



香港信託人公會  
Hong Kong Trustees' Association

HKTA seminar:  
**Foreign Account  
Tax Compliance Act (FATCA)/  
Common Reporting Standard  
(CRS)**

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16 January 2025  
5:00pm - 6:30pm

# Housekeeping



## **SILENT MODE**

Please switch your mobile phone to silent mode.



**PRESENTATION TIME: 5:00pm – 6:30pm**



**PRESENTATION MATERIAL WILL BE EMAILED TO YOU AFTER THE SEMINAR.**

Upon request, the e-Attendance certificate will be issued within 10 working days.



**PLEASE ASK QUESTIONS DURING Q&A SESSION**

We will try our best to answer as many questions as possible.



## **FEEDBACK SURVEY**

Please help to complete the survey at the end of the seminar.

# Speaker

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S&P Global Market Intelligence*

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# Overview of FATCA/CRS Regimes

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# Overview of FATCA Regime

- The US Introduced, under the 2010 Hire Act, a new requirement on foreign financial institutions (FIs) to assess and periodically reevaluate their full customer accounts to determine if there are any US persons. This is known as Foreign Account Tax Compliance Act (FATCA) or Chapter 4.
- The US tax code taxes its residents on a world-wide basis. The purpose for the introduction of FATCA was to combat US tax evasion where US residents reside outside of the US. FATCA effectively mandates foreign FIs to either report or withhold US taxes on such identified impacted financial accounts.
- FATCA was introduced on top of the already existing Chapter 3 requirements placed upon foreign FIs, which applies US tax withholding and reporting obligations for US sourced fixed, determinable, annual & periodical (FDAP) income (e.g., fixed interest, dividends etc.).
- Such new extra-territorial tax laws were enforceable on foreign FIs:
  - via direct US tax legislation known as FATCA model 1 under the Intergovernmental Agreement (IGA), where such impacted customer accounts would be withheld upon and/or reported to local tax authorities, the local tax authority enforces its US tax requirements; or
  - via bilateral legal agreements between the IRS and its counterparty tax authority under the IGA Model 2, where the foreign FI reports directly to the Internal Revenue Service (IRS).
- Hong Kong is currently a FATCA Model 2 IGA jurisdiction.

**In a Model 2 IGA jurisdiction, the building blocks for FATCA are:**

## **Due diligence**

To identify US Reportable Accounts

## **Withholding Tax**

On FATCA Withholdable Payments

## **Reporting**

Of US Reportable Accounts annually

# Overview of CRS Regime

- The Organization for Economic Co-Operation & Development (OECD) developed a global framework, which broadly followed the legal definition of US FATCA, adapted for international deployment in January 2016. This new tax reporting framework created a new tax reporting requirement placed upon participating country financial intermediaries (FIs) with the main policy intent of reducing tax avoidance and evasion.
- Such participating countries agreed to share reported account information between one another on tax residents of the counterparty tax authorities that had been reported to it by FIs mandated to report such customer account information.
- The OECD framework is known Common Reporting Standard (CRS). The CRS and FATCA is collectively known as Automatic Exchange of Information (AEOI).
- The Hong Kong SAR:
  - published in the local Gazette on 30 June 2016 its local adoption of the OECD CRS framework. CRS was formally adopted from 1 January 2017 and the first Automatic Exchange of Information (AEOI) on financial account information commenced in calendar year 2018.
  - agreed to provide financial account information to other participating jurisdictions with respect to tax residents of those other jurisdictions for which it had been reported.
  - consider CRS to be an effective tool to counter tax evasion and increase voluntary tax compliance.

