

## Title

### *Is a quiet (silent) trust illusory?*

by

Charles E. Rounds, Jr.

## Summary

Is a quiet or silent trust illusory? The question is intentionally ambiguous. Is the question whether the trust itself is illusory, or just its quietness? A quiet or silent trust has been defined as “an irrevocable trust that, by its terms, directs the trustee not to inform the beneficiaries of the existence of the trust, its terms and the details of the administration of the trust.” See Joyce Crivellari, Trust & Estate *Insights*, May 2013 [A UBS Private Wealth Management Newsletter]. South Dakota, for example, would seem to authorize such trusts by statute. See S.D. Codified Laws §55-2-13, which provides that “[t]he settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or in writing delivered to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to the trust.” It seems there are two possibilities:

The first is that §55-2-13 means what it says, in which case a quiet or silent trust is something other than the legal/equitable relationship that is the subject of *Loring and Rounds: A Trustee’s Handbook*. Perhaps it is just a constructive principal/agency relationship, the “settlor” being the principal and the “trustee” being the agent. Or perhaps it is just a fancy completed common law gift to the “trustee.”

The second is that a quiet or silent trust is a true trust. If that is the case, then how, as a practical matter, is the trustee to hide the existence of the trust from the beneficiary and comply with applicable tax laws? See generally Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 659, 679 (taxation and the quiet/silent trust). Assuming that that is possible, then how is the trustee to handle a request for information from the curious beneficiary about the terms of the trust should the beneficiary somehow otherwise get wind of its existence? If the trustee lies to the beneficiary, or intentionally obfuscates, is he not committing an act of actual or constructive fraud against the beneficiary, such that any applicable statute of ultimate repose is tolled? See generally § 1005(c) of the Uniform Trust Code. Finally, the trustee’s duty to account is a two-edged sword. Yes, it is burdensome for the trustee. But rendering accounts to the beneficiary also is the tried- and-true vehicle for limiting the trustee’s liability. What follows is an edited transcription of §6.1.5.1 of Rounds & Rounds, *Loring and Rounds: A Trustee’s Handbook (2014)*. The section covers the trustee’s affirmative general duty to furnish the beneficiary with critical information pertaining to the trust.

## Text

### *The Trustee's General Duty to Keep the Beneficiary Informed*

#### §6.1.5.1 Duty to Provide Information [from Rounds & Rounds, *Loring & Rounds: A Trustee's Handbook* (2014)]

*A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information.... Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests.... It may also mask more serious violations by the trustee.*<sup>745</sup>

*Together these Sections...[of the Restatement (Third) of Trusts]...foster a reasonable degree of openness and transparency suitable to the underlying principles that, under modern default law, trustees have comprehensive authority subject to their fiduciary responsibilities and that a trust is to be administered for its beneficiaries and to be enforceable by them.*<sup>746</sup>

**The historical context and utilitarian rationale.** The trustee's duty to inform the beneficiaries about the trust and its administration is of ancient origin. In the 1818 Chancery case of *Walker v. Symonds*, Lord Chancellor Eldon stated: "It is the duty of trustees to afford to their [beneficiaries] accurate information of the disposition of the trust-fund; all the information of which they are, or ought to be, in possession..."<sup>747</sup> In 2007, one commentator articulated the utilitarian rationale for imposing on trustees such a duty: "The trustee has a mandatory duty to inform the beneficiaries because only they have both the financial incentive and legal authority to fulfill the monitoring and enforcement functions."<sup>748</sup>

**Information to which the beneficiary is entitled.** An incident of the trustee's general duty to account is the specific affirmative duty to furnish the beneficiary with all the information that the beneficiary needs to protect his, her, or its equitable interest.<sup>749</sup> A trustee who fails to do so may

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<sup>745</sup>Uniform Trust Code §706 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>). See, e.g., *Wood v. Honeyman*, 178 Or. 484, 561, 169 P.2d 131, 164 (1946) (the court observing that a provision in the terms of a trust relieving a trustee of the duty to furnish the beneficiary on an ongoing basis with whatever information the beneficiary would need to protect the equitable interest would render equity "impotent" and is therefore unenforceable; otherwise, should the settlor's confidence in the trustee prove mistaken, the provision could be "virtually a license to the trustee to convert the fund to his own use and thereby terminate the trust").

<sup>746</sup>Restatement (Third) of Trusts §82 cmt. a.

<sup>747</sup>(1818) 3 Swanst. 1,59, 36 Eng. Rep. 751, 772 (Ch.)

