



## 2021 Swiss AEOI/CRS guidance notes

Most relevant changes for the trust industry

# Agenda

## 1. Introduction

- Exchange of information mechanism
- AEOI legal basis
- Evolution of implementation

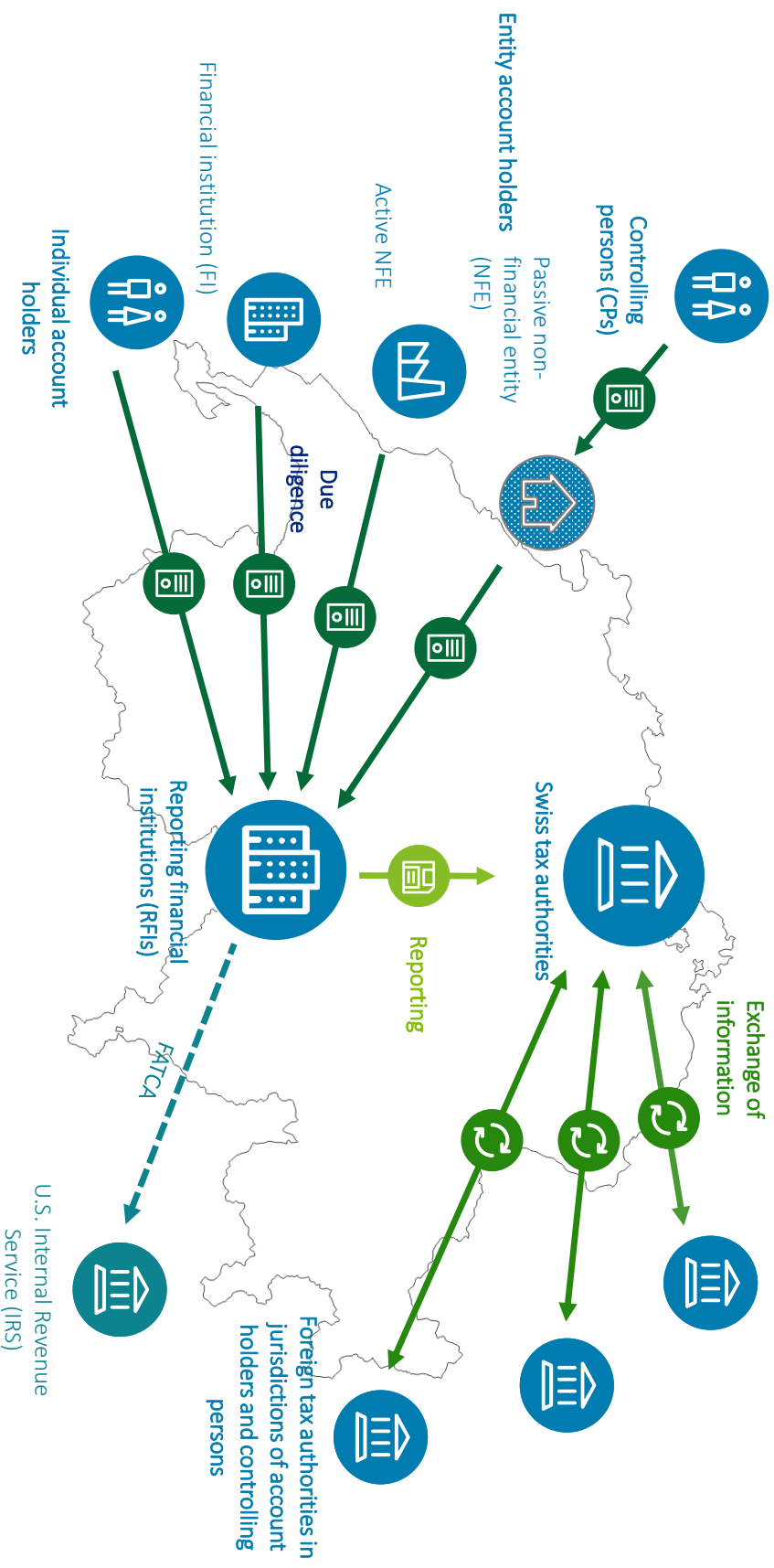
## 2. Key changes for the trust industry

