

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 301 |
| 2. SUBJECT | Definitions |
| 3. UFIPA STATUTE | <p>SECTION 301. DEFINITION. In this article:</p> <p>(1) “Applicable value” means the amount of the net fair market value of a trust taken into account under Section 307.</p> <p>(2) “Express unitrust” means a trust for which, under the terms of the trust without regard to this [article], income or net income must or may be calculated as a unitrust amount.</p> <p>(3) “Income trust” means a trust that is not a unitrust.</p> <p>(4) “Net fair market value of a trust” means the fair market value of the assets of the trust, less the noncontingent liabilities of the trust.</p> <p>(5) “Unitrust” means a trust for which net income is a unitrust amount. The term includes an express unitrust.</p> <p>(6) “Unitrust amount” means an amount computed by multiplying a determined value of a trust by a determined percentage. For a unitrust administered under a unitrust policy, the term means the applicable value, multiplied by the unitrust rate.</p> <p>(7) “Unitrust policy” means a policy described in Sections 305 through 309 and adopted under Section 303.</p> <p>(8) “Unitrust rate” means the rate used to compute the unitrust amount under paragraph (6) for a unitrust administered under a unitrust policy.</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| <p>4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS</p> | <p>Background. The word “unitrust” can be traced at least to the literature of the mid1960s. Lovell, “The Unitrust: A New Concept to Meet an Old Problem,” 105 Trusts & Estates 215 (1966); Del Cotto & Joyce, “Taxation of the Trust Annuity: The Unitrust Under the Constitution and the Internal Revenue Code,” 23 Tax L. Rev. 257 (1968). For many estate planners and charitable giving planners, the first introduction to the word may be in the term “charitable remainder unitrust” introduced by Congress in section 664, added to the Internal Revenue Code by the Tax Reform Act of 1969. The word was reprised following the enactment of section 2702 in Treasury Reg. § 25.2702-3(c), governing “qualified unitrust interests” in grantor retained unitrusts (“GRUTs”) (which are hardly ever used, if they are used at all).</p> <p>While the precise origin or intent of the word is not totally clear, it appears derived from the notion that the trust consists of a <i>unified</i> fund—“a single fund [in which] there would be no distinction between income and principal,” only between “receipts” and “payouts.” Lovell, <i>supra</i>. The “unitrust” can be thought of as a trust in which there is a “unity” of interest between the current income beneficiary and the successor beneficiary, because both benefit from a higher value of the trust assets.</p> <p>Thus, in current legal usage, a “unitrust” is simply a trust in which the periodic payout to the current income beneficiary is determined with reference to a percentage of the net value of the trust assets, determined from time to time, regardless of how much income is produced by the trust assets or the growth of the trust assets. As the value of the trust assets increases, the unitrust amount increases. As the value decreases, the unitrust amount decreases.</p> <p>The “unity” of interest between the current income beneficiaries and the remainder or successor beneficiaries will enable the trustee to invest the assets for long-term growth to the benefit of all beneficiaries. This will permit the mission of the trustee and investment team to be more focused. Investment decisions can be based on the needs and risk tolerances of the beneficiaries, and there is less likelihood of dissension between the current and future beneficiaries over investment policy. In addition, to the extent that a unitrust approach obviates discretionary invasions of principal, the trustee is protected against challenges by the remainder beneficiaries that any discretionary principal distributions were excessive. Similarly, a unitrust approach eliminates the need to make adjustments between income and principal under Section 203 and</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>thus avoids or minimizes controversy over whether such adjustments are proper.</p> <p>By the end of 2016, 36 states (Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming) had enacted statutes, some as part of their Principal and Income Acts and some separately, permitting a trustee to convert a trust to a unitrust. Some of those statutes refer to unitrusts as “total return unitrusts” (a term not used in Article 3).</p> <p>Response by the Internal Revenue Service. In February 2001, the Internal Revenue Service published proposed regulations it described in part as follows: “This document contains proposed regulations revising the definition of income under section 643(b) of the Internal Revenue Code to take into account changes in the definition of trust accounting income under state laws.” The preamble to the proposed regulations noted:</p> <p>These [then current] statutory and regulatory provisions [under section 643] date back to a time when, under state statutes, dividends and interest were considered income and were allocated to the income beneficiaries while capital gains were allocated to the principal of the trust. Changes in the types of available investments and in investment philosophies have caused states to revise, or to consider revising, these traditional concepts of income and principal....</p> <p>To ensure that the income beneficiaries are not penalized if a trustee adopts a total return investment strategy, many states have made, or are considering making, revisions to the definitions of income and principal. Some state statutes permit the trustee to make an equitable adjustment between income and principal if necessary to ensure that both the income beneficiaries and the remainder beneficiaries are treated impartially, based on what is fair and reasonable to all the beneficiaries. Thus, a receipt of capital gains that previously would have been allocated to principal may be allocated by the trustee to income if</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>necessary to treat both parties impartially. Conversely, a receipt of dividends or interest that previously would have been allocated to income may be allocated by the trustee to principal if necessary to treat both parties impartially.</p> <p>Other states are proposing legislation that would allow the trustee to pay a unitrust amount to an income beneficiary in satisfaction of that beneficiary's right to the income from the trust. This unitrust amount will be a fixed percentage, sometimes required to be within a range set by state statute, of the fair market value of the trust assets determined annually.</p> <p>Questions have arisen concerning how these state statutory changes affect the definition of income provided in section 643(b) and the other Code provisions that rely on the section 643(b) definition of income. This definition of income affects trusts including, but not limited to, ordinary trusts, charitable remainder trusts, pooled income funds, and qualified subchapter S trusts.</p> <p>In short, revision of the regulations was proposed to respond to changes in circumstances, including changes in the pressures on a trustee faced with an obligation to invest for total return under the prudent investor rule and faced with the remedies of principal-income adjustments under the 1997 Revised Uniform Principal and Income Act and of conversion to a total return unitrust.</p> <p>The final regulations were released on December 30, 2003. Treasury Reg. §1.643(b)-1 states, in part:</p> <p>[A]n allocation of amounts between income and principal pursuant to applicable local law will be respected if local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, including ordinary and tax-exempt income, capital gains, and appreciation. For example, a state statute providing that income is a unitrust amount of no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis, is a reasonable apportionment of the total return of the trust.</p> <p>Article 3. The typical state unitrust statute limits unitrust conversions to the parameters in the Treasury Regulations – “a unitrust amount of no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>averaged on a multiple year basis.” Article 3 borrows heavily from that existing state legislation, but it is broader and more flexible than the laws of most states. The 2018 Act does not limit state law by these specialized federal regulations and includes in Article 3 many more features and refinements than only a 3to-5-percent range and the potential for annual averaging, to permit a unitrust to even better serve the objective of achieving more stability and predictability for beneficiaries.