

SESSION OF 2021

**SUPPLEMENTAL NOTE ON SENATE BILL NO. 107**

As Amended by House Committee on Judiciary

**Brief\***

SB 107, as amended, would enact the Uniform Fiduciary Income and Principal Act [UFIPA] and repeal the Uniform Principal and Income Act (1997) [UPIA]. Throughout the UFIPA, some provisions from UPIA are continued, reorganized, or updated without substantive changes. The bill also would amend one statute within the Kansas Uniform Trust Code (UTC). This brief summarizes the UFIPA structure and notes provisions containing substantive changes or additions to UPIA provisions.

***Definitions (Section 2)***

UFIPA would retain most definitions from the UPIA in substantially similar form or with slight or clarifying modifications. A definition of “asset-backed security” would be moved to this section and modified. UFIPA would expand definitions of “fiduciary,” “income interest,” “net income,” “principal,” “terms of a trust,” and “trustee.”

UFIPA would add definitions of “court,” “current income beneficiary,” “distribution,” “estate,” “independent person,” “personal representative,” “record,” “settlor,” “special tax benefit,” “successive interest,” “successor beneficiary,” “trust,” and “will.”

UFIPA would remove definitions of “income beneficiary” and “remainder beneficiary” that are contained in the UPIA.

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

Throughout the bill, where UFIPA continues provisions from the UPIA, UFIPA would usually use the term “fiduciary” where the UPIA used the term “trustee.”

### ***Scope (Section 3)***

UFIPA would create a new section stating the act applies to a trust or estate and a life estate or other term interest in which the interest of one or more persons will be succeeded by the interest of one or more other persons, except as otherwise provided in the terms of a trust or in UFIPA.

### ***Governing Law (Section 4)***

UFIPA would create a new section stating, except as otherwise provided in the terms of a trust or in UFIPA, UFIPA applies when Kansas is the principal place of administration of a trust or estate or the situs of property that is not held in a trust or estate and is subject to a life estate or other term interest described in Section 3. This provision would state a trustee submits to the application of UFIPA to any matter within the scope of UFIPA involving the trust by accepting the trusteeship of a trust having its principal place of administration in Kansas or by moving the principal place of administration of a trust to Kansas.

### ***Fiduciary Duties; General Principles (Section 5)***

UFIPA would continue this section from the UPIA. Its provisions would be reorganized and several provisions from the UPIA section addressing the trustee’s power to adjust would be moved to this section. Additionally, UFIPA would add a good faith requirement and references to unitrusts. In the list of factors a fiduciary must consider in exercising certain powers, UFIPA would remove “purpose of the trust” and “intent of the settlor,” add “terms of the trust,” and clarify or simplify other factors.

***Judicial Review of Exercise of Discretionary Power;  
Request for Instruction (Section 6)***

UFIPA would create a new section defining “fiduciary decision” and stating the court may not order a fiduciary to change a fiduciary decision unless the court determines the decision was an abuse of the fiduciary’s discretion. If the court makes such a determination, the court could order a remedy authorized by law, including current statutory remedies for breach of trust. This section would further enumerate specific orders a court could make to place the beneficiaries in the positions they would have occupied without the fiduciary’s abuse of discretion.

This section also would allow a fiduciary to petition for instruction and for the court to determine whether a proposed fiduciary decision would result in an abuse of the fiduciary’s discretion. If the petition meets certain requirements, a beneficiary opposing the proposed decision would have the burden to establish it would result in an abuse of the fiduciary’s discretion. A fiduciary’s choice to not seek court instruction under this section would not constitute evidence that the fiduciary’s decision was an abuse of discretion.

***Fiduciary’s Power to Adjust (Section 7)***

UFIPA would revise and expand provisions from the UPIA regarding a fiduciary’s power to adjust.

Under UFIPA, except as otherwise provided in the terms of a trust or this section, a fiduciary, in a record, without court approval, would be allowed to 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.

This section would state it does not create a duty to exercise or consider the power to adjust or to inform a beneficiary about the applicability of this section, and a

fiduciary that in good faith exercises or fails to exercise the power to adjust would not be liable to a person affected by such exercise or failure.