- Indirect distributions of a trust
- Account holder of FI trust
- Trustee-documented Trust
- Beneficiaries and categories of beneficiaries of trusts
- New Accounts
- Various amendments

# Introduction

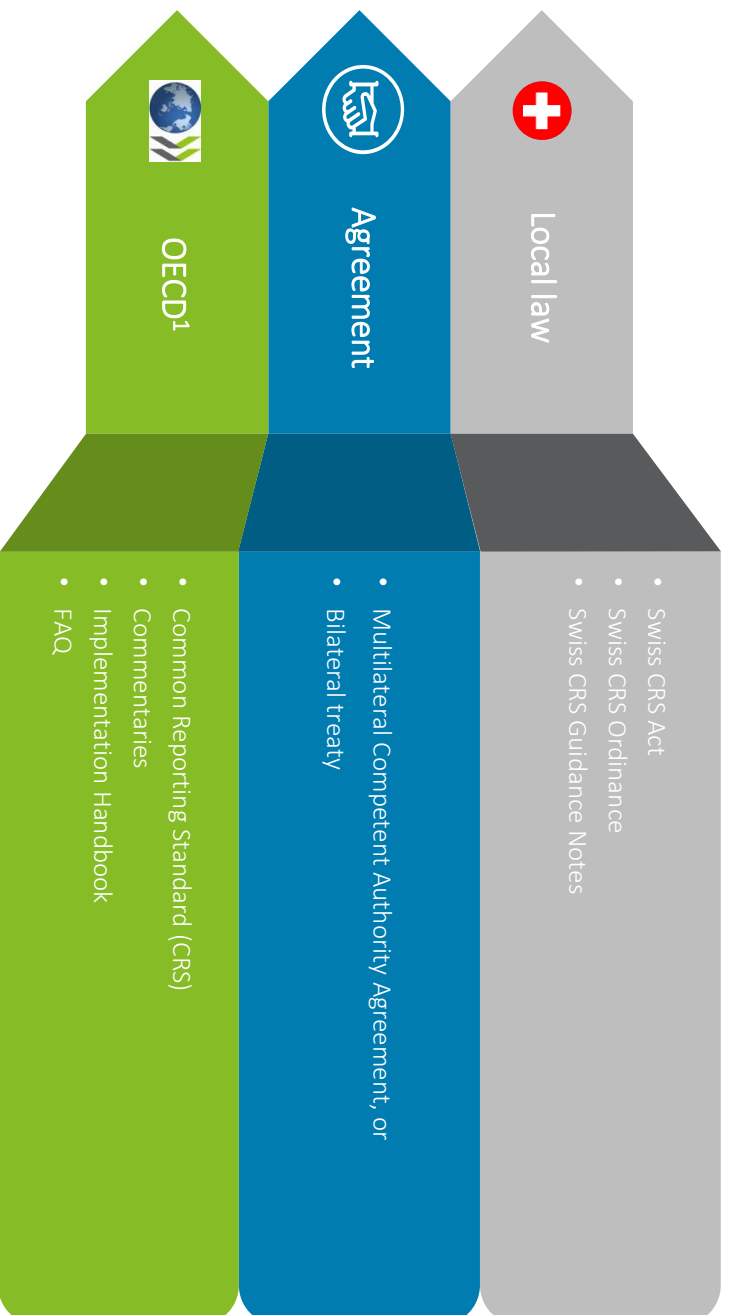
# Introduction

## Exchange of information mechanism



# Introduction

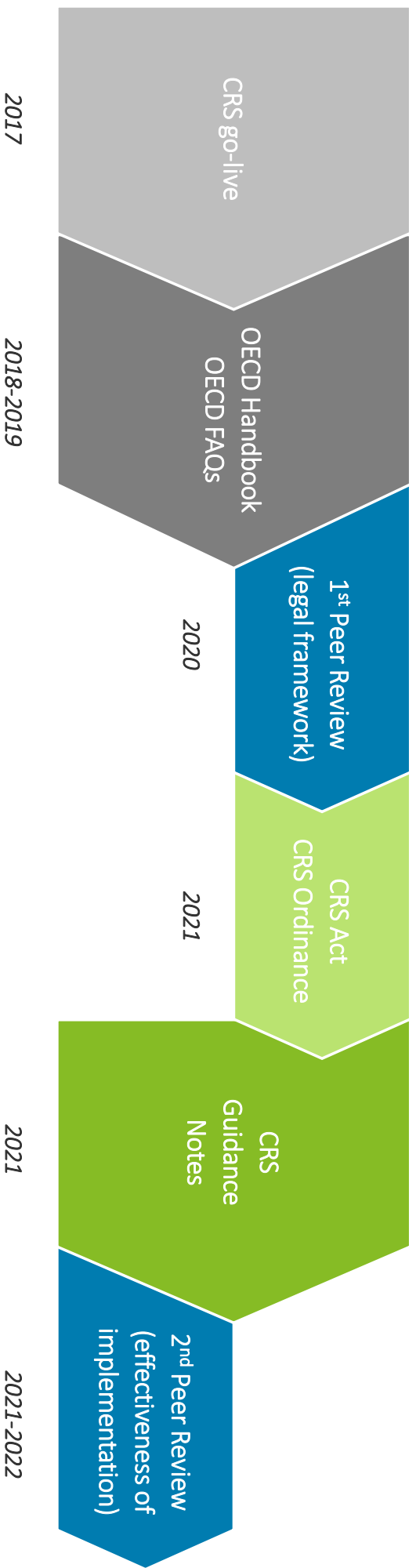
## AEOL legal basis



1. Organisation for Economic Co-operation and Development

# Introduction

## Evolution of implementation



# **Key changes for the trust industry**

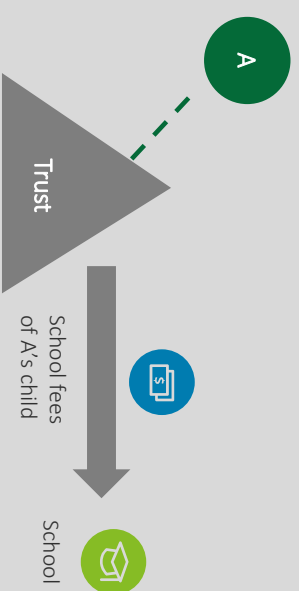
## Indirect distributions of a trust

Examples illustrating the term "reportable distribution" under the updated guidance

 Under subsection C(4) of Section VIII of CRS, a reportable person will be considered a beneficiary of a trust if he or she is entitled to receive, directly or indirectly (for example, through an agent), a mandatory distribution from the trust or may receive, directly or indirectly, a voluntary distribution from the trust.

### Example 25

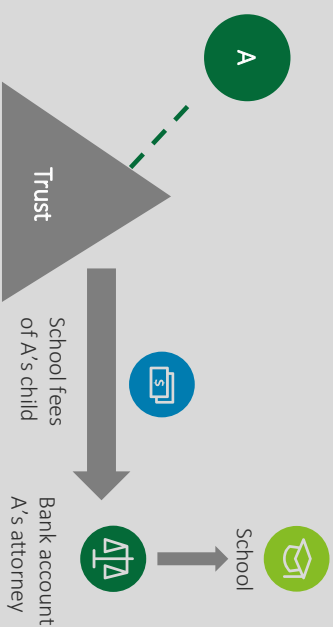