</p> <p>One such refinement is to provide that the trust distribute a percentage of its market value determined on the basis of a rolling average of values for periods other than years. Twelve quarters is an example. This can reduce potential fluctuations in distributions caused by shortswing movements in the stock market. Although the rate of increase in the unitrust distribution to the current income beneficiary will lag the performance of the portfolio, the current income beneficiary will benefit in down years. Another similar refinement designed to reduce risk to all the beneficiaries is to place a ceiling and/or a floor on the unitrust payout amount, or on the size of fluctuation of the unitrust amount from year to year or period to period. More fundamental refinements include a variable unitrust rate itself, perhaps drawn from specified market data, and different treatment for different types of assets, including the total exclusion of certain assets and the income therefrom. Sections 305-309(a) allow all variations of that kind. To afford a trustee the benefit of the safe harbor in the Treasury regulations in situations where it applies, Section 309(b) limits the parameters in those situations to the parameters specified in that safe harbor. The situations where Section 309(b) applies, described as situations in which the trust offers a “special tax benefit,” which is defined in Section 102(19), are built around situations addressed in the 2003 Treasury Regulations.</p> <p>Because of the broad flexibility Article 3 allows, it is not necessary to provide specific statutory fixes for specific identified challenges, including computational challenges like the treatment of accrued but unpaid income and the treatment of property that is personally used and not invested.</p> <p>In addition to the requirements in Sections 303(b)(2) and 304 for sending notice of a proposed conversion to or from a unitrust or change to a unitrust, some state statutes also require the trustee to send a copy of the state unitrust statute. If the other, somewhat</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>more detailed, requirements of this Article 3 are followed, that seems unnecessary, although any state that chooses may still add it.</p> <p>Like some state unitrust statutes, Article 3 applies to “express unitrusts,” defined in Section 301(2) to be “a trust for which, under the terms of the trust without regard to this [article], income or net income must or may be calculated as a unitrust amount.” This scope of Article 3 is confirmed in Section 301(5), which includes an express unitrust in the general definition of a “unitrust,” in Section 301(6), in which the definition of a “unitrust amount” “includes” the unitrust amount determined under Article 3 but also covers any “amount computed by multiplying a determined value of a trust by a determined percentage” (as in an express unitrust), and in Section 302(a)(2), which includes an express unitrust in the application of Article 3. This definition and scope are carried out in Section 303(a)(2) and (3), which provides that any unitrust (which includes an express unitrust under Section 301(5)) may be changed (Section 303(a)(2)) or converted (not just “converted <i>back</i>”) to an income trust (Section 303(a)(3)). Thus the Comments to this act refer to “the power to convert to or from a unitrust or change a unitrust,” although the act itself (in Sections 201(d) and 202(a)(2) and (c)(2)) is more formal.</p> <p>As in the case of the power to adjust between income and principal provided in Section 203 and discussed in the Comment to Section 203, Section 302(c) provides that a trust may be converted to a unitrust regardless of the terms of the trust governing distributions – that is, even though distributions are not defined or limited by the amount of net income of the trust. This is a departure from current state laws, but it reflects the overall commitment to flexibility in the 2018 Act that is discussed in the Comment to Section 302. Like the power to adjust, Section 303(b)(1) makes the power to convert to or from a unitrust or change a unitrust available when “the fiduciary determines that the action will <i>assist</i> the fiduciary to administer a trust impartially.”</p> |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | |
| <p>6. COLORADO LAW</p> | <p>CRS 15-1-404.5 (10) provides two definitions.</p> <p>CRS 15-1-404.5 (10) As used in this section:</p> <p>(I) "Unitrust" means a trust, the terms of which require or permit distribution of a unitrust amount, without regard to whether the trust has</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>been converted to a unitrust in accordance with this section or whether the trust is established by express terms of the governing instrument.</p> <p>(II) "Unitrust amount" means an amount equal to a percentage of a unitrust's assets that may or are required to be distributed to one or more beneficiaries annually in accordance with the terms of the unitrust. The unitrust amount may be determined by reference to the net fair market value of the unitrust's assets as of a particular date each year or as an average determined on a multiple-year basis.</p> <p>CRS 15-1-404.5 (4.5) provides two additional definitions:</p> <p>For purposes of subsection (4) of this section:</p> <ul style="list-style-type: none">(a) "Income", as that term appears in the governing instrument, shall be deemed to mean the distribution amount.(b)<ul style="list-style-type: none">i. The "distribution amount" shall be an annual amount equal to the distribution percentage multiplied by the average net fair market value of the trust's assets.ii. For purposes of this paragraph (b), the average net fair market value of the trust's assets shall be the net fair market value of the trust's assets averaged over the lesser of:<ul style="list-style-type: none">(A) The three preceding years; or(B) The period during which the trust has been in existence. <p>"Qualified beneficiary" is a definition from the Colorado UPIA that is specifically used in the Colorado Unitrust Statute.</p> <p>CRS 15-1-402 (10.5)</p> <p>"Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined:</p> <ul style="list-style-type: none">(a) Is a distributee or a permissible distributee of trust income or principal;(b) Would be a distributee or permissible distributee of trust income or principal if the interest of the distributees described in paragraph (a) of this subsection (10.5) terminated on that date; or(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on said date. |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | Notably, the term “ income trust ” used in the Colorado Unitrust Statute is not defined. |
| 7. RECOMMENDATION | |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 302 |
| 2. SUBJECT | Application of Article; Duties and Remedies |
| 3. UFIPA STATUTE | <p>SECTION 302. APPLICATION; DUTIES AND REMEDIES.</p> <p>(a) Except as otherwise provided in subsection (b), this article applies to:</p> <p>(1) an income trust, unless the terms of the trust expressly prohibit use of this article by a specific reference to this [article] or an explicit expression of intent that net income not be calculated as a unitrust amount; and</p> <p>(2) an express unitrust, except to the extent the terms of the trust explicitly:</p> <p>(A) prohibit use of this [article] by a specific reference to this [article];</p> <p>(B) prohibit conversion to an income trust; or</p> <p>(C) limit changes to the method of calculating the unitrust amount.</p> <p>(b) This article does not apply to a trust described in Section 170(f)(2)(B), 642(c)(5), 664(d), 2702(a)(3)(A)(ii) or (iii), or 2702(b) of the Internal Revenue Code of 1986, as amended, 26 U.S.C. Section 170(f)(2)(B), 642(c)(5), 664(d), 2702(a)(3)(A)(ii) or (iii), or 2702(b), as amended.</p> <p>(c) An income trust to which this article applies under subsection (a)(1) may be converted to a unitrust under this article</p> |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>regardless of the terms of the trust concerning distributions.</p> <p>Conversion to a unitrust under this article does not affect other terms of the trust concerning distributions of income or principal.</p> <p>(d) This article applies to an estate only to the extent a trust is a beneficiary of the estate. To the extent of the trust’s interest in the estate, the estate may be administered as a unitrust, the administration of the estate as a unitrust may be discontinued, or the percentage or method used to calculate the unitrust amount may be changed, in the same manner as for a trust under this article.</p> <p>(e) This article does not create a duty to take or consider action under this article or to inform a beneficiary about the applicability of this article.</p> <p>(f) A fiduciary that in good faith takes or fails to take an action under this article is not liable to a person affected by the action or inaction.</p> <p>Legislative Note: A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in subsection (b). The United States Code citation is included as an aid to the reader. If the state’s convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be omitted.</p> |