This section would require a fiduciary, in deciding whether and to what extent to exercise the power to adjust, to consider all factors the fiduciary considers relevant, including specified factors and sections elsewhere in UFIPA.

This section would list circumstances under which a fiduciary would be prohibited from exercising the power to adjust or making a determination, under Section 24, that an allocation is insubstantial. Under some of these circumstances, and subject to additional conditions, UFIPA would allow a co-fiduciary to exercise the power to adjust. Similarly, UFIPA would allow a fiduciary to release or delegate to a co-fiduciary the power to adjust if the fiduciary makes certain determinations and would set forth content and procedural requirements for such release or delegation.

This section would state that terms of a trust denying or limiting the power to adjust would not affect the application of this section, unless such terms expressly deny or limit the power to adjust under this section. The exercise of the power to adjust in any accounting period could apply to the current period, the immediately preceding period, and one or more subsequent periods. This section would require a description of the exercise of the power to adjust be included in any report sent to beneficiaries under the UTC or communicated at least annually to qualified beneficiaries determined under the UTC, other than the Attorney General.

#### ***Unitrusts (Sections 8-16)***

UFIPA would expand the one UPIA section regarding unitrusts into nine separate sections.

### *Definitions (Section 8)*

This section would define “unitrust” to mean a trust for which net income is a unitrust amount, including an express unitrust.

“Unitrust amount” would be defined to mean 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.

This section also would define “applicable value,” “express unitrust,” “income trust,” “net fair value of a trust,” “unitrust policy,” and “unitrust rate.”

### *Application; Duties and Remedies (Section 9)*

This section would set forth the various types of trusts and estates to which UFIPA’s unitrust provisions do or do not apply. The section would state the unitrust provisions do not create a duty to take or consider action under the provisions or to inform a beneficiary about the applicability of the provisions. A fiduciary that in good faith takes or fails to take an action under the unitrust provisions would not be liable to a person affected by the action or inaction.

### *Authority of Fiduciary (Section 10)*

This section would allow a fiduciary, without court approval, to:

- Convert an income trust to a unitrust if the fiduciary adopts in a record a unitrust policy for the trust containing certain provisions;
- 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

amendment or replacement of such policy, providing changes in the percentage or method; or

- 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 the UFIPA unitrust provisions, rather than a unitrust amount.

The bill would specify determinations, considerations, and procedures required of a fiduciary in taking one of the above actions. The requirements would include sending a notice in a record, describing and proposing to take the action, to certain persons. UFIPA would include provisions allowing these persons to object to a proposed action, whereupon the fiduciary or a beneficiary could request the court to have the proposed action taken as proposed, taken with modifications, or prevented.

If a fiduciary sends a notice and subsequently decides not to take the action proposed in the notice, the fiduciary would be required to notify in a record the same persons of the decision and the reasons for the decision.

If a beneficiary requests in a record that a fiduciary take an action under this section and the fiduciary declines to act or does not act within 90 days of receiving the request, the beneficiary could request the court to direct the fiduciary to take the requested action.

This section would allow a fiduciary to release or delegate the powers in this section under certain circumstances described in Section 7, governing a fiduciary's power to adjust.

#### *Notice (Section 11)*

This section would provide additional details and requirements regarding the notice required by Section 10.

Notice would have to be sent in a manner authorized under a UTC provision regarding methods and waiver of notice. The section would detail to whom the notice must be sent, which would include qualified beneficiaries determined under the UTC, other than the Attorney General, and each person granted a power over the trust by the terms of the trust, with certain exclusions.

This section would state that representation provisions of the UTC apply to notice under the section and would allow a person to consent in a record at any time to action proposed under Section 10, whereupon notice would not need to be sent to such person.

Finally, this section would specify certain required contents of the notice.

#### *Unitrust Policy (Section 12)*

This section would require a fiduciary administering a unitrust under the unitrust provisions to follow a unitrust policy adopted, amended, or replaced under Section 10. The bill would require such policy to provide the unitrust rate or method of determining such rate; the method for determining the applicable value; and certain rules that apply in the administration of the unitrust, whether the rules are mandatory or optional, to the extent the fiduciary elects to adopt those rules.

