DOD'S CYBERSECURITY ASSESSMENT REGIME: *Key Compliance Considerations for Contractors*

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Alex speaks and writes frequently on emerging issues in government contracts and is an adjunct professor of Performance of Government Contracts at GW Law School and a co-chair of the ABA Public Contract Law Section's Contract Claims and Disputes Resolution Committee.

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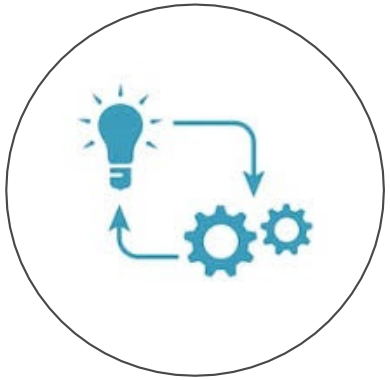
Agenda

DoD Contractor Cybersecurity: Big Picture



DFARS Interim Rule: Key Considerations

Risk Mitigation Strategies

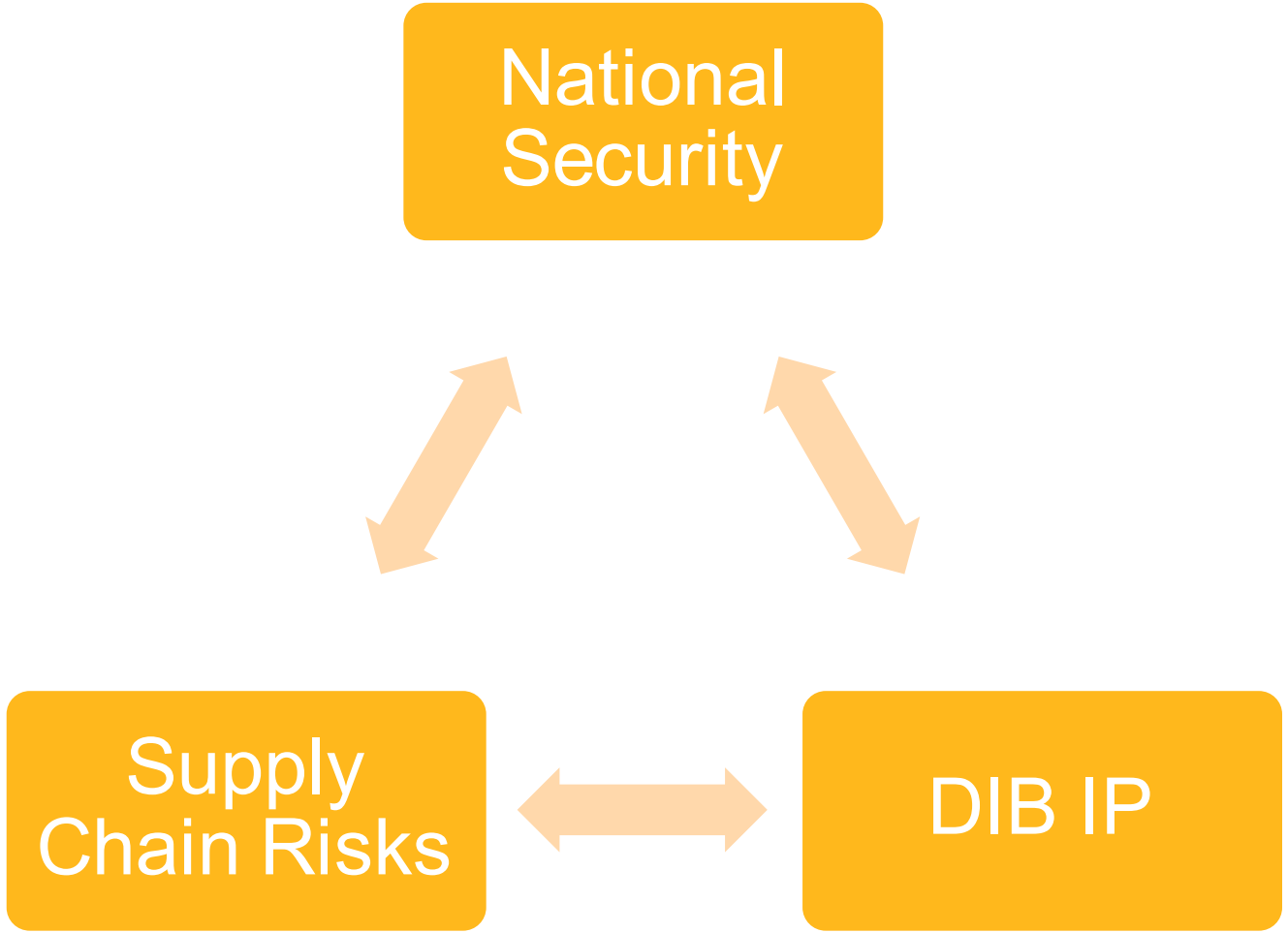
Questions

DOD CONTRACTOR CYBERSECURITY: BIG PICTURE

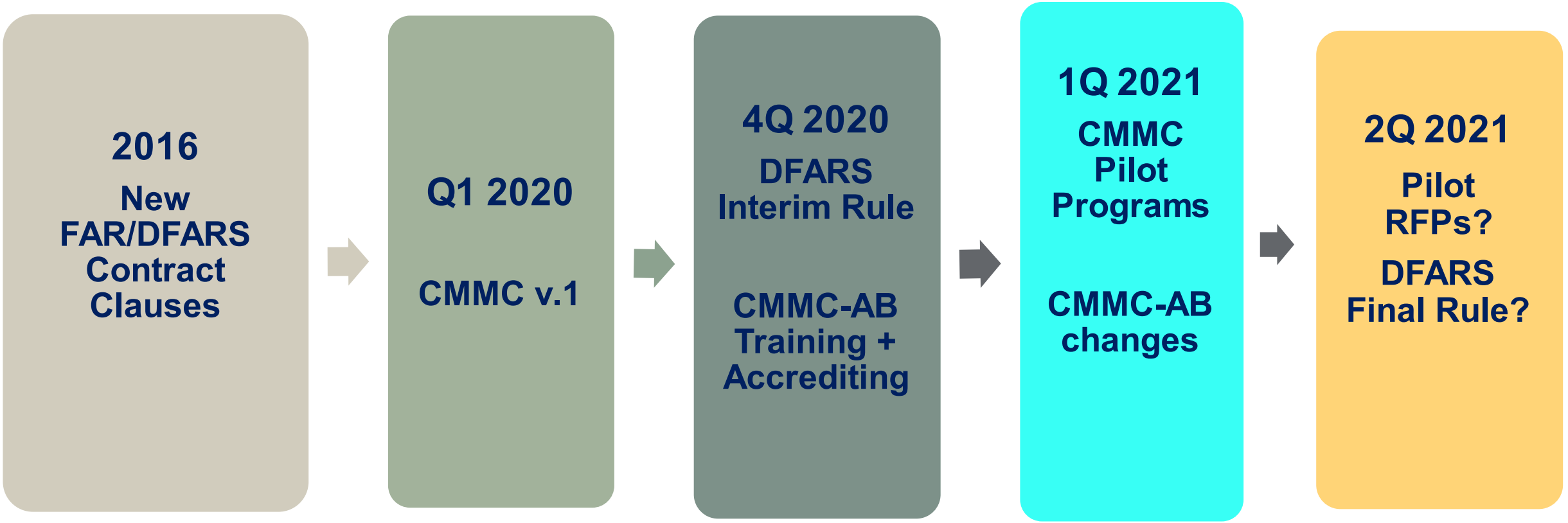
Cybersecurity and the Biden Administration

- High-profile cyber breaches highlight cyber vulnerabilities in the Defense Industrial Base and refocus regulatory and policy agenda
- *Pres. Biden's Interim National Security Strategic Guidance* March 2021
  - "[W]e will make cybersecurity **a top priority**, strengthening our capability, readiness, and resilience in cyberspace. We will **elevate cybersecurity as an imperative across the government**."
- Nominations
  - First National Cyber Director
  - CISA
- FY 2022 Budget
  - $2.1B for CISA—$110M increase from FY 2021
  - $500 for Technology Modernization Fund

CMMC and Cybersecurity Assessment Regime



Evolution of DoD's Regulatory Framework



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DFARS INTERIM RULE: KEY CONSIDERATIONS

Two Tracks of Assessments

CMMC

- **Third-Party Verification**
- 5-year rollout
- Supplement NIST 800-171
- CMMC-AB management

NIST 800-171 Assessments

- **Basic (Self) and DoD Assessments**
- Immediate impact
- Tied to NIST 800-171/DFARS
- DoD oversight

Two Tracks of Assessments

NIST 800-171

- Teeth to DFARS 252.204-7012.
- Verify compliance with NIST 800-171.
- Required for all solicitations and contracts except COTS.
- Basic Assessment score (not more than 3 years old) required for award.
- Plan of Action/Milestones permitted.
- Medium & High Assessments (DoD).

