

POLICY ISSUE INFORMATION

September 11, 2009

SECY-09-0126

FOR: The Commissioners

FROM: Thomas M. Boyce, Director
Office of Information Services

SUBJECT: STATUS OF THE CONTROLLED UNCLASSIFIED INFORMATION
INITIATIVE

PURPOSE:

To provide the Commission with information regarding the Governmentwide transition to the Controlled Unclassified Information (CUI) Framework and its impact on the U.S. Nuclear Regulatory Commission (NRC).

SUMMARY:

This paper provides information on the progress made by the National Archives and Records Administration (NARA) CUI Office on implementing the CUI Framework. The effort is intended to standardize the handling of CUI across the Federal Government and establish procedures to make it easier to share CUI among Federal, State, local, tribal, and private sector entities and foreign partners. For the NRC, the transition to the CUI Framework will include Safeguards Information (SGI) and all Sensitive Unclassified Non-Safeguards Information (SUNSI).

CONTACT: Donna Sealing, OIS/IRSD
301-415-5804

The Commissioners

-2-

BACKGROUND:

As a result of a post-September 11, 2001, study, Congress enacted Section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004 directing the President to establish an Information Sharing Environment (ISE) across the Federal Government. On December 16, 2005, then-President George W. Bush issued a memorandum for the heads of the executive departments and agencies entitled, "Guidelines and Requirements in Support of the Information Sharing Environment" (Presidential Memorandum). Guideline 3 of the Presidential Memorandum required an inventory of all Executive Branch sensitive but unclassified information (SBU). Guideline 3 also required the standardization of procedures for designating, marking, and handling SBU. It required submission, for the President's approval, of recommendations for the standardization of SBU procedures for homeland security information, law enforcement information, and terrorism information, hereafter collectively referred to as terrorism-related information. Recommendations for the standardization of procedures for all other types of SBU not considered terrorism-related information were required within 1 year of the date of the memorandum.

The resulting inventory revealed more than 107 unique markings and over 130 different handling processes for SBU, which includes categories such as "Official Use Only" and "Safeguards Information." Current processes and procedures—some driven by statute and regulation and some by department and agency policy—have confused producers and users of SBU; impeded the timeliness, accuracy, and flow of information that should be shared, particularly with first responders; and failed to control the flow of information that should not be shared.

To address these matters, on May 9, 2008, President Bush issued a memorandum for the heads of executive departments and agencies entitled, "Designation and Sharing of Controlled Unclassified Information (CUI)." This memorandum adopts, defines, and institutes CUI as the single categorical designation for all terrorism-related information referred to as SBU in the ISE. It also establishes a corresponding CUI Framework for designating, marking, safeguarding, and disseminating terrorism-related CUI. Furthermore, the memorandum designates NARA as the Executive Agent (EA) to oversee and implement the CUI Framework.

The EA established a CUI Council (CUIC), comprising Federal, State, and private sector stakeholders, including the NRC, to provide advice to the EA. The CUIC has established CUI working groups and is currently developing CUI policy standards and implementation guidance. While development of the CUI Framework and implementation of its standardized procedures will be required only within the Executive Branch of the Federal government, efforts proceed with the goal of developing a universal framework that simplifies and encourages voluntary compliance even among non-Federal information sharing partners, such as State, local, tribal, and foreign governments and the private sector. Staff members from the Office of Information Services (OIS) and the Office of Nuclear Security and Incident Response (NSIR) represent the NRC in the working groups, with support from the Office of the General Counsel (OGC). The Presidential Memorandum requires Federal departments and agencies to implement the CUI Framework within 5 years of its date of issuance. During this time, agencies will work with NARA to develop and issue CUI policy standards, define business processes, develop technology designs and testing strategies, and build performance measurement and training plans.