The building blocks for CRS are:

## **Due diligence**

To identify tax residence(s) of customers including obtaining self-certification

## **Reporting**

On reportable jurisdiction tax residents annually

# Trust

- Trusts are treated as legal entities under FATCA, Qualified Intermediaries (QI) and CRS.
- A trust can be either a financial institution (FI), or non-financial foreign entity (NFFE) for FATCA or a non-financial entity (NFE) under CRS.
- Trusts are more likely to be managed investment entities but must meet both the tests to be within this category of FI, i.e., its gross income must be primarily derived from investing, reinvesting or trading in financial assets and it must be managed by an FI.
- If the trust is not professionally managed in this way and does not meet any of the other definitions of a foreign financial institution (FFI), it will be a NFFE,
  - e.g., where the trustees of a trust are individuals (and therefore not FIs) and
  - the trust holds a Depository Account with an FI, and that FI does not have discretion to manage the account or the funds in the account
- For QI purposes, trust classification follows US tax rules, not the rules of the jurisdiction in which the trust is organised



# Trust under QI (Chapter 3)

- Under QI, non-US trusts fall into one of three categories:
  - Foreign Complex Trust (複合信託)
  - Foreign Grantor Trust (委託人信託)
  - Foreign Simple Trust (簡單信託)
- A foreign complex trust is one that does not meet the criteria to be classified as either a foreign grantor trust or foreign simple trust
  - Documentation requirements:
    - FATCA & QI: Form W-8BEN-E

# Type of Trusts

Foreign Simple Trust	Foreign Grantor Trust	Non-Discretionary Trust
<ul style="list-style-type: none"> <li>Is not a grantor trust or required to be treated as a grantor trust;</li> <li>Is required to distribute all income annually; and</li> <li>Does not distribute the corpus of the trust or make charitable contributions. (IRC Section 651).</li> </ul>	<ul style="list-style-type: none"> <li>Any trust over which the grantor or other owner retains the power to control or direct the trust's income or assets. If a grantor retains certain powers over or benefits in a trust, the income of the trust will be taxed to the grantor, rather than to the trust.</li> <li>Examples of such powers include the power to decide who receives income, the power to vote or to direct the vote of the stock held by the trust or to control the investment of the trust funds, the power to revoke the trust, etc.).</li> <li>All "revocable trusts" are by definition grantor trusts. An "irrevocable trust" can be treated as a grantor trust if any of the grantor trust definitions contained in Internal Code §§ 671, 673, 674, 675, 676, or 677 are met.</li> <li>If a trust is a grantor trust, then the grantor is treated as the owner of the assets, the trust is disregarded as a separate tax entity, and all income is taxed to the grantor.</li> </ul>	<ul style="list-style-type: none"> <li>When customer invests via a bank, the customer needs to setup a non-discretionary trust with the bank being the trustee and the customer being the grantor and beneficiary.</li> <li>Bank cannot disclose any personal information to third-party.</li> <li>Apply joint account provisions which enable pooled reporting.</li> </ul>
<p>Documentation:</p> <ul style="list-style-type: none"> <li>FATCA: Investment entity or passive NFFE or owner documented FFI</li> <li>QI: Form W-8IMY+ Form W-8BEN from the trust beneficiaries</li> </ul>	<p>Documentation:</p> <ul style="list-style-type: none"> <li>FATCA- same considerations as simple trust</li> <li>QI: Form W-8IMY + Form W-8BEN from the grantor/settlor</li> </ul>	<p>Documentation:</p> <ul style="list-style-type: none"> <li>FATCA - same considerations as simple trust</li> <li>QI: Form W-8IMY + Form W-8BEN from the individual grantor</li> </ul>

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## Due Diligence Requirements

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# CRS

# Due Diligence Requirements for CRS

## Due Diligence

A Reporting Financial Institution is required to establish where a customer is resident for tax purposes.

1

### Document Account Holder

- Obtain a self-certification establishing where the individual is resident for tax purposes.

2

### Validate Documentation

- Assess validity of self-certification and check for reasonableness by determining if the FI knows or has reason to know that the self-certification is incorrect or unreliable.

3

### Manage Change in Circumstances (CIC)

- If there is a CIC that causes the Reporting Financial Institution to know, or have reason to know, that the original self-certification is incorrect or unreliable, the Reporting Financial Institution cannot rely on the original self-certification.

# How to Determine Tax Residence – Individual

Tax residence is defined differently by each jurisdiction. The OECD has released guidance for some jurisdictions.

