

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Fiduciary Income and Principal Act**

UFIPA Section	Section 201
Section Title	Article 2 Fiduciary Duties and Judicial Review
Statutory Language	<p>SECTION 201. FIDUCIARY DUTIES; GENERAL PRINCIPLES.</p> <p>(a) In making an allocation or determination or exercising discretion under this [act], a fiduciary shall:</p> <p style="padding-left: 40px;">(1) act in good faith, based on what is fair and reasonable to all beneficiaries;</p> <p style="padding-left: 40px;">(2) administer a trust or estate impartially, except to the extent the terms of the trust manifest an intent that the fiduciary shall or may favor one of more beneficiaries;</p> <p style="padding-left: 40px;">(3) administer the trust or estate in accordance with the terms of the trust, even if there is a different provision in this [act]; and</p> <p style="padding-left: 40px;">(4) administer the trust or estate in accordance with this [act] except to the extent the terms of the trust provide otherwise or authorize the fiduciary to determine otherwise.</p> <p>(b) A fiduciary’s allocation, determination, or exercise of discretion under this [act] is presumed to be fair and reasonable to all beneficiaries. A fiduciary may exercise a discretionary power of administration given to the fiduciary by the terms of the trust, and an exercise of the power which produces a result different from a result required or permitted by this [act] does not create an inference that the fiduciary abused the fiduciary’s discretion.</p> <p>(c) A fiduciary shall:</p> <p style="padding-left: 40px;">(1) add a receipt to principal, to the extent neither the terms of the trust nor this [act] allocates the receipt between income and principal; and</p> <p style="padding-left: 40px;">(2) charge a disbursement to principal, to the extent neither the terms of the trust nor this [act] allocates the disbursement between income and principal.</p> <p>(d) A fiduciary may exercise the power to adjust under Section 203, convert an income trust to a unitrust under Section</p>

303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3), if the fiduciary determines the exercise of the power will assist the fiduciary to administer the trust or estate impartially.

(e) Factors the fiduciary must consider in making the determination under subsection (d) include:

- (1) the terms of the trust;
- (2) the nature, distribution standards, and expected duration of the trust;
- (3) the effect of the allocation rules, including specific adjustments between income and principal, under [Articles] 4 through 7;
- (4) the desirability of liquidity and regularity of income;
- (5) the desirability of the preservation and appreciation of principal;
- (6) the extent to which an asset is used or may be used by a beneficiary;
- (7) the increase or decrease in the value of principal assets, reasonably determined by the fiduciary;
- (8) whether and to what extent the terms of the trust give the fiduciary power to accumulate income or invade principal or prohibit the fiduciary from accumulating income or invading principal;
- (9) the extent to which the fiduciary has accumulated income or invaded principal in preceding accounting periods;
- (10) the effect of current and reasonably expected economic conditions; and
- (11) the reasonably expected tax consequences of the exercise of the power.

<p>Uniform Law Commission Comments (unfinished – Oct. 2018)</p>	<p>Subsections (a) through (c) of Section 201 of the 2018 Act are an update of Section 103 of the 1997 Act.</p> <p>The standard of what is fair and reasonable to all beneficiaries in subsection (a)(1) is derived from Section 103(b) of the 1997 Act; it is an objective standard, not dependent on what seems to any beneficiary to be fair and reasonable. A requirement to act “in good faith” is added, complementing and supporting the exoneration for a fiduciary’s action or inaction in good faith in Sections 203(c)(relating to the power to adjust between income and principal) and 302(f)(relating to the new power to convert to or from a unitrust or change a unitrust) of the 2018 Act.</p> <p>The requirement to administer a trust or estate impartially in subsection (a)(2) is also derived from Section 103(b) of the 1997 Act, as is the accompanying exception to the extent the terms of the trust manifest an intent to favor one or more beneficiaries.</p> <p>The terms of the trust may alter the degree or nature of impartiality without abandoning the duty of impartiality. For example, the terms of the trust may permit or require a current beneficiary to be preferred to meet needs for support in accordance with an accustomed standard of living and for medical care, but in making determinations regarding that standard the trustee owes a duty of impartiality to the current beneficiary and the successive beneficiaries. If such a preference for support and health is expressed, the 2018 Act preserves the duty of impartiality in making discretionary distributions when that standard is satisfied.</p> <p>The fact that an income beneficiary or a remainder beneficiary is also the fiduciary is not by itself an indication of partiality for that beneficiary.</p> <p>Like previous acts, the 2018 Act contains only default rules. The general supremacy of the terms of the trust is affirmed in subsection (a)(3), as in Section 103(a)(1) of the 1997 Act. Conversely, the applicability of the act where not overridden by the terms of the trust is affirmed in subsection (a)(4), but in a simpler and clearer way than Section 103(a)(3) of the 1997 Act, which stated that “a fiduciary ... shall administer a trust or estate in accordance with this [Act] <i>if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration.</i>” The 2018 Act states simply “except to the extent the terms of the trust provide otherwise or authorize the fiduciary to determine otherwise.”</p>
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The presumption of fairness and reasonableness of a fiduciary's determination in the first sentence of subsection (b) is adapted from the last sentence of Section 103(b) of the 1997 Act. The reassurance in the following sentence of subsection (b) that a result of a fiduciary's exercise of discretion under the terms of the trust that is different from a result under the act does not create a negative inference is adapted from Section 103(a)(2) of the 1997 Act.

The default of adding a receipt, or charging a disbursement, to principal in subsection (c) is derived from Section 103(a)(4) of the 1997 Act.