<sup>748</sup>T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C.L. Rev. 1595, 1621 (2007).

<sup>749</sup>Uniform Trust Code §813(a) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (Duty to Inform and Report). See also Bogert,

be compelled by the court to do so incident to an equitable action to account brought by the beneficiary.<sup>750</sup> Even a beneficiary whose equitable interest is contingent on the trustee's exercise of discretion would have standing to bring such an action.<sup>751</sup> Having said that, certain opinions of counsel, a special category of "information" that is covered in Section 8.8 of this handbook, may not be discoverable. "When the trust is in favor of successive beneficiaries, a beneficiary who has a future interest, as well as a beneficiary who is presently entitled to receive income, is ordinarily entitled to this information, whether the interest is vested or contingent..."<sup>752</sup> Recent English case law is generally in accord.<sup>753</sup> Secrecy and accountability are incompatible.<sup>754</sup> The Uniform Trust Code puts it this way: A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.<sup>755</sup> Again, this is an affirmative duty, not a passive one.<sup>756</sup> That the beneficiary did not ask for the information is no excuse. The Restatement (Third) of Trusts is generally in accord,<sup>757</sup> as is the Uniform Probate Code.<sup>758</sup>

*The UTC's qualified beneficiary concept.* Under the Uniform Trust Code, any person who has a present or future interest in an irrevocable trust, whether vested or contingent, and any holder of a power of appointment over the trust property is entitled upon request to the trustee's accountings or "reports," as well as any other information reasonably related to the trust's administration.<sup>759</sup> This right may not be waived by the settlor.<sup>760</sup> The Uniform Trust Code further provides that the trustee has an affirmative duty to notify the "qualified beneficiaries" of an irrevocable trust who are 25 years of age or older of the existence of the trust and of their right to request accountings

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Trusts and Trustees §961; Restatement (Third) of Trusts §82(1)(c); Restatement (Second) of Trusts §173; 3 Scott & Ascher §17.5; 2A Scott on Trust §173. *See* §§5.4.1.1 of this handbook (the beneficiary's right to information and confidentiality) and 8.8 of this handbook (whom trust counsel represents). For a comparison of the trustee's common law duty to provide information with the ERISA fiduciary's statutory duty to disclose, *see* John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 697-701 (2000) (suggesting that the courts have become "more insistent about developing disclosure standards under ERISA than in the common law of trusts" because "disclosure duties in ERISA plan settings demarcate the tension between the employer's two roles, that is, between the employer's so-called 'business' or 'settlor' functions and the ERISA fiduciary functions").

<sup>750</sup>Bogert, Trusts and Trustees §970 (Parties and Procedures on Accounting).

<sup>751</sup>Bogert, Trusts and Trustees §970 (Parties and Procedures on Accounting).

<sup>752</sup>3 Scott & Ascher §17.5. Note, however, that if beneficiary X has a "right of revocation, a general power of appointment, or an unrestricted right of withdrawal" and beneficiary Y does not, then while X is of full age and legal capacity, the trustee generally has no duty to keep Y informed.

<sup>753</sup>*See, e.g.,* Schmidt v. Rosewood Trust Ltd. [2003] WTLR 565 (Privy Council).

<sup>754</sup>*See generally* Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 373 (Summer 2005).

<sup>755</sup>Uniform Trust Code §813(a) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>756</sup>*See, e.g.,* McNeill v. Bennett, 798 A.2d 503, 510 (Del. 2002). *See generally* 3 Scott & Ascher §17.5.

<sup>757</sup>Restatement (Third) of Trusts §§82, 82(1)(c), & 83.

<sup>758</sup>Uniform Probate Code §7-303.

<sup>759</sup>Uniform Trust Code §105(b)(9) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>760</sup>Uniform Trust Code §105(b)(9) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

or “reports” and other information related to the administration of the trust.<sup>761</sup> The trustee may not be relieved of this duty by express language in the governing instrument.<sup>762</sup> A “qualified beneficiary” is either a current beneficiary or a presumptive remainderman.<sup>763</sup>