## Quantitative Factors

- Substantial presence test

## Qualitative Factors

- Domicile

# How to Determine Tax Residence – Entity

Tax residence is defined differently by each jurisdiction. The OECD has released guidance for some jurisdictions. Common factors in determining tax residence:



Place of incorporation or organization



Registered address or principal office

Control and management



Address of trustee



# Validating and Assessing the Reasonableness of a CRS Self-Certification

- Is the self-certification dated, signed or otherwise positively affirmed?
- Has the Account Holder provided all the information required for reporting?
- Review information obtained in connection with the opening of the account - Assess whether the information obtained in connection with the opening of the account, including any documentation collected pursuant to AML / KYC Procedures, conflicts with the entity's declared tax residency.
- Does the account holder need to disclose "Controlling Persons" (i.e., settlor(s), trustee(s), protector(s) (if any), the beneficiary(ies) & etc.)?



# Change in Circumstances – Individual

Examples of CIC for CRS include, but are not limited to, the following:

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Tax residence

Residence address

Mailing address

Telephone number(s)

Standing instructions to transfer funds

Address of Power of Attorney or Signatory Authority

“Hold mail” instruction or “in-care-of” address

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Change in circumstances

Original self-certification becomes unreliable

Reporting FI must obtain a valid self-certification that establishes the Account Holder's tax status

# Change in Circumstances – Entity

Examples of CIC for CRS include, but are not limited to, the following:

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Updates to controlling person(s)

Change of address (registered and/or business address)

Change in business activities

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Change in circumstances

Reason to know that the self-certification or other documentation associated with an account is incorrect or unreliable

Reporting FI must re-determine the status of the account by obtaining either:

- (i) a self-certification, or
- (ii) a reasonable explanation and documentation supporting the reasonableness of the original self-certification or documentation.

# Change in Circumstances

Individual	Entity
A Reporting FI may choose to treat a person as having the same status that it had prior to the change in circumstances until the <b>earlier of 90 calendar days from the date that the self-certification became invalid due to the change in circumstances, the date that the validity of the self-certification is confirmed, or the date that a new self-certification is obtained.</b>	The Reporting FI must re-determine the status of the account by <b>the later of the last day of the relevant calendar year, or 90 calendar days following the notice or discovery of the change in circumstances.</b>

# FATCA

# Due Diligence Requirements – FATCA

## Due Diligence

1

### Document Account Holder

- US Person:
  - Self-Cert
  - Form W-9
- Non-US Person:
  - Self-Cert
  - Form W-8.
- Note: Self-Cert forms are forms which collect jurisdiction of tax residency (JoTR), FATCA classifications and TIN numbers

2

### Validate Documentation

- Confirm documentation is complete and validate the information against all other account documentation to confirm the tax claim is consistent.
- Review for US indicia. If indicia are found, request for specific documentation to explain or “cure” the indicia.

3

### Manage Change in Circumstances

- Self-certification forms become invalid on the date the withholding agent is informed of the Change in Circumstances (CIC).
- A CIC is any change that would affect the claimed FATCA status of an Account Holder.

4

### Apply Presumption Rules in Absence of Documentation

- In the absence of valid documentation, presumptions are mandatory.

# When is an Individual a US Person?

## US Person

- US citizen (by birth or naturalization);
- A dual citizen where one country of citizenship is the US;
- Non-US citizen that is a US permanent resident in (i.e. green card holder);
- Non-US citizen with substantial presence in US (greater than 183 days)
  - 31 days during the calendar year, AND
  - 183 days during 3-year period including current year and 2 prior years
    - All of the days present during current calendar year.
    - 1/3 days present during 1 year before current year.
    - 1/6 days present during 2 years before current year.