Factors. The factors in subsection (e) that a fiduciary must consider are adapted from Section 104(b) of the 1997 Act, which was written in the context of the power to adjust between income and principal now found in Section 203. Unlike Section 104(b) of the 1997 Act, subsection (e) does not limit such consideration to those factors "to the extent they are relevant," because determining that a factor is not relevant would itself require a degree of consideration. Under subsection (d), those factors are now also applicable to the new power to convert to or from a unitrust or change a unitrust granted by Section 303.

"The terms of the trust" are added as an obvious factor and, indeed, placed first, in paragraph (1). Correspondingly, in paragraph (2) the "purpose" of the trust is deleted as a factor, as is "the intent of the settlor" in Section 104(b)(2) of the 1997 Act. Divining or guessing subjective elements like "purpose" and "intent" are not a reasonable burden to place on a fiduciary, whereas "terms of the trust" is defined in Section 102(22)(A) to be "the *manifestation* of the settlor's intent" in an objective medium.

Paragraph (3) adds "the effect of the allocation rules, including specific adjustments between income and principal, under [Articles] 4 through 7," an elaboration of the reference to "the other sections of this [Act]" in Section 104(b)(6) of the 1997 Act. This wording affirms that a main function of the power to adjust or to convert to a unitrust is to fix or compensate for the results otherwise obtained under those default rules. And because the filter of the default rules in Articles 4 through 7 is the meaningful way to view the assets of the trust, the enumeration of a few characteristics of those assets in Section 104(b)(5) of the 1997 Act is omitted, except for the use of an asset by a beneficiary, which is retained in paragraph (6).

	<p>In paragraphs (4) and (5), “the needs for liquidity, regularity of income, and preservation and appreciation of capital” (as expressed in Section 104(b)(4) of the 1997 Act) is retained, except that “needs for” is changed to “desirability of” and “capital” is changed to “principal.”</p> <p>Paragraph (7) retains “the increase or decrease in the value of principal assets” from Section 104(b)(6) of the 1997 Act. The volatility of value, as well as the unpredictability of income, can be an occasion for the “smoothing” the powers to adjust between income and principal and to convert to or from a unitrust or change a unitrust are designed to provide.</p> <p>Finally, “the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation” in Section 104(b)(8) of the 1997 Act is simplified to “the effect of current and reasonable expected economic conditions” in paragraph (1)), and “anticipated tax consequences” in Section 104(b)(9) of the 1997 Act is changed to “reasonably expected tax consequences” in paragraph 11.</p>
<p>Current Colorado Law</p>	<p><u><i>Uniform Principal and Income Act:</i></u></p> <p>§ 15-1-403. Fiduciary Duties – general principles.</p> <p>(1) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of subparts 2 and 3 of this part 4, a fiduciary:</p> <p>(a) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in subparts 1 through 6 of this part 4;</p> <p>(b) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by subparts 1 through 6 of this part 4;</p> <p>(c) Shall administer a trust or estate in accordance with subparts 1 through 6 of this part 4 if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and</p> <p>(d) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and subparts 1 through 6 of this part 4 do not provide a rule for allocating the receipt or disbursement to or between principal and income.</p> <p>(2) In exercising the power to adjust under section 15-1-404(1) or a discretionary power of administration regarding a matter within the</p>

scope of subparts 1 through 6 of this part 4, whether granted by the terms of a trust, a will, or subparts 1 through 6 of this part 4, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with subparts 1 through 6 of this part 4 is presumed to be fair and reasonable to all of the beneficiaries.

(3) The terms and conditions of a trust or a will shall govern all actions taken by a fiduciary with respect to any matter within the scope of subparts 1 through 6 of this part 4. The provisions of subparts 1 through 6 of this part 4 are default provisions and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust or a will. The provisions of subparts 1 through 6 of this part 4 shall govern the administration of a trust or will by a fiduciary only if such trust or will contains no conflicting provision.

(4) Nothing in subparts 1 through 6 of this part 4 shall be construed to limit or restrict a maker of a trust or will from making provisions in such trust or will that are different from the provisions in subparts 1 through 6 of this part 4.

15-1-402(12) “Terms of a trust” means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

Colorado Uniform Trust Code:

15-5-105(2)(b): the trustee has a mandatory non-waivable general duty “to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”

15-5-801: Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article 5.

15-5-103(21): "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions, as expressed in the trust instrument, or as may be established by other evidence in a judicial proceeding, or in a nonjudicial settlement agreement pursuant to section 15-5-111 or by alternative dispute resolution pursuant to section 15-5-113.

<p>Colorado Subcommittee Comment</p>	<p>201(a)(1) Current 15-1-403(1) and (2) do require a fiduciary to act reasonably, based on what is fair and reasonable to all of the beneficiaries. They do not explicitly state that the fiduciary has a duty to act in good faith. Stating this would ensure the Colorado UPAIA is consistent with CUTC 15-5-105(2)(b) and 15-5-801.</p> <p>201(a)(2) This is consistent with current 15-1-403(2), although 403(2) uses “clearly manifest” an intention to favor a beneficiary while UFIPA uses simply “manifest”.</p> <p>201(a)(3) This is generally consistent with existing 15-1-403. “Terms of a trust” is defined differently in existing 15-1-402(12), in CUTC 15-5-103(21), and in the Decanting Act. (This is outside the scope of section 201 but is an action item for the CUTC subcommittee to address with the Decanting subcommittee).</p> <p>201(a)(4) This is generally consistent with existing 15-1-403(1). Query: does UFIPA’s stating this as an imperative with an exception (“shall administer the trust or estate in accordance with this act except...”) instead of using the wordier formulation in existing 15-1-403(1) substantively change anything? Note also the last sentence of 15-5-403(3) which reiterates that “the provisions of ... this part 4 shall govern the administration of a trust or will by a fiduciary only if such trust or will contains no conflicting provision.” There is no similar declaratory statement in UFIPA 201. Is this last sentence redundant or important to retain?</p> <p>201(b) The first sentence is consistent with existing 15-1-403(2)(presumption that a fiduciary’s determination under the act is fair and reasonable to all beneficiaries). The second sentence (no inference of abuse of discretion) is new, and has no counterpart in existing 15-1-403.</p>