Under the Uniform Trust Code, in a critical matter such as when equitable property rights, whether vested or contingent, are at stake, notice to the qualified beneficiaries would not relieve the trustee of the duty to give adequate notice to *the nonqualified beneficiaries*, either by giving actual notice to them or by giving notice to a duly appointed guardian ad litem charged with representing their interests. The virtual representation exception to the rule applies only if there is no conflict of interest between the qualified and nonqualified beneficiaries. In most cases, however, there will be such a conflict. Here is the Code’s commentary on the limitations of the qualified beneficiary concept: “Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the *day-to-day affairs of the trust*, the Uniform Trust Code uses the concept of ‘qualified beneficiary’...to limit the class of beneficiaries to whom certain notices must be given or consents received.”<sup>764</sup> Examples given are trustee resignations, successor trustee appointments, combining trusts, and the like. In other words, notice to the qualified beneficiaries is only sufficient in quasi-ministerial undertakings that generally do not affect one way or another equitable property rights, absent special facts. A trustee who fails to parse the due process limitations of the qualified beneficiary concept does so at his peril. In the words of Justice J.D. Heydon of the High Court of Australia, “the silent waters of equity run deep—often too deep for legislation to obstruct.”<sup>765</sup>

*Waiver by the settlor via the trust terms of the trustee’s duty to keep the beneficiaries informed.* Section 105 of the Uniform Trust Code imposes some mandatory duties on the trustee. Two of them “have been extremely controversial and have failed to gain traction in UTC-adopting jurisdictions.” Here are the two mandatory duties:

- [8] the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee’s reports.
- [9] the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of the trust.

As of 2013, only Nebraska, New Mexico, and Florida “have actually and substantially adopted the duty to notify found in section 105(b)(8).”<sup>766</sup> There is less to this mini-revolt,

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<sup>761</sup>Uniform Trust Code §105(b)(8) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>762</sup>Uniform Trust Code §105(b)(8) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>763</sup>Uniform Trust Code §103(12) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>764</sup>Uniform Trust Code §103, cmt. (emphasis added).

<sup>765</sup>The Hon. Justice J.D. Heydon, A.C., *Does statutory reform stultify trust law analysis?*, 6 Tr. Q. Rev., 3, 28 (2008) (a STEP publication).

<sup>766</sup>John Spencer Treu, *The Mandatory Disclosure Provisions of the Uniform Trust Code: Still Boldly Going Where No Jurisdiction Will Follow*, 82 Miss. L.J. 597, 611 (2013). The author refers to Ohio as a “partially-mandatory disclosure jurisdiction.” See also *Zimmerman v. Zirpolo Trust*, 2012 WL 346657 (Ohio App. 5 Dist.).

however, than meets the eye. “Waiver by a settlor of the trustee’s duty to keep the beneficiaries informed of the trust’s administration does not otherwise affect the trustee’s duties. The trustee remains accountable to the beneficiaries for the trustee’s actions.”<sup>767</sup> All beneficiaries are owed this general duty, not just the qualified beneficiaries. True, the Code imposes on the trustee a duty to involve the qualified beneficiaries in the “day-to-day affairs of the trust” to a limited degree, such as by keeping them informed of trustee resignations and the like. This is an additional burden imposed on the trustee by the Code. In no way does this imposition, however, derogate from, or otherwise erode, the critical general duty—a duty that trustees have had since time immemorial—to account to all the beneficiaries, qualified and nonqualified alike, for his or her actions. It remains the case that the beneficiary is entitled to whatever information the beneficiary must have in order to effectively defend and protect his or her equitable property rights, whether those rights be vested or contingent, except, perhaps, (1) while the trust is revocable or (2) if the five-year period of the UTC’s Section 1005(c) statute of ultimate repose has run. And, except for the statute of repose, the statute limiting actions for breaches of trust will not begin to run against the beneficiary until such time as that information has been received and comprehended by the beneficiary.<sup>768</sup>

**Some beneficiaries may now be more equal than others, but only as to things ministerial.** As noted, the Uniform Trust Code and the Restatement (Third) of Trusts would limit those who must be kept informed *on an ongoing basis* to those entitled or eligible to receive distributions of income and principal and to those who *would be entitled* to take upon the termination of the current interest or the trust itself, whether their interests are contingent or vested.<sup>769</sup> This class is referred to in the Uniform Trust Code as “qualified beneficiaries”<sup>770</sup> and in the Restatement as “fairly representative” beneficiaries.<sup>771</sup> On occasion, this ongoing duty to inform may run to a holder of a general testamentary or nongeneral power of appointment, a power to veto or direct acts of the trustee, or a power to modify the trust.<sup>772</sup> Absent special facts, this ongoing duty would not run to representatives of unborn and unascertained contingent interests.<sup>773</sup> The trustee, however, may “for some matters and some trustee concerns” provide information to additional beneficiaries, if the trustee “wishes or deems appropriate to the circumstances.”<sup>774</sup> In the case of a charitable trust, the duty to be kept informed would run to the

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<sup>767</sup>Uniform Trust Code §105, cmt.