## Non-US persons

- Any person who is not a US person

# When is an Entity a US person?

- An entity is a US person when it is:
  - A US organized corporation;
  - A US organized partnership;
  - Any estate, other than a foreign estate;
  - Any trust if:
    - A court within the US is able to exercise primary supervision over the administration of the trust, and
    - One or more US persons have the authority to control all substantial decisions of the trust.
- Foreign entity – Any entity which is not a US person

# What is a Specified US person?

Specified US person means a US person other than:

- A corporation the stock of which is regularly traded on one or more established securities markets;
- Any corporation that is a member of the same expanded affiliated group, defined in section 1471(e)(2) of the Internal Revenue Code (IRC), as a corporation described in clause (i);
- The United States or any wholly owned agency or instrumentality thereof;
- Any State of the United States, any US Territory, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;
- Any organization exempt from taxation under section 501(a) of the IRC or an individual retirement plan as defined in section 7701(a)(37) of the IRC.
- Any bank as defined in section 581 of the IRC
- Any real estate investment trust as defined in section 856 of the IRC
- Any regulated investment company as defined in section 851 of the IRC or any entity registered with the US Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-64);
- Any common trust fund as defined in section 584(a) of the IRC;
- Any trust that is exempt from tax under section 664(c) of the IRC or that is described in section 4947(a)(1) of the IRC;
- A dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws applicable in the US Territory or State of the US;
- A broker as defined in section 6045(c) of the IRC; or
- Any tax exempt trust under a plan that is described in section 403(b) or section 457(g) of the IRC



# US Indicia and Cures

- During the validation process, documentation must be reviewed for indicia, or indicators, of US status.
- If one or more indicia of US ownership are found, the withholding agent must request specific documentation from the account holder to explain or “cure” the indicia.
- There can also be conflict with treaty benefit claims of clients, known as “treaty benefit indicia”.
- All US indicia present in account documentation must be “cured.”
  - The withholding agent must obtain documentation required to cure the US indicia and if indicia can be cured using the same documentation (e.g., Certificate of Incorporation), the withholding agent does not need to obtain the documentation twice.
- Validation process includes reviews for US indicia – included on the form itself or any account information or AML/KYC data associated with the account.
  - While the validation of tax documentation must occur as part of the account onboarding process, the withholding agent will have a 30-day window to validate documentation against AML/KYC information and cure any issues identified in AML/KYC information.

# US Indicia and Cures - Individuals

Indicia of U.S. Status	Cures for Validating Withholding Certificate (onshore and offshore obligation)	Cures for Validating Documentary Evidence (offshore obligations only)
Identification of an account holder as a USP.	Form W-9 and valid effective waiver (if necessary).	
U.S. place of birth	<ul style="list-style-type: none"><li>Valid government-issued ID evidencing citizenship in a non-U.S. country; <b>and</b></li><li>Certificate of Loss of Nationality of the U.S. or a reasonable written explanation stating why the individual did not obtain U.S. citizenship at birth or explaining the individual's renunciation of U.S. citizenship</li></ul>	<ul style="list-style-type: none"><li>Valid Form W-8BEN, valid government-issued ID evidencing citizenship in a non-U.S. country, and a reasonable written explanation stating why the individual did not obtain U.S. citizenship at birth or explaining the individual's renunciation of U.S. citizenship; <b>or</b></li><li>Valid government-issued ID evidencing citizenship in a non-U.S. country and a Certificate of Loss of nationality of the U.S.</li></ul>
Classification as a USP in customer files	<ul style="list-style-type: none"><li>Documentary evidence establishing foreign status that does not contain a U.S. address and, if onshore, a reasonable written explanation of foreign status; <b>or</b></li><li>Valid government-issued ID evidencing citizenship in a non-U.S. country.</li></ul>	<ul style="list-style-type: none"><li>Form W-8BEN that contains a permanent residence address outside the U.S. an also a mailing address outside the U.S. or a reasonable written explanation of foreign status; <b>or</b></li><li>A reasonable written explanation of foreign status and additional documentary evidence establishing foreign status that does not contain a U.S. address</li></ul>
Current U.S. residence address or mailing address (including a U.S. post office box)	<ul style="list-style-type: none"><li>Documentary evidence establishing foreign status that does not contain a U.S. address and, if onshore, a reasonable written explanation of foreign status</li></ul>	
Current U.S. telephone number(s) and no telephone number outside the U.S.		
For offshore obligations only, standing instructions to transfer funds to an account maintained in the U.S.	<ul style="list-style-type: none"><li>Reasonable written explanation that supports foreign status; <b>or</b></li><li>Documentary evidence establishing foreign status</li></ul>	<ul style="list-style-type: none"><li>Reasonable written explanation that supports foreign status; <b>or</b></li><li>Valid Form W-8BEN.</li></ul>