CMMC

- Five-level maturity model supplements NIST 800-171.
- Third party conducts assessments.
- Phased rollout to Oct. 2025.
- Go/No Go criterion.
- Full implementation required.
- OUSD A&S role.
- Civilian agencies (DHS, GSA).

NIST SP 800-171 Assessments

- **Basic Assessments**
  - Self-assessment tied to NIST 800-171.
  - Scores posted to Supplier Performance Risk System as condition for award.
  - Threshold Q: do you have CDI?
  - Weighted (highest: 110; lowest: -200).
  - Must identify CAGE code(s).
- **Medium + High Assessments**
  - DoD (DIBCAC) performed.
  - Estimated 200 Medium and 110 High Assessments annually.
- DFARS -7019 and -7020 clauses.

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CMMC and Third-Party Verification

- Third-party assessments (C3PAOs) via contracts (DFARS 252.204-7021).
- Must be certified at time of award and maintain certification.
- Five levels of maturity
  - *Level 1 – Basic*
  - *Level 2 – Intermediate*
  - *Level 3 – Good*
  - *Level 4 – Proactive*
  - *Level 5 – Advanced/Progressive*
- DoD: at least 200 entities will undergo assessment each year.

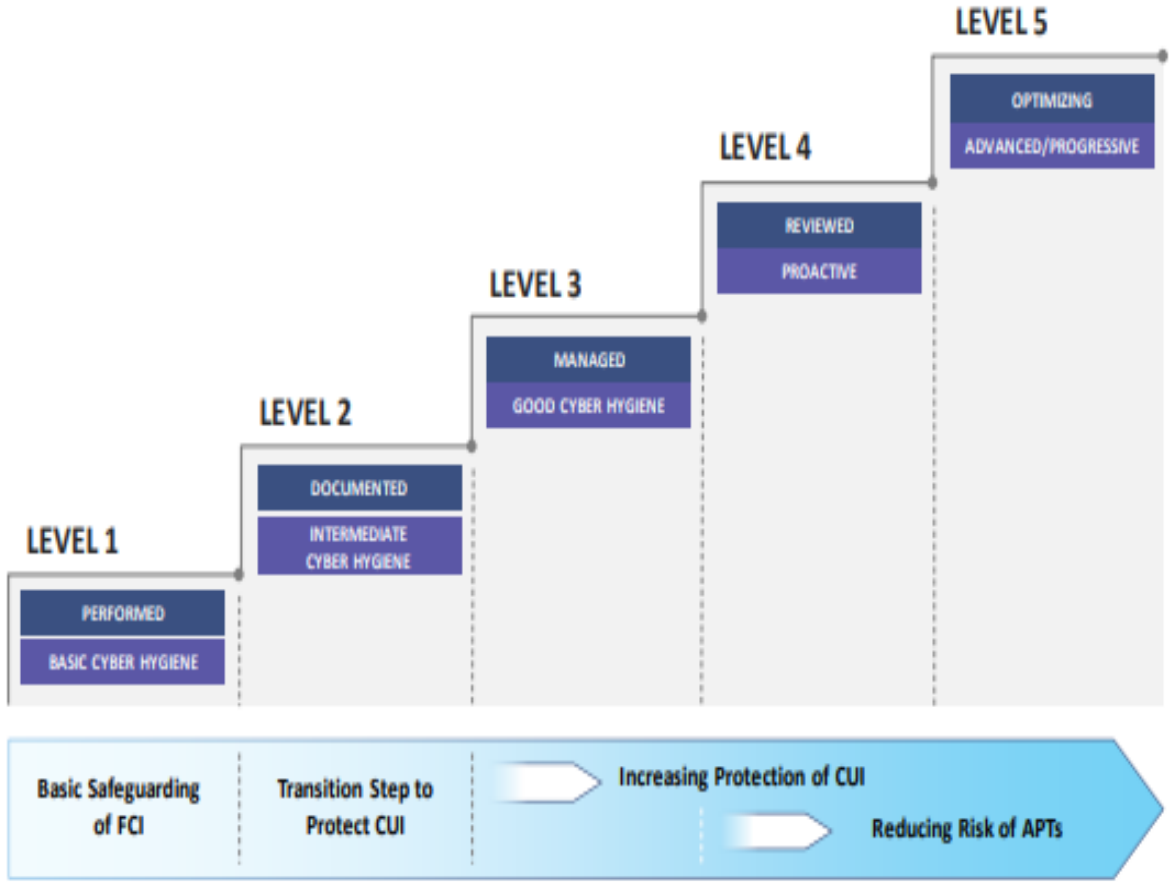

Figure 3. CMMC Levels and Associated Focus

Source: DoD CMMC v.1.02

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CMMC—Update and Next Steps

DOD DEVELOPMENTS

- DoD in process of reviewing the CMMC program.
- Leadership changes in UOSD/A&S.
- To watch for:
  - Final rule
  - CMMC model revisions
  - CMMC Assessment Guide
  - Guidance re: reciprocity
  - Congress oversight

