

## Legislation in the 110<sup>th</sup> Congress to Improve Information Sharing

On Wednesday, July 30<sup>th</sup> the House of Representatives passed two bills to limit and standardize the use of control markings on controlled unclassified information (CUI), also referred to as sensitive but unclassified information (SBU). These bills, [H.R. 6193](#), the Improving Public Access to Documents Act of 2008, and [H.R. 6576](#), the Reducing Information Control Designations Act, represent the Congressional response to a [Presidential Memorandum](#) issued in May that created a small set of categorical designations for SBU and established a framework for designating, marking, safeguarding, and disseminating designated information.

A side-by-side breakdown of the major provisions of each bill follows:

| <b>Provision</b>                            | <b>H.R. 6193, Improving Public Access to Documents Act of 2008 (Harman)</b>  | <b>H.R. 6576, Reducing Information Control Designations Act (Waxman)</b>  |
|---|--|---|
| Applicability                               | Requires regulations adopted within the information sharing environment (ISE)  | Regulations to be adopted throughout federal government   |
| Reduction/<br>Disclosure<br>Requirement     | Requires regulations maximize the disclosure to the public   | Requires agency to reduce and minimize its use of information control designations and requires regulations to maximize public disclosure; also requires policy to address the duration of the markings and the process for removing them   |
| Responsibility to<br>Develop<br>Regulations | Secretary of the Department of Homeland Security   | Archivist of the United States  |
| Enforcement                                 | Requires the Secretary to establish an ongoing auditing mechanism administered by the Inspector General (IG) of the Department (or other appropriate senior Department official) to audit controlled unclassified information and requires a report on findings and suggestions for improvement (at least annually) to the House and Senate Homeland Security Committees, and to make the report available to the public | Requires IG to randomly audit controlled unclassified information and report findings, including suggestions for improvement of the policy, to the House Oversight and Government Reform Committee, the Senate Homeland Security and Governmental Affairs Committee, and the public |
| Tracking                                    | Assessment of the technology available to track the use of control markings by employees and contractors   | Requires policy to include procedures for identifying, marking, and tracking information, including the identity of the official making the designation   |
| System for<br>Employee<br>Challenges        | Requires the Secretary to establish a process so that employees or contractors are given incentives for successfully challenges resulting in the removal of control markings or the correct application of control markings  | Requires the Archivist to establish a process so that employees or contractors are given incentives for successfully challenges resulting in the removal of control markings or the correct application of control markings   |
| Penalties                                   | Requires the Secretary to institute a series of penalties for employees and contractors that do not comply with the policy after employee or contractor has been notified of non-compliance and has gone through re-training   | Requires the Archivist to institute a series of penalties for employees and contractors that do not comply with the policy after employee or contractor has been notified of non-compliance and has gone through re-training  |
| FOIA  | Requires Secretary to maintain a publicly available list of all controlled unclassified information that have been withheld in response to a FOIA request, including an explanation of why the document is withheld; states control markings are non-determinative for FOIA requests   | States control markings are non-determinative for FOIA requests   |
| Public Challenges                           | Requires Secretary to create a process for public to notify the IG of any concerns regarding implementation of the controlled unclassified   | Requires the Archivist to establish a process for members of the public to challenge the use of control markings  |

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|                                      | information policy  |   |
| Definition of controlled information | Includes anything designated by law or executive order, or information the Secretary submits to the Archivist                     | None  |
| Authority to Apply Markings          | Requires the Secretary to limit the number of employees and contractors with the authority to place control markings on documents | Requires agency heads to limit the number of employees and contractors with the authority to use control markings           |
| Detailee Program                     | Requires Secretary to implement a program to detail Departmental employees to NARA for one year; ends December 31, 2012           | Requires the Archivist to implement a program to detail Departmental employees to NARA for one year; ends December 31, 2012 |
| Deadline                             | Regulations released one year after enactment of the Act  | Regulations released not later than one and a half years after enactment of the Act   |

**Analysis:**

Both bills make significant improvements over the President’s proposed framework. If both bills are passed in their current form with their current timeframes, whatever policy is developed at the Department of Homeland Security will be the basis of the government-wide policy implementing the CUI Framework as set up by the Presidential Memorandum—meaning the government misses out on a significant opportunity to reduce secrecy and restore public trust by