# US Indicia and Cures - Entities

Indicia of U.S. Status	Cures for Validating Withholding Certificate (onshore and offshore obligation)	Cures for Validating Documentary Evidence (offshore obligations only)
U.S. country of incorporation / formation	Form W-9 and valid effective waiver (if necessary).	
Classification as a USP in customer files	<ul style="list-style-type: none"> <li>Documentary evidence establishing foreign status that substantiates the entity is actually organized under the laws of a foreign country</li> </ul>	<ul style="list-style-type: none"> <li>Form W-8 that contains a permanent residence address outside the U.S. and also a mailing address outside the U.S. or additional documentary evidence establishing foreign status; <b>or</b></li> <li>Documentary evidence establishing foreign status that substantiates the entity is actually organized under the laws of a foreign country.</li> </ul>
Current U.S. residence address or mailing address (including a U.S. post office box)		
Current U.S. telephone number(s) and no telephone number outside the U.S.		
For offshore obligations only, standing instructions to transfer funds to an account maintained in the U.S.	<ul style="list-style-type: none"> <li>Reasonable written explanation that supports foreign status; <b>or</b></li> <li>Documentary evidence establishing foreign status</li> </ul>	<ul style="list-style-type: none"> <li>Reasonable written explanation that supports foreign status; <b>or</b></li> <li>Valid Form W-8.</li> </ul>

Q: Form W-8BEN/BENE collected from account holders must be submitted to the IRS by which of the following?

- (1) At the end of each year
- (2) Each quarter
- (3) Every three years
- (4) There is no regular submission requirement of collected Forms W-8BEN/BENE

A: Form W-8BEN/BENE collected from account holders must be submitted to the IRS by which of the following?

- (1)
- (2)
- (3)
- (4) There is no regular submission requirement of collected Forms W-8BEN/BENE

Q: The most commonly used Forms W-8 used for collecting Non-US person payee (account holder) data include which of the following?

- (1) W-8BEN, W-8BEN-E
- (2) W-8BEN-E, W-8IMY
- (3) W-8IMY, W-8BEN
- (4) W-9, W8BEN

A: The most commonly used Forms W-8 used for collecting Non-US person payee (account holder) data include which of the following?

- (1) W-8BEN, W-8BEN-E
- (2)
- (3)
- (4)

# Change in Circumstances

Examples of a CIC include, but are not limited to:

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Change in address/phone number from non-US to US

Expiration of documentation used to support a FATCA status

Addition of any information that conflicts with current FATCA status

Addition of evidence of US status (i.e., US indicia) for non-US account holders only

Changes in substantial US owners of passive NFFE

Any change that provides a withholding agent a “reason to know” the FATCA status is not valid

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- Reporting FI’s Responsibilities:
  - Can rely on tax certification without inquiry into CIC unless the Reporting FI knows or has reason to know circumstances have changed. Documentation becomes invalid as of date notified of change.
  - **New Individual Account:** Reporting FI cannot rely on the original self-certification and must obtain a valid self-certification that establishes whether the Account Holder is a US citizen or resident for US tax purposes. If the Reporting FI is unable to obtain a valid self-certification, the Reporting FI must treat the account as a US Reportable Account.
  - **Entity Account:** Reporting FI must re-determine the status of the account by re-applying the new account/pre-existing (whichever applicable) account due diligence procedures
- Generally, a 30-day grace period can be provided for FATCA purposes.



# Apply Presumption Rules

In the absence of valid documentation, presumptions are mandatory and apply regardless of actual knowledge, unless reliance on actual knowledge would result in a greater amount of withholding.

