DENTONS

Overview of the Cyber Legal and Regulatory Maze

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Series Overview & Objectives

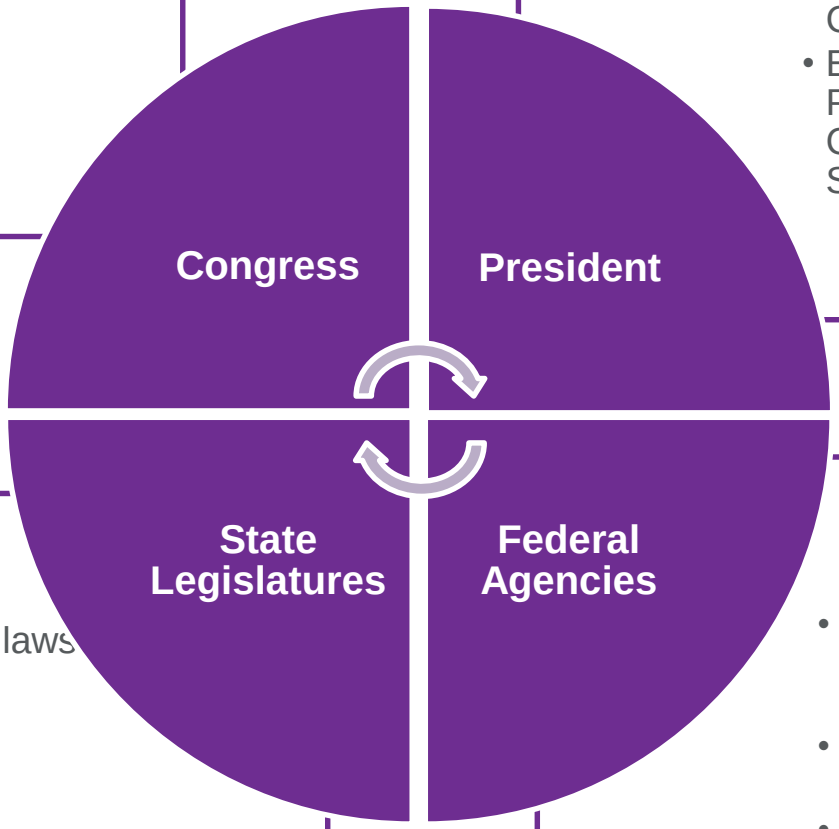
- Summarize the broad range of sources of cybersecurity requirements
  - Begin with a high-level overview
  - Subsequent sessions probe specific requirements in greater depth
- Provide practical guidance on how to address these requirements as part of an effective compliance program
- Help craft a high-level 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
  - Federal agencies reported over 67,000 incidents to the U.S. Computer Emergency Readiness Team in 2014 (up from 5,500 in 2006)
  - Defense contractors lag behind retail companies and financial institutions in cybersecurity (study by Nextgov.com using data from BitSight Technologies)
- 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

Key Players Regulating Cybersecurity

- FISMA
- HIPAA
- Privacy Act
- CISA (under Consideration)



- Executive Order 13636 – Improving Critical Infrastructure Cybersecurity
- Executive Order 13691 – Promoting Private Sector Cybersecurity Information Sharing