The Commissioners

-3-

DISCUSSION:

The NRC received an exception for SGI within the current CUI Framework, one of only four Federal programs to be “grandfathered” from the CUI Framework because those programs have more stringent statutory or regulatory requirements than those contemplated by the CUI Framework. The U.S. Department of Homeland Security manages the other excepted programs, which are Chemical Vulnerability Information, Sensitive Security Information, and Protected Critical Infrastructure Information. The extent of the exception is limited, and the primary CUI Framework structure will be imposed on the excepted programs; however, some accommodations will be made to address the particular needs of each program. The CUI Framework will “grandfather” SGI in that the safekeeping and storage requirements for SGI will remain unchanged; however, changes will be required for SGI in terms of marking and training. The details regarding the integration of SGI into the CUI Framework, while still maintaining the integrity of the SGI program as established by the Atomic Energy Act, remain to be developed.

In Staff Requirements Memorandum (SRM) - COMSECY-05-0054, “Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI),” dated June 29, 2006, the Commission directed the staff to develop a simplified policy, including a two-tiered handling regime, for SUNSI. Because of the development and anticipated implementation of the CUI Framework, the staff has deferred action on this SUNSI revision requirement. The CUI Framework aligns with the requirements outlined in the SRM. Therefore, the staff plans to apply the CUI Framework to include all SUNSI, not just terrorism-related information.

On May 27, 2009, President Obama issued a memorandum for the heads of executive departments and agencies entitled, “Classified Information and Controlled Unclassified Information.” This memorandum echoes the principles and goals expressed in President Obama’s memorandum of January 21, 2009, entitled “Freedom of Information Act,” while acknowledging the need to prevent the public disclosure of information that would compromise privacy, national security, or other legitimate interests. The memorandum establishes an interagency task force to review CUI, recognizing that such an initiative has already commenced under the CUI Framework but expressing the desire for more deliberate action. It charges the interagency task force with examining the progress made on the CUI initiative, considering the proper balance between the necessary protection of relevant interests and appropriate sharing of information. Of note in this memorandum is a requirement for the task force to consider whether the CUI Framework should be expanded beyond terrorism-related information and include all SBU. As a practical matter, the NRC staff, along with that of most other agencies, had planned to apply the CUI Framework across the board to all SUNSI-like information; this direction would not impact the NRC beyond what the agency had already planned to implement under the present scheme.

The Obama memorandum directed the task force to present recommendations by August 27, 2009, on how the Executive Branch should proceed regarding the CUI Framework, considering the Administration’s presumption in favor of openness; the value of standardizing procedures for designating, marking, and handling SBU; and the need to prevent improper public disclosure of SBU. The task force provided its report to the President on August 25, 2009. The President has not yet responded.

The Commissioners

-4-

The CUIC has established working groups to help formulate new CUI policies. The CUIC refers to these new draft policies as straw men. The working groups are developing straw men in the areas described below.

Safeguarding: This policy will provide the physical and electronic protection guidelines for the storage, transmission, and destruction of CUI. All CUI will merit one of two levels of safeguarding procedures: standard (marked “Controlled”) or enhanced (marked “Controlled Enhanced”). Standard safeguarding is a handling requirement that means that the information is subject to baseline safeguarding measures that reduce the risks of unauthorized or inadvertent disclosure. Enhanced safeguarding is a handling requirement that means that the information is subject to measures more stringent than the “Controlled” level because inadvertent or unauthorized disclosure would create a risk of substantial harm. It is envisioned that 90 percent of CUI will be at the “Controlled” level. Development of this straw man is “at rest” (i.e., completed), as it is considered to be fully developed but may receive minor editing before finalization (Enclosure 1).