| <p>4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS</p> | <p>Section 302(a)(2) includes “express unitrusts” within the scope of Article 3. Section 302(b) excludes charitable lead annuity trusts and unitrusts (CLATs and CLUTs), pooled income funds (PIFs), charitable remainder annuity trusts and unitrusts (CRATs and CRUTs), personal residence trusts and qualified personal residence trusts</p> |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>(PRTs and QPRTs), and grantor retained annuity trusts and unitrusts (GRATs and GRUTs).</p> <p>Section 302(c) confirms that conversion of an income trust to a unitrust does not depend on the terms of the trust concerning distributions. In other words, a unitrust conversion is available even for a trust in which a trustee may accumulate income or invade principal. This works both ways under Section 302(c). Discretion over distributions does not disqualify an income trust from converting to a unitrust, and neither does conversion to a unitrust change the trustee’s discretion to accumulate income (even the unitrust amount, although that may be unusual) or invade principal above the unitrust amount. This carries out the objective of the 2018 Act, explained in the Prefatory Note and in the Comment to Section 203, to allow a fiduciary to respect the simple, predictable, and reassuring notion of “income” (in this case a unitrust amount) without necessarily relying on accumulations of income or invasions of principal as a first resort.</p> <p>Section 302(d) provides that Article 3 applies to a decedent’s estate only to the extent a trust is a beneficiary of the estate. To that extent, the estate, or part of the estate, is treated for all purposes the same as a trust under Article 3. Thus, there are no other references to estates in Article 3.</p> <p>Section 302(e) rejects any creation of an affirmative duty to act under Article 3 or to inform beneficiaries of the actions available under Article 3. And Section 302(f) exonerates a fiduciary that in good faith acts or fails to act under Article 3.</p> |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | <p>The current Colorado unitrust statute also may be applicable to discretionary income trusts.</p> <p>Colorado law already prohibits application of unitrust conversion to certain trusts referred to in the Internal Revenue Code. Section 302 would add trusts described in IRC 170(f)(2)(B) and 2702(b) as trusts to which the uniform unitrust provisions will not apply.</p> |
| <p>6. COLORADO LAW</p> | <p>CRS 15-1-404.5(1) ... a trustee ...may convert a trust to a unitrust ... if all of the following apply:</p> <p>(a) The trust describes the amount that may or must be distributed to a beneficiary by referring to the trust’s income...</p> <p>CRS 15-1-404.5(13)(b) Application.</p> <p>(b)This section shall be construed to apply to the administration of a trust that is administered in Colorado under Colorado law or that is</p> |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>governed by Colorado law with respect to the meaning and effect of its terms unless:</p> <ul style="list-style-type: none">i. The trust is a trust described in the federal "Internal Revenue Code of 1986", section 642 (c)(5), 664 (d), or 2702 (a)(3); <p>CRS 15-1-404.5(9) Tax limitations. If a particular trustee is also a beneficiary of the trust and conversion or failure to convert would enhance or diminish the beneficial interest of that trustee, or if possession or exercise of the conversion power by a particular trustee alone would cause any individual to be treated as owner of a part of the trust for federal income tax purposes or cause a part of the trust to be included in the gross estate of any individual for federal estate tax purposes, then that particular trustee may not participate as a trustee in the exercise of the conversion power; except that:</p> <ul style="list-style-type: none">(a) The trustee may petition the court under paragraph (a) of subsection (3) of this section to order conversion in accordance with this section; and(b) A co-trustee or co-trustees to whom this subsection (9) does not apply may convert the trust to a unitrust in accordance with subsection (1) or (2) of this section. <p>CRS 15-1-404.5(14) Application to express trusts. (a) This subsection (14) does not apply to a charitable remainder unitrust as defined by section 664 (d), federal "Internal Revenue Code of 1986", 26 U.S.C. sec. 664, as amended.</p> <p>CRS 15-1-404.5(3)(d)(ii) A trustee's actions undertaken in accordance with this subsection (3) shall not be deemed improper or inconsistent with the trustee's duty of impartiality unless the court finds from all the evidence that the trustee acted in bad faith.</p> <p>CRS 15-1-405.5 (11) Remedies. (a) A trustee who reasonably and in good faith takes any action or omits to take any action under this section is not liable to any person interested in the trust. An act or omission by a trustee under this section shall be presumed to be reasonable and undertaken in good faith unless the act or omission is determined by the court to have been an abuse of discretion.</p> <p>(b) If a trustee reasonably and in good faith takes or omits to take any action under this section and a person interested in the trust opposes</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>the act or omission, the person's exclusive remedy shall be to seek an order of the court directing the trustee to:</p> <ul style="list-style-type: none">(i) Convert the trust to a unitrust;(ii) Reconvert from a unitrust;(iii) Change the distribution percentage; or(iv) Order any administrative procedures the court determines are necessary or helpful for the proper functioning of the trust. <p>CRS 15-1-404.5 (12) No duty. A trustee has no duty to inform a beneficiary about the availability and provisions of this section. A trustee has no duty to review the trust to determine whether any action should be taken under this section unless the trustee is requested in writing by a qualified beneficiary to do so.</p> |
| <p>7. RECOMMENDATION</p> | |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 303 |
| 2. SUBJECT | Authority of Fiduciary |
| 3. UFIPA STATUTE | <p>SECTION 303. AUTHORITY OF FIDUCIARY.</p> <p>(a) A fiduciary, without court approval, by complying with subsections (b) and (f), may:</p> <p>(1) convert an income trust to a unitrust if the fiduciary adopts in a record a unitrust policy for the trust providing:</p> <p>(A) that in administering the trust the net income of the trust will be a unitrust amount rather than net income determined without regard to this article; and</p> <p>(B) the percentage and method used to calculate the unitrust amount;</p> <p>(2) change the percentage or method used to calculate a unitrust amount for a unitrust if the fiduciary adopts in a record a unitrust policy or an amendment or replacement of a unitrust policy providing changes in the percentage or method used to calculate the unitrust amount; or</p> <p>(3) convert a unitrust to an income trust if the fiduciary adopts in a record a determination that, in administering the trust, the net income of the trust will be net income determined without regard to this article rather than a unitrust amount.</p> <p>(b) A fiduciary may take an action under subsection (a) if:</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>(1) the fiduciary determines that the action will assist the fiduciary to administer a trust impartially;</p> <p>(2) the fiduciary sends a notice in a record, in the manner required by Section 304, describing and proposing to take the action;</p> <p>(3) the fiduciary sends a copy of the notice under paragraph (2) to each settlor of the trust which is:</p> <ul style="list-style-type: none">(A) if an individual, living; or(B) if not an individual, in existence; <p>(4) at least one member of each class of the qualified beneficiaries determined under CRS 15-5-103 (16), other than the Attorney General], receiving the notice under paragraph (2) is:</p> <ul style="list-style-type: none">(A) if an individual, legally competent; or(B) if not an individual, in existence; or(C) represented in the manner provided in Section 304(b); and <p>(5) the fiduciary does not receive, by the date specified in the notice under Section 304, an objection in a record to the action proposed under paragraph (2) from a person to which the notice under paragraph (2) is sent.</p> <p>(c) If a fiduciary receives, not later than the date stated in the notice under Section 304, an objection in a record described in</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>Section 304 to a proposed action, the fiduciary or a beneficiary may request the court to have the proposed action taken as proposed, taken with modifications, or prevented. A person described in Section 304(a) may oppose the proposed action in the proceeding under this subsection, whether or not the person:</p> <ul style="list-style-type: none">(1) consented under Section 304; or(2) objected under Section 304. <p>(d) If, after sending a notice under subsection (b)(2), a fiduciary decides not to take the action proposed in the notice, the fiduciary shall notify in a record each person described in Section 304(a) of the decision not to take the action and the reasons for the decision.</p> <p>(e) If a beneficiary requests in a record that a fiduciary take an action described in subsection (a) and the fiduciary declines to act or does not act within 90 days after receiving the request, the beneficiary may request the court to direct the fiduciary to take the action requested.</p> <p>(f) In deciding whether and how to take an action authorized by subsection (a), or whether and how to respond to a request by a beneficiary under subsection (e), a fiduciary shall consider all factors relevant to the trust and the beneficiaries, including relevant factors in Section 201(e).</p> |