A is a beneficiary (without a fixed legal interest) of a trust. The trust does not make a direct payment to A, but it pays the school fees of A's child.



 This payment constitutes a **reportable distribution** to A, even though the payment is not made to A but to the school.

### Example 26

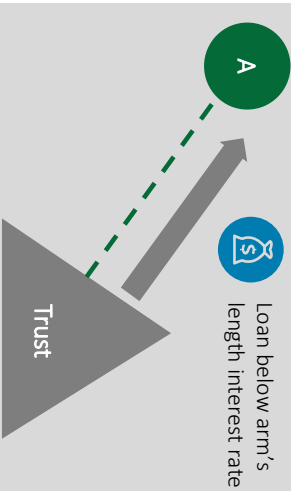
Same situation as Example 25, but the trust makes the payment to an account of A's attorney to pay (in trust) the school fees.




 This payment constitutes a **reportable distribution** to A, even though the payment is not made to A but to his attorney.

### Example 27

Same situation as Example 25, but A receives a loan from the trust below an arm's length interest rate.



 The loan (in the amount of the loan) **does not qualify as a distribution** because it does not encumber the assets of the trust. The difference from an arm's length interest rate constitutes a **reportable distribution** to A. If the loan is written off at a later date at the expense of the trust, this also constitutes a **reportable distribution** to A.



