

SESSION OF 2022

SUPPLEMENTAL NOTE ON SENATE BILL NO. 377

As Amended by Senate Committee on Financial
Institutions and Insurance

Brief*

SB 377, as amended, would amend and enact law supplemental to the Captive Insurance Act to allow a technology-enabled fiduciary financial institution (TEFFI) insurance company to operate as an authorized captive insurance company in Kansas.

The bill would be in effect upon publication in the *Kansas Register*.

***Technology-enabled Fiduciary Financial Institution
Insurance Companies Authorized (New Section 1)***

Certificate of Authority

The bill would provide that, in addition to the types of insurance permitted under the Captive Insurance Act, the certificate of authority issued to a TEFFI insurance company shall:

- Authorize the TEFFI insurance company to provide contracts of suretyship or credit insurance where the obligee or insured is:
 - An affiliated TEFFI;
 - An affiliated fidfin trust; or
 - Any other affiliated company;

*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>

- Provide the TEFFI insurance company with authorization to insure its affiliated companies that are investors in an investment fund against liability, loss, or damage (*i.e.*, fraud, theft, or conversion of assets by an investment fund manager and breach of an obligation of a transferor, assignor, or investor in an investment fund);
 - If such coverages are not included within the classes outlined in KSA 40-1102, such coverages would be deemed included, and the Commissioner would be required to assign these coverages to an appropriate line of business for reporting purposes;
- List events that would be considered, for the purpose of a policy or product offered by a TEFFI insurance company issue, as “fortuitous events” (*i.e.*, any action taken by an investment fund manager that affects the economic value of an investor’s interest in an investment fund in response to the attempted transfer of such interest in an investment fund to an affiliated fidfin trust); and
- Exempt a TEFFI insurance company from a naming requirement in the Captive Insurance Act;
 - The TEFFI insurance company would not be required to incorporate “captive” into its name if the company uses any of these identifiers in its name: “Technology-enabled fiduciary financial institution insurance company” or “TEFFI insurance company”; “Kansas e-commerce fidfin insurance company”; or “KEFFI”.

Place of business; board of directors and residency; service contracts; examination. The bill would establish requirements specific to the location of the principal place of business and membership of the board of directors for a

TEFFI that receives a certificate of authority under the Captive Insurance Act and service contracts as follows:

- The principal place of business for a TEFFI insurance company may be located in the same or shared office premises with an affiliated TEFFI or other TEFFI insurance company;
- Any person who serves as a member of the board of directors of an affiliated TEFFI or other affiliated company may concurrently fulfill the Kansas residency requirement contained in the TEFFI Act (KSA 9-2306) and may:
 - Serve on the board of a directors of a TEFFI insurance company that is organized as a corporation or serve as a manager of a TEFFI that is organized as a limited liability company; and
 - Fulfill the applicable Kansas residency requirements of the Captive Insurance Act (KSA 40-4306(d));
- A TEFFI insurance company would be permitted to enter into service contracts with any other TEFFI insurance company, an affiliated TEFFI, or affiliated companies that provide for services to be performed:
 - For the TEFFI insurance company, including insurance companies that operate with or without direct employees; or
 - By the TEFFI insurance company;
- Personnel who perform services for a TEFFI insurance company, either as employees of the company or pursuant to service contracts, would be permitted to concurrently perform services for any other TEFFI insurance company, an affiliated TEFFI or an affiliated company thereof, either as employees or pursuant to service contracts; and

- A TEFFI insurance company would not be required to employ, engage, or contract more than one employee in Kansas to provide services for such company or to facilitate any examinations required by the Captive Insurance Act.

Payment-in-kind policies; financial statements. The bill would also establish criteria for TEFFI insurance companies that issue payment-in-kind policies (the definition for this term is outlined later in this Supplemental Note). Among the requirements, the bill would provide:

- If the TEFFI insurance company issues payment-in-kind policies that expressly require it to hold a sufficient amount of in-kind assets to meet the full obligation of such payment-in-kind policies, the insurance company must hold in-kind assets in a total amount determined to be actuarially prudent to meet its obligations to make claim payments, but in no event could this amount be less than the sum of the aggregate obligations of and for such payment-in-kind policies.
 - If the TEFFI insurance company issues payment-in-kind policies that do not expressly require a certain amount of in-kind assets to be held, the bill would require the company to hold in-kind assets to the extent the company determines to be actuarially prudent and confirmed by a third-party actuary to meet the company's obligation to make claims payments;
- A TEFFI insurance company would be required to satisfy the claims under a payment-in-kind policy by delivering to the qualified policyholder in-kind assets or a combination of in-kind assets pursuant to the schedules attached to the policy. The bill would provide for the types of in-kind assets and combination of such assets permitted;