	<p>201(c)(1) and (2) This section states the default allocation provisions that apply where neither the terms of the trust nor other provisions of the act govern. Existing 15-1-403 does not contain default allocation rules like this as “general duties”; our default allocation rules are sprinkled through the rest of the UPAIA.</p> <p>201(d) This section provides a general condition that before a trustee exercises a power to adjust, convert an income trust to a unitrust, change the percentage or method used to calculate a unitrust amount, or convert a unitrust to an income trust, the fiduciary must make a determination that the exercise of the power will assist the fiduciary to administer a trust or estate impartially.</p> <p>201(e) This section lists all of the factors for the fiduciary to consider in making the determination in 201(d). Colorado’s existing 15-1-403 contains no “general” requirement applicable to all of these actions. Instead, the requirements and factors for each type of action are given separately depending on the type of action: 15-1-404 (power to adjust); 15-1-404.5 (unitrust conversion); 15-1-405 (notice of action).</p>
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Fiduciary Income and Principal Act**

UFIPA Section	Section 202
Section Title	Article 2 Fiduciary Duties and Judicial Review
Statutory Language	<p>SECTION 202. JUDICIAL REVIEW OF EXERCISE OF DISCRETIONARY POWER; [REQUEST FOR INSTRUCTION].</p> <p>(a) In this section, “fiduciary decision” means:</p> <p style="padding-left: 40px;">(1) a fiduciary’s allocation between income and principal or other determination regarding income and principal required or authorized by the terms of the trust or this [act];</p> <p style="padding-left: 40px;">(2) the fiduciary’s exercise or nonexercise of a discretionary power regarding income and principal granted by the terms of the trust or this [act], including the power to adjust under Section 203, convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3); or</p> <p style="padding-left: 40px;">(3) the fiduciary’s implementation of a decision described in paragraph (1) or (2).</p> <p>(b) The court may not order a fiduciary to change a fiduciary decision unless the court determines that the fiduciary decision was an abuse of the fiduciary’s discretion.</p> <p>(c) If the court determines that a fiduciary decision was an abuse of the fiduciary’s discretion, the court may order a remedy authorized by law, including Uniform Trust Code Section 1001 and Part 5 of Article 10 of Title 15, C.R.S. To place the beneficiaries in the positions the beneficiaries would have occupied if there had not been an abuse of the fiduciary’s discretion, the court may order:</p> <p style="padding-left: 40px;">(1) the fiduciary to exercise or refrain from exercising the power to adjust under Section 203;</p> <p style="padding-left: 40px;">(2) the fiduciary to exercise or refrain from exercising the power to convert an income trust to a unitrust under Section 303(a)(1), change the percentage or method used to calculate a unitrust amount under Section 303(a)(2), or convert a unitrust to an income trust under Section 303(a)(3);</p>

	<p>(3) the fiduciary to distribute an amount to a beneficiary;</p> <p>(4) the beneficiary to return some or all of a distribution; or</p> <p>(5) the fiduciary to withhold an amount from one or more future distributions to a beneficiary.</p> <p>[(d) On [petition] by a fiduciary for instruction, the court may determine whether a proposed fiduciary decision will result in an abuse of the fiduciary’s discretion. If the [petition] describes the proposed decision, contains sufficient information to inform the beneficiary of the reasons for making the proposed decision and the facts on which the fiduciary relies, and explains how the beneficiary will be affected by the proposed decision, a beneficiary that opposes the proposed decision has the burden to establish that it will result in an abuse of the fiduciary’s discretion.]</p> <p>Legislative Note: <i>In subsection (c), refer to Section 1001 of the Uniform Trust Code or modify subsection (c) appropriately or refer to the corresponding provision of the state’s Trust Code if the state has not adopted the Uniform Trust Code. Modify subsection (d) if the state does not permit requests for instructions in these circumstances.</i></p>
<p>Uniform Law Commission Comments (unfinished – Oct 2018)</p>	<p>Section 202 of the 2018 Act is adapted from Section 105 of the 1997 Act. Subsection (a) expands the scope of Section 105(b) of the 1997 Act from the power to adjust to include not only the powers under the new unitrust provisions (subsection (a)(2)) but also any allocation or other determination regarding income and principal (subsection (a)(1) and the implementation of any such allocations, determinations, or actions (subsection (a)(3)). Collectively these decisions are called “fiduciary decisions.”</p> <p>Subsection (b) retains the general rule of Section 105(a) of the 1997 Act that a court will intervene only if it determines that the fiduciary decision was an abuse of the fiduciary’s discretion. The statement that “A fiduciary’s decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power,” although obviously true, is deleted as unnecessary. See Restatement (Third) of Trusts § 50, comment b (2003)(“A court will not interfere with a trustee’s exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust. Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.”)</p> <p>Subsection (c) focuses the enumeration of available remedies on remedies that place the beneficiaries overtly – and the trust implicitly – “in the positions [they would have occupied if there had not been</p>