<sup>768</sup>*See generally* §7.1.2 of this handbook (defense of failure of beneficiary to take timely action against trustee).

<sup>769</sup>*See, e.g.,* Barber v. Barber, 837 P.2d 714 (Alaska 1992) (a contingent trust beneficiary having a constitutionally protected property interest, the beneficiary was entitled to notice of a contemplated sale of real estate comprising the trust estate).

<sup>770</sup>*See* Uniform Trust Code §103(12) (defining “qualified” beneficiary).

<sup>771</sup>*See* Restatement (Third) of Trusts §82 cmt. a(1) (defining “fairly representative” beneficiary).

<sup>772</sup>Restatement (Third) of Trusts §82 cmt. a(1).

<sup>773</sup>*See, however,* Restatement (Third) of Trusts §83 cmt. b (suggesting that it is “essential to the enforceability of a meaningful duty of impartiality” that the trustee’s duty to “report on request” extend when appropriate in light of a particular set of facts and circumstances to beneficiaries who are not “fairly representative,” presumably even on occasion to appropriate representatives of the unborn and unascertained). *See generally* §8.14 of this handbook (guardian ad litem and virtual representation issues).

<sup>774</sup>Restatement (Third) of Trusts §82 cmt. a(1). Take, for example, a trust for the benefit of a widow for her lifetime. Upon her death, the subject property passes outright and free of trust to her then living issue. The widow, her terminally ill daughter, the daughter’s husband and guardian, and the daughter’s two adult children are all alive. Under the circumstances, namely,

appropriate attorney general, and to identifiable charities, if any, with equitable interests under the trust.<sup>775</sup>

**Sensitive personal information.** At any given time, though, it may be appropriate for the trustee to furnish certain types of information to some beneficiaries and not to others, *e.g.*, information on the health condition of a particular beneficiary. This should not implicate the duty of impartiality,<sup>776</sup> provided “the trustee’s selection—or exclusion—of those to be informed or consulted is fair, reasonable, and impartial in light of the context and reasons for the communication.”<sup>777</sup> For a discussion of the dilemma a trustee can face when one beneficiary’s right to information conflicts with another’s right to confidentiality, see Section 5.4.1.1 of this handbook. Absent special facts, however, “[w]hen a trustee prepares and provides a report in response to a request by a beneficiary, the trustee might wish to follow a simple, routine practice of also sending a copy to other beneficiaries, particularly to fairly representative beneficiaries and perhaps to others as well.”<sup>778</sup>

**The revocable trust exception.** There is another exception to the trustee’s duty to provide information, namely if the trust is revocable by the settlor alone and the settlor has the capacity to revoke it.<sup>779</sup> During the period when he does, the trustee may not disclose any information pertaining to the trust to the other beneficiaries, if any, *i.e.*, to those who possess equitable contingent remainder interests.<sup>780</sup> The trustee’s duty to inform under these circumstances runs to the settlor and to the settlor alone.<sup>781</sup> It is likely that the Uniform Probate Code is in accord.<sup>782</sup> Otherwise, the trustee should respond to a reasonable request for information as soon as possible after the request is received.<sup>783</sup>

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that in all likelihood the daughter will predecease her widowed mother, the trustee may want to provide appropriate information regarding the trust to the two adult children (the widow’s grandchildren) on an ongoing basis, although neither meets the technical definition of a “fairly representative” beneficiary. The trustee may want to do this if only to smoke out and informally address any misconceptions they may have about how the trust is being administered, or should be administered, in anticipation of sooner rather than later having to put before them his final accounts.

<sup>775</sup>Restatement (Third) of Trusts §82 cmt. a. *See generally* §9.4.2 of this handbook (standing to enforce charitable trusts).

<sup>776</sup>*See generally* §6.2.5 of this handbook (the trustee’s duty of impartiality in his dealing with the beneficiaries).

<sup>777</sup>Restatement (Third) of Trusts §79 cmt. d.

<sup>778</sup>Restatement (Third) of Trusts §83 cmt. b.

<sup>779</sup>Restatement (Third) of Trusts §82 cmt. a; 3 Scott & Ascher §17.5. *See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

<sup>780</sup>Uniform Trust Code. §603 (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (providing that while a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor). *See also* §8.11 of this handbook (the duties of a trustee of a revocable inter vivos trust).

<sup>781</sup>Restatement (Third) of Trusts §74 cmt. e.

<sup>782</sup>*See* Uniform Probate Code §§1-403(2)(A), 7-303(a).