- Any in-kind assets held pursuant to the bill's provisions would be required to be counted as part of the reserves, capital, and surplus of a TEFFI insurance company and reported as for the primary and predominant business activity of the writing of insurance or the reinsuring of risks, except that the TEFFI insurance company meeting the capital requirements in the Captive Insurance Act (40-4304) would not be required to hold any other assets so long as such in-kind assets are sufficient to meet its obligations to make claim payments under payment-in-kind policies;
 - All revenue and income generated by the in-kind assets, whether realized or unrealized, would be deemed income derived from the business activity of the writing of insurance or the reinsuring of risks underwritten by the TEFFI insurance companies. The bill would further provide for the reporting of net income and net loss in statutory financial statements. All payment-in-kind assets required to be held by the TEFFI insurance company would be required to be reported on the company's statutory balance sheet (satisfying the company's payment-in-kind obligations); and
 - A TEFFI insurance company would be required to report any required items in a statutory financial statement in the segment reporting section of the footnotes prepared in accordance with generally accepted accounting principles (GAAP) and would also be required to include in its complete statutory financial statements' footnote reporting, other information prepared in accordance with GAAP;
- Any insurance company, regardless of its jurisdiction, would be permitted to hold equity interests in an affiliated TEFFI and may utilize such

equity interests as in-kind assets when issuing payment-in-kind policies to such affiliated TEFFI or other qualified policyholder; and

- A payment-in-kind policy issued to a qualified policyholder would be fully enforceable in accordance with the terms and conditions included in the definitions, as amended by the bill.

Organization; policy governance; legal forum. The bill would include provisions governing examination requirements, the organization of the TEFFI insurance company under the Captive Insurance Act and other Kansas law, and forum selection, as follows:

- A TEFFI insurance company or other insurance company organized under incorporation provisions of the Captive Insurance Act (KSA 40-4306) that has been issued a certificate of authority would be deemed an “insurance company” as defined in KSA 40-222c. An insurance company described under the bill’s provisions would be considered to have as its primary and predominant business activity the writing of insurance or the reinsuring of risks underwritten by insurance companies and would be subject to the supervision of the Commissioner of Insurance;
- A TEFFI insurance company that has been issued a certificate of authority would be permitted, subject to compliance with provisions relating to conditions under which insurance may be written (KSA 40-214), to do business in any other state or territory of the United States;
- A TEFFI policy would be permitted to include a provision that such policy shall be governed by, and construed in accordance with, the laws of the state of Kansas and such policy provision shall

control over any contrary provision of state law regarding conflict of laws;

- A TEFFI policy would be permitted to also include a provision that any suit, action, or proceeding arising out of or relating to such policy shall be brought in any district court of Kansas or the U.S. District Court for the district of Kansas and such provision shall be fully enforceable; and
- A TEFFI policy issued in connection with an affiliated fidfin trust or fidfin transaction would be required to respect the form, treatment, and character of such affiliated trust or transactions under the laws of this state notwithstanding the treatment or characterization of such transactions under GAAP or for tax purposes.

The bill would also address the construction of provisions pertaining to the certificate of authority issued to a TEFFI insurance company to state the provisions shall be construed in a manner that shall not be disruptive to state efforts to establish a coherent policy with respect to a TEFFI insurance company, a TEFFI policy, payment-in-kind policies, TEFFIs, or any other matter of substantial public concern.

The provisions pertaining to the certificate of authority issued to a TEFFI insurance company would be a part of and supplemental to the Captive Insurance Act.