Presumption Rules for Individuals	Presumption Rules for Entities
<p>If the name of the payee is the name of an individual, treat as an individual.</p> <p>USFIs will always treat undocumented individuals as US Persons:</p> <ul style="list-style-type: none"><li>• 24% backup withholding applies; and</li><li>• Form 1099 reporting.</li></ul> <p>PFFIs will always treat undocumented individuals as recalcitrant account holders:</p> <ul style="list-style-type: none"><li>• 30% FATCA withholding as applicable; and</li><li>• Form 8966 reporting.</li></ul> <p>Model 2 IGA FFI will always treat undocumented individuals as US reportable account holders:</p> <ul style="list-style-type: none"><li>• No FATCA withholding is applicable (however, custodian will apply on US source income);</li><li>• Model 2 IGA reporting on a fully disclosed basis; and</li><li>• Maximum QI withholding on US source FDAP income.</li></ul>	<p>Under FATCA, both USFIs and PFFIs will generally presume undocumented entities to be NPFFIs:</p> <ul style="list-style-type: none"><li>• 30% FATCA withholding.</li><li>• Form 1042-S reporting for FATCA reportable payments.</li><li>• Where a Model 2 IGA FFI does not have documentation to classify a FFI from another IGA jurisdiction, it should presume it to be a Passive NFFE with unknown US persons and therefore, it should be included in FATCA IGA reporting and also have maximum QI withholding applied.</li></ul>

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Reporting

# FATCA/CRS Reportable Information for Hong Kong FI/FFI

FATCA		CRS	
Reporting Deadline: March 31		Reporting Deadline: May 31	
Reportable Person: Specified US Person		Reportable Person(s): Refer to Hong Kong Inland Revenue Ordinance	
Reportable Information: Account number, account balance or value, gross proceeds		Reportable Information: Account number, account balance or value, gross payment	
Individual	Entity	Individual	Entity
Name	Name	Name	Name
Address	Address	Address	Address
Tax Identification Number (e.g., SSN)	Tax Identification Number (e.g., EIN)	Jurisdiction(s) of residence	Jurisdiction(s) of residence
		Tax Identification Number(s) or TIN(s)	Tax Identification Number(s) or TIN(s)
	<b>Controlling Person</b>	Date of Birth (DOB)	
	Name		<b>Controlling Person</b>
	Address		Name
	Tax Identification Number		Address
			Jurisdiction(s) of residence
			Tax Identification Number(s) or TIN(s)
			Date of Birth (DOB)

# 4

## Implications of Non-Compliance

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# CRS

## Compliance

- Guidance for Financial Institutions
- Commentaries on the CRS
- CRS-related FAQ
- CRS Implementation Handbook

## Supervisory Activities

- Desk-based review
- On-site review
- Thematic review

## Record Keeping

- Self-cert and documentary evidence
- Process and procedures
- 6 years beginning on the date on which the return is furnished

## Criminal Sanctions

- Examples
  - Non-compliance
  - Submission of incorrect return
  - Defrauding with intent
  - Self-Certification Form - Account holder knowingly makes a statement that is misleading, false or incorrect

# FATCA

## Minor and administrative errors

- The IRS will notify the Reporting FIs when they believe that the FATCA returns submitted by Reporting FIs contain administrative errors or other minor errors
- Examples of such errors:
  - Data fields missing or incomplete
  - Data that has been corrupted
  - Use of an incompatible format