	<p>an abuse of the fiduciary’s discretion,’ while acknowledging that the choice of remedy is of course the court’s decision to make. Paragraphs (1) and (2) add that the court may simply order that the fiduciary exercise or refrain from exercising the power to adjust or the power to convert to or from a unitrust or change a unitrust. Those remedies are placed first because they may often be the first choices (but again, without purporting to limit the court’s authority). Paragraphs (3), (4), and (5) contain the remedies of ordering a distribution or withholding from future distributions by a fiduciary or even ordering a refund by a beneficiary.</p> <p>The remedy in Section 105(c)(3) of the 1997 Act or ordering the fiduciary to use the fiduciary’s own funds to make a beneficiary whole is deleted – not denied to a court, but deleted as beyond the scope of a statute dealing primarily with allocations of income and principal. But the fiduciary’s option of obtaining advance directions from the court (in Section 105(d) of the 1997 Act) is retained in subsection (d), if consistent with general state law. The reference in Section 105 of the 1997 Act to “the court having jurisdiction of a trust or estate” is shortened to just “the court,” which is defined in Section 102(4).</p>
Current Colorado Law	<p>Our current CO Uniform Principal and Income Act addresses court intervention and factors to be considered <i>separately</i> with respect to allocations and fiduciary duties generally (in a comment under 403), powers to adjust (in 404(7)), and unitrust conversion (in 404.5(7)). 202 brings all of these topics under one umbrella, labels them all as “fiduciary decisions,” and makes all 3 subject to the same judicial review provisions and the same factors for consideration.</p> <p>The official comment to § 15-1-403, third paragraph, states as follows: Fiduciary discretion. The general rule is that if a discretionary power is conferred upon a trustee, <i>the exercise of that power is not subject to control by a court except to prevent an abuse of discretion.</i> Restatement (Second) of Trusts § 187. The situations in which a court will control the exercise of a trustee’s discretion are discussed in the comments to § 187. See also <i>id.</i> § 233 Comment p.</p> <p>15-1-404(7), regarding the power to adjust, includes a statement that “[i]n a proceeding with respect to a trustee’s exercise or nonexercise of the power to make an adjustment under this section, <i>the sole remedy is to direct, deny, or revise an adjustment between principal and income.</i>”</p> <p>15-1-404.5(7), regarding unitrust conversion, provides: (7) Court orders.</p>

	<p>(a) The court may order any of the following actions in a proceeding brought by a trustee or a beneficiary pursuant to paragraph (a), (b), or (c) of subsection (3) of this section:</p> <ul style="list-style-type: none"> (I) Select a distribution percentage other than four percent, except that the court may not order a distribution percentage less than three percent or greater than five percent; (II) Average the valuation of the trust's net assets over a period other than three years; (III) Reconvert prospectively from a unitrust, or adjust the distribution percentage of a unitrust; (IV) Direct the distribution of net income, determined as if the trust were not a unitrust, in excess of the distribution amount as to any or all trust assets if the distribution is necessary to preserve a tax benefit; or (V) Change or direct any administrative procedure as the court determines is necessary or helpful for the proper functioning of the unitrust. <p>(b) Nothing in this subsection (7) shall be construed to limit the equitable jurisdiction of the court to grant other relief as the court deems proper.</p> <p>In addition, there are several provisions in the new CUTC discussing the role of the court in trust administration generally, and court intervention with respect to a fiduciary's exercise of discretion in particular. Query how or whether these provisions may apply to exercises of "fiduciary discretion" under the principal and income act?</p> <p>CUTC § 15-5-201. [Effective 1/1/2019] Role of court in administration of trust</p> <ul style="list-style-type: none"> (1) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law. (2) A trust is not subject to continuing judicial supervision unless ordered by the court.
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	<p>(3) A judicial proceeding involving a trust may relate to any matter involving the trust's administration. Such matters may include, but are not limited to, proceedings involving:</p> <ul style="list-style-type: none"> (a) The appointment or removal of a trustee; (b) Review of a trustee's fees and review and settling of interim or final accountings; (c) Requests for instruction; (d) Declarations of rights; (e) Determinations as to the creation, existence, and validity of all or part of a trust; (f) The ascertainment of beneficiaries, and determinations of any other questions arising in the administration of distribution of any trust, including questions of construction in trust instruments, and the existence or nonexistence of any immunity, power, privilege, duty, or right; (g) The registration or release of registration of a trust; (h) A direction to compel or refrain from performing a particular act; (i) The amendment, modification, revocation, or termination of a trust; (j) The combination or division of trusts; or (k) Equitable doctrines of cy pres, equitable deviation, and other principles of equity pertaining to charitable and other trusts. <p>CUTC § 15-5-814. [Effective 1/1/2019] Discretionary powers - tax savings</p> <p>(1) (a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith. the parameters for that exercise are established by the terms and purposes of the trust, the interests of the beneficiaries, and relevant fiduciary duties. <i>A trustee does not abuse its discretion if the trustee, following the</i></p>
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terms and purposes of the trust and considering the interests of its beneficiaries, exercises its judgment honestly and with a proper motive.