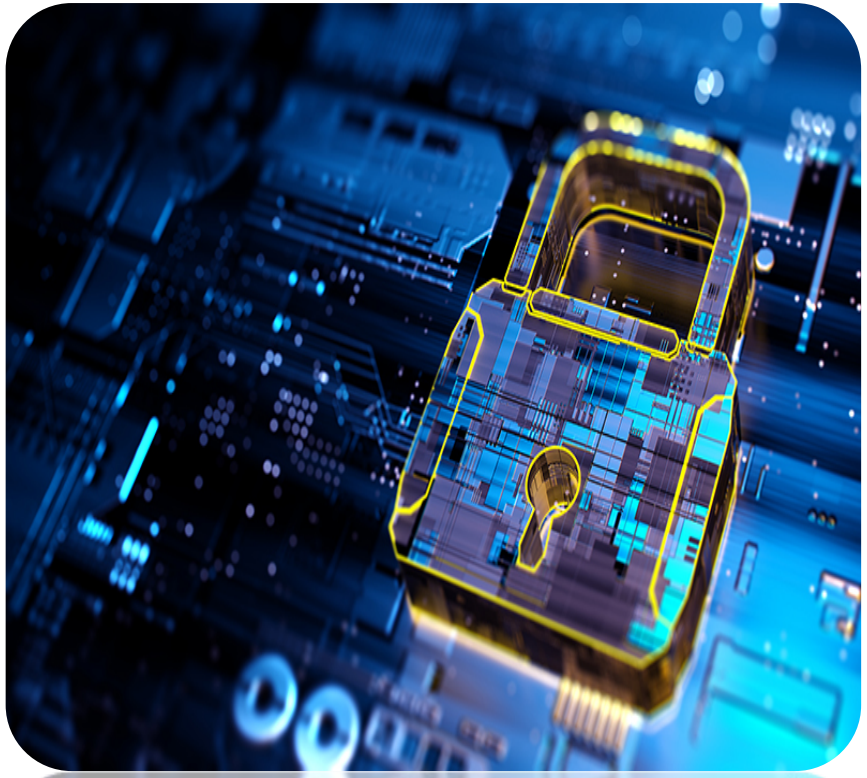
PILOT PROGRAMS

- DoD plans for up to 15 in 2021.
- New RFPs in acquisitions.
- USD A&S approval.
- CMMC assessments and certifications.
- Default is CMMC Level 3.
- Up to 475 prime contracts through Oct. 2025.

Cost Recovery and Impact on DIB

- Significant uncertainty remains regarding the ability to recover CMMC compliance costs.
- Impact on small businesses and DIB overall.
- NIST 800-171 Costs.
  - Contractors subject to DFARS 252.204-7012 "***should have already implemented*** these cybersecurity requirements and incurred the associated costs; therefore, those costs are not attributed to this rule."
- Tracking of CMMC implementation costs.
- FAR Part 31 cost principles and REAs.

CUI and CDI: Uncertainty Regarding Definitions



- Identifying what is CUI or CDI and how it should be marked or treated remains a **significant challenge for industry**.
- **Controlled Unclassified Information (CUI)**
  - Government created or owned
  - Requires safeguarding or dissemination controls consistent with applicable laws, regulations and Gov-wide policies.
- Guidance from USG.
  - DoD Instruction No. 5200.48 (Mar. 6, 2020) – terms and marking.

Impact on Source Selection and Competition

- **What will become of Basic Assessment?**
  - Any weight given to self-scores?
  - Responsibility (FAR Subpart 9.1)?
- **CMMC and Bid Protest Litigation**
  - Pre-award protests of CMMC Level.
    - ***Oracle v. United States*** (Fed. Cir. 19-2326) (Sept. 2020): "Hesitant" to "override the agency's judgment as to its needs" for security.
  - Organizational Conflicts of Interest (OCIs).