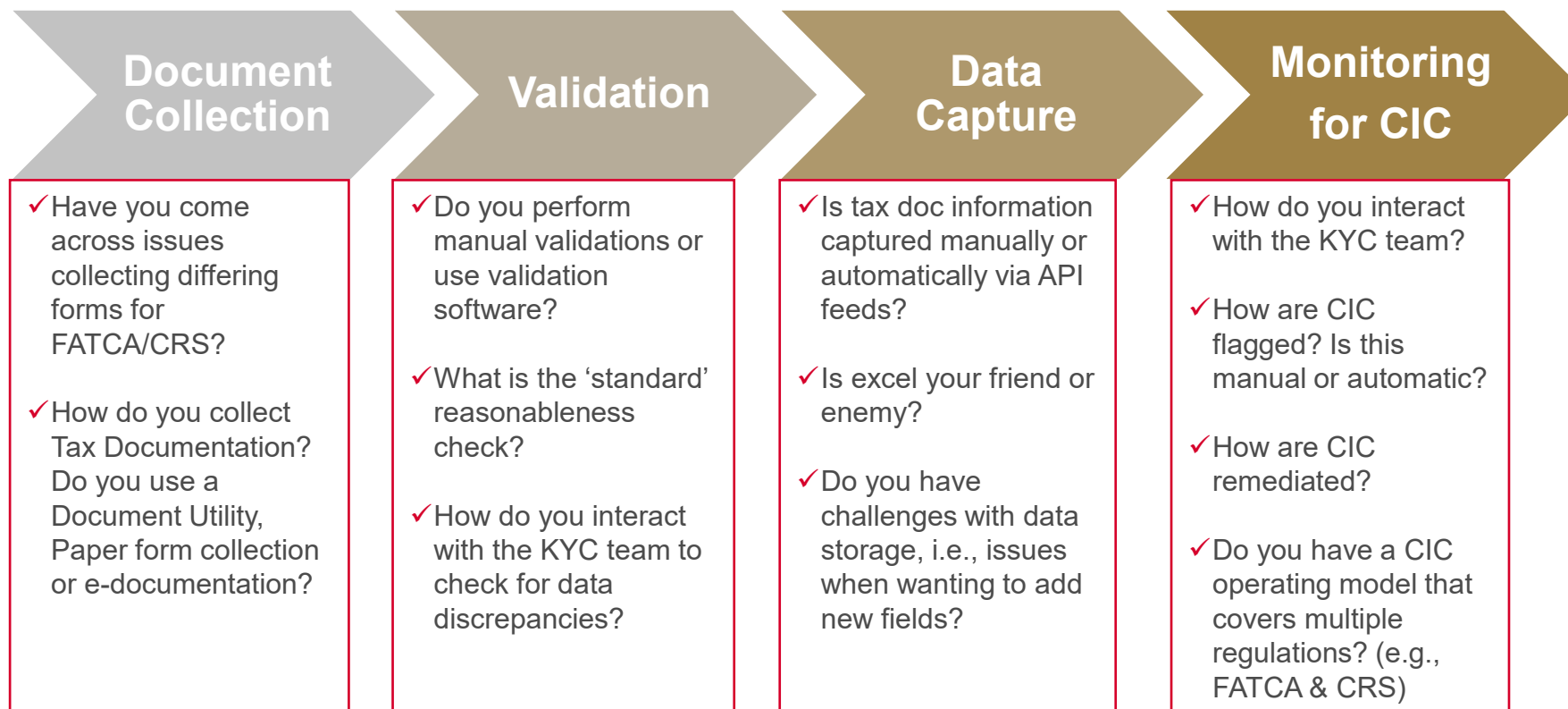
## Significant non-compliance

- Examples of significant non-compliance:
  - Repeated failure to file a return
  - On-going or repeated failure to supply accurate information or establish appropriate governance or due diligence processes
  - Intentional provision of substantially incorrect information
  - Deliberate or negligent omission of required information
  - Actively assisting clients in avoiding reporting obligations
- If the non-compliance remains unresolved within a period of 18 months after notification is provided, the Reporting FI will be treated as a Non-participating Financial Institution (NPFFI) and may be subject to 30% withholding.

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Challenges/Operational Gaps

# Due Diligence: Approaches and Challenges





# Case Studies - CRS

## Hong Kong Inland Revenue Department (HKIRD)

Selected HKFIs are required to provide the following information to the HKIRD with respect to CRS:

- CRS procedures
  - Due diligence
  - Officer responsible for carrying out due diligence and reporting obligations
  - Discretionary beneficiary of a trust
- Tax reporting procedures
  - Oversight and governance – 3<sup>rd</sup> party service provider
- Internal control and periodic review
- Reportable accounts with no payment