<sup>783</sup>*See generally* Bogert, *Trusts and Trustees* §961. *See also* Uniform Trust Code §813(a) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (providing that unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust). A trustee upon request shall promptly

**The trustee's duty to inform upon creation of an irrevocable trust or upon a revocable trust becoming irrevocable.** As noted above, the Uniform Trust Code provides that upon the creation of an irrevocable trust or upon a revocable trust becoming irrevocable, whether by death of the settlor or otherwise, the trustee has an affirmative duty immediately to notify the beneficiaries of the existence of the trust, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument,<sup>784</sup> and of the right to the accountings or "reports" of the trustee.<sup>785</sup> After accepting a trusteeship, the trustee should notify the beneficiaries of the acceptance and of the trustee's name, address, and telephone number.<sup>786</sup> Under the Uniform Trust Code (available on the Internet at <[www.law.upenn.edu/library/archives](http://www.law.upenn.edu/library/archives)>), notice to current beneficiaries and to the presumptive remaindermen, *i.e.*, the "qualified beneficiaries," would satisfy these notice requirements.<sup>787</sup>

The Restatement (Third) of Trusts catalogs the "initial information" that the trustee should furnish the "fairly representative" beneficiaries of a trust that is irrevocable, or has just become so:<sup>788</sup>

- "The existence, source, and name (or descriptive reference) of the trust,"<sup>789</sup>
- The extent and (present or future, discretionary or conditional, etc.) nature of their interests,<sup>790</sup>
- The name(s) of the trustee(s), contact and compensation information, and perhaps the roles of the cotrustees,<sup>791</sup> and

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furnish to the beneficiary a copy of the trust instrument. Uniform Trust Code §813(b)(1) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>784</sup>*See generally* 3 Scott & Ascher §17.5; Uniform Probate Code §7-303(b), however, would only require that the trustee upon reasonable request provide the beneficiary with a copy of the terms of the trust that describe or affect his interest and with relevant information about assets of the trust and the particulars relating to the administration.

<sup>785</sup>The Uniform Trust Code §813(b)(3) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) provides that this shall be done within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust or within sixty days after the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise. The Uniform Probate Code provides that within thirty days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible one or more persons who under §1-403 may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address. Uniform Probate Code §7-303(a).

<sup>786</sup>Uniform Trust Code §813(b)(2) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) provides that this shall be done within sixty days after the trusteeship is accepted. *See generally* Bogert, Trusts and Trustees §961. *See also* §§3.4.2 of this handbook (acceptance or disclaimer of the trusteeship); 3.4.4.3 of this handbook (successor trustees) and 8.2.4 of this handbook (a trust termination checklist).

<sup>787</sup>*See* Uniform Trust Code §103(12) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (defining the term *qualified beneficiary*); Uniform Trust Code §813(b) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (describing the events that trigger an affirmative duty on the part of the trustee to supply qualified beneficiaries with information).

<sup>788</sup>Restatement (Third) of Trusts §82 cmt. b.

<sup>789</sup>Restatement (Third) of Trusts §82 cmt. b.

<sup>790</sup>Restatement (Third) of Trusts §82 cmt. b.

<sup>791</sup>Restatement (Third) of Trusts §82 cmt. b.

- The beneficiaries’ right to further information, including the usual right to request information concerning the terms of the trust or a copy of the trust instrument.<sup>792</sup>

A beneficiary might not qualify as “fairly representative” at the time when an irrevocable trust is funded or when a revocable trust becomes irrevocable. Should the beneficiary, however, later achieve “fairly representative” status, perhaps because of the death of a “higher” remainder beneficiary, the trustee would have a duty to furnish the beneficiary with the initial information described immediately above.<sup>793</sup> “If a beneficiary becomes currently entitled to distributions (such as by obtaining a specified age or because of another’s death), or becomes eligible to receive or request discretionary distributions, or if a beneficiary ceases to be entitled or eligible to receive distributions, the trustee should appropriately inform the beneficiary.”<sup>794</sup>