## Account holder of FI trust (1/3)

Previous rules for determining the account holders of FI trusts



### Account Holder of an FI Trust (Equity Interest Holder)

- **Previous rule:** Settlor, beneficiaries and any other natural person who actually controls the trust

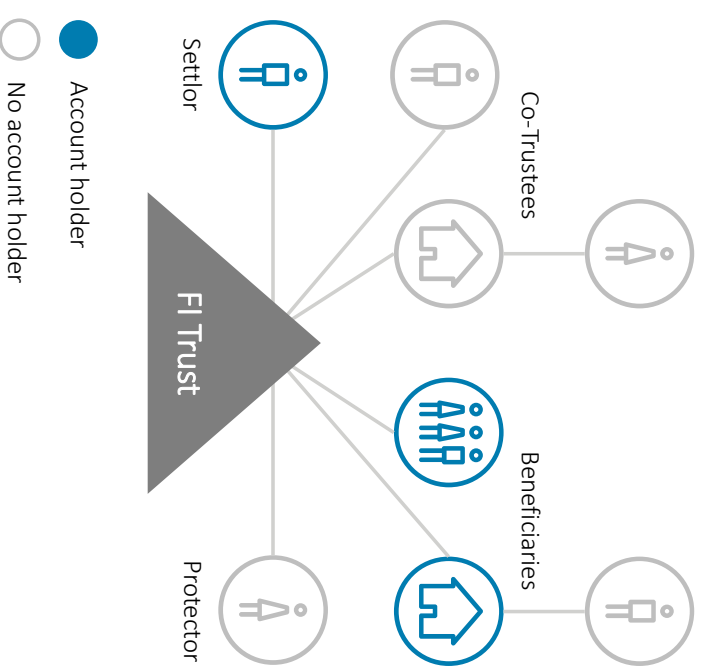


### FI Trusts where legal entities act as settlor or beneficiaries

- **Previous rule:** Legal entities are considered the account holders
  - AEOI status of the legal entity must be determined
  - If the legal entity is a passive NFE, the controlling persons must also be identified (and reported, if applicable)



### Example determination Account Holder - previous rules



## Account holder of FI trust (2/3)

Previous rules for determining the account holders of FI trusts



### Account Holder of an FI Trust

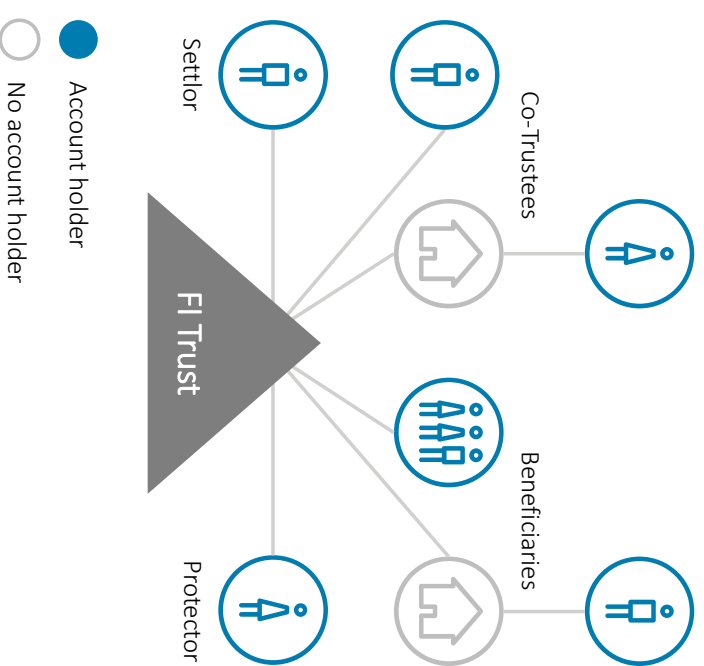
- **2021 Swiss guidance notes:** In the case of a trust that is an FI, attribution is made to the person considered to be the settlor, trustee, beneficiary or protector of all or part of the trust, or to the other natural person who effectively controls the trust. The persons subject to reporting requirements are the settlor, trustee, beneficiary, protector and other natural persons who actually control the trust.