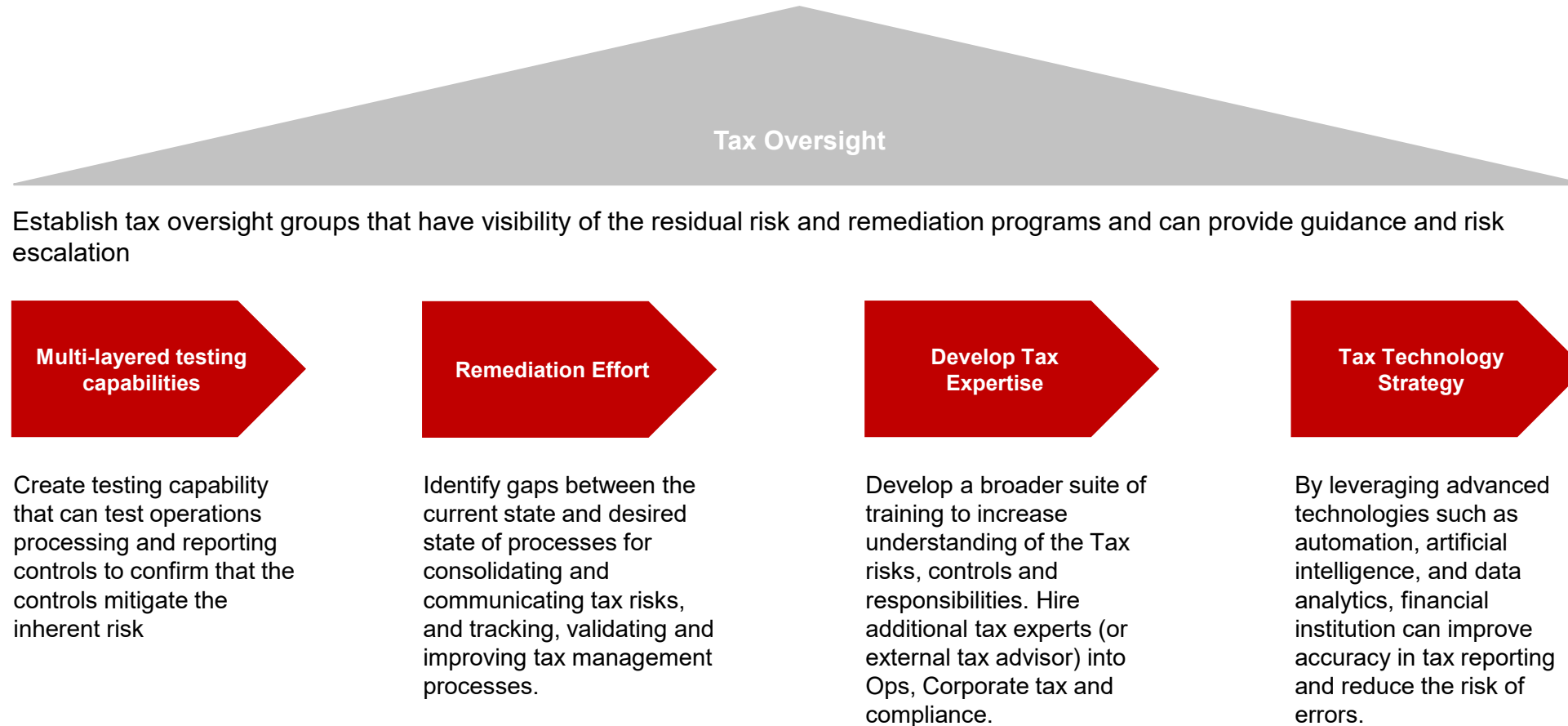
## Inland Revenue Authority of Singapore (IRAS)

For purposes of risk assessment, IRAS may review past trends of certain CRS data that Reporting SGFIs had reported.

List of risk factors (non-exhaustive):

- Business profile and activities
  - Industry and complexity of business
  - Size of business
  - Client profile
  - Resources allocated for CRS compliance
- Track record in fulfilling FATCA and CRS obligations
  - Timeliness of reporting
  - Completeness and quality of reporting
- Track record in other areas of regulatory compliance
  - Compliance with AML/KYC Procedures
  - Compliance with tax reporting
- Feedback received from Singapore's CRS partners
  - Data quality and completeness
  - Timeliness of data verification and correction

# Minimize Operational Tax Risk



# Contacts



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