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{W1213990 SLB}3

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>(g) A fiduciary may release or delegate the power to convert an income trust to a unitrust under subsection (a)(1), change the percentage or method used to calculate a unitrust amount under subsection (a)(2), or convert a unitrust to an income trust under subsection (a)(3), for a reason described in Section 203(g) and in the manner described in Section 203(h).</p> |
| <p>4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS</p> | <p>Section 303 sets forth, in effect, the road map for action under Article 3: the options under Section 303(a), a determination that impartiality will be assisted under Section 303(b)(1), notice to beneficiaries under Section 303(b)(2) with a copy to the settlor or settlors under Section 303(b)(3), existence of a competent potential party under Section 303(b)(4), a wait for a prescribed time before acting under Section 303(b)(5), and an opportunity to ask for court approval under Section 303(c) if there is a timely objection. There is also an opportunity under Section 303(e) for a beneficiary to seek the help of the court if the beneficiary asks the fiduciary to act under Article 3 and the fiduciary refuses or fails to act.</p> <p>Although the recipients of the required notice are set forth in detail in Section 304, settlors are included only here in Section 303(b)(3) and are said to receive only “a copy of the notice.” This is done to avoid unintentionally making the settlor of an irrevocable trust over which he or she has relinquished all power a party to a proceeding with a voice in the matter that could be construed as retained control of the trust. See Section 303(c), which provides that “[a] person described in Section 304(a) may oppose the proposed action in the proceeding under this subsection,” and Section 304[(d)][(c)](4), which requires the notice to state that everyone who receives the notice “may object to the proposed action.” This is a departure from the Uniform Trust Decanting Act (UTDA), for example, which includes the requirement for notice to the settlor in the same list, indeed at the head of the list (Section 7(c)(1)), of all persons entitled to notice. But there may be reasons unique to decanting to give formal notice to the settlor. Section 19(b)(10) of UTDA, for example, allows a settlor to block a fiduciary’s decanting proposal if the decanting would reduce the settlor’s power to avoid or terminate grantor trust status, which typically would not be implicated by a unitrust conversion.</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>Section 303(a)(1)(A) states that in a unitrust “the net income of the trust will be a unitrust amount rather than net income determined without regard to this article.” Thus, for example, because “net income” already reflects the disbursements made from income, there will be no deductions from the unitrust amount for expenses unless the unitrust policy expressly allows it.</p> <p>Like the power to adjust, the power to convert to or from a unitrust or change a unitrust is governed by consideration of the same factors under Sections 303(f) and 201(e), and a fiduciary may release or delegate the power under Section 303(g).</p> |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | |
| <p>6. COLORADO LAW</p> | <p>CRS 15-1-404.5 (1) Conversion by trustee. Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust described in section 15-1-404 and convert a trust to a unitrust as described in this section if all of the following apply:</p> <p>(a) The trust describes the amount that may or must be distributed to a beneficiary by referring to the trust's income and the trustee determines that conversion to a unitrust will enable the trustee to better carry out the purposes of the trust;</p> <p>(b) The trustee sends a written notice of the trustee's decision to convert the trust to a unitrust specifying a prospective effective date for the conversion, which may not be sooner than sixty days after the notice is sent, and including a copy of this section to the qualified beneficiaries, determined as of the date the notice is sent and assuming nonexercise of all powers of appointment;</p> <p>(c) There are one or more legally competent beneficiaries described in section 15-1-402 (10.5)(a), and one or more legally competent remainder beneficiaries described in either section 15-1-402 (10.5)(b) or 15-1-402 (10.5)(c), determined as of the date the notice is sent; and</p> <p>(d) No beneficiary has objected in writing to the conversion to a unitrust and delivered such objection to the trustee within sixty days after the notice was sent.</p> <p>CRS 15-1-404.5 (2) Conversion, reconversion, and adjustment of the distribution percentage by agreement. Conversion to a unitrust or reconversion to an income trust may be made by agreement between the trustee and all qualified beneficiaries of the trust. The trustee and all qualified beneficiaries may also agree to modify the distribution percentage; except that the trustee and the qualified beneficiaries may</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>not agree to a distribution percentage less than three percent or greater than five percent. The agreement may include any other actions a court could properly order pursuant to subsection (7) of this section.</p> <p>CRS 15-1-404.5 (3) Conversion or reconversion by court. (a) The trustee may, for any reason, elect to petition the court to order conversion to a unitrust, including without limitation the reason that conversion under subsection (1) of this section is unavailable because:</p> <ul style="list-style-type: none">(i) A beneficiary timely objects to the conversion to a unitrust;(ii) There are no legally competent beneficiaries described in section 15-1-402 (10.5)(a); or(iii) There are no legally competent beneficiaries described in section 15-1-402 (10.5)(b) or (10.5)(c). <p>(b) A beneficiary may request the trustee to convert to a unitrust or adjust the distribution percentage pursuant to this subsection (3). If the trustee declines or fails to act within six months after receiving a written request from a beneficiary to do so, the beneficiary may petition the court to order the conversion or adjustment.</p> <p>(c) The trustee may petition the court prospectively to convert from a unitrust to an income trust or to adjust the distribution percentage if the trustee determines that the reconversion or adjustment will enable the trustee to better carry out the purposes of the trust. A beneficiary may request the trustee to petition the court prospectively to reconvert from a unitrust to an income trust or adjust the distribution percentage. If the trustee declines or fails to act within six months after receiving a written request from a beneficiary to do so, the beneficiary may petition the court to order the reconversion or adjustment.</p> <p>(d) (i) In a judicial proceeding instituted under this subsection (3), the trustee may present opinions and reasons concerning:</p> <ul style="list-style-type: none">(A) The trustee's support for, or opposition to, a conversion to a unitrust, a reconversion from a unitrust to an income trust, or an adjustment of the distribution percentage of a unitrust, including whether the trustee believes conversion, reconversion, or adjustment of the distribution percentage would enable the trustee to better carry out the purposes of the trust; and(B) Any other matter relevant to the proposed conversion, reconversion, or adjustment of the distribution percentage. <p>(ii) A trustee's actions undertaken in accordance with this subsection (3) shall not be deemed improper or inconsistent with the trustee's</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>duty of impartiality unless the court finds from all the evidence that the trustee acted in bad faith.</p> <p>(e) The court shall order conversion to a unitrust, reconversion prospectively from a unitrust to an income trust, or adjustment of the distribution percentage of a unitrust if the court determines that the conversion, reconversion, or adjustment of the distribution percentage will enable the trustee to better carry out the purposes of the trust.</p> <p>(f) If a conversion to a unitrust is made pursuant to a court order, the trustee may reconvert the unitrust to an income trust only:</p> <p>(i) Pursuant to a subsequent court order; or</p> <p>(ii) By filing with the court an agreement made pursuant to subsection (2) of this section to reconvert to an income trust.</p> <p>(g) Upon a reconversion, the power to adjust, as described in section 15-1-404 and as it existed before the conversion, shall be revived.</p> <p>(h) An action may be taken under this subsection (3) no more frequently than every two years, unless the court for good cause orders otherwise.