Definitions—Captive Insurance Act (Section 2)

The bill would create several definitions in the Captive Insurance Act specific to TEFFIs and TEFFI insurance companies. Among the new definitions are:

- “Affiliated technology-enabled fiduciary financial institution” would mean a TEFFI;
- “In-kind asset” would mean:

- Any loan, financing, or extension of credit, including to an affiliated fidfin trust, originated by a TEFFI;
 - One or more equity interests in one or more investment funds, each an interest in an investment fund, or one or more equity interests in one or more TEFFIs;
 - Any loan, financing, or extension of credit secured by the pledge of equity of one or more interests in an investment fund or the cash flow derived as a result;
 - Any other assets that serve as collateral securing such loans, equity, or debt financing or extension of credit described in this definition; and
 - Any beneficial interests in trusts that own assets described in this definition that are held by an insurance company for the purpose of enabling such insurance company to meet its obligations to make claim payments under payment-in-kind policies by delivering such assets;
- “Payment-in-kind policy” would mean a policy that, along with applicable schedules, is required to be in writing and which satisfies the following conditions:
 - The policyholder of such policy is a qualified policyholder;
 - Is issued by a TEFFI insurance company or an insurance company organized in a jurisdiction other than Kansas;
 - Provides that such insurance company has the option, in such company's sole discretion, to make claim payments, in whole or in part, in cash, or in the form of in-kind assets rather than cash pursuant to schedules attached to the policy as required by this definition's

provisions, and agreed to in writing by the qualified policyholder;

- Provides for such payment-in-kind policy to be fully enforceable with such policy's terms and this definition's provisions;
- May provide for such payment-in-kind policy or provisions relating to in-kind assets and payments thereof to be governed by, and construed in accordance with, the laws of the state of Kansas and such policy or provisions shall control over any contrary provision of state law regarding conflict of laws and any such provision shall be fully enforceable;
- May provide that any suit, action, or proceeding arising out of or relating to such payment-in-kind policy shall be brought in any district court of this state or the U.S. District Court for the District of Kansas, and any such provision shall be fully enforceable;
- May be a contract of suretyship or credit insurance (as provided in New Section 1);
- Contains one or more schedules to such payment-in-kind policy that sets out a description of the specific in-kind assets that the insurance company may deliver to the qualified policyholder to make claim payments as agreed to in writing by the qualified policyholder;
- May include a copy of the governing documents in effect at the time of issuance of such payment-in-kind policy of any legal entity that is the issuer of or obligor under such in-kind assets;
- Includes a provision that the qualified policyholder agrees the insurance company has no obligation to provide, and the qualified policyholder has no additional rights to, any further disclosure regarding the in-kind assets

and shall not rely on any other disclosures provided by the insurance company and the provisions within this definition;

- Includes a provision that the qualified policyholder agrees such insurance company has no obligation to make claim payments in any form other than the in-kind assets specified in such schedules;
- Requires the qualified policyholder to acknowledge that such insurance company has no obligation to deliver to such qualified policyholder any underlying assets in the chain of ownership below the in-kind assets specified in such schedules; and
- Requires the qualified policyholder to acknowledge that:
 - Such qualified policyholder has no recourse against the insurance company with respect to any in-kind assets other than those in-kind assets scheduled and attached to such payment-in-kind policy; and
 - Any such recourse shall be limited to only those scheduled in-kind assets that the insurance company, in its sole discretion, makes available to such qualified policyholder as an in-kind payment in response to a claim initiated by such qualified policyholder;
- “Technology-enabled fiduciary financial institution insurance company” would mean a pure captive insurance company that:
 - Is related to a TEFFI by common ownership; and
 - Owns, directly, indirectly, or beneficially, at least 5.0 percent of the equity interests of a TEFFI, including any equity interests in such TEFFI’s holding company.

The bill would require, for the calculation of the TEFFI insurance company's ownership of a TEFFI, both voting and nonvoting equity interests to be included in the calculation, and any equity interests of the TEFFI owned by an affiliate of this TEFFI insurance company would be attributed to such insurance company.

Other definitions established by the bill include: affiliated fidfin trust, common ownership, fidfin trust, interest in an investment fund, investment fund, investor in an investment fund, manager, qualified policyholder, technology-enabled fiduciary financial institution, technology-enabled fiduciary financial institution policy, and technology-enabled fiduciary financial institution policyholder. The bill would also amend the definition of "affiliated company."

TEFFI Insurance Companies—Surety Services and Credit Insurance; Renewal Date; Privacy of Qualified Policyholders (Section 3)

The bill would amend a prohibition in the Captive Insurance Act pertaining to certain lines of insurance and coverage that a captive could not provide, to specify an exception that would allow a TEFFI insurance company to be permitted to provide contracts of suretyship and credit insurance, in accordance with the certificate of authority provisions stated in the bill.

The bill would also amend renewal provisions in this act to provide the certificate of authority renewal date for a TEFFI insurance company to be the later of March 1 or the maturity date of the last payment-in-kind asset held by that insurance company.