- (b) Where a trust gives a trustee unlimited discretion, including the use of such terms as "absolute", "sole", or "uncontrolled", a court may not determine that a trustee abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

§ 15-5-1001. [Effective 1/1/2019] Remedies for breach of trust

- (1) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
- (2) To remedy a breach of trust that has occurred or may occur, the court may:
 - (a) Compel the trustee to perform the trustee's duties;
 - (b) Enjoin the trustee from committing a breach of trust;
 - (c) Compel the trustee to redress a breach of trust by paying money, restoring property, being surcharged or sanctioned, or other means;
 - (d) Order a trustee to account, provide a status or financial report, or provide an inventory;
 - (e) Appoint a special fiduciary to take possession of the trust property and administer the trust;
 - (f) Restrain, restrict, or suspend the trustee;
 - (g) Remove the trustee as provided in section 15-5-706;
 - (h) Reduce or deny compensation to the trustee or require the trustee to disgorge compensation previously paid;
 - (i) Subject to section 15-5-1012, void an act of the trustee, impose a lien or constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
 - (j) Order other appropriate relief.

	(3) If a remedy for a breach of trust is sought by a cotrustee, Beneficiary, or interested person, or the court acts sua sponte, the provisions of part 5 of article 10 of this title 15 apply.
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee on the
Uniform Fiduciary Income and Principal Act**

By Herb E. Tucker

Date: April 3, 2019

UFIPA Section	Section 203
Section Title	Fiduciary's Power to Adjust
Statutory Language	<p>Section 203. Fiduciary's Power to Adjust.</p> <p>(a) Except as otherwise provided in the terms of a trust or this section, a fiduciary, in a record, without court approval, may adjust between income and principal if the fiduciary determines the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially.</p> <p>(b) This section does not create a duty to exercise or consider the power to adjust under subsection (a) or to inform a beneficiary about the applicability of this section.</p> <p>(c) A fiduciary that in good faith exercises or fails to exercise the power to adjust under subsection (a) is not liable to a person affected by the exercise or failure to exercise.</p> <p>(d) In deciding whether and to what extent to exercise the power to adjust under subsection (a), a fiduciary shall consider all factors the fiduciary considers relevant, including relevant factors in Section 201(e) and the application of Section 401(i), 408, and 413.</p> <p>(e) A fiduciary may not exercise the power under subsection (a) to make an adjustment or under Section 408 to make a determination that an allocation is insubstantial if:</p> <p style="padding-left: 40px;">(1) the adjustment or determination would reduce the amount payable to a current income beneficiary from a trust that qualifies for a special tax benefit, except to the extent the adjustment is made to provide for a reasonable apportionment of the total return of the trust between the current income beneficiary and the successor beneficiaries;</p> <p style="padding-left: 40px;">(2) the adjustment or determination would change the amount payable to a beneficiary, as a fixed annuity or a fixed fraction of the value of the trust assets, under the terms of the trust;</p>

(3) the adjustment or determination would reduce an amount that is permanently set aside for a charitable purpose under the terms of the trust, unless both income and principal are set aside for the charitable purpose;

(4) possessing or exercising the power would cause a person to be treated as the owner of all or part of the trust for federal income tax purposes;

(5) possessing or exercising the power would cause all or part of the value of the trust assets to be included in the gross estate of an individual for federal estate tax purposes;

(6) possessing or exercising the power would cause an individual to be treated as making a gift for federal gift tax purposes;

(7) the fiduciary is not an independent person;

(8) the trust is irrevocable and provides for income to be paid to the settlor and possessing or exercising the power would cause the adjusted principal or income to be considered an available resource or available income under a public-benefit program; or

(9) the trust is a unitrust under [Article] 3.

(f) If subsection (e)(4), (5), (6), or (7) applies to the fiduciary:

(1) a co-fiduciary to which subsection (e)(4) through (7) does not apply may exercise the power to adjust, unless the exercise of the power by the remaining co-fiduciary or co-fiduciaries is not permitted by the terms of a trust or law other than this [act]; or

(2) if there is no co-fiduciary to which subsection (e)(4) through (7) does not apply, the fiduciary may appoint a co-fiduciary to which subsection (e)(4) through (7) does not apply, which may be a special fiduciary with limited powers, and the appointed co-fiduciary may exercise the power to adjust under subsection (a), unless the appointment of a co-fiduciary or the exercise of the power by a co-fiduciary is not permitted by the terms of the trust or law other than this [act].