</p> <p>CRS 15-1-404.5 (5) Determination of matters in administration of unitrust. The trustee may determine any of the following matters in administering a unitrust as the trustee deems necessary or helpful for the proper functioning of the trust:</p> <p>(a) The effective date of a conversion to a unitrust pursuant to subsection (1) of this section;</p> <p>(b) The manner of prorating the distribution amount for a short year in which a beneficiary's interest commences or ceases, or if the trust is a unitrust for only part of the year, or the trustee may elect to treat the trust year as two separate years, the first of which ends at the close of the day on which the conversion or reconversion occurs and the second of which ends at the close of the trust year;</p> <p>(c) Whether distributions are made in cash or in kind;</p> <p>(d) The manner of adjusting valuations and calculations of the distribution amount to account for other payments from, or contributions to, the trust;</p> <p>(e) Whether to value the trust's assets annually or more frequently;</p> <p>(f) Which valuation dates to use and how many valuation dates to use;</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>(g) Valuation decisions concerning any asset for which there is no readily available market value, including:</p> <p>(i) How frequently to value such an asset;</p> <p>(ii) Whether and how often to engage a professional appraiser to value such an asset; and</p> <p>(iii) Whether to exclude the value of such an asset from the net fair market value of the trust's assets for purposes of determining the distribution amount. For purposes of this section, any such asset so excluded shall be referred to as an "excluded asset", and the trustee shall distribute any net income received from the excluded asset as provided for in the governing instrument, subject to the following principles:</p> <p>(A) The trustee shall treat each asset for which there is no readily available market value as an excluded asset unless the trustee determines that there are compelling reasons not to do so and the trustee considers all relevant factors including the best interests of the beneficiaries;</p> <p>(B) If tangible personal property or real property is possessed or occupied by a beneficiary, the trustee may not limit or restrict any right of the beneficiary to use the property in accordance with the governing instrument regardless of whether the trustee treats the property as an excluded asset; and</p> <p>(C) By way of example and not by way of limitation, assets for which there is a readily available market value include cash and cash equivalents; stocks, bonds, and other securities and instruments for which there is an established market on a stock exchange, in an over-the-counter market, or otherwise; and any other property that can reasonably be expected to be sold within one week of the decision to sell without extraordinary efforts by the seller. By way of example and not by way of limitation, assets for which there is no readily available market value include stocks, bonds, and other securities and instruments for which there is no established market on a stock exchange, in an over-the-counter market, or otherwise; real property; tangible personal property; and artwork and other collectibles.</p> <p>(h) Any other administrative matter that the trustee determines is necessary or helpful for the proper functioning of the unitrust.</p> <p>CRS 15-1-404.5 (10) Releases. A trustee may irrevocably release the power granted by this section if the trustee reasonably believes the release is in the best interests of the trust and its beneficiaries. The</p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>release may be personal to the releasing trustee or it may apply generally to some or all subsequent trustees. The release may be for any specified period, including a period measured by the life of an individual.</p> <p>Similar to Section 303()(1)(a), CRS 15-1-404.5 (6) allocation of the unitrust amount already reflects the “net income amount,” so no deductions from the unitrust amount should be made.</p> <p>CRS 15-1-404.5 (6) provides: Allocations. (a) Expenses, taxes, and other charges that would otherwise be deducted from income if the trust was not a unitrust may not be deducted from the distribution amount.</p> <p style="padding-left: 40px;">(b) Unless otherwise provided by the governing instrument, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:</p> <ul style="list-style-type: none">i. Net income determined as if the trust was not a unitrust;ii. Other ordinary income as determined for federal income tax purposes;iii. Net realized short-term capital gains as determined for federal income tax purposes;iv. Net realized long-term capital gains as determined for federal income tax purposes;v. Trust principal comprising assets for which there is a readily available market value; andvi. Other trust principal. |
| 7. RECOMMENDATION | |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 304 |
| 2. SUBJECT | Notice |
| 3. UFIPA STATUTE | <p>SECTION 304. NOTICE.</p> <p>(a) A notice required by Section 303(b)(2) must be sent in a manner authorized under CRS 15-5-1-109 to:</p> <ul style="list-style-type: none">(1) the qualified beneficiaries determined under CRS 15-5-103(16) other than the Attorney General; and(2) each person acting as trust director of the trust under the Colorado Uniform Directed Trust Act; and(3) each person that is granted a power by the terms of the trust to appoint or remove a trustee or person described in paragraph (2), to the extent the power is exercisable when the person that exercises the power is not then serving as a trustee or person described in paragraph (2). <p>(b) The representation provisions of 15-5-301 through 15-5-305 apply to notice under this section.</p> <p>(c) A person may consent in a record at any time to action proposed under Section 303(b)(2). A notice required by Section 303(b)(2) need not be sent to a person that consents under this subsection.</p> <p>(d) A notice required by Section 303(b)(2) must include:</p> <ul style="list-style-type: none">(1) the action proposed under Section 303(b)(2); |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>(2) for a conversion of an income trust to a unitrust, a copy of the unitrust policy adopted under Section 303(a)(1);</p> <p>(3) for a change in the percentage or method used to calculate the unitrust amount, a copy of the unitrust policy or amendment or replacement of the unitrust policy adopted under Section 303(a)(2);</p> <p>(4) a statement that the person to which the notice is sent may object to the proposed action by stating in a record the basis for the objection and sending or delivering the record to the fiduciary;</p> <p>(5) the date by which an objection under paragraph (4) must be received by the fiduciary, which must be at least 30 days after the date the notice is sent;</p> <p>(6) the date on which the action is proposed to be taken and the date on which the action is proposed to take effect;</p> <p>(7) the name and contact information of the fiduciary; and</p> <p>(8) the name and contact information of a person that may be contacted for additional information.</p> <p>Legislative Note:</p> <p><i>A United States Code citation (U.S.C.) follows a reference to the federal Internal Revenue Code in subsection (a)(2)(B)(iii). The United States Code citation is included as an aid to the reader. If the state's convention is to omit the United States Code citation, simply delete the United States Code citation. In states in which the constitution, or</i></p> |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p><i>other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be omitted.</i></p> |
| <p>4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS</p> | <p>Section 304 provides details of the fiduciary’s notice to beneficiaries. Subsection (a) is offered in two Alternatives, Alternative A for a state that has enacted the Uniform Trust Code and Alternative B for a state that hasn’t. Alternative A also includes a subsection (b) that affirms the application of the UTC representation rules. Generally, a detailed notice goes to “qualified beneficiaries” in the UTC sense, as both current and successor beneficiaries are affected by the administration of a trust as a unitrust. Subsection (d) (in the UTC case) or (c) (in the non-UTC case) requires, in paragraphs (7) and (8), the name and contact information of the fiduciary and of a person that may be contacted for additional information. “Contact information” is left open ended, to accommodate any reasonably accessible technology or medium.</p> |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | |
| <p>6. COLORADO LAW</p> | <p>CRS 15-1-404.5 (1) Conversion by trustee. Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust described in section 15-1-404 and convert a trust to a unitrust as described in this section if all of the following apply:</p> <p>(a) The trust describes the amount that may or must be distributed to a beneficiary by referring to the trust's income and the trustee determines that conversion to a unitrust will enable the trustee to better carry out the purposes of the trust;</p> <p>(b) The trustee sends a written notice of the trustee's decision to convert the trust to a unitrust specifying a prospective effective date for the conversion, which may not be sooner than sixty days after the notice is sent, and including a copy of this section to the qualified beneficiaries, determined as of the date the notice is sent and assuming nonexercise of all powers of appointment;</p> <p>(c) There are one or more legally competent beneficiaries described in section 15-1-402 (10.5)(a), and one or more legally competent remainder beneficiaries described in either section 15-1-402 (10.5)(b) or 15-1-402 (10.5)(c), determined as of the date the notice is sent; and</p> <p>(d) No beneficiary has objected in writing to the conversion to a unitrust and delivered such objection to the trustee within sixty days after the notice was sent.</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 7. RECOMMENDATION | Approved |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 305 |
| 2. SUBJECT | Unitrust Policy |
| 3. UFIPA STATUTE | <p>SECTION 305. UNITRUST POLICY.</p> <p>(a) In administering a unitrust under this article, a fiduciary shall follow a unitrust policy adopted under Section 303(a)(1) or (2) or amended or replaced under Section 303(a)(2).</p> <p>(b) A unitrust policy must provide:</p> <p>(1) the unitrust rate or the method for determining the unitrust rate under Section 306;</p> <p>(2) the method for determining the applicable value under Section 307; and</p> <p>(3) the rules described in Sections 306 through 309 which apply in the administration of the unitrust, whether the rules are:</p> <p>(A) mandatory, as provided in Sections 307(a) and 308(a); or</p> <p>(B) optional, as provided in Sections 306, 307(b), 308(b), and 309(a), to the extent the fiduciary elects to adopt those rules.</p> |
| 4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS | <p>Section 305 provides for a “unitrust policy,” which will include a few mandatory details spelled out in Sections 306 through 308 and may include many more optional details mentioned in those sections. It is in those sections where broad flexibility is encountered, including a unitrust rate under Section 306 that may be less than 3 percent or more than 5 percent and a period under Section 308 that may be</p> |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>something other than a calendar year. For exceptions to that flexibility in certain cases, see Section 309 and the Comment thereto.</p> |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | <p>Except for the minimal terms required by a trustee to qualified beneficiaries upon conversion to a unitrust, the current Colorado law does not require the trustee to provide the other matters of administration of a unitrust in a written document.</p> |
| <p>6. COLORADO LAW</p> | <p>The Colorado Unitrust Statute does not require trustee to implement a “policy” but does give the trustee authority to determine certain details that will be conveyed to qualified beneficiaries in a notice.</p> <p>CRS 15-1-404.5 (5) Determination of matters in administration of unitrust. The trustee may determine any of the following matters in administering a unitrust as the trustee deems necessary or helpful for the proper functioning of the trust:</p> <p>(a) The effective date of a conversion to a unitrust pursuant to subsection (1) of this section;</p> <p>(b) The manner of prorating the distribution amount for a short year in which a beneficiary's interest commences or ceases, or if the trust is a unitrust for only part of the year, or the trustee may elect to treat the trust year as two separate years, the first of which ends at the close of the day on which the conversion or reconversion occurs and the second of which ends at the close of the trust year;</p> <p>(c) Whether distributions are made in cash or in kind;</p> <p>(d) The manner of adjusting valuations and calculations of the distribution amount to account for other payments from, or contributions to, the trust;</p> <p>(e) Whether to value the trust's assets annually or more frequently;</p> <p>(f) Which valuation dates to use and how many valuation dates to use;</p> <p>(g) Valuation decisions concerning any asset for which there is no readily available market value, including:</p> <p>(i) How frequently to value such an asset;</p> <p>(ii) Whether and how often to engage a professional appraiser to value such an asset; and</p> <p>(iii) Whether to exclude the value of such an asset from the net fair market value of the trust's assets for purposes of determining the distribution amount. For purposes of this section, any such asset so excluded shall be referred to as an "excluded asset", and the trustee shall distribute any net income received from the excluded asset as</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>provided for in the governing instrument, subject to the following principles:</p> <p>(A) The trustee shall treat each asset for which there is no readily available market value as an excluded asset unless the trustee determines that there are compelling reasons not to do so and the trustee considers all relevant factors including the best interests of the beneficiaries;</p> <p>(B) If tangible personal property or real property is possessed or occupied by a beneficiary, the trustee may not limit or restrict any right of the beneficiary to use the property in accordance with the governing instrument regardless of whether the trustee treats the property as an excluded asset; and</p> <p>(C) By way of example and not by way of limitation, assets for which there is a readily available market value include cash and cash equivalents; stocks, bonds, and other securities and instruments for which there is an established market on a stock exchange, in an over-the-counter market, or otherwise; and any other property that can reasonably be expected to be sold within one week of the decision to sell without extraordinary efforts by the seller. By way of example and not by way of limitation, assets for which there is no readily available market value include stocks, bonds, and other securities and instruments for which there is no established market on a stock exchange, in an over-the-counter market, or otherwise; real property; tangible personal property; and artwork and other collectibles.</p> <p>(h) Any other administrative matter that the trustee determines is necessary or helpful for the proper functioning of the unitrust.</p> |
| 7. RECOMMENDATION | |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 306 |
| 2. SUBJECT | Unitrust Rate |
| 3. UFIPA STATUTE | <p>SECTION 306. UNITRUST RATE.</p> <p>(a) Except as otherwise provided in Section 309(b)(1), a unitrust rate may be:</p> <ul style="list-style-type: none">(1) a fixed unitrust rate; or(2) a unitrust rate that is determined for each period using:<ul style="list-style-type: none">(A) a market index or other published data; <p>or</p> <ul style="list-style-type: none">(B) a mathematical blend of market indices or other published data over a stated number of preceding periods. <p>(b) Except as otherwise provided in Section 309(b)(1), a unitrust policy may provide:</p> <ul style="list-style-type: none">(1) a limit on how high the unitrust rate determined under subsection (a)(2) may rise;(2) a limit on how low the unitrust rate determined under subsection (a)(2) may fall;(3) a limit on how much the unitrust rate determined under subsection (a)(2) may increase over the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods; |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p align="center">(4) a limit on how much the unitrust rate determined under subsection (a)(2) may decrease below the unitrust rate for the preceding period or a mathematical blend of unitrust rates over a stated number of preceding periods; or</p> <p align="center">(5) a mathematical blend of any of the unitrust rates determined under subsection (a)(2) and paragraphs (1) through (4).</p> |
| <p>4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS</p> | |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | <p>The unitrust rate established under current Colorado law depends on whether the conversion is accomplished by notice to the beneficiaries by the trustee or by agreement or by order of the court.</p> |
| <p>6. COLORADO LAW</p> | <p>CRS 15-1-404.5(2) (Conversion by agreement between qualified beneficiaries and trustee) (Conversion by trustee) (2) Conversion, reconversion, and adjustment of the distribution percentage by agreement. Conversion to a unitrust or reconversion to an income trust may be made by agreement between the trustee and all qualified beneficiaries of the trust. The trustee and all qualified beneficiaries may also agree to modify the distribution percentage; except that the trustee and the qualified beneficiaries may not agree to a distribution percentage less than three percent or greater than five percent. The agreement may include any other actions a court could properly order pursuant to subsection (7) of this section.</p> <p>CRS 15-1-404.5 (4) (Conversion by trustee with notice to qualified beneficiaries: Administration of a unitrust. During the time that a trust is a unitrust, the trustee shall administer the trust in accordance with the provisions of this subsection (4) as follows, unless otherwise expressly provided by the terms of the trust: (c) The distribution percentage for any trust converted to a unitrust by a trustee in accordance with subsection (1) of this section shall be four percent, unless a different percentage has been determined in an agreement made pursuant to subsection (2) of this section or ordered by the court pursuant to subsection (3) of this section;</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 7. RECOMMENDATION | |