- 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

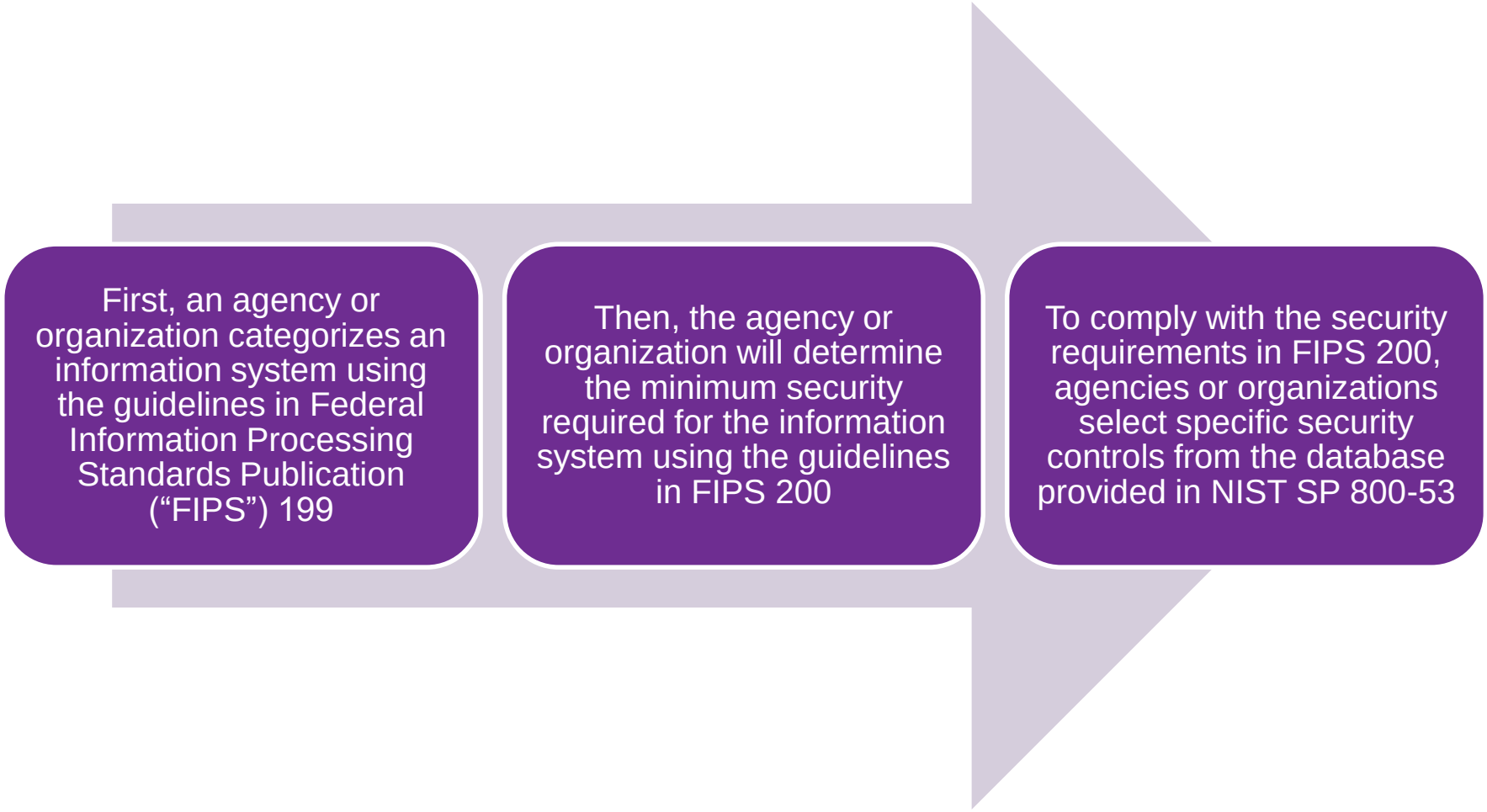
- Statutes (Federal and State)
- Executive Orders
- Regulations
- Government-wide policies
- Contract clauses
- Company policies & procedures
- Industry Standards & best practices
- State and local government
- International government

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



FIPS 199 – Security Categorization

- Categorizes information and information systems based on three security objectives:
  - **Confidentiality** – protecting against the unauthorized disclosure of information
  - **Integrity** – protecting against the unauthorized modification or destruction of information
  - **Availability** – protecting against the disruption of access to or use of information or an information system

- For each objective, the agency determines if the potential impact of a breach would be **Low**, **Moderate**, or **High**
  - $\mathbf{SC}_{\text{information system}}$ = {(**confidentiality**, *impact*), (**integrity**, *impact*), (**availability**, *impact*)}

- "High water mark" determines the overall security categorization

FIPS 200 – Minimum Security Requirements

- Specifies minimum security requirements in seventeen security related areas
  - Ex., Access Control, Incident Response, Personnel Security, Risk Assessment
- "Risk-based" process for selecting security controls necessary
  - "High water mark" categorization from FIPS 199 determines overall impact level of a system
  - Requires agencies to employ the appropriately tailored security controls from the **low**, **moderate**, and **high baselines** in NIST SP 800-53
  - Agencies may tailor these baselines as provided in NIST SP 800-53
    - "To ensure a cost-effective, risk-based approach to achieving adequate security across the organization, security control baseline tailoring activities must be coordinated with and approved by appropriate organizational officials."