Dissemination: Currently, sensitive information is disseminated based on the “need-to-know” principle. Under the CUI Framework, this principle shifts to information being “shared to further the execution of lawful or official mission purposes.” There will be two levels of dissemination: “standard” and “specified.” Most CUI will merit “standard” dissemination. Numerous “specified” dissemination working group meetings have taken place. The goal in writing the specified dissemination instructions is to standardize the instructions to the lowest possible common denominator so that all agencies can use one specified dissemination instruction for each type of information rather than developing their own instructions. Specified dissemination instructions are being developed for information falling into the following categories: procurement sensitive/source selection, business/proprietary, law enforcement, export controlled, security, information not releasable to foreign nationals, intellectual property, legal, and personally identifiable information (PII). The CUIC must approve specified dissemination instructions to be given for any documents, and the instructions must be published in the CUI registry. Development of this straw man is also “at rest” pending final editing (Enclosure 2).

Dispute Resolution: There will be two processes related to dispute resolution: one for interagency disputes and one for disputes involving entities outside of the Executive Branch. The CUIC’s philosophy is that these disputes should be resolved at the lowest level possible. If this proves unsuccessful, the CUIC will be the final arbiter. Development of this straw man is also “at rest” pending final editing (Enclosure 3).

Designation: The agency head, or a senior agency official appointed by the agency head, will be responsible for designating, through specific written guidance, the categories of information within the agency that may be identified as CUI and carry an authorized marking. *Designation* is currently defined as the determination as to whether a general category of information (e.g., PII, business/proprietary information, etc.) may be protected as CUI and, if so, the level of protection required and dissemination authorized. *Identification* is currently defined as recognition by an authorized individual that specific information fits within a general category of information which has been previously *designated* as CUI. The agency written guidance must be provided to the CUI EA for review which must be completed before issuance of the guidance to the agency. Development of this straw man is also “at rest” pending final editing (Enclosure 4).

The Commissioners

-5-

When the EA asks agencies to provide their designated CUI categories for review, the NRC staff would propose that the Commission appoint the Deputy Executive Director for Corporate Management, in his role as the agency Chief Information Officer, as the senior agency official responsible for designating NRC information categories as CUI. At this time, no decision is necessary. The staff will forward the appointment paperwork to the Commission when the EA requests agencies to provide their designated CUI categories for review.

Marking: Development of the straw man for marking has been the most contentious issue. CUI markings will require the name, office, and agency of the document originator, as well as the title of documents from which the CUI was derived, on the first page of the created document and in e-mail, if not readily apparent from the e-mail address. According to many agencies, this requirement would impose an onerous administrative burden, especially the need to list the name of the creator. Because staff members leave or change jobs, having the name of the creator on the document would add little value.

In defense of the requirement, the Chairman of the CUIC, who is also the Director of the NARA Information Security Oversight Office responsible for implementing Federal policy for classified national security information, explained, at the CUI working group meeting on May 28, 2009, the reasoning for imposing marking requirements for CUI that would be more stringent than most agencies expected or desired. He stated that 43 percent of markings on classified documents are incorrect and that the CUIC did not want to repeat the same mistakes in the marking of CUI documents. In his view, the primary purpose for including the originator's name on a CUI document is to engender individual accountability, stating that it is critical for individuals to take personal responsibility for the documents they produce. Thus, although recognizing that people will not stay in the same position indefinitely, the CUIC Chairman believes that the requirement to place one's name on a document will reduce the inclination to identify information as CUI when it should not be marked as such. To respect the information of agencies, identification of the source document will be required whenever a CUI document is created using information from another CUI document. The stringent requirements will therefore ensure rigor and specificity in the designation of CUI.

Portion marking will also be required within a CUI document so that paragraphs or sections that contain CUI will be easily identified; this may aid in identifying the information of other agencies. The CUIC will only require CUI procedures to apply prospectively, except when documents created before implementation of the CUI Framework, referred to as "legacy documents," enter the ISE. Thus, an agency would be required to perform CUI marking of legacy documents only if sharing the information outside the agency. Discussion is still ongoing about whether to require the re-marking of legacy documents in shared databases from which multiple agencies may retrieve the documents as needed.