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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 307 |
| 2. SUBJECT | Applicable Value |
| 3. UFIPA STATUTE | <p>SECTION 307. APPLICABLE VALUE.</p> <p>(a) A unitrust policy must provide the method for determining the fair market value of an asset for the purpose of determining the unitrust amount, including:</p> <ul style="list-style-type: none">(1) the frequency of valuing the asset, which need not require a valuation in every period; and(2) the date for valuing the asset in each period in which the asset is valued. <p>(b) Except as otherwise provided in Section 309(b)(2), a unitrust policy may provide methods for determining the amount of the net fair market value of the trust to take into account in determining the applicable value, including:</p> <ul style="list-style-type: none">(1) obtaining an appraisal of an asset for which fair market value is not readily available;(2) exclusion of specific assets or groups or types of assets;(3) other exceptions or modifications of the treatment of specific assets or groups or types of assets;(4) identification and treatment of cash or property held for distribution;(5) use of: |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p align="center">(A) an average of fair market values over a stated number of preceding periods; or</p> <p align="center">(B) another mathematical blend of fair market values over a stated number of preceding periods;</p> <p align="center">(6) a limit on how much the applicable value of all assets, groups of assets, or individual assets may increase over:</p> <p align="center">(A) the corresponding applicable value for the preceding period; or</p> <p align="center">(B) a mathematical blend of applicable values over a stated number of preceding periods;</p> <p align="center">(7) a limit on how much the applicable value of all assets, groups of assets, or individual assets may decrease below:</p> <p align="center">(A) the corresponding applicable value for the preceding period; or</p> <p align="center">(B) a mathematical blend of applicable values over a stated number of preceding periods;</p> <p align="center">(8) the treatment of accrued income and other features of an asset which affect value; and</p> <p align="center">(9) determining the liabilities of the trust, including treatment of liabilities to conform with the treatment of assets under paragraphs (1) through (8).</p> |
| <p>4. NATIONAL CONFERENCE OF COMMISSIONERS ON</p> | <p>In determining the amount to which the unitrust rate is applied to determine the unitrust amount, a fiduciary first determines</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| <p>UNIFORM STATE LAWS COMMENTS</p> | <p>the fair market value of <i>each</i> asset that is not excluded under Section 307(b)(2). Fair market value is just that, fair market value in the usual sense. Next, the fiduciary adds the fair market values of <i>all</i> those assets together and subtracts the noncontingent liabilities of the trust to determine “net fair market value of the trust,” as defined in Section 301(4). Finally, the fiduciary applies the actions described in Section 307(b)(3) through (9), to the extent provided by the unitrust policy (as well as other actions provided by the unitrust policy under Section 309(a)(3)), to determine the “applicable value.” It is the applicable value that is multiplied by the unitrust rate to determine the unitrust amount, which is deemed to be the net income of the trust under Section 303(a)(1)(A) or (2). Thus, unlike fair market value, the “applicable value” may be affected by the actions taken under Section 307(b)(3) through (9). Those actions may be somewhat artificial, in that they are not produced by the market as is “fair market value.” In fact, most of those actions are intended to counterbalance the effects of the market to provide a smoother and more predictable unitrust amount from year to year. Like the “terms of <i>a</i> trust” and “terms of <i>the</i> trust” discussed in the Comment to Section 102, “net fair market value of <i>a</i> trust” (in Section 301(1) and (4)) and “net fair market value of <i>the</i> trust” in Section 307(b) are used interchangeably, depending on whether there has been a reference to a trust, either explicitly or indirectly, previously in the subsection or paragraph. In Section 307(b), that previous reference to a trust is imbedded in the term “unitrust policy.”</p> |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | |
| <p>6. COLORADO LAW</p> | <p>CRS 15-14-404.5(5) gives guidance to the trustee in its determination of the value of assets and other administrative matters:</p> <p>(5) Determination of matters in administration of unitrust. The trustee may determine any of the following matters in administering a unitrust as the trustee deems necessary or helpful for the proper functioning of the trust:</p> <p>(a) The effective date of a conversion to a unitrust pursuant to subsection (1) of this section;</p> <p>(b) The manner of prorating the distribution amount for a short year in which a beneficiary’s interest commences or ceases, or if the trust is a unitrust for only part of the year, or the trustee may elect to treat the trust year as two separate years, the first of which ends at the close of the day on which the conversion or reconversion occurs and the second of which ends at the close of the trust year;</p> <p>(c) Whether distributions are made in cash or in kind;</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>(d) The manner of adjusting valuations and calculations of the distribution amount to account for other payments from, or contributions to, the trust;</p> <p>(e) Whether to value the trust's assets annually or more frequently;</p> <p>(f) Which valuation dates to use and how many valuation dates to use;</p> <p>(g) Valuation decisions concerning any asset for which there is no readily available market value, including:</p> <p>(i) How frequently to value such an asset;</p> <p>(ii) Whether and how often to engage a professional appraiser to value such an asset; and</p> <p>(iii) Whether to exclude the value of such an asset from the net fair market value of the trust's assets for purposes of determining the distribution amount. For purposes of this section, any such asset so excluded shall be referred to as an "excluded asset", and the trustee shall distribute any net income received from the excluded asset as provided for in the governing instrument, subject to the following principles:</p> <p>(A) The trustee shall treat each asset for which there is no readily available market value as an excluded asset unless the trustee determines that there are compelling reasons not to do so and the trustee considers all relevant factors including the best interests of the beneficiaries;</p> <p>(B) If tangible personal property or real property is possessed or occupied by a beneficiary, the trustee may not limit or restrict any right of the beneficiary to use the property in accordance with the governing instrument regardless of whether the trustee treats the property as an excluded asset; and</p> <p>(C) By way of example and not by way of limitation, assets for which there is a readily available market value include cash and cash equivalents; stocks, bonds, and other securities and instruments for which there is an established market on a stock exchange, in an over-the-counter market, or otherwise; and any other property that can reasonably be expected to be sold within one week of the decision to sell without extraordinary efforts by the seller. By way of example and not by way of limitation, assets for which there is no readily available market value include stocks, bonds, and other securities and instruments for which there is no established market on a stock exchange, in an over-the-counter market, or otherwise; real property; tangible personal property; and artwork and other collectibles.</p> <p>(h) Any other administrative matter that the trustee determines is necessary or helpful for the proper functioning of the unitrust.</p> |
| 7. RECOMMENDATION | |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 308 |
| 2. SUBJECT | Period |