### FI Trusts where legal entities act as settlor or beneficiaries

- **2021 Swiss guidance notes:** The Account Holder of a trust that is an FI is the settlor, trustee, protector, beneficiaries and any other natural person who effectively controls the trust. If the Account Holder is a settlor, trustee, beneficiary or protector that is an entity, the trust that qualifies as an FI must look through that entity and report the controlling person(s) of the entity that is required to report.

### Example determination Account Holder – 2021 Swiss guidance notes



## Account holder of FI trust (3/3)

Changes in the determination of account holders of FI trusts



### Account Holder of an FI Trust (Equity interest holder)

- **2021 Swiss guidance notes:** In the case of a trust that is an FI, an equity interest is deemed to be held by any person who is deemed to be the settlor, **trustee**, beneficiary or **protector** of all or part of the trust, or by any other natural person who effectively controls the trust



### FI Trusts where legal entities act as settlor, trustee, protector or beneficiaries

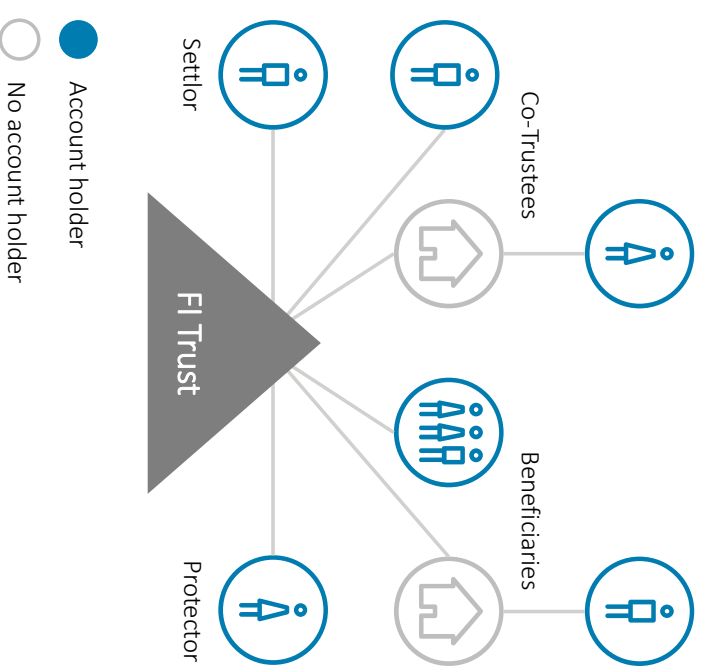
- **2021 Swiss guidance notes:** If a settlor, trustee, beneficiary, protector or other person who effectively controls the trust is an entity, the entity and other intermediary **entities must be "looked through"** and the controlling individuals behind the entity must be considered to hold the equity interest.



### Reportable amounts for trustees and protectors

- **2021 Swiss guidance notes:** Settlor, beneficiaries with fixed/mandatory entitlement and other natural persons who actually control the trust (**including trustee and protector**). Alternatively, if the balance or value is not calculated otherwise and reported to the relevant Account Holder, the **total value** of the trust assets shall be reported."