NIST SP 800-53 – Security and Privacy Controls

- Provides specific controls in each of the 17 control families, as well an additional Program Management control family
- Some controls are also provided with “enhancements”
- NIST SP 800-53 identifies which controls and enhancements are required for each baseline – low, moderate, or high

FISMA Requirements for Contractors

- Contractual requirements
- Risk Management Framework - NIST SP 800-39
  - Categorize → Select Security Controls → Implement Security Controls → Assess → Authorize → Monitor
- Authorization to Operate ("ATO") Package
  - Categorization Documentation
  - System Security Plan
  - System Configuration Baseline
  - System Test and Evaluation
  - Plan of Action and Milestones
  - Detailed Risk Assessment

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: Federal Trade Commission Enforcement

- FTC has long charged companies with unfair trade practices for failure to protect customers from a data security breach
- FTC's authority to regulate corporate cybersecurity was recently upheld by the 3rd Circuit (*FTC v. Wyndham Worldwide Corp. et al*)
- Section 5 prohibition against "unfair or deceptive practices" may apply to data breach scenarios
  - If a business has made false or misleading claims about its data security
  - If a business has failed to establish reasonable security measures
- Other Statutes
  - Safeguards Rule
  - Fair Credit Reporting Act
  - Children's Online Privacy Protection Act

Federal Statutes: Federal Communications Commission Fines

- FCC issued its first fines for negligent cybersecurity practices in October 2014, fining YourTel America and TerraCom Inc. $10 million after a data breach putting up to 300,000 customers at risk
- In April 2015, the FCC reached a $25 million settlement with AT&T for a breach involving disclosure of almost 280,000 U.S. customers' names, full or partial SSNs, and protected account-related data
- 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)
- Federal CUI Regulation proposed by NARA on May 8, 2015
  - 80 Fed. Reg. 26501
  - Government-wide policy for safeguarding CUI
  - Establishes CUI Program and creates CUI Registry
- 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
  - 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

- In 2016, NARA plans to sponsor a single FAR clause that will apply the federal CUI regulation proposed in May 2015 and 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

Regulations: Protecting "Covered Defense Information"

- DoD announced an interim rule on August 26, 2015 significantly amending the structure of DoD cybersecurity requirements for contractors (80 Fed. Reg. 51739)
- Rule effective immediately, comments were due by October 26
- Rule expands applicability
  - From "unclassified controlled technical information" to "covered defense information"
  - Now applies to commercial item acquisitions and small business contractors
- Consistency across defense and civilian agencies
  - Amends DFARS § 252.204-7012 to replace the clause's previous table of security controls with NIST SP 800-171 controls
- Imposes continued reporting obligation
- Formalizes cloud computing guidance

Regulations: What is "Covered Defense Information"?

- DFARS Subpart 204.73, as amended by interim rule
  - Unclassified information
  - Provided by DoD or collected, developed, received, transmitted, used, or stored by the contractor in support of the performance of the contract
  - Falls in any of the following categories:
    - Controlled technical information
    - Critical information
    - Export Control
    - Any other information, marked or otherwise identified in the contract, that requires safeguarding or dissemination controls

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
  - First version released on February 12, 2014
- Seeks to provide a common language for understanding, managing, and expressing cybersecurity risk both internally and externally
- Framework Core
  - Five Core Functions – Identify, Protect, Detect, Respond, Recover
  - Twenty-two categories under the five functions – ex. Asset Management, Risk Management, Access Control, Mitigation
  - Maps categories and subcategories to existing standards, such as NIST SP 800-53, COBIT 5, CCS CSC, ISA 62443-2-1:2009, ISA 62443-3-3:2013, and ISO/IEC 27001:2013

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
- Stakeholders: GAS, NIST, DHS, DoD, NSA, OMB, Federal CIO Council, and private industry
- Cloud Service Providers must meet all FedRAMP requirements before implementing services for federal agencies
- Three-Step Authorization Process:
  - 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

Industry Best Practices: DOJ Best Practices

- Department of Justice on April 29, 2015 released its “Best Practices for Victim Response and Reporting of Cyber Incidents”
- Baseline cybersecurity expectations for all organizations connected to the internet
- Separated into guidance for before, during, and after a cyber incident
  - **Before** – identify “crown jewels”; have action plan and appropriate technology in place; ensure legal counsel is familiar with cyber incident management policies
  - **During** – make initial assessment; implement measures to minimize continuing damage; record and collect information; notify law enforcement, DHS, appropriate in-house personnel, and potential victims; **DO NOT** communicate on compromised system or hack into or damage another network
  - **After** – continue monitoring network for anomalous activity; conduct a post-incident review