The NRC staff will need to determine how to identify the particular type of CUI contained in documents. For example, to conspicuously indicate the presence of SGI in a document in accordance with regulatory requirements, double markings will be necessary. The specific markings have not been developed; however, there is verbal agreement with the EA that the marking will include the term "Safeguards Information." Current SUNSI markings in use by the NRC indicate the category of SUNSI (e.g., proprietary information, security-related information, Privacy Act/PII). This information is used to determine profiling in the Agencywide Documents Access and Management System (ADAMS). This profiling aids the ADAMS staff in identifying

The Commissioners

-6-

documents for periodic review and documents that should not be made publicly available. With the implementation of the CUI Framework, the NRC will need to incorporate this scheme of document marking and identification to aid in ADAMS profiling. This straw man is still in draft (Enclosure 5).

Life Cycle: “Life cycle” refers to the duration of CUI controls on the information and records management retention of a document. The life cycle straw man specifies that the information should be decontrolled as soon as it no longer requires the protection of the CUI Framework. It requires automatic decontrol of CUI after 10 years unless a statute requires longer controls. However, agency heads may request control periods beyond 10 years at the time a document is created. Any variation from this 10-year period, either shorter or longer, will be indicated by a statement placed conspicuously on the face of the document that identifies the decontrol date or event.

The NRC appears to be the only Federal agency that already has a periodic review policy for its documents. NRC policy requires a review after 7 years for certain categories of SUNSI to determine whether the information should be decontrolled. The agency will need to rescind this policy when the CUI Framework is implemented. This straw man is still in draft (Enclosure 6).

CUI Registry: The CUI Registry will contain precise, detailed guidance on safeguarding and document dissemination standards and will constitute the definitive authority for document marking and handling. (The NRC was unsuccessful in its attempts to convince the CUIC to refrain from using the term “safeguarding,” in the sense of “protection,” to avoid confusion with NRC’s SGI program.) Examples of the planned guidance include detailed specified dissemination instructions, encryption criteria, and guidance on exceptions. The registry has not yet been developed.

Regulatory Changes: The EA will explore whether existing laws need to be changed for the “grandfathered” CUI categories. The NRC will eventually need to revise its regulations on SUNSI and SGI to comport with the changes imposed by the CUI Framework. A straw man for regulatory changes will not be developed.

Training: NARA is developing a CUI Web-based training and awareness program aimed at both general and specialized stakeholder audiences. NARA will also develop and provide a classroom training course and will provide onsite briefings, meetings, and conferences, as requested. NARA’s initial timetable to develop the training has been extended from July 2009 to April 2010. Agencies will be responsible for developing their own CUI-specific training (e.g., SGI training for NRC staff and stakeholders). A straw man for training will not be developed.

Exceptions: This topic area pertains to the four categories of information that are “grandfathered” into the CUI Framework, as indicated earlier. Working group meetings related to exceptions have yet to take place, although representatives from the CUI Office have visited the NRC to discuss SGI with NSIR and OIS staff. In an effort to address questions raised by the task force, representatives from each of the excepted programs met with the Chair and Co-Chair of the task force to explain why the various categories of information could not be and

The Commissioners

-7-

should not be made a part of the standard requirements currently being written for CUI. Task force representatives made no commitments and did not indicate that a modification was pending for the current categories of exceptions.

Conclusions: For the NRC, the major impacts and changes arising from this initiative will include the following areas: document marking and encryption, regulatory revisions for SUNSI (Title 10 of the *Code of Federal Regulations* (10 CFR) 2.390, “Public Inspections, Exemptions, Requests for Withholding”) and SGI (10 CFR 73.21, “Protection of Safeguards Information: Performance Requirements”; 10 CFR 73.22, “Protection of Safeguards Information: Specific Requirements”; and 10 CFR 73.23, “Protection of Safeguards Information—Modified Handling: Specific Requirements”), management directive changes, management of legacy documents, implementation of the CUI milestones, and training. Currently there are sufficient budgeted resources to support work on the CUIC and working groups in FY 2010 and 2011. Until we know the final requirements that will result when the straw men are finalized, the true future resource impacts remain uncertain. Therefore, resources will be addressed in future Planning, Budgeting, and Performance Management processes.