### Example determination Account Holder – 2021 Swiss guidance notes



## Trustee-documented Trust Registration requirement

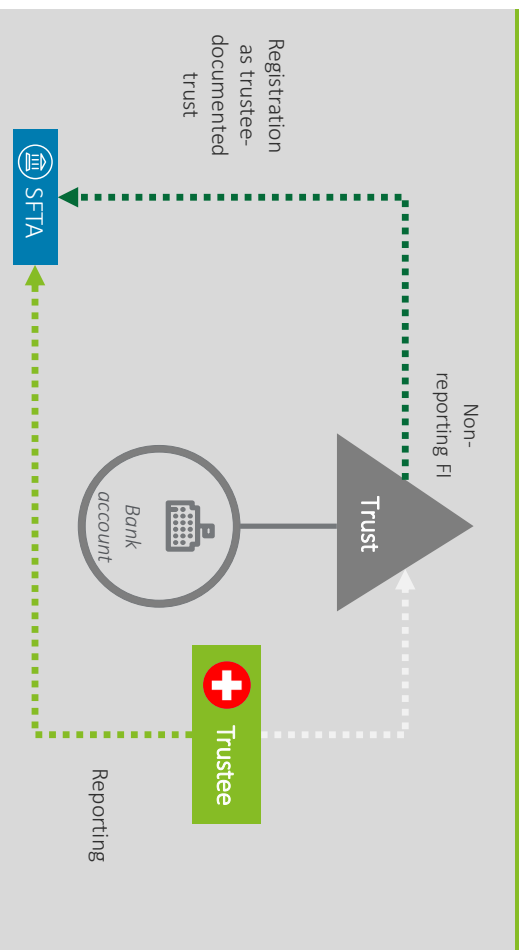


If the applicable agreement so provides, trusts are considered non-reporting Swiss FIs if the trustee of the trust is a reporting FI and reports all information required to be reported under the applicable agreement on all reportable accounts of the trust (trustee-documented trust, cf. Art. 3 para. 9 AIA/G). When a trust is treated as a trustee-documented trust, the responsibility for fulfilling the due diligence and reporting obligations is transferred to the corresponding trustee (see Section VIII, Subsection B(1)(e) CRS).

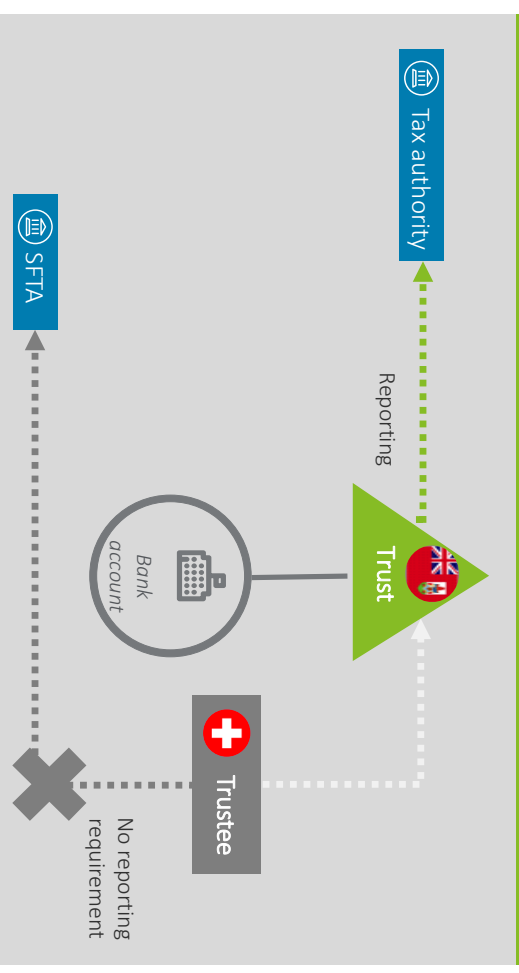
### Example 42:

A Swiss domiciled entity that qualifies as an FI is the trustee of a trust; the trust is a non-reporting FI and the trustee files the necessary reports in place of the trust.

**The trust must be registered as a trustee-documented trust with the FTA**



If the trust is deemed to be resident for tax purposes in a particular participating state and the trust reports all of the information required to be reported for the reportable accounts it holds, the **trust is exempt from the reporting requirements in the states of residence of the other trustees**. In order to obtain this exemption, each trustee must be able to prove that the trust actually makes all the required reports.



## Beneficiaries and categories of beneficiaries of trusts Controlling and Reportable Persons

 The 2019 version allowed reporting FIs that applied **method 2**, to assume that no distributions were made to the beneficiaries of the trust when the bank was not inform by the trustee on any such distributions. However, this sentence has been deleted from the 2021 version and no clarification has been added. We believe that with the deletion of this option, the 2021 version signals that the **reporting Swiss FIs will consider all beneficiaries as reportable**, unless the trustee informs the RFI to the contrary.



\* UEC = Any other natural person(s) exercising ultimate effective control over the trust



### Controlling Persons

All natural persons who have one of these five roles must always be regarded as Controlling Persons, **irrespective of whether they actually control the trust and irrespective of whether the trust is revocable or irrevocable.**