#### *Unitrust Rate (Section 13)*

This section would state, subject to certain exceptions, a unitrust rate may be fixed or determined for each period using a market index or other published data or a mathematical blend of market indices or other published data over a stated number of preceding periods. A unitrust policy also could provide for various limits on how a rate could rise and fall or increase and decrease in relation to unitrust rates for preceding periods, as well as for a mathematical blend of

unitrust rates determined under the other provisions of this section.

*Applicable Value (Section 14)*

This section would require a unitrust policy to provide the method for determining the fair market value of an asset for the purpose of determining the unitrust amount, including the frequency of valuing the asset, which need not require a valuation in every period, and the date for valuing the asset in each period in which the asset is valued. This section would list various methods a unitrust policy could provide for determining the amount of the net fair market value of the trust to take into account in determining the applicable value.

*Period (Section 15)*

This section would require a unitrust policy provide the period used for purposes of Sections 13 and 14, and would set forth the permissible options for such period. It also would allow a unitrust policy to provide standards for using fewer preceding periods or prorating the unitrust amount on a daily basis, under certain circumstances.

*Special Tax Benefits; Other Rules (Section 16)*

This section would allow a unitrust policy to:

- Provide methods and standards for determining the timing of distributions, making distributions in cash or in kind or partly in cash or partly in kind, or correcting an underpayment or overpayment to a beneficiary based on the unitrust amount if there is an error in calculating the unitrust amount;
- 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

- Provide other standards and rules the fiduciary determines serve the interests of the beneficiaries.

This section also would require, if a trust qualifies for a special tax benefit or a fiduciary is not an independent person, the unitrust rate to be not less than 3.0 percent or more than 5.0 percent. Additionally, the applicability of certain provisions related to the applicable value (Section 14) and period (Section 15) would be limited for such trusts.

### ***Allocation of Receipts (Sections 17-32)***

#### *Character of Receipts from Entity (Section 17)*

UFIPA would continue this section from the UPIA with the following modifications:

- Clarify the definition of “entity” does not depend on whether the entity is a taxpayer for federal income tax purposes and does not include an instrument or arrangement to which the UFIPA section regarding other financial arrangements or instruments applies;
- Add definitions of “capital distribution” and “entity distribution”;
- State an attribute or action of an entity would include an attribute or action of any other entity in which the entity owns or holds an interest, including through another entity;
- Address allocation of tangible personal property of nominal value;
- Clarify allocation of money received in an entity distribution in an exchange for part or all of the fiduciary’s interest in the entity, money received in an entity distribution that the fiduciary determines

or estimates is a capital distribution, and money received in an entity distribution from an entity that is treated in a certain manner for federal income tax purposes;

- Modify and clarify the methods by which a fiduciary may determine or estimate that money received in an entity distribution is a capital distribution, as well as add specific factors a fiduciary may consider in making such determination or estimate in certain situations, and direct a fiduciary to allocate to principal any amount of the entity distribution which is in doubt after making such determination or estimate; and
- Add provisions providing direction to a fiduciary who receives additional information about the application of this section to an entity distribution before or after paying part of the entity distribution to a beneficiary.

*Distribution from Trust or Estate (Section 18)*

UFIPA would continue this section from the UPIA in a substantially similar form.

*Business or Other Activity Conducted by Fiduciary (Section 19)*

UFIPA would continue this section from the UPIA but add language to state the section would apply if the fiduciary determines it is in the interests of beneficiaries to account separately for the business or other activity instead of conducting it through an entity described in Section 17. UFIPA also would add language stating a fiduciary accounting separately under this section may make certain determinations separately and differently from the fiduciary's decisions concerning distributions of income or principal, and would add to the list of activities for which a fiduciary may

account separately “any other business conducted by the fiduciary.”

*Principal Receipts (Section 20)*

UFIPA would continue this section from the UPIA in a substantially similar form.

*Rental Property (Section 21)*

UFIPA would continue this section from the UPIA in a substantially similar form, adding the phrase “is not allocated to income” to clarify a provision regarding an amount received as a refundable deposit.