	<p>(g) A fiduciary may release or delegate to a co-fiduciary the power to adjust under subsection (a) if the fiduciary determines that the fiduciary's possession or exercise of the power will or may;</p> <ul style="list-style-type: none">(1) cause a result described in subsection (e)(1) through (6) or (8); or(2) deprive the trust of a tax benefit or impose a tax burden not described in subsection (e)(1) through (6). <p>(h) A fiduciary's release or delegation to a co-fiduciary under subsection (g) of the power to adjust under subsection (a):</p> <ul style="list-style-type: none">(1) must be in a record;(2) applies to the entire power, unless the release or delegation provides a limitation, which may be a limitation to the power to adjust:<ul style="list-style-type: none">(A) from income to principal;(B) from principal to income;(C) for specified property; or(D) in specified circumstances;(3) for a delegation, may be modified by a re-delegation under this subsection by the co-fiduciary to which the delegation is made; and(4) subject to paragraph (3), is permanent, unless the release or delegation provides a specified period, including a period measured by the life of an individual or the lives of more than one individual. <p>(i) Terms of a trust which deny or limit the power to adjust between income and principal do not affect the application of this section, unless the terms of the trust expressly deny or limit the power to adjust under subsection (a).</p> <p>(j) The exercise of the power to adjust under subsection (a) in any accounting period may apply to the current period, the immediately preceding period, and one or more subsequent periods.</p>
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	<p>(k) A description of the exercise of the power to adjust under subsection (a) must be:</p> <p>(1) included in a report, if any, sent to <u>the qualified beneficiaries, including the Attorney General when applicable, under Section 15-5-813(1) C.R.S.</u>; or</p> <p>(2) communicated at least annually to the qualified beneficiaries, <u>including the Attorney General when applicable, in accordance with Section 15-5-813(3) C.R.S.</u></p> <p><i>Legislative Note: Delete or modify subsection (f) if the state law requires fiduciaries to act unanimously. Colorado Uniform Trust Code C.R.S. § 15-5-703 “Co-Trustees”.</i></p> <p><i>In subsection (k), refer to Uniform Trust Codes Sections 813(c) and 103(13), or the modify subsection (k) of the Uniform Trust Code or modify subsection (k) appropriately or refer to the corresponding provision of the state’s trust law if the state has not enacted the Uniform Trust Code. Colorado Uniform Trust Code C.R.S. § 15-5-813 “Duty to Inform and Report”.</i></p>
<p>Uniform Law Commission Comments</p>	<p>Origin, purpose and scope of the power to adjust. The power to adjust between income and principal was added to the 1997 Act as Section 104 to complement the Uniform Prudent Investor Act that had been approved by the Uniform Law Commission in 1994.</p> <p>The purpose of the power to adjust between income and principal was to enable a fiduciary to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio’s total return in the form of traditional trust accounting income such as interest, dividends and rents.</p> <p>Section 104 of the 1997 Act authorized a fiduciary to make adjustments between income and principal if three conditions were met: (1) the fiduciary must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary’s distribution rights in terms of the right to receive “income” in the sense of traditional trust accounting income; and (3) the fiduciary must be unable to comply with the duty to administer the trust impartially, based on what is fair and reasonable to all beneficiaries, without making an adjustment.</p>

Under 203 of the 2018 Act in deciding whether and to what extent to exercise the power to adjust, the fiduciary shall consider factors described in Section 201(e). The new Section 203 is significantly expanded over the former Section 104, especially by eliminating the three aforementioned pre-conditions. For the power to adjust to be available, trust distributions need not be constricted to the concept of “income” in a way that economic results from year to year could arbitrarily affect. A trustee of a more modern trust is given greater flexibility to make distributions from income and/or principal which would have been precluded in former Section 104. The new section 203 ensures that designing a trust for greater flexibility will not ironically sacrifice the flexibility of adjustments.

Section 203 does not empower a fiduciary to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the fiduciary to make adjustments between income and principal that may be necessary or helpful if the income component of a portfolio’s total return is too small or too large because of investment decisions made by the fiduciary under the prudent investment rule.

The paramount considerations in applying Section 203(a), which replace the three preconditions of former Section 104, are the requirements in Section 201(a)(1) and (2) that “a fiduciary shall ... act in good faith, based on what is fair and reasonable to all beneficiaries [and] administer a trust or estate impartially, except to the extent the terms of the trust manifest an intent that the fiduciary shall or may favor one or more beneficiaries,” and the precondition in Section 203(a) that “fiduciary [determine] the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially.”

Under former Section 104(a) of the 1997 Act, the power to adjust was only available when, without the power, the fiduciary would have been “unable” to administer the trust impartially because prudent investment for total return was not producing an appropriate level of traditional trust income return to impartially balance the interests of the beneficiaries. Under new Section 203(a), that standard is relaxed when “the fiduciary determines the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially.” The former standard of impossibility is replaced by a standard of assistance.

A trustee of a flexible trust that could have coped with the constraints of income and principal rules by accumulating income or invading principal now is given the alternative of making an adjustment under Section 203 instead.

Under Section 203, a trustee of a discretionary trust can make adjustments taking into account the nonexclusive list of factors provided in Section 201(e), and still achieve the comfortable outcome distributing income.

Factors to consider in exercising the power to adjust. The factors to consider regarding the power to adjust are revised and set forth in Section 201(e), applicable to both the power to adjust between income and principal and the power to convert to or from a unitrust or change a unitrust.

Under comment to Section 201, the factors in subsection (e) that a fiduciary must consider are adopted from Section 104(b) of the 1997 Act, which was written in the context of the power to adjust between income and principal now found in Section 203. Unlike Section 104(b) of the 1997 Act, subsection (e) does not limit such considerations to those factors “to the extent they are relevant” because that factor is not relevant would itself require a degree of consideration.

Duration of an exercise of the power to adjust. Section 104 of the 1997 Act did not state the trust accounting periods to which a fiduciary’s exercise of the power to adjust between income and principal would apply, suggesting that the power would be exercised year-by-year. Section 203(j) of the 2018 Act explicitly provides that an exercise of the power in 2019, for example, may apply to 2018, 2019, and any subsequent years. This type of accounting method would permit a fiduciary to take note that a particular long-term investment was likely to produce little or no accounting income but significant capital appreciation, and to provide accordingly for ongoing adjustments to occur as long as conditions prevailed.

Accountability to beneficiaries and review by the court. Section 203(k) clarifies that a description of a fiduciary’s exercise of the power to adjust must be communicated to beneficiaries, either in the annual report contemplated by Section 813(c) of the Uniform Trust Code or by less formal communication at least annually. (C.R.S. § 15-5-813(c) Colorado Uniform Trust Code)

The exercise or nonexercise of the power to adjust is subject to review by the court under an abuse-of-discretion standard pursuant to Section 202. Certain remedies available to the court are addressed in Section 202(c) and discussed in the Comment to Section 202.