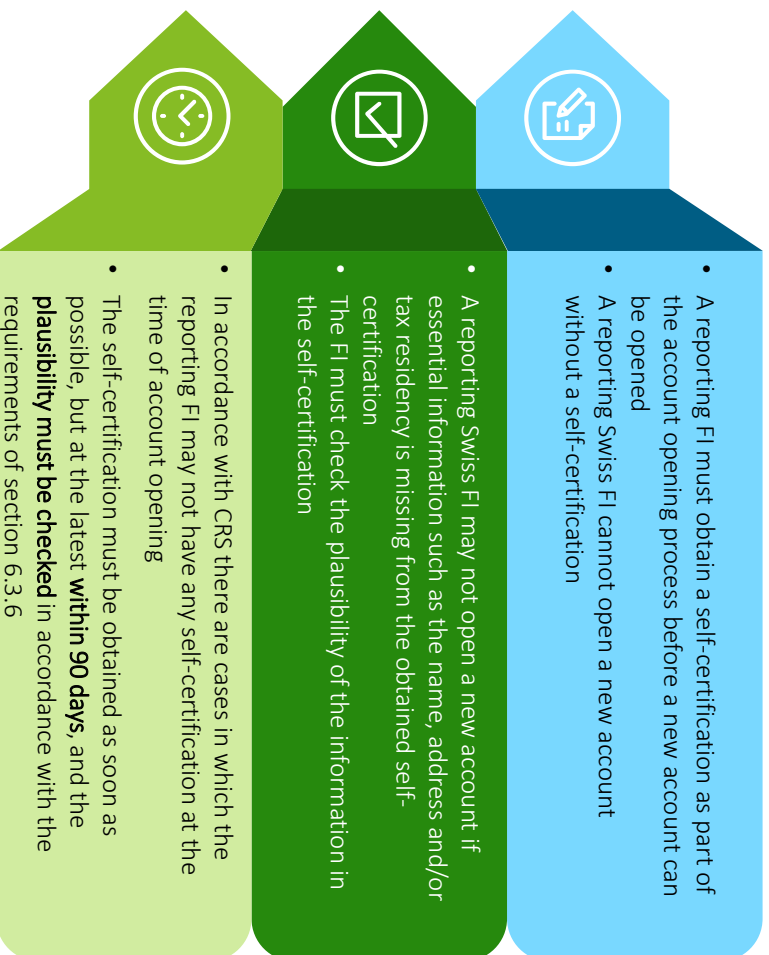


### Reportable Persons

A report must always be made if a person is a reportable Controlling Person by virtue of a trust role listed in section 4.8.2

## New Accounts (1/2) Requirements

### Account opening procedure for individual and entity account holders



### Plausibility of self-certifications of new individual and entity account holders

 The plausibility check of the self-certification must generally be carried out on the same day (so-called **day one process**). However, it must be completed within 90 days at the latest if this is not possible on the same day, for example because it is carried out by a back office (so-called **day two process**).



#### Day one: "formal validation"

- Account opening only with self-certification
- Formal validation of the self-certification when opening the account: all mandatory information (name, address, tax residency(s)) must be available)
- TIN and date of birth not necessary in exceptional cases




#### Day two: "material validation"

- Plausibility check of the self-certification within 90 days, based on the available information, incl. information and documents received as part of AML/KYC processes

## New Accounts (2/2)

Exceptional cases concerning the obligation to obtain self-certification

### New individual accounts

 In Switzerland, exceptions to the obligation to obtain self-certifications are only applicable **if new accounts are opened without any action by the reporting Swiss FI** and the creation of such accounts **cannot be prevented by the reporting Swiss FI** (cf. Art. 11(8)(b) AEOI Law).


1. Change of policyholder in the case of insurance on the life of another person as a result of legal succession;
2. Change of account holder as a result of a court or official order; or
3. **Creation of a beneficiary claim against a trust or similar legal entity on the basis of its deed of establishment or foundation deed.**



For example, the birth of a child who has been designated in advance as the beneficiary of a fixed interest trust.

The same applies if the governing bodies of an FI are obliged by the articles of association or trust deed to grant a beneficiary. This can arise, for example, when a protector of a trust, who is authorised to do so, makes corresponding specifications to the trustee. If, on the other hand, the granting of a benefit is at the discretion of the board of trustees or the trustee, **the board of trustees or the trustee must obtain prior to the distribution a self-certification from the persons to be benefited.**

### New entity accounts

 The opening of new accounts is **not permitted without a self-certification**. However, the Swiss guidance notes have been updated in line with CRS and provide **exceptional cases** in which the reporting FI either does not have a self-certification at the time of account opening or that no self-certification has to be obtained for opening the account.

