisor, when the provisions of the State Banking Code (Article 8, organization) would not apply. Those instances would include if such entity:

- Is established for the exclusive purpose of acting as a trust advisor;
- Is acting in such capacity under an instrument that names a fiduciary financial institution as trustee or custodian;
- Is not engaged in trust business with the general public as a public trust company or with any family as a private trust company;
- Does not hold itself out as being in the business of acting as a fiduciary for hire as either a public or private trust company; and
- Agrees to be subject to examination by the OSBC at the discretion of the Bank Commissioner.

The bill would require the governing documents of any such entity limit that entity's authorized activities to those of a trust advisor.

Indemnification (Section 18)

The bill would provide that an instrument may relieve and indemnify a trust advisor and fiduciary financial institution that serves as a trustee of a fidfin or alternative asset custody account that serves as a trustee from liability for breach of fiduciary liability duty if any such provision is unenforceable to the extent that it relieves the trust advisor or fiduciary financial institution from liability for a breach of fiduciary duty committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary.

Compensation of the Trustee (Section 19)

The bill would provide requirements governing the compensation of a trustee, specifying each trustee would be entitled to be compensated as provided in the terms of a fidfin trust, except that such compensation may be increased or decreased upon approval by the trustee and by unanimous consent of the beneficiaries. The bill would also specify when the court would be permitted to allow additional compensation of a trustee.

Privacy Protections (Section 20)

The bill would establish privacy protections for those establishing a fidfin trust or alternative asset custody account, in court proceedings, upon petition of the acting trustee, custodian, trustor or any beneficiary. Upon the filing, documents would be sealed and not be part of the public record, except that the petition would be available.

Permissible Filing of Forms with Bank Commissioner (Section 21)

The bill would provide a trust bank may, but would not be required to, file forms relating to trust bank transactions under the Act with the Bank Commissioner for examination,

review, and approval. The bill would also provide for the approval and disapproval of such forms, the time frames associated with consideration of the forms, and the uses of the forms.

Rules and Regulations (Section 22)

The bill would require the Bank Commissioner to adopt rules and regulations on or before January 1, 2022, as necessary to administer the Act.

Interest Rate or Charge; Written Agreement (Section 23)

The bill would provide, notwithstanding the provisions of Chapter 16 of the *Kansas Statutes Annotated* (contracts and promises) or other law, there is no maximum interest rate or charge or usury rate restriction between or among a fiduciary financial institution and a fidfin trust if the rate or charge is established by written agreement.

A “written agreement” would mean a document in writing, whether in physical or electronic form, in which the parties have demonstrated their agreement to the terms and conditions of an extension of credit, including the rate of interest.

Technology-Enabled Fiduciary Financial Institutions Development and Expansion Fund (Section 24)

The bill would establish the Technology-Enabled Fiduciary Financial Institutions Development and Expansion Fund (Fund) in the State Treasury to be administered by the Secretary of Commerce. The bill would require expenditures from the Fund to be for the purposes of distributing to economic growth zones for the purposes of economic development projects or opportunities and promoting and facilitating the development and growth of trust banks, fidfin

activities, and custodial services in Kansas and to locate trust banks' office space in an economic growth zone.

The bill would also require transfers from the State General Fund (SGF) to the Fund of interest earnings.

Issuance of Charter to The Beneficient Company; FidFin Fiduciary Financial Institution Pilot Program (Section 25)

On July 1, 2021, the bill would require the Bank Commissioner to grant a fiduciary financial institution charter to Beneficient Company (Beneficient) upon the filing of an application and satisfying requirements as detailed in the bill.

Harvey County Community; Pilot Program

The bill would require Beneficient to designate a community within Harvey County as the first economic growth zone.

The Bank Commissioner would be required to establish a FidFin Fiduciary Financial Institution Pilot Program that would include Beneficient as a participant, assess an initial fee of \$1.0 million in lieu of the initial charter fee established in the bill (Section 3), and impose a requirement for Beneficient to distribute or facilitate the distribution of cash, beneficial interests, or other assets having an aggregate value of \$9.0 million. This distribution will be distributed in accordance with requirements in the bill and shall be construed as the applicable distribution amount, as specified in the bill (Section 2).