| 3. UFIPA STATUTE | <p>SECTION 308. PERIOD.</p> <p>(a) A unitrust policy must provide the period used under Sections 306 and 307. Except as otherwise provided in Section 309(b)(3), the period may be:</p> <ul style="list-style-type: none">(1) a calendar year;(2) a 12-month period other than a calendar year;(3) a calendar quarter;(4) a three-month period other than a calendar quarter; or(5) another period. <p>(b) Except as otherwise provided in Section 309(b), a unitrust policy may provide standards for:</p> <ul style="list-style-type: none">(1) using fewer preceding periods under Section 306(a)(2)(B) or (b)(3) or (4) if:<ul style="list-style-type: none">(A) the trust was not in existence in a preceding period; or(B) market indices or other published data are not available for a preceding period;(2) using fewer preceding periods under Section 307(b)(5)(A) or (B), (6)(B), or (7)(B) if: |

{W1213996 SLB}1

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p align="center">(A) the trust was not in existence in a preceding period; or</p> <p align="center">(B) fair market values are not available for a preceding period; and</p> <p align="center">(3) prorating the unitrust amount on a daily basis for a part of a period in which the trust or the administration of the trust as a unitrust or the interest of any beneficiary commences or terminates.</p> |
| <p>4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS</p> | |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | |
| <p>6. COLORADO LAW</p> | <p>CRS 15-1-404.5(4.5)(b) (i) The "distribution amount" shall be an annual amount equal to the distribution percentage multiplied by the average net fair market value of the trust's assets. (ii) For purposes of this paragraph (b), the average net fair market value of the trust's assets shall be the net fair market value of the trust's assets averaged over the lesser of: (A) The three preceding years; or (B) The period during which the trust has been in existence.</p> <p>CRS 15-1-404.5(5) Determination of matters in administration of unitrust. The trustee may determine any of the following matters in administering a unitrust as the trustee deems necessary or helpful for the proper functioning of the trust: (a) The effective date of a conversion to a unitrust pursuant to subsection (1) of this section; (b) The manner of prorating the distribution amount for a short year in which a beneficiary's interest commences or ceases, or if the trust is a unitrust for only part of the year, or the trustee may elect to treat the trust year as two separate years, the first of which ends at</p> |

{W1213996 SLB}2

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | the close of the day on which the conversion or reconversion occurs and the second of which ends at the close of the trust year; |
| 7. RECOMMENDATION | |

Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| 1. UFIPA SECTION | 309 |
| 2. SUBJECT | Other Rules; Limitations |
| 3. UFIPA STATUTE | <p>SECTION 309. SPECIAL TAX BENEFITS; OTHER RULES.</p> <p>(a) A unitrust policy may:</p> <p>(1) provide methods and standards for:</p> <p>(A) determining the timing of distributions;</p> <p>(B) making distributions in cash or in kind or partly in cash and partly in kind; or</p> <p>(C) correcting an underpayment or overpayment to a beneficiary based on the unitrust amount if there is an error in calculating the unitrust amount;</p> <p>(2) specify sources and the order of sources, including categories of income for federal income tax purposes, from which distributions of a unitrust amount are paid; or</p> <p>(3) provide other standards and rules the fiduciary determines serve the interests of the beneficiaries.</p> <p>(b) If a trust qualifies for a special tax benefit or a fiduciary is not an independent person:</p> <p>(1) the unitrust rate established under Section 306 may not be less than three percent or more than five percent;</p> <p>(2) the only provisions of Section 307 which apply are Section 307(a) and (b)(1), (4), (5)(A), and (9);</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>(3) the only period that may be used under Section 308 is a calendar year under Section 308(a)(1); and</p> <p>(4) the only other provisions of Section 308 which apply are Section 308(b)(2)(A) and (3).</p> <p><u>(c) Unless otherwise provided by the terms of unitrust policy or the terms of the trust, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:</u></p> <p><u>(1) Net income determined as if the trust was not a unitrust;</u></p> <p><u>(2) Other ordinary income as determined for federal income tax purposes;</u></p> <p><u>(3) Net realized short-term capital gains as determined for federal income tax purposes;</u></p> <p><u>(4) Net realized long-term capital gains as determined for federal income tax purposes;</u></p> <p><u>(5) Trust principal comprising assets for which there is a readily available market value; and</u></p> <p><u>(6) Other trust principal.</u></p> |
| <p>4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS COMMENTS</p> | <p>Section 309(a) provides that a unitrust policy may include details beyond even the broad scope of Sections 306 through 308. One specific example, in paragraph (2), is to “specify sources and the order of sources, including categories of income for federal income tax purposes, from which distributions of a unitrust amount are paid.” Approximately two-thirds of the state unitrust statutes include a default “ordering rule,” although five of those default rules are limited to net accounting income or ordinary income and leave the ordering of short- and long-term capital gains, for example, to the fiduciary’s discretion. Although the 2018 Act does not include such an ordering rule, Section 309(a)(2) makes it clear that the fiduciary may include an ordering rule in a proposed unitrust policy.</p> <p>Importantly, Section 309(b) addresses trusts that qualify for a “special tax benefit” defined in Section 102(19) – the annual gift tax exclusion, eligibility of a qualified subchapter S trust (QSST), an estate</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>or gift tax marital deduction, or exemption from generation-skipping transfer tax (GST tax) – and trusts with a fiduciary that is not an “independent person” defined in Section 102(11). For those trusts, much of the expanded flexibility of Article 3 is denied, and, specifically, the unitrust rate is limited to 3-5 percent and the period used for calculation is limited to a calendar year. This protects the trust under the following safe harbor in Treasury Reg. §1.643(b)-1 (Dec. 30, 2003) (emphasis added):</p> <p align="center">[A]n allocation of amounts between income and principal pursuant to applicable local law will be respected if local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, including ordinary and tax-exempt income, capital gains, and appreciation. For example, <i>a state statute providing that income is a unitrust amount of no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis, is a reasonable apportionment of the total return of the trust.</i></p> <p>Although two of the “special tax benefits” – the gift tax exclusion and the marital deduction – are short-term, and there are often alternatives to QSSTs and non-independent trustees, GST tax exemption is anything but short-term, is unavoidable, and is often crucial in the type of large long-term or even perpetual trust that is perhaps the most typical candidate for a unitrust conversion. And although “no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis” is explicitly offered in the Treasury regulation only as an “example,” it is expressly incorporated into the regulations for GST-grandfathered trusts (Treasury Reg. §26.2601-1(b)(4)(i)(D)(2) & (E), <i>Example 11</i>), and the GST tax stakes are typically so high that few fiduciaries or beneficiaries would want to assume the risk. The focus of the regulation is on what the “state statute provid[es].” Therefore, Section 309(b) respects this safe harbor for such trusts.</p> |
| <p>5. COLORADO COMMITTEE COMMENTS</p> | <p>Colorado law allows the trustee to take into consideration the treatment of whether property is possessed or occupied by a beneficiary and provides certain protections of the beneficiary in that event.</p> |
| <p>6. COLORADO LAW</p> | <p>CRS 15.1.404.5(g)(iii)(B) provides guidance where property is in possession of a beneficiary:</p> |

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Colorado T&E Section Statutory Revisions Committee Subcommittee on the

Uniform Fiduciary Income and Principal Act

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| | <p>If tangible personal property or real property is possessed or occupied by a beneficiary, the trustee may not limit or restrict any right of the beneficiary to use the property in accordance with the governing instrument regardless of whether the trustee treats the property as an excluded asset; and</p> <p>CRS 15.1.404.5(5) provides default “ordering rule”</p> <p>(b) Unless otherwise provided by the governing instrument, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:</p> <p>(i) Net income determined as if the trust was not a unitrust;</p> <p>(ii) Other ordinary income as determined for federal income tax purposes;</p> <p>(iii) Net realized short-term capital gains as determined for federal income tax purposes;</p> <p>(iv) Net realized long-term capital gains as determined for federal income tax purposes;</p> <p>(v) Trust principal comprising assets for which there is a readily available market value; and</p> <p>(vi) Other trust principal.</p> |
| <p>7. RECOMMENDATION</p> | |