- a. The account holder is an entity and the reporting Swiss FI can reasonably determine, based on the information available to it or publicly available information, that the account holder is not a Reportable Person; or
- b. New accounts are opened without any action on the part of the reporting Swiss FI and the opening of such accounts cannot be prevented by the reporting Swiss FI.

The following are considered to be **exceptions under letter b** (cf. Art. 27 AEOI Ordinance)

1. Change of policyholder in the case of insurance on the life of a third party through legal succession
2. Change of account holder as a result of a court or official order
3. Creation of a beneficiary claim against a trust or similar legal entity on the basis of its deed of establishment or foundation deed

## Various amendments (1/3)

### Passive income



The newly included paragraph aligns the Swiss guidance notes with the OECD CRS FAQs.



- It is not important if passive income is actually generated with a class of income during the assessment period
- Rather, it must be **possible to generate passive income with it**
  - For example, **cash can be used to generate passive income (interest).**

### Documentary evidence



Reporting FIs will no longer accept certain types of documentation as documentary evidence.



- Two sub-bullets of section 5.9 in connection to documentary evidence supporting residence address have been **removed**:
- A certificate from a lawyer's office, a fiduciary or the employer, provided that the exact address is noted with the current date and other documents proving residency in an appropriate manner.
  - Other documents proving residency in an appropriate manner.

### Curing



Changes should not apply retroactively, i.e. pre-existing accounts should not be in scope. This will however affect change in circumstances and new accounts going forward.

- A reporting Swiss FI is not required to consider an account holder as a resident of a reporting jurisdiction if it obtains the following:
1. A self-certification by the account holder of its country(ies) of residence, which shall include only non-reporting countries; and
  2. Documentary evidence is sufficient to establish an account holder's non-reporting status if the evidence:
    - a. confirms that the account holder is a resident of a country other than the relevant reporting country;
    - b. contains a current home address outside the relevant reporting country; or
    - c. was issued by an authorised governmental entity of a country other than the relevant reporting country



## Various amendments (2/3)

### Entity classification

#### Foundations

Foundations established under Swiss law with an open group of beneficiaries, which are subject to cantonal or federal foundation supervision and for which the foundation board alone decides on the possible beneficiaries - in accordance with the purpose of the foundation - do not qualify as investment entities.

#### Charitable trusts

Charitable trusts which are not primarily focused on investing financial assets but on distributing assets qualify as Active NFEs.

#### Trusts that are managed by a natural person

A trust whose financial assets are managed by a natural person, e.g. by a natural person as a trustee or with an advisory mandate (advisory) from a bank, is not considered to be professionally managed.



The following three paragraphs were deleted without replacement in the 2021 Swiss AEOI/CRS guidance notes.

## Various amendments (3/3)

### TIN requirement



We note that the self-certification accepted from a reportable person without a TIN, where the jurisdiction of residence of such person issues a TIN should be closely examined.

Generally, a self-certification needs to have a TIN if such TIN is required. This means that at account opening a self-certification cannot be accepted without a TIN to only subsequently do reasonable efforts to obtain a TIN.

The transitional rule which is stated in section 6.3.4.2 indicates that with respect to **accounts opened prior to 1 January 2021**, for which the reporting Swiss FI has a self-certification that does not contain a TIN, the **TIN does not need to be reported if it is not included in the Swiss FI's records**. However, Reporting Swiss FIs are required to make **reasonable efforts to obtain the TIN by the end of the second calendar year following the year in which such accounts were identified as Reportable Accounts**.

Additionally, section 6.3.4.5 of the updated Swiss CRS guidance notes indicate that a self-certification may be valid even if the natural person submitting the self-certification has not provided a TIN. This may be the case, for example, if the jurisdiction of residence does not issue a TIN.

### Corrections



When an FI submits an incorrect report it must **immediately correct the report**.

The following statements included in the prior version have been **deleted**:

- An incorrect report may be corrected by a reporting Swiss FI no later than June 30 following the end of the calendar year to which the information relates by submitting to the FTA a cancellation to the original report and a new report.
- A report that was wrongly omitted may be submitted subsequently within five years of the end of the calendar year in which the report was to be submitted.
- An incorrectly transmitted or erroneous report may be cancelled by a reporting Swiss FI within five years of the end of the calendar year in which the report was transmitted.

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