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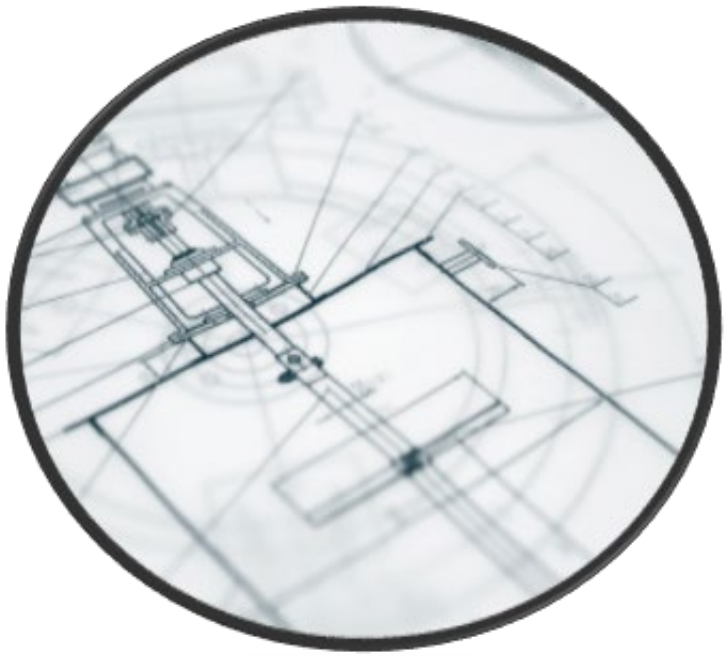
Determining CMMC Levels

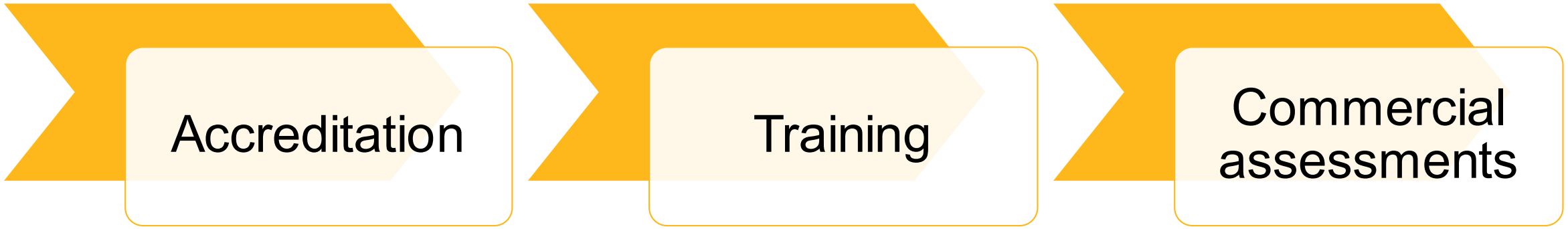


- DoD estimates that nearly 70% of companies in DIB will not need CMMC Level 3 or higher.
- Process for determining CMMC Levels at prime and lower tiers remains uncertain.
  - Interim rule requires mandatory flow-down (except COTS).
  - Primes must ensure that subs are certified at "appropriate" level prior to subcontract award.
- DoD guidance to Program Managers
  - DoDI 5000.90 - Guidance for crafting RFPs

Cloud and Reciprocity

- Ongoing questions about extent to which reciprocity will be available between CMMC and other certification programs, e.g., FedRAMP.
- Key issue: Plans of Action & Milestones.
- DFARS requires contractors using CSPs to “ensure” that CSP meets FedRAMP Moderate baseline.

CMMC Accreditation Ecosystem



RISK MITIGATION STRATEGIES

CMMC and Risk Management

- Compliance as ongoing responsibility
- Cross-functional team approach
- Documentation of compliance and decision-making (not just SSP)
- Nature of data will drive strategy: do you have CUI?
- Gap analysis/preparation
- Enclaves + multi-CMMC levels
- Tracking implementation costs
- Managing subcontractors

CMMC Assessment Disputes

Contractors may dispute the "**outcome of a C3PAO assessment**"

CMMC-AB review disputes re: "claimed errors, malfeasance, or ethical lapses" by a C3PAO.

May appeal to CMMC-AB.

Numerous open questions as to how process will work, scope of review, legal remedies available.

False Claims Act Risks

- **The FCA and Cybersecurity Non-Compliance**
  - Knowing submission of false or fraudulent claims.
  - Implied false certification liability based upon cybersecurity non-compliance.
  - Issues re: good faith and reasonable interpretations of ambiguity.
- ***Markus v. Aerojet Rocketdyne*** **(E.D. Cal. 2019)**
  - *Qui tam* relator alleged contractor fraudulently entered into DoD and NASA contracts despite knowing non-compliance with cyber controls.
  - Court declined to dismiss: relator sufficiently pled "materiality."
- **Risk Mitigation**:
  - Documentation of decisions + communication with USG.
  - Ethics and internal controls, training, incorporating agency guidance.
  - Mandatory disclosures (FAR 52.203-13).

QUESTIONS?

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