*Receipt on Obligation to be Paid in Money (Section 22)*

UFIPA would continue this section from the UPIA but would reword a provision regarding the allocation of amounts received from the sale of an obligation or the increase in value of a bond or other obligation. The modification would include the removal of a one-year time period applicable to the determination of the allocation.

*Insurance Policy or Contract (Section 23)*

UFIPA would continue this section from the UPIA in a substantially similar form.

*Insubstantial Allocation Not Required (Section 24)*

UFIPA would continue this section from the UPIA, but would require both continuing conditions to be met before presuming an allocation is insubstantial, rather than one or the other, and would add the ability to delegate, under certain conditions, the power to make a determination under the section.

*Deferred Compensation, Annuity, or Similar Payment  
(Section 25)*

UFIPA would continue this section from the UPIA with the following modifications:

- Add definitions of “internal income of separate fund” and “marital trust” and modify the definition of “payment”;
- Add a provision directing a fiduciary to allocate a payment received from a separate fund during an accounting period to income, to the extent of the internal income of the separate fund during the period, and the balance to principal;
- Clarify provisions providing direction to the fiduciary of a marital trust;
- Add a provision providing direction to the fiduciary of a trust, other than a marital trust, of which one or more current income beneficiaries are entitled to a distribution of all the current net income; and
- Reorganize the section.

*Liquidating Asset (Section 26)*

UFIPA would continue this section from the UPIA but change the default rule for allocation from 10.0 percent to income of receipts from a liquidating asset and the balance to principal to:

- Allocation to income of a receipt produced by a liquidating asset, to the extent the receipt does not exceed 4.0 percent of the value of the asset; or
- If the fiduciary cannot determine the value of the asset, 10.0 percent of the receipt; and

- The balance of the receipt to principal.

*Minerals, Water, and Other Natural Resources (Section 27)*

UFIPA would continue this section from the UPIA but change the default rule for certain amounts received from 15.0 percent allocated to principal and the balance to income to allocation between income and principal equitably. UFIPA also would add a provision stating such allocation would be presumed to be equitable if the amount allocated to principal is equal to the amount allowed by the Internal Revenue Code of 1986 as a deduction for depletion of the interest.

*Timber (Section 28)*

UFIPA would continue this section from the UPIA in a substantially similar form, with some changes in wording to ensure consistency in phrasing with other UFIPA sections.

*Marital Deduction Property Not Productive of Income  
(Section 29)*

UFIPA would continue this section from the UPIA but remove a provision addressing cases not governed by the remainder of the section.

*Derivative or Option (Section 30)*

UFIPA would continue this section from the UPIA, with the following changes:

- Modify the definition of “derivative” and provide examples;
- Change the default rule to allocate 10.0 percent of receipts from a transaction in derivatives and 10.0 percent of disbursements made in connection with

the transaction to income and the balance to principal; and

- Change the default rule for certain options transactions to allocate 10.0 percent to income and the balance to principal of amounts received for granting the option, amounts paid to acquire the option, and gain or loss realized on the exercise, exchange, settlement, offset, closing, or expiration of the option.

#### *Asset-Backed Security (Section 31)*

UFIPA would continue this section from the UPIA but modify it to expand the definition of “asset-backed security” and move that definition to the definitions section (Section 2).

#### *Other Financial Instrument or Arrangement (Section 32)*

UFIPA would create a new section stating a fiduciary shall allocate receipts from or related to a financial instrument or arrangement not otherwise addressed by UFIPA, in a manner consistent with the provisions regarding derivatives or options (Section 30) and asset-backed securities (Section 31).

#### ***Allocation of Disbursements (Sections 33-39)***

##### *Disbursement from Income (Section 33)*

UFIPA would continue this section from the UPIA but clarify that some disbursements are to be made to the extent income is sufficient and when the balance of disbursements is to be made in certain situations.

*Disbursement from Principal (Section 34)*

UFIPA would continue this section from the UPIA but clarify language regarding the balance of disbursements and add references to title insurance and insurance premiums for certain specified matters.