The bill would further amend the law to provide for the privacy of both the qualified policyholder and those who have established an affiliated fidfin trust or alternative asset custody account in court proceedings, as follows:

- *Qualified policyholder* – the privacy in any court proceeding shall be protected if the TEFFI insurance company so petitions the court. Upon the filing, any information including, but not limited to, an instrument, inventory, statement, or verified report produced by the TEFFI insurance company regarding a policy issued to a qualified policyholder or payment-in-kind assets held by the TEFFI insurance company to satisfy claims, all payment-in-kind policies, all relevant petitions, and all court orders thereon, would be sealed upon filing and not made part of the public record of the proceeding;
 - Such petition would be available to the court, the Commissioner of Insurance, the TEFFI insurance company, their attorneys, and to other persons as the court may order upon a showing of good cause; and

- *Affiliated fidfin trust or alternative asset custody accountholder* – the privacy in any court proceeding shall be protected if the acting trustee, custodian, trustor, or other beneficiary so petition the court. Upon the filing, any information, including the instrument, inventory, statement filed by any trustee or custodian, annual verified report of the trustee or custodian, and all relevant petitions, and all court orders thereon, would be sealed upon filing and not made part of the public record of the proceeding;
 - Such petition would be available to the court, the trustor, the trustee, the custodian, any beneficiary, their attorneys, and to other persons as the court may order upon a showing of good cause.

***Naming of Captive Insurance Companies—Exemption
from Use of “Captive” in Company Name (Section 4)***

The bill would amend provisions in the Captive Insurance Act pertaining to the use of the word “captive” into the name of every captive insurance company organized in Kansas to allow for an exception from this naming requirement as provided in the bill’s provisions pertaining to the certificate of authority for a TEFFI insurance company.

Investment Requirements; In-kind Assets (Section 5)

The bill would amend provisions in the Captive Insurance Act pertaining to investment requirements to allow insurance companies organized in a jurisdiction other than Kansas and Kansas TEFFI insurance companies to hold in-kind assets in accordance with provisions of this bill. The bill would further provide any such in-kind assets required to be held shall be counted as part of the reserves, capital, and surplus of such insurance companies required for the primary and predominant business activity of the writing of insurance or the reinsuring of risks underwritten by TEFFI insurance companies. The bill would also permit a TEFFI insurance company to hold equity interests in an affiliated TEFFI.

Background

The bill was introduced by the Senate Committee on Financial Institutions and Insurance at the request of Senator Longbine.

***Senate Committee on Financial Institutions and
Insurance***

In the Senate Committee hearing, a representative of the Beneficient Company Group, LP, provided **proponent** testimony highlighting the function of TEFFIs, which finance and administer specialized assets, and the need to address

the unique risk management characteristics with a clear statutory framework that will encourage TEFFIs to form Kansas captives. The conferee noted a TEFFI may choose to secure coverage for events, including breach of representation or warranties made by an investor in connection with a transfer of alternative assets, credit risk associated with the financing of alternative assets, and risks associated with the management of alternative assets in trust.

No other testimony was provided.

The Senate Committee amendments added two provisions pertaining to the certificate of authority issued to a TEFFI insurance company to specify compliance with requirements of Kansas law (permitting the company to do business in another state or territory) and clarify the treatment of TEFFI policies issued in connection with an affiliated fidfin trust or fidfin transaction. The amendment also made technical updates.

Fiscal Information

According to the revised fiscal note prepared by the Division of the Budget on the bill, as introduced, the Kansas Insurance Department states that if one TEFFI insurance company applies for admission and approval, then the Department would be able to absorb the additional workload within existing resources. The Department notes only one TEFFI currently exists within Kansas.

The Office of the State Bank Commissioner states the bill would not have a fiscal effect on its operations.

The Office of Judicial Administration (OJA) provided fiscal information since the initial fiscal effect statement was published. The OJA states enactment of the bill could increase the number of cases filed in district courts and increase the time spent by district court judicial and

nonjudicial personnel in processing, researching, and hearing cases.

Any fiscal effect associated with the bill is not reflected in *The FY 2023 Governor's Budget Report*.

Insurance; Captive Insurance Act; technology-enabled fiduciary financial institution (TEFFI); TEFFI insurance company; Kansas e-commerce fidfin insurance company (KEFFI); payment-in-kind-policies