**There are limits on a settlor’s ability to limit the trustee’s duty to keep the beneficiaries informed.** Under the Uniform Trust Code, the settlor by the terms of the trust may not relieve the trustee of the duty to inform “qualified beneficiaries” 25 years of age or older of the existence of the trust, to provide them upon request with such accountings or “reports” as the trustee may have prepared, and to respond to their request for other information reasonably related to the trust’s administration.<sup>795</sup> The settlor, however, by the terms of the trust may relieve the trustee of the duty to provide a beneficiary upon request with a copy of the trust instrument and the requirement that the trustee provide annual reports to the “qualified beneficiaries,”<sup>796</sup> a radical divergence from traditional trust principles that unsurprisingly is not without its detractors.<sup>797</sup> “The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust’s administration.”<sup>798</sup> Certainly, as we have already discussed, the “provisions of the UTC [Uniform Trust Code] that codify the trustee’s duty to inform and report are among the most controversial portions of the UTC and, as a result, have become the least uniform among jurisdictions that have enacted the UTC.”<sup>799</sup>

At the other end of the spectrum, the Uniform Probate Code (UPC) encountered resistance when it came to limiting a trust beneficiary’s access to the entire trust document. Section 7-303(b)

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<sup>792</sup>Restatement (Third) of Trusts §82 cmt. b. “It is appropriate, and will ordinarily be simplest, for the trustee to provide a copy of the trust instrument to fairly representative beneficiaries as a part of the initial information at the outset of administration.” Restatement (Third) of Trusts §82 cmt. b.

<sup>793</sup>Restatement (Third) of Trusts §82 cmt. c.

<sup>794</sup>Restatement (Third) of Trusts §82 cmt. c.

<sup>795</sup>See Uniform Trust Code §105(b)(8) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>796</sup>See Uniform Trust Code §105 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>). See also *Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C. App. 1997). But see *Fletcher v. Fletcher*, 253 Va. 30, 480 S.E.2d 488 (1997) (although the settlor may have orally asked the trustee not to disclose to the beneficiaries the details of the trust, the court held that a beneficiary may inspect the entire trust document, not just redacted portions).

<sup>797</sup>See, e.g., Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

<sup>798</sup>Uniform Trust Code §105 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>799</sup>Kevin D. Millard, *The Trustee’s Duty to Inform and Report Under the Uniform Trust Code*, 40 Real Prop. Prob & Tr. J. 373, 400 (Summer 2005). See also Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

of the UPC provided that “[u]pon reasonable request the Trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest....” In 2010, Section 7-303(b) was purged from the model UPC. The Restatement (Third) of Trust falls generally in line with the Uniform Trust Code in permitting a settlor in the terms of the trust to limit the trustee’s duty to inform beneficiaries under the age of 25,<sup>800</sup> suggesting, however, that “a court that is troubled about such specificity and arbitrariness as a matter of common-law principle might consider a more flexible approach to reconciling” the “policy favoring a settlors’ freedom of disposition” with “the policies of facilitating enforcement and limiting dead-hand control.”<sup>801</sup>

While the Restatement (Third) of Trusts would tolerate some alteration in the amount of information a trustee must give to the beneficiaries initially and on an ongoing basis, as well as some alteration in the “circumstances and frequency with which, and persons to whom, it must be given,” it cautions that a beneficiary is “always entitled...to request such information...as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust,” except, of course, when the trust is self-settled and revocable, the settlor is alive and not legally incapacitated, and the beneficiary is not the settlor.<sup>802</sup> Moreover, it is not just the “qualified” or “fairly representative” beneficiary who is entitled to information.<sup>803</sup> As to the trustee’s duty to furnish information to a beneficiary who is under a legal disability,<sup>804</sup> the trustee may furnish the requisite information to the beneficiary’s legal or natural guardian, conservator, agent under a durable power of attorney, or such “one or more trust beneficiaries whose concerns can be expected reasonably to coincide with those of the disabled beneficiary.”<sup>805</sup>

**The Uniform Probate Code’s trust registration requirement.** When it comes to the trustee’s duty to inform and account to the beneficiaries, the model Uniform Probate Code was sort of the black sheep, in large part due to its trust registration requirement. Section 7-303(a) provided that “[w]ithin 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible one or more persons who...may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.” Section 7-303(b) required the trustee “upon request” to furnish the beneficiary with a copy of the “terms of the trust which describe or affect his interest.” This obligation on the part of trustees to register their trusts was the centerpiece of the Uniform Probate Code’s system of trust-related codifications and thus indispensable to the system’s internal coherence and logic. Again, the portions of the model UPC dealing with trust administration, housed mainly in its Article VII, were purged in 2010.

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<sup>800</sup>Restatement (Third) of Trusts §82 cmt. e.

<sup>801</sup>Restatement (Third) of Trusts §82 cmt. e, Reporter’s Notes thereto. *See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 *Ariz. St. L.J.* 713 (2006).