Upon the issuance of the charter, Beneficient will be subject to all requirements imposed on trust banks under the Act, but will not be permitted to conduct fidfin transactions, custodial services, or trust business in Kansas until the earlier of December 31, 2021, or the date the Bank Commissioner adopts rules and regulations (as required in section 22).

*Extension of Time Frame before Transactions and other
Business; Report to Legislature*

The bill would permit the Bank Commissioner to extend the period of time in which Beneficient may not commence fidfin transactions, custodial services, or trust business in Kansas for a period not to exceed six months if the Bank Commissioner submits a report to the chairperson of the Senate Committee on Financial Institutions and Insurance and the House Committee on Financial Institutions and Rural Development identifying the specific reasons for which such extension was necessary.

The bill would further allow Beneficient to satisfy the application distribution requirements of the bill (section 2) by placing assets in escrow with one or more qualified charities provided that such funds shall be released when Beneficient is permitted to commence fidfin transactions, custodial services, or trust business.

Interest in a Fidfin Trust (Section 26)

The bill would provide 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.

***Classification of Business Trust, Taxation Purposes
(Section 27)***

The bill would provide that, for state taxation purposes, a fiduciary financial institution that serves as a trustee under the Act shall be classified as a corporation, association, a partnership, a trust, or otherwise, as determined by the federal Internal Revenue Code.

Income and Privilege Tax Credit; “Qualified Charitable Distributions” (Section 28)

The bill would establish an income and privilege tax credit beginning with tax year 2021 for fiduciary financial institutions in an amount equal to such fiduciary financial institution’s qualified charitable distributions during such taxable year if the fiduciary financial institution maintained such fiduciary financial institution’s principal office in an economic growth zone. The bill would allow a tax credit could be carried forward. The credit could be carried forward for up to five taxable years following the years in which the credit is first allowed. These provisions would be part of and supplemental to the Kansas Income Tax Act.

The bill would create definitions for “qualified charitable distributions” and “qualified charities.” The bill would specify “qualified charities” would be charities that have been:

- Organized pursuant to a charter promulgated by the Department for the purposes of making distributions for the benefit of economic growth zones;
- Committed in writing to utilize the entire amount of the qualified charitable distributions, excluding reasonable administrative expenses, exclusively for the benefit of charitable causes located in one or more economic growth zone or postsecondary educational institution; and
- Agreed to provide an annual report to the Department detailing qualified distributions received during such year, distributions made, and the remaining balance of qualified distributions as of the end of the reporting year.

The bill would also specify when such requirements would not apply.

Background

The Senate Committee on Financial Institutions and Insurance recommended a substitute bill incorporating provisions pertaining to technology-enabled fiduciary financial institutions (amended provisions of SB 288). The original provisions of the bill were removed from the bill. [Note: HB 2074, as recommended by the House Committee on Insurance, would have amended provisions governing agent licensing and renewal requirements. Similar provisions were included in SB 37, which has passed the Legislature.]

SB 288 was introduced by the Senate Committee on Ways and Means at the request of Senator Claeys.

Senate Committee on Financial Institutions and Insurance

In the Senate Committee hearing on March 29, 2021, representatives of The Beneficient Company Group, LP, provided **proponent** testimony, stating the bill would encourage business development in evolving and expanding industries and address the complimentary, but separate lane the TEFFIs would occupy among Kansas banks and trust companies. The Beneficient representatives also noted the bill would represent comprehensive legislation positioning Kansas as the preferred jurisdiction for trust banks to consolidate operations from other states.

The Lieutenant Governor and Secretary of Commerce also provided **proponent** testimony, stating the bill would provide an opportunity to bring new dollars into the state that could then be distributed to rural communities that are in need of revitalization. The mayor of the City of Hesston, the president of the Hesston Community Foundation, and Representative Owens also provided proponent testimony.

In the continued hearing on March 30, 2021, neutral testimony was provided by representatives of the OSBC and

the Kansas Bankers Association. The Bank Commissioner stated the agency will be able to regulate this new entity, but offered the agency's concerns about the business model proposed in the bill (which will be unique to the Kansas market); the entity's lending practice that relies on "alternative assets," which are generally considered volatile (the OSBC is not accustomed to examining these assets, will not have historical data demonstrating expected cash flow); bill language that does not allow the agency to review the profitability of the technology-enabled trust bank (TETB) during examination; and the steps that might be necessary in the event this entity fails (not an FDIC-insured institution). The KBA representative highlighted initial concerns with the bill and discussions with the proponents to the bill, indicating the TETB would not directly compete with Kansas banks and trust companies, as they do not offer the same services. A concern was raised regarding the use of "TETB" and the proponents were to address those concerns in an amendment to update the name to TEFBI.

