Overview of the Cyber Legal and Regulatory Maze

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Series Overview & Objectives

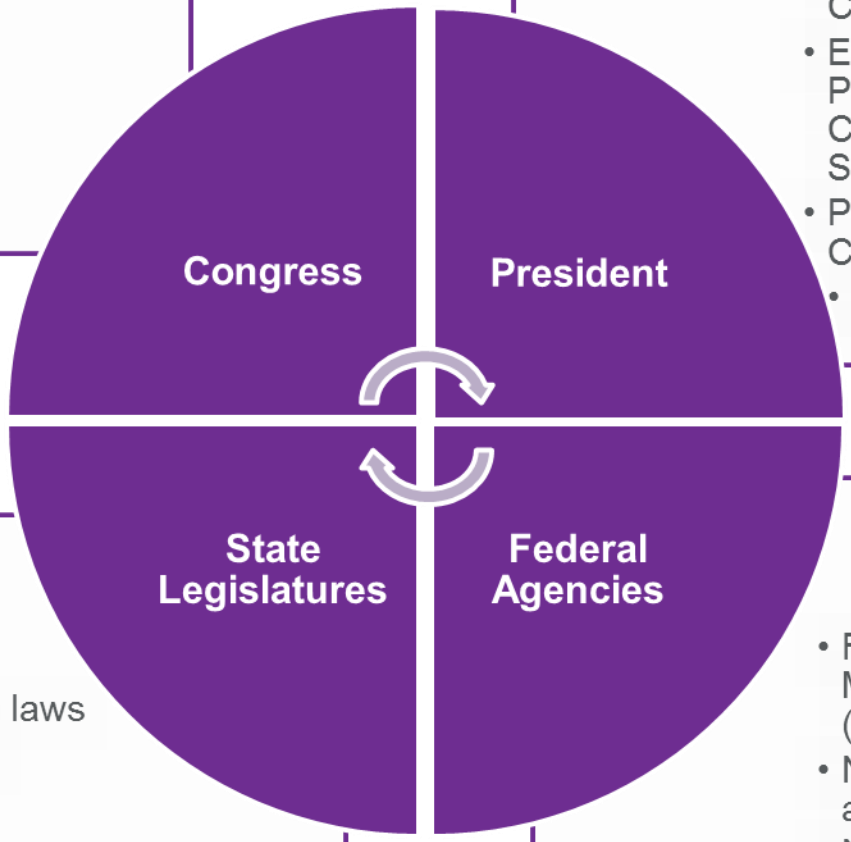
- Summarize the broad range of sources of cybersecurity requirements
  - Begin with a high-level overview
  - Subsequent sessions probe specific requirements in greater depth
- Provide practical guidance on how to address these requirements as part of an effective compliance program
- Help craft a high-level outline for such a program:
  - Begin to address the applicability of those requirements to your organization
  - Be able to conduct a basic, baseline assessment of organization's compliance
  - Gain basic understanding of how to parlay the results of such a gap analysis into an effective compliance program

Why is Cybersecurity So Important?

- Malicious cyber actors are out there
  - Foreign state-sponsored espionage
  - Cyber criminals
  - “Hacktivists”
  - Internal threats
- Breaches occur frequently
- Serious consequences and legal ramifications
  - Theft of personal/financial data or intellectual property
  - Disruption/denial of services
  - Reporting obligations under state and federal law and potential liability
- All federal contractors now face baseline cybersecurity safeguarding requirements, and that is only going to expand

Key Players Regulating Cybersecurity

- FISMA
- HIPAA
- Privacy Act
- CISA



- Executive Order 13636 – Improving Critical Infrastructure Cybersecurity
- Executive Order 13691 – Promoting Private Sector Cybersecurity Information Sharing
- PPD 41 – U.S. Cyber Incident Coordination
- Commission on Enhancing National Cybersecurity

- 47 breach notification laws
- Possibility of Federal Preemption

- FTC, FCC, DOJ Office of Management and Budget ("OMB")
- National Institute of Standards and Technology ("NIST")
- National Archives and Records Administration ("NARA")
- Contracting agencies

Sources of Cybersecurity Requirements

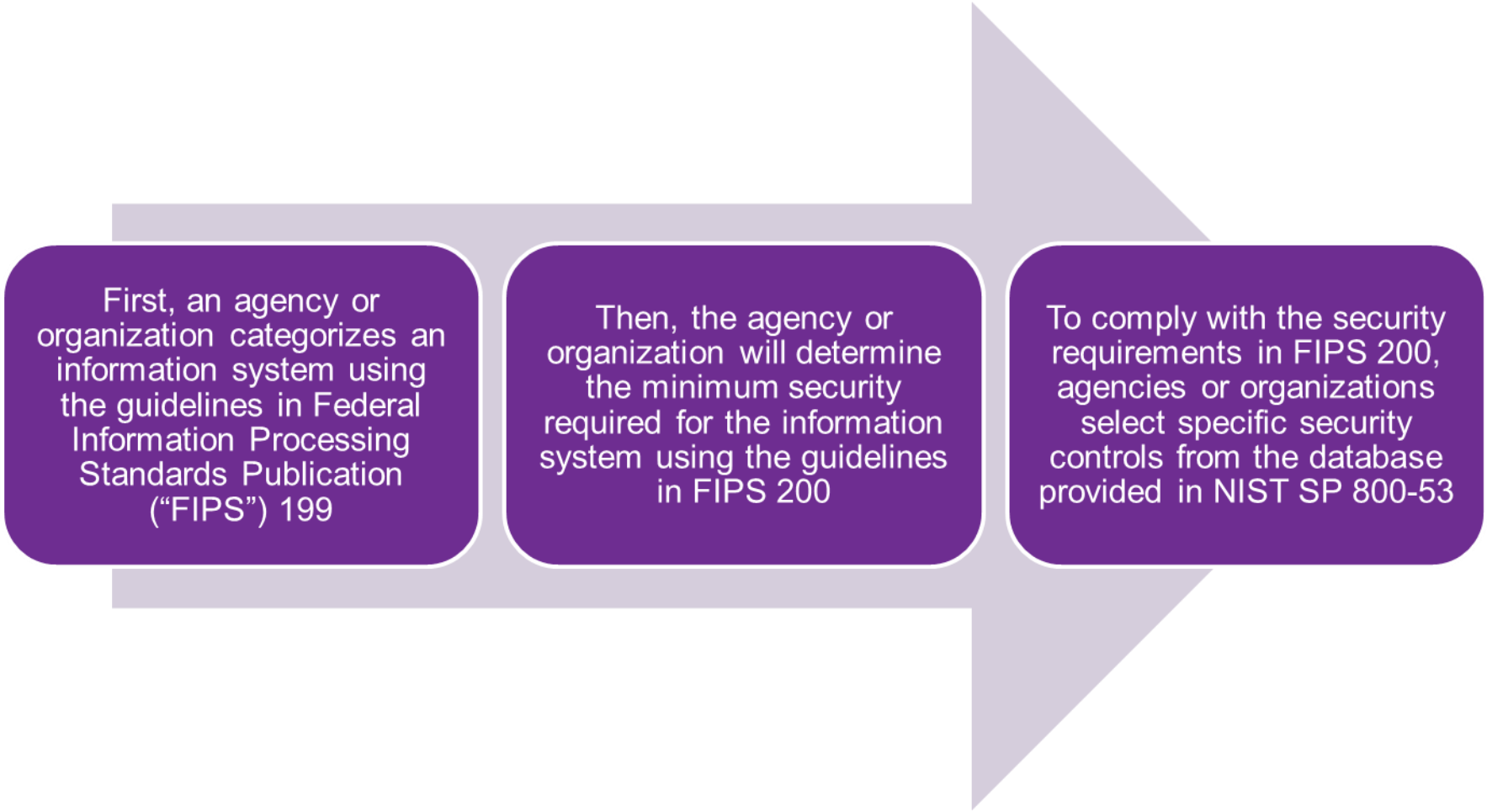
- Statutes (Federal and State)
- Executive Orders
- Regulations
- Government-wide policies
- Contract clauses
- Industry Standards & best practices
- Company policies & procedures
- International

Federal Statutes: Overview of Federal Information Systems

- More than 50 different statutes addressing cybersecurity in some way
  - HIPAA (42 U.S.C. § 1320d-2(d)) (healthcare data)
  - Privacy Act (5 U.S.C. § 552a) (federal systems of records)

- Federal Information Security Management Act of 2002
  - Codified at 44 U.S.C. § 3551-58
  - Primary cybersecurity legal authority applying to the federal government
  - Requires agencies to develop information security programs implementing NIST and OMB standards

Federal Statutes: FISMA Compliance Process



FISMA Requirements for Contractors

- Contractual requirements
- Implement controls from NIST SP 800-53
  - 17 control families
- Risk Management Framework - NIST SP 800-39
  - Categorize → Select Security Controls → Implement Security Controls → Assess → Authorize → Monitor
- Authorization to Operate ("ATO") Package

Regulations: FISMA Requirements for Contractors (*cont'd*)

Federal-wide Regulatory Requirements

- FAR § 7.103(w) - Requires agency heads to ensure compliance with FISMA and related guidance when acquiring information technology
- FAR § 39.101 – Requires agencies to follow OMB Circular A-130 and NIST publications
- OMB Circular A-130 – Issued in 1996 and establishes very general guidelines

Agency-Specific Regulatory Requirements

- GSAR § 552.239-70 and -71 (GSA)
- HHSAR 352.239-72 (HHS)
- DOSAR § 652.239-70 and -71 (State Department)
- NFS § 1852.204-76 (NASA)
- HUD, Nuclear Regulatory Commission, Dep't of Transportation, and VA also have regulations
- Generally require FISMA authorization to operate process prior to contract performance

Federal Statutes: Cybersecurity Information Sharing Act

- CISA was enacted at the end of 2015 and clarifies certain uncertainties regarding the propriety of obtaining and sharing threat information between private entities and with the federal government.
- Establishes a process lead by the Department of Homeland Security for sharing and receiving cybersecurity threat information by the federal government, including real-time-sharing of cyber threat indicators and sharing of classified threat intelligence information to properly cleared individuals
- Affords specific liability protection for monitoring networks for cybersecurity information and sharing or receiving threat information in accordance with the Act.
- Required DOJ and DHS to issue guidance which was finalized in June 2016.

Federal Statutes: FTC Enforcement & FCC Fines

- FTC has long charged companies with unfair trade practices for failure to protect customers from a data security breach
  - *FTC v. Wyndham Worldwide Corp. et al*
  - Section 5 prohibition against "unfair or deceptive practices" may apply to data breach scenarios

- FCC enforcement actions for negligent cybersecurity practices
  - YourTel America and TerraCom Inc. fined $10 million (Oct. 2014)
  - AT&T reached $25 million settlement (Apr. 2015)
  - FCC Chairman Wheeler – the "Commission will exercise its full authority against companies that fail to safeguard the personal information of their customers."

Executive Orders: Protecting Controlled Unclassified Information

- National Archives and Records Administration (“NARA”)
  - Executive agency in charge of CUI (E.O. 13556)
- Final Federal CUI Regulation issued Sept. 14, 2016
  - 81 Fed. Reg. 63324
  - Government-wide policy for safeguarding CUI
  - Establishes CUI Program and creates CUI Registry
  - Final rule strives to clarify and obtain uniform treatment of CUI across the federal government
  - Pending FAR case will extend directive to federal contractors
- NIST SP 800-171
  - Issued in June 2015
  - Guidance on protecting CUI residing in non-federal systems

Executive Orders: “Controlled Unclassified Information”

- “Information that law, regulation or governmentwide policy requires to have safeguarding or disseminating controls, excluding classified information”
- CUI Registry – 23 categories and 82 subcategories, including:
  - Agriculture
  - Controlled Technical Information
  - Critical Infrastructure
  - Emergency Management
  - Export Control
  - Financial
  - Immigration
  - Information Systems Vulnerability
  - Intelligence
  - Law Enforcement
  - Legal
  - Nuclear
  - Patent
  - Privacy
  - Proprietary Business Information
  - SAFETY Act Information

Executive Orders: Compliance with NIST SP 800-171

- NIST SP 800-171 built on the assumption that the FIPS 199 *confidentiality* impact value for CUI is no less than *moderate*
- Two-tiered security requirements structure
  - Basic requirements – FIPS 200
  - Derived requirements – NIST SP 800-53 “moderate” baseline
- Tailors these security requirements to eliminate controls that are:
  - Uniquely federal (i.e., primarily the responsibility of the government)
  - Not directly related to protecting the confidentiality of CUI
  - Expected to be routinely satisfied by nonfederal organizations without specification
- This leaves 14 security control families and related security controls specified in NIST SP 800-171

Implementation of NIST 800-171

- Final NARA rule confirms that a future FAR clause will extend the federal CUI regulation to contractors to require implementation of at least some subset of the requirements of NIST SP 800-171 to federal contractors

- Until single FAR clause is established, federal agencies are encouraged to reference the CUI safeguarding requirements in NIST SP 800-171 in contractual requirements

- Some agencies have already begun to adopt new contract clauses implementing the controls in NIST SP 800-171 (DOD, FAR Basic Safeguarding of Covered Contractor Information Systems)

Executive Orders: NIST Cybersecurity Framework

- Voluntary framework based on existing standards, guidelines, and practices for reducing cyber risks to critical infrastructure
- Executive Order 13636 tasked NIST with developing the Framework for Improving Critical Infrastructure Cybersecurity
- Seeks to provide a common language for understanding, managing, and expressing cybersecurity risk both internally and externally
- Framework Core
  - Five Core Functions
  - Twenty-two categories under the five functions
  - Maps categories and subcategories to existing standards,

Executive Orders: Cybersecurity National Action Plan

- Executive Order Issued February 9, 2016
  - Establishes "Commission on Enhancing National Cybersecurity"
  - Creates a new Federal Chief Information Security Officer
  - Launches a National Cybersecurity Awareness Campaign
  - Invests over $19 billion in cybersecurity as part of President's FY2017 proposed budget

- Commission will make recommendations on actions to be taken over the next decade over a range of dimensions, to include bolstering partnerships between public and private sectors.
  - NIST has issued an RFI to assist the CENC on its information gathering.
  - Likely source of eventual further procurement reforms, but these are a long way off

Regulations: Protecting “Federal Contract Information”

- FAR Basic Safeguarding Rule, Effective June 15, 2016 (81 Fed. Reg. 30439)
  - Establishes new FAR Clause, 52.204-21, Basic Safeguarding of Covered Contractor Information Systems (June 2016)
  - Intended to establish a basic level of safeguarding for all federal government contractors
  - Applies to contractor information systems that process, store, or transmit "federal contract information"
    - Non public information "that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government"
    - Intended to be read very broadly
  - Imposes 15 different security controls (though not specifically linked to SP 800-171, taken verbatim from those controls)

Regulations: Protecting "Covered Defense Information"

- DoD issued a final Network Penetration Reporting and Contracting for Cloud Services rule on October 21, 2016
  - August and December 2015 Interim rule significantly amended the structure of DoD cybersecurity requirements for contractors (80 Fed. Reg. 51739) (80 Fed. Reg. 81472)
- Final rule confirms expanded applicability of the rule, clarifies certain other aspects, and raises new questions
- Consistency across defense and civilian agencies
  - Requires implementation of NIST SP 800-171 security controls (or alternate but equally effective controls)
- Imposes continued reporting obligation

Regulations: What is “Covered Defense Information”?

- DFARS Subpart 204.73, as amended by interim rule
  - "Covered defense information” means unclassified controlled technical information or other information (as described in the [CUI Registry] that requires safeguarding or dissemination controls. . ." and is either (1) marked or identified in the contract or (2) collected, developed, received, transmitted, used, or stored by the contractor in support of the performance of the contract.
- Implementation
  - Contractors have until December 31, 2017 to implement required controls
  - Requires report to DOD CIO regarding implementation progress within 30 days of award
  - Contractors may submit requests to vary from SP 800-171 controls before or after award under the final rule

Government Wide Policy: Presidential Policy Directive 41

- U.S. Cyber Incident Coordination Policy issued July 26, 2016 seeks to enhance unity of effort within the Federal Government and strengthen synchronization between public and private sector

- Establishes five guiding principles:
  - Shared Responsibility
  - Risk-Based Response
  - Respecting Affected Entities
  - Unity of Governmental Effort
  - Enabling Restoration and Recovery

Contractual Requirements: FedRAMP

- U.S. Federal Risk and Authorization Management Program (FedRAMP)
- Government-wide program standardizing security assessment, authorization, and continuous monitoring for cloud products and services
- Cloud Service Providers must meet FedRAMP's 3-step authorization process before implementing services for federal agencies.
  - Security Assessment – based on FISMA baselines in NIST SP 800-53
  - Authorization – agency reviews a provider's security authorization package to grant authorization
  - Ongoing Assessment & Authorization – third party assessment organizations complete ongoing assessments to maintain the security authorization

Contractual Requirements: Agency Specific Requirements

- Agency level regulations & requirements lack of uniformity on requirements, specificity, and structure
  - Requirements can be lurking in agency publications incorporated by reference.
  - Merits heightened review of sections H & I.
- Many agencies have separate cybersecurity/information security requirements:
  - DOD: Security & Privacy for Computer Systems; Safeguarding of Controlled Defense Information; Supply Chain Risk; breach notification
  - DHS: Security Requirements for Unclassified Information Technology Resources; internal policies incorporated by reference; NIST controls
  - GSA: CIO IT Security Procedural Guide; IT Audit access
  - HHS: HHSAR Subpart 339.71 related to HHS information systems access; internal policies incorporated by reference; security plans
- Applicability of Internal Agency Guidance not always clear

State Statutes

- 47 states have data breach notification laws
- California Notice of Security Breach Act
  - Recently expanded covered “personal information” to include a username or email address, in combination with a password or security question and answer
- New York passed four cybersecurity bills in February 2015
  - Provide safe harbor for companies adopting heightened data security standards
- Potential preemption issue if federal data breach notification legislation is passed

Practical Tips for Compliance: Step 1 – Read Your Contracts

Understand contractual obligations

- Failure to comply may lead to termination or even False Claims Act liability
- Ensure all personnel are aware of requirements and current capabilities, sales and contracts personnel included

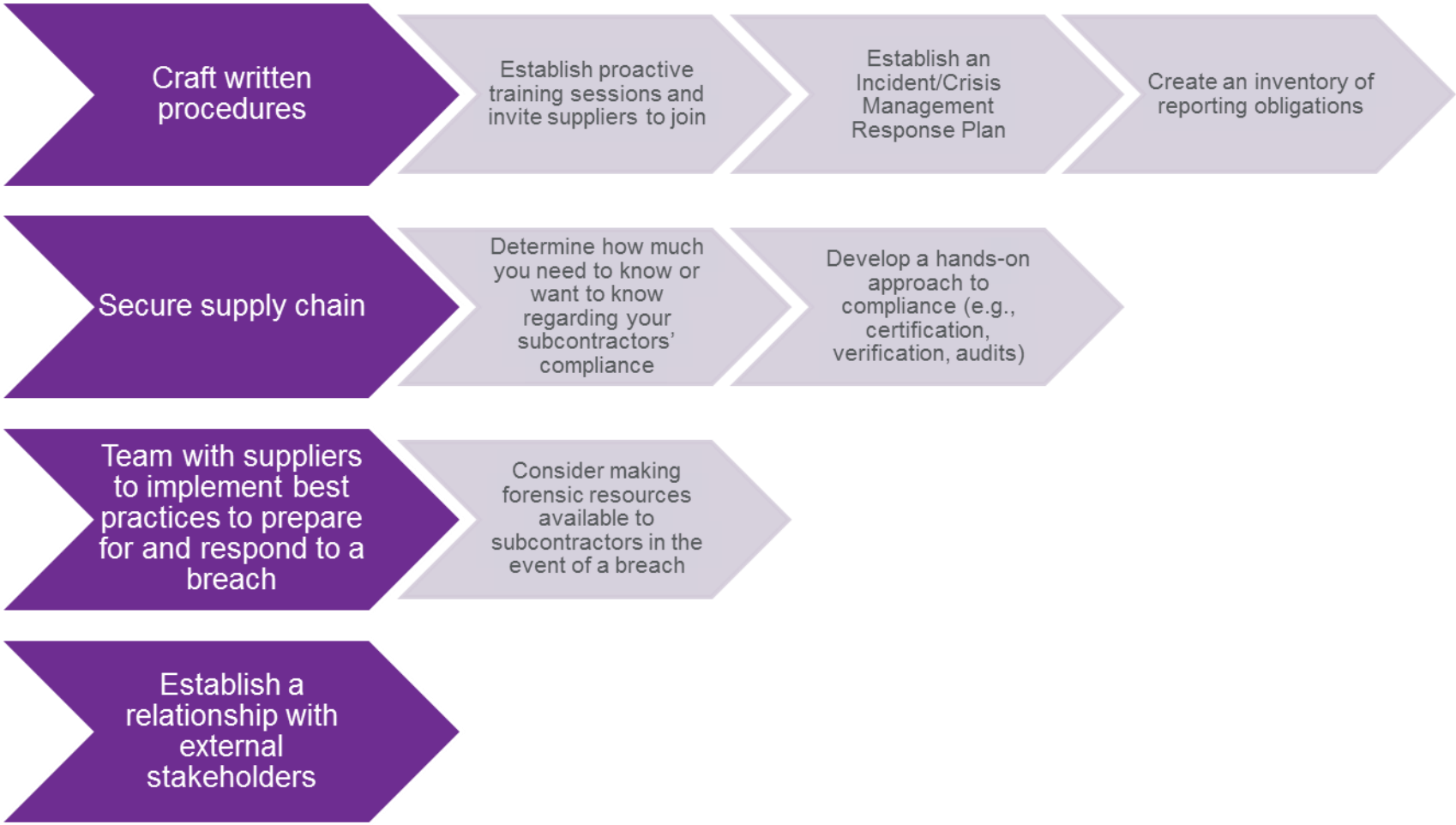
Assess flow-down requirements

- Require subcontractors to report any incident that affects data related to performance
- Some agencies, such as DoD, may require subcontractors to report incidents directly to the agency

Practical Tips for Compliance: Step 2 – Perform Gap Analysis

- How are you meeting current obligations?
- Have you identified categories of protected information?
- How are you managing your supply chain?
- Have you enacted any additional protections?
- Have you identified and assigned responsibilities in the event of a cyber incident?

Practical Tips for Compliance: Step 3 – Craft Policies and Procedures to Close Gaps



Questions?

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