<sup>802</sup>Restatement (Third) of Trusts §82 cmt. a(2). *See generally* 3 *Scott & Ascher* §17.5; Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 *Ariz. St. L.J.* 713 (2006).

<sup>803</sup>*Jacob v. Davis*, 128 *Md. App.* 433, 738 *A.2d* 904 (1999).

<sup>804</sup>Restatement (Third) of Trust §82 cmt. a(1).

<sup>805</sup>Restatement (Third) of Trust §82 cmt. a(1). If, for example, two children, with more or less identical equitable interests under a trust are entitled to be furnished information about the trust on an ongoing basis, but one is a minor, ordinarily the trustee’s duty to furnish information to the minor is satisfied if he furnishes only the adult child with the requisite information. If, however, the interests of the two children are in potential conflict, *e.g.*, if the two are permissible beneficiaries under a discretionary trust, *see* §3.5.3.2(a) of this handbook, then keeping just the adult beneficiary informed will not satisfy the trustee’s duty to keep the minor informed.

**When the trustee may have a duty to give beneficiaries advance notice of an important or significant event.** The trustee may have a duty to give advance notice to the beneficiaries of important or significant events affecting the trust property, such as a change in the method or rate of the trustee's compensation or an important transaction involving an asset that is difficult to value or to replace, *e.g.*, real estate or a closely held business interest.<sup>806</sup> Under the Uniform Trust Code, the trustee would have a duty to notify the current beneficiaries and the presumptive remaindermen of a proposed transfer of a trust's principal place of administration not less than sixty days before initiating the transfer.<sup>807</sup> A self-dealing transaction that involves the underlying trust property also would warrant the giving of advance notice. To the extent readily available, remainder beneficiaries, whether ascertained or presumptive, are shut out of the process, the trustee could be in breach of the duty of impartiality.<sup>808</sup> A trustee's duty under the default law to give advance notice to a beneficiary of a contemplated action, however, does not in and of itself afford the beneficiary a nonjudicial power to veto the contemplated action.<sup>809</sup> A general power in the beneficiary to veto contemplated actions of the trustee would conflict with a core principle of the default law of trusts, namely, that the trustee is not an agent of the beneficiary.<sup>810</sup> The source of any veto powers must be the terms of the trust.<sup>811</sup> The Restatement (Third) of Trusts lists some situations which could give rise to a requirement on the part of a trustee to give advance notice to qualified or fairly representative beneficiaries of a contemplated action:

- “significant changes in trustee circumstances, including changes in the identities, number, or roles of trustees or in methods of determining trustee compensation;
- decisions regarding delegation of important fiduciary responsibilities or significant changes in arrangements for delegation;
- important adjustments being considered in investment or other management strategies;
- significant actions under consideration involving hard-to-value assets or special sensitivity to beneficiaries (such as liquidating or selling shares of a closely held business or a sale or long-term lease of a major real estate holding);
- plans being made for distribution on termination or partial termination (or perhaps subdivision) of the trust; and
- other transactions or developments of which beneficiaries should be made aware and thereby allowed an opportunity to offer suggestions, comments, or information, or to request reports

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<sup>806</sup>See Uniform Trust Code §813(a), (b)(4) & cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>) (suggesting that notice to qualified beneficiaries would satisfy the advance notice requirement); Restatement (Third) of Trusts §82(1)(c); 3 Scott & Ascher §17.5. See also *Allard v. Pacific Nat'l Bank*, 663 P.2d 104 (Wash. 1983) (surcharging trustee for failing to give beneficiaries advance notice of proposed sale of a parcel of real estate that was sole asset of trust); *In re Green Charitable Trusts*, 172 Mich. App. 298, 431 N.W.2d 492 (1988) (affirming trial court finding that trustee was in breach of trust for failing to inform beneficiaries of a contemplated transaction involving the trust estate).

<sup>807</sup>Uniform Trust Code §108(d) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

<sup>808</sup>Restatement (Third) of Trusts §79 cmt. d. See generally §6.2.5 of this handbook (trustee's duty of impartiality in his dealings with the beneficiaries); 4 Scott & Ascher §20.1 (Impartiality Between Successive Beneficiaries).

<sup>809</sup>Restatement (Third) of Trusts §82 cmt. d.

<sup>810</sup>See generally §5.6 of this handbook (duties and liabilities of the beneficiary).