Limitations on the power to adjust. Section 203(e) prohibits a trustee from exercising the power to adjust where the exercise or even possession of the power might produce unwelcome tax results. Many of the tax results listed in 203(e) are carryovers from Section 104(c) of the 1997 Act:

- Loss of marital deduction. (203(e)(1) and 102(19)(C))
- Loss of annual gift tax exclusion. (203(e)(1) and 102(19)(A))
- Loss of annuity trust or unitrust treatment. (203(e)(2))
- Charitable deduction. (203(e)(3))
- Grantor trust treatment. (203(e)(4))
- Exposure to estate tax. (203(e)(5))
- A traceable gift by a beneficiary or fiduciary. (203(e)(6))

Adverse results that subsection 203(e) added:

- Disqualification of trust to hold S corporation stock as a qualified subchapter S Trust (QSST) under Section 102(19)(B). (Subsection 203(e)(7))
- Loss of grandfathered or exempt status for GST tax purposes under Subsection 102(19)(D) and (E). (Subsection 203(e)(7))
- Jeopardize public benefits. (Subsection 203(e)(8))

With respect to the “special tax benefits” defined in Section 102(19), however, the limitation of Section 203(e)(1) does not apply “to the extent the adjustment is made to provide for reasonable apportionment of a total return of the trust between the current income beneficiary and successor beneficiaries. This is patterned after a safe harbor in Treasury Reg. § 1.643(b)(1) discussed in Comments to Sections 301 and 309.

Estate tax protection is extended to all individuals under Section 203(e)(5). But the limitation applies only to the exposure of “trust assets” to estate tax, not assets outside the trust including assets distributed from the trust.

Section 104(c)(7) and (8) of the 1997 Act prohibited exercise of the power to adjust “if the trustee is a beneficiary of the trust or

	<p>... the adjustment would benefit the trustee directly or indirectly.” Section 203(e)(7) of the 2018 Act simply requires the fiduciary to be “an independent person,” as defined in new Section 102(11).</p> <p>Like Section 104(d) of the 1997 Act, if some but not all co-fiduciaries are restricted from exercising the power, Section 203(f)(1) of the 2018 Act permits a qualified co-fiduciary to exercise the power, if permitted by the terms of the trust and applicable law.</p> <p>Section 203(f)(2) of the 2018 Act goes on to permit the appointment of a co-fiduciary for that purpose, even limited to the power to adjust.</p> <p>Even in a case where Section 203(e) does not prohibit a trustee from adjusting between income and principal because certain tax advantages might be jeopardized the trustee’s adjustment between income and principal does not necessarily determine or affect the amount of income that will be subject to federal income tax. Income for federal tax purposes is different from income for purposes of trust administration. As Treasury Reg. § 1.643(b)-1 warns, “[t]rust provisions that depart fundamentally from traditional principles of income and principal will generally not be recognized” for income tax purposes.</p> <p>Section 203(e)(9) provides that that the power to adjust is not available for a unitrust under Article 3.</p> <p>Release or delegation of the power to adjust.</p> <p>Section 203(g) of the 2018 Act permits a fiduciary to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of the benefit or impose a burden or risk.</p> <p>Section 203(h) provides that a release or delegation may be limited to income, to principal, or in other ways, or may apply only for a limited time, which may be measured by a life or lives. If not limited, the default under Section 203(h) is that the release or delegation is complete and permanent.</p> <p>Trust terms that limit a power to adjust. Section 203(i), like former Section 104(f) of the 1997 Act, acknowledges the terms of the trust may limit the power to adjust, but only if the limitation expressly applies to “the power to adjust under subsection (a)”.</p>
Current Colorado Law	<i>Uniform Principal and Income Act:</i>

§ 15-1-404. **Trustee's power to adjust.** (1) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in section 15-1-403(1), that the trustee is unable to comply with section 15-1-403(2).

(2) In deciding whether and to what extent to exercise the power conferred by subsection (1) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (a) The nature, purpose, and expected duration of the trust;
- (b) The intent of the settlor;
- (c) The identity and circumstances of the beneficiaries;
- (d) The needs for liquidity, regularity of income, and preservation and appreciation of capital;
- (e) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
- (f) The net amount allocated to income under the other sections of subparts 1 through 6 of this part 4 and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (g) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
- (h) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
- (i) The anticipated tax consequences of an adjustment.

(3) A trustee may not make an adjustment:

(a) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(b) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(c) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(d) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(e) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(f) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(g) If the trustee is a beneficiary of the trust;

(h) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly; or

(i) If the trust is a unitrust.

(4) If the provisions of paragraph (e), (f), (g), or (h) of subsection (3) of this section apply to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

	<p>(5) A trustee may release the entire power conferred by subsection (1) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in paragraph (a), (b), (c), (d), (e), (f), or (h) of subsection (3) of this section, or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (3) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.</p> <p>(6) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee of power of adjustment conferred by subsection (1) of this section.</p> <p>(7) Nothing in this section or in subparts 1 through 6 of this part 4 is intended to create or imply a duty to make an adjustment, and a trustee is not liable for not considering whether to make an adjustment or for choosing not to make an adjustment. In a proceeding with respect to a trustee’s exercise or nonexercise of the power to make an adjustment under this section, the sole remedy is to direct, deny, or revise an adjustment between principal or income.</p>
<p>Official Comments to Colorado Law C.R.S. § 15-1-404</p>	<p>Purpose and Scope of Provision. The purpose of Section 15-1-404 is to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio’s total return in the form of traditional trust accounting income such as interest, dividends, and rents.</p> <p>Section 15-1-404(1) authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary’s distribution rights in terms of the right to receive “income” in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in Section 15-1-403(1), that he is unable to comply with Section 15-1-403(2). In deciding whether and to what extent to exercise the power to adjust, the trustee is required to consider the factors described in Section 15-1-404(2), but the trustee may not make an adjustment in circumstances described in Section 15-4-404(3). (Prohibitions to Adjustment)</p>

Section 15-1-404 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration in applying Section 15-1-404(1) is the requirement in Section 15-1-403(2) that "a fiduciary must administer a trust or estate impartially, based on what is fair and reasonable to all the beneficiaries, except to the extent the terms of the trust or the will clearly manifest an intention that a fiduciary shall or may favor one or more beneficiaries."