The Senate Committee amended the bill to:

- Update references from "trust bank" to "fiduciary financial institution" throughout the bill;
- Specify an economic growth zone or qualified charity would have no obligation to repay any distributions received under the Act or to make any contributions to a fiduciary financial institution;
- Update business name and advertising provisions pertaining to fiduciary financial institutions;
- Include language stating the purpose for expenditures from the Technology-enabled Fiduciary Financial Institution Development and Expansion Fund;
- Add language relating to the satisfaction of the applicable distribution requirement;

- Include language regarding the permissive extension of the period specified for commencing fidfin transactions and reporting to certain legislative committees;
- Require a report by the OSBC to the House Committee on Financial Institutions and Rural Development Committee and the Senate Committee on Financial Institutions and Insurance;
- Add language pertaining to the fiduciary financial institutions' tax liability; and
- Make technical amendments.

Fiscal Information

The following information was provided in a fiscal note prepared by the Division of the Budget on SB 288 as introduced. A fiscal note was not immediately available for the substitute bill.

State Agency Costs

Office of the State Bank Commissioner. According to the fiscal note prepared by the Division of the Budget, the OSBC indicates one TETB will be chartered and examined in FY 2022 and would be subject to the fees outlined in the bill. The agency estimates in FY 2022 it would receive \$1,125,000 into its Bank Commissioner Fee Fund. Of that amount \$375,000 ($\$500,000 \times 75.0$ percent) would be from one initial fee and \$750,00 ($\$1,000,000 \times 75.0$ percent) would be from an annual examination fee. Any additional expenditures to create new forms, develop an application process, investigate, train, or perform annual exams would be paid with the additional revenues received from enactment of the bill. However, the OSBC does not have any data to estimate such expenditures at this time.

Department of Commerce. The Department of Commerce states it would require \$90,300 in FY 2022 from the SGF and \$85,300 in FY 2023 from the Technology-Enabled Trust Bank Development and Expansion Fund to staff and manage the new fund. Of that amount for FY 2022, \$74,250 would be for 1.00 FTE position, \$6,050 would be for overhead expenditures, and \$10,000 would be for travel expenditures. For FY 2023, \$74,250 would be for 1.00 FTE position, \$6,050 would be for overhead expenditures, and \$5,000 would be for travel expenditures. The agency states it would require an appropriation from the SGF to finance its expenditures until there is enough funding in the Technology-Enabled Trust Bank Development and Expansion Fund to support expenditures.

Kansas Bureau of Investigation. The Kansas Bureau of Investigation states the bill would create additional state and national criminal history record check requests. Any additional expenditures created by the bill would be offset by revenues received to perform the checks by staff and maintenance on required systems.

State Agency Costs and Impact on Income and Privilege Tax Receipts

Department of Revenue. The Department of Revenue indicates the bill would decrease SGF revenues beginning in FY 2022 by an unknown amount. The agency does not have data on technology-enabled trust banks to make a precise estimate of the fiscal effect of providing an income and privilege tax credit for trust banks making certain charitable donations. The Department of Revenue indicates it would require a total \$105,664 from the SGF in FY 2022 to implement the bill and to modify the automated tax system. The required programming for this bill by itself would be performed by existing staff of the agency. In addition, if the combined effect of implementing this bill and other enacted legislation exceeds the agency's programming resources, or if the time for implementing the changes is too short,

additional expenditures for outside contract programmer services beyond the agency's current budget may be required.

County-level Impact

The Kansas Association of Counties states the bill could impact Harvey County since that county will be the first economic growth zone. If additional businesses are drawn to Kansas as a result of the bill, there could be a fiscal effect on those counties as well. However, a fiscal effect cannot be estimated. The League of Kansas Municipalities states the bill would not have a fiscal effect on cities.

Any fiscal effect associated with the bill is not reflected in *The FY 2022 Governor's Budget Report*.

Financial institutions; Technology-enabled Fiduciary Financial Institutions Act; Office of the State Bank Commissioner; State Banking Board; Department of Commerce; economic growth zone; Technology-enabled Fiduciary Financial Institutions Development and Expansion Fund