<sup>811</sup>See generally §§3.2.6 of this handbook (considerations in the selection of a trustee) and 4.2 of this handbook (expressly reserved beneficial interests and powers).

or accountings....<sup>812</sup>

This duty to inform in advance has its limitations, particularly if the trustee is engaged in sensitive contract negotiations with third parties on behalf of the trust:

Confidential information may take more than one form. Trustees negotiating a contract may obtain confidential information of the other party. To allow a beneficiary to see that information might be a breach of contract: a beneficiary having the information might wish to intervene concerning the conduct of negotiations, thereby compromising the trustees' autonomy. Trustees who own shares may receive confidential information in that capacity. If they breach confidentiality the value of the shares might be diminished: *Neagle v. Remington* [2002] 3 NZLR 827 at 32(e) per Patterson J.<sup>813</sup>

**The trustee's duty to render accounts to the court and to the beneficiaries.** Apart from the duty to provide advance notice of important or significant events, "[t]he trustee... owes his beneficiary a duty to render at suitable intervals, upon resignation or removal, and upon termination of the trust, a formal and detailed account of his receipts, disbursements, and property on hand, from which the beneficiary can learn whether the trustee has performed his trust and what the current status of the trust is."<sup>814</sup> This we refer to as the duty to keep and render accounts, a topic that is covered next in Section 6.1.5.2 of this handbook.

**Self-dealing transactions.** The trustee's duty to inform also may be implicated when the trustee transacts with a beneficiary, a topic that is covered in Section 6.1.3.5 of this handbook (acquisition by trustee of equitable interest; duty of loyalty to the beneficiary in non-trust matters).

**The quiet or silent trust.** Is a quiet or silent trust illusory? The question is intentionally ambiguous. Is the question whether the trust itself is illusory, or just its quietness? A quiet or silent trust has been defined as "an irrevocable trust that, by its terms, directs the trustee not to inform the beneficiaries of the existence of the trust, its terms and the details of the administration of the trust."<sup>1</sup> South Dakota, for example, would seem to authorize such trusts by statute. See S.D. Codified Laws §55-2-13, which provides that "[t]he settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or in writing delivered to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to the trust." It seems there are two possibilities:

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<sup>812</sup>Restatement (Third) of Trusts §82 cmt. d.

<sup>813</sup>W. A. Lee, *Purifying the dialect of equity*, 7(2) Tr. Q. Rev. 14 (May 2009) [a STEP publication]. See generally §3.5.1 of this handbook (the trustee is a principal, not someone's agent).

<sup>814</sup>Bogert, *Trusts and Trustees* §963.

<sup>1</sup>Joyce Crivellari, *Trust & Estate Insights*, May 2013 [A UBS Private Wealth Management Newsletter].

The first is that §55-2-13 means what it says, in which case a quiet or silent trust is something other than the legal/equitable relationship that is the subject of this handbook. Perhaps it is just a constructive principal/agency relationship, the “settlor” being the principal and the “trustee” being the agent. Or perhaps it is just a fancy completed common law gift to the “trustee.”

The second is that a quiet or silent trust is a true trust. If that is the case then how, as a practical matter, is the trustee to hide the existence of the trust from the beneficiary and comply with applicable tax laws?<sup>2</sup> Assuming that is possible, then how is the trustee to handle a request for information from the curious beneficiary about the terms of the trust should the beneficiary somehow otherwise get wind of its existence? If the trustee lies to the beneficiary, or intentionally obfuscates, is he not committing an act of actual or constructive fraud against the beneficiary, such that any applicable statute of ultimate repose is tolled?<sup>3</sup> Finally, the trustee’s duty to account is a two-edged sword. Yes, it is burdensome for the trustee. But rendering accounts to the beneficiary is also the tried-and-true vehicle for limiting the trustee’s liability.

The quiet or silent trust is not to be confused with the secret (or semi-secret) trust, which is the subject of §9.9.6 of this handbook.

**Countervailing considerations.** It may not always be in the best interests of a beneficiary, or of his or her cobeneficiaries, for the trustee to disclose to the beneficiary confidential legal advice which counsel has rendered to the trustee. It could even be “prejudicial to the ability of the trustees to discharge their obligations under the trust.”<sup>815</sup> This is a topic we take up in Section 8.8 of this handbook in our discussion of trust counsel and the attorney-client privilege.

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<sup>2</sup> See generally Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 659, 679 (taxation and the quiet/silent trust).

<sup>3</sup> See generally §7.1.2 of this handbook (the Uniform Trust Code’s statute of ultimate repose).

<sup>815</sup>David Hayton, Paul Mathews, & Charles Mitchell, *Underhill and Hayton, Law Relating to Trusts and Trustees* §60.58 (17th ed. 2006).