Given the complexity of the task to implement the CUI Framework at the NRC, the representatives of OIS, NSIR, and OGC intend to keep the Commission informed on a regular basis of the progress of this effort. As agreed during the CUI briefing to the Commissioners’ technical assistants on June 2, 2009, in addition to this Commission paper, OIS and NSIR representatives will prepare Commissioner’s Assistants Notes to keep the Commission informed on future progress in the transition to the CUI Framework. By doing so, when the NRC receives the CUI Framework for final comment, especially if it is a short turnaround comment period, the Commission will have been fully informed.

COORDINATION:

OGC has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections.

On August 20, 2009, NARA, the EA for the CUI Framework, informed the NRC that the information outlined in this paper and the enclosed straw men cannot be released to the public as it has been designated as “Official Use Only – Predecisional Information.”

/RA/

Thomas M. Boyce, Director
Office of Information Services

Enclosures:
As stated (6)

The Commissioners

-7-

should not be made a part of the standard requirements currently being written for CUI. Task force representatives made no commitments and did not indicate that a modification was pending for the current categories of exceptions.

Conclusions: For the NRC, the major impacts and changes arising from this initiative will include the following areas: document marking and encryption, regulatory revisions for SUNSI (Title 10 of the *Code of Federal Regulations* (10 CFR) 2.390, “Public Inspections, Exemptions, Requests for Withholding”) and SGI (10 CFR 73.21, “Protection of Safeguards Information: Performance Requirements”; 10 CFR 73.22, “Protection of Safeguards Information: Specific Requirements”; and 10 CFR 73.23, “Protection of Safeguards Information—Modified Handling: Specific Requirements”), management directive changes, management of legacy documents, implementation of the CUI milestones, and training. Currently there are sufficient budgeted resources to support work on the CUI and working groups in FY 2010 and 2011. Until we know the final requirements that will result when the straw men are finalized, the true future resource impacts remain uncertain. Therefore, resources will be addressed in future Planning, Budgeting, and Performance Management processes.

Given the complexity of the task to implement the CUI Framework at the NRC, the representatives of OIS, NSIR, and OGC intend to keep the Commission informed on a regular basis of the progress of this effort. As agreed during the CUI briefing to the Commissioners’ technical assistants on June 2, 2009, in addition to this Commission paper, OIS and NSIR representatives will prepare Commissioner’s Assistants Notes to keep the Commission informed on future progress in the transition to the CUI Framework. By doing so, when the NRC receives the CUI Framework for final comment, especially if it is a short turnaround comment period, the Commission will have been fully informed.

COORDINATION:

OGC has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections.

On August 20, 2009, NARA, the EA for the CUI Framework, informed the NRC that the information outlined in this paper and the enclosed straw men cannot be released to the public as it has been designated as “Official Use Only – Predecisional Information.”

/RA/

Thomas M. Boyce, Director
Office of Information Services

Enclosures:
As stated (6)

ADAMS Accession No.: Pkg ML092220578; Paper ML092220553 *e-mail concurrence

OFC:	Tech Editor	OIS	OIS	OIS	OGC	NSIR
NAME:	K.Azariah-Kribbs	T. Smith*	D. Sealing	R. Nichols	C. Holzle*	L. Silvius*
DATE:	07/29/09	08/06/09	08/03/09	08/03/09	08/10/09	08/06/09
OFC:	OIS	OIS	OCFO	OIS	OIS	
NAME:	M. Janney	J. Holonich	R.Mitchell*(T. Pulliam for)	J. Schaeffer	T. Boyce	
DATE:	08/11/09	08/26/09	9/2/09	09/09/09	09/11/09	

OFFICIAL RECORD COPY