*Transfer from Income to Principal for Depreciation (Section 35)*

UFIPA would continue this section from the UPIA but replace a reference to a “fixed asset” to “tangible asset” and add an exception for liquidating assets under Section 26.

*Reimbursement of Income from Principal (Section 36)*

UFIPA would create a new section allowing a fiduciary to transfer an appropriate amount from principal to income in one or more accounting periods to reimburse income, if the fiduciary makes or expects to make certain income disbursements specified in the section.

*Reimbursement of Principal from Income (Section 37)*

UFIPA would continue this section from the UPIA but add clarifying language regarding sufficiency of income and changing the term “successive income interest” to “successive interest.”

*Income Taxes (Section 38)*

UFIPA would continue this section from the UPIA in a substantially similar form.

*Adjustment Between Income and Principal Because of Taxes  
(Section 39)*

UFIPA would continue this section from the UPIA but clarify the fiduciary is to charge each beneficiary from a decrease in income tax to reimburse principal and add that, when this occurs, the fiduciary may offset the charge by obtaining payment from the beneficiary, withholding an amount from future distributions to the beneficiary, or adopting other methods.

***Death of Individual or Termination of Income Interest  
(Sections 40-41)***

UFIPA would continue, in a substantially similar form, sections from the UPIA addressing determinations and distributions upon the death of an individual creating an estate or trust or the termination of an income interest in a trust, with some modifications to provide clarification and references to the new unitrust provisions.

***Apportionment at Beginning and End of Income Interest  
(Sections 42-44)***

UFIPA would continue, in a substantially similar form, sections from the UPIA addressing apportionment at the beginning and end of the income interest in substantially similar form, with several clarifying changes regarding dates.

***Other Provisions (Sections 45-48)***

Like UPIA, UFIPA would include uniformity (Section 45), default date of applicability (Section 46), and severability (Section 48) provisions. UFIPA also would add a provision specifying UFIPA's interaction with the Electronic Signatures in Global and National Commerce Act (Section 46) and would specify the act would apply to a trust or estate existing or created on or after July 1, 2021, except as otherwise

expressly provided in the term of the trust or in UFIPA (Section 47).

#### ***Amendment to Kansas Uniform Trust Code (Section 49)***

The bill would amend the definition of “terms of a trust” in the UTC to include the trust’s provisions as established, determined, or amended by a trustee or person holding a power to direct under the UTC, in accordance with applicable law; court order; or a nonjudicial settlement agreement under the UTC.

#### ***Effective Date (Section 51)***

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

#### **Background**

Kansas enacted the UPIA in 2000. Some version of the UPIA has been enacted in 48 states. In 2019, Utah enacted UFIPA, and in 2021, legislation enacting UFIPA has been introduced in Kansas, Tennessee, and Washington. UFIPA, like the UPIA, was drafted by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission). According to the prefatory note from the Uniform Law Commission’s draft of UFIPA, UFIPA updates UPIA and adapts to changes in the design and use of trusts, including an expansion of the use of the power to adjust between income and principal, the addition of provisions for unitrusts, and a simplifying change in governing law for purposes of distinguishing income and principal.

The bill was introduced by the Senate Committee on Judiciary at the request of the Kansas Judicial Council. [*Note:* SB 107 contains the same provisions found in 2020 HB 2554.]

### ***Senate Committee on Judiciary***

In the Senate Committee hearing on February 8, 2021, a representative of the Kansas Judicial Council provided **proponent** testimony, stating UFIPA would provide greater flexibility to trustees in the power to adjust between principal and income, provide more detailed unitrust conversion provisions, and clarify which state's law applies. No other testimony was provided.

### ***House Committee on Judiciary***

In the House Committee hearing on March 10, 2021, the representative of the Kansas Judicial Council again appeared and provided **proponent** testimony. No other testimony was provided.

On March 18, 2021, the House Committee amended the bill to make it effective upon publication in the *Kansas Register*.

### **Fiscal Information**

According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the Office of Judicial Administration estimates enactment of the bill would have a negligible fiscal effect on the operations of the Judicial Branch.

Uniform Fiduciary Income and Principal Act; uniform Laws; Uniform Principal and Income Act; fiduciary duties; trusts