Section 15-1-404, with the adoption of the Restatement of Trusts 3d: Prudent Investor Rule, is an important tool in trust administration.

Three conditions to the exercise of the power to adjust. The first of the three conditions that must be met before a trustee can exercise the power to adjust – that the trustee invest and manage trust assets a prudent investor. These requirements are met if the state has adopted the Uniform Act or other prudent investor legislation has been enacted.

The second condition will be met when the terms of the trust require all of the "income" to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of the trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or of trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust's income to the beneficiary or to accumulate some of all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income.

To meet the third condition, the trustee must first meet the requirements of Section 15-1-403(1), i.e., she must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must

apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that she is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor income beneficiary or the remainder beneficiary, the trustee must conclude that she is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion – that she is unable to administer the trust impartially or that she is unable to achieve the degree of partiality required or permitted – she may exercise the power to adjust under Section 15-1-404(1).

Impartiality and productivity of income. The duty of impartiality between income and remainder beneficiaries is linked to the trustee’s duty to make the portfolio productive of trust accounting income whenever the distribution requirements are expressed in terms of distributing the trust “income.”

Under the prudent investor rule, “[t]o whatever extent a requirement of income productivity exists, . . . the requirement applies not investment by investment but to the portfolio as a whole” Restatement of Trusts 3d: Prudent Investor Rule § 227, comment *i*, at 34. The power to adjust under Section 15-1-404(1) is also to be exercised by considering net income from the portfolio as a whole and not investment by investment.

While the purpose of the power to adjust in Section 15-1-404(1) is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio’s total return, the trustee must still determine the extent to which a distribution must be made to an income beneficiary and the adequacy of the portfolio’s liquidity as a whole to make that distribution.

Factors to consider in exercising the power to adjust. Section 15-1-404(2) requires a trustee to consider factors relevant to the trust and its beneficiaries in deciding whether and to what extent the power to adjust should be exercised. Section 2(c) of the Uniform Prudent Investor Act sets forth circumstances that a trustee is to consider in investing and managing trust assets. The circumstances in Section (c) of the Uniform Prudent Investor Act are the source of the factors in paragraphs (a) through (f) and (h)

of Section 15-1-404(2) so that, to the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust. If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary. On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust.

Assets received from settlor. Section 3 of the Uniform Prudent Investor Act provides that “[a] trustee shall diversify the investments of a trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are best served without diversifying.” The special circumstances may include the wish to retain a family business, the benefit derived from deferring liquidation of the asset in order to defer payment of income taxes, or the anticipated capital appreciation from retaining an asset such as undeveloped real estate for a long period. To the extent the trustee retains assets received from the settlor because of special circumstances that overcome the duty to diversity, the trustee may take these circumstances into account in determining whether and to what extent the power to adjust should be exercised to change the results produced by other provisions of this Act that apply to retained assets.

Limitations on the power to adjust. The purpose of subsections (3)(a) through (d) is to preserve tax benefits that may have been an important purpose for creating the trust. Subsections (3)(e), (f), and (h) deny the power to adjust in the circumstances described in those subsections in order to prevent adverse tax consequences, and the subsection(3)(g) denies the power to adjust to any beneficiary, whether or not possession of the power may have adverse tax consequences.

Under subsection (3)(a), a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but the subsection does not prevent a trustee from making an adjustment

that increases that amount of income paid from a marital deduction trust to the spouse.

Subsection (3)(a) applies to a trust that qualifies for the marital deduction because the spouse has a general power of appointment over the trust, but it applies to a qualified terminable interest property (QTIP) trust only if and to the extent that the fiduciary makes the election required to obtain the tax deduction.

Subsection (3)(c) applies to annuity trusts and unitrusts with no charitable beneficiaries as well as to trusts with charitable income or remainder beneficiaries; its purpose is to make it clear that a beneficiary's right to receive a fixed annuity or a fixed fraction of the value of a trust's assets is not subject to adjustment under Section 15-1-404(1).

Subsection (3)(c) does not apply to any additional amount to which the beneficiary may be entitled that is expressed in terms of a right to receive income from the trust. For example, if a beneficiary is to receive a fixed annuity or the trust income, whichever is greater, subsection (3)(c) does not prevent a trustee from making an adjustment in determining the amount of the trust's income.

If subsection (3)(e), (f), (g) or (h) prevents a trustee from exercising the power to adjust, subsection (4) permits a cotrustee who is not subject to the provision to exercise the power unless the terms of the trust do not permit the cotrustee to do so.

Release of power to adjust. Section 15-1-404(5) permits a trustee to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden.

Trust terms that limit a power to adjust. Section 15-1-404(6) applies to trust provisions that limit a trustee's power to adjust. Since the power is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the adoption of this Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust's income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under Section 15-1-

	404(1) if the need for adjustment arises because the trustee is operating under the prudent investor rule.
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

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