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

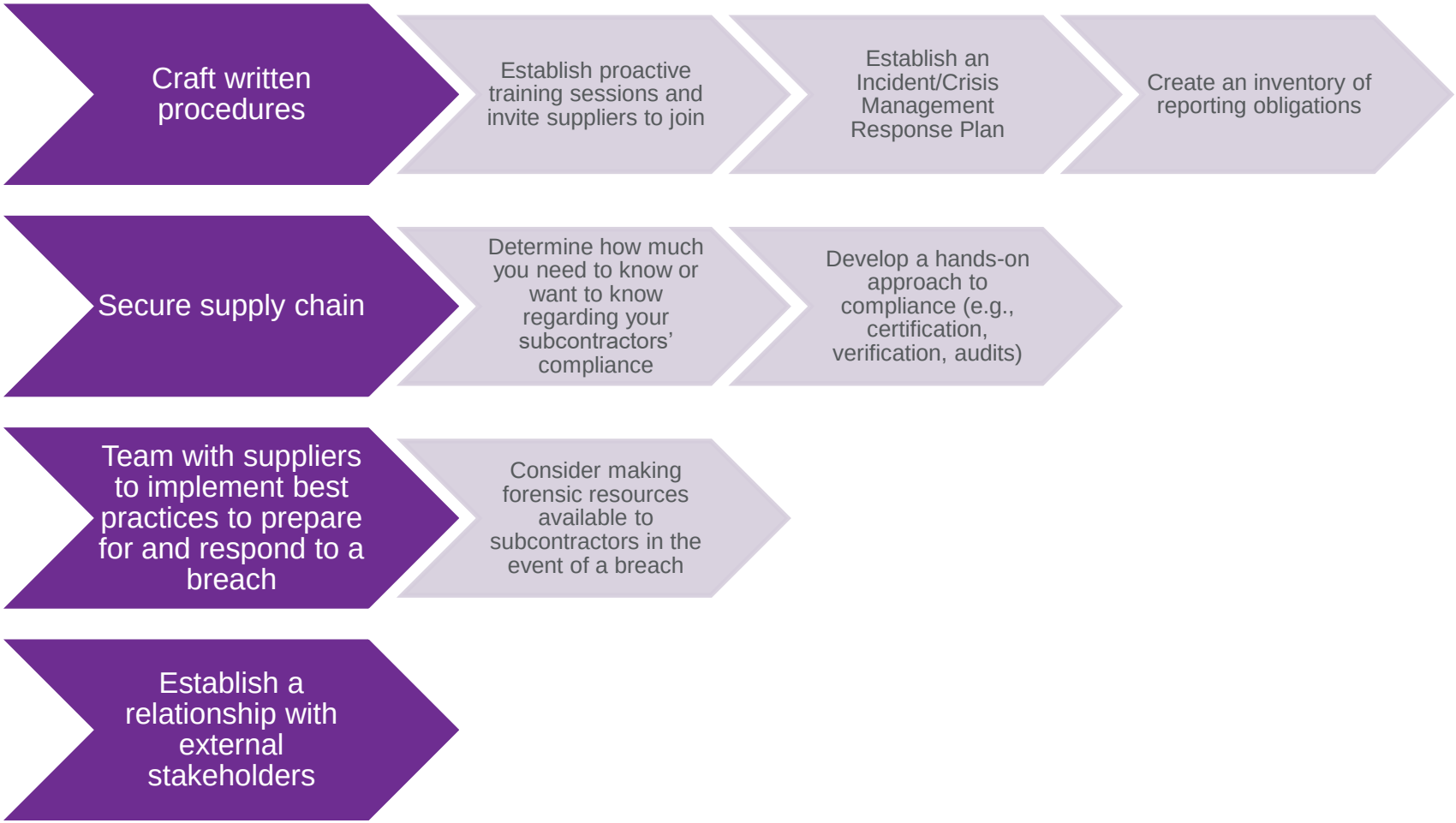
Assess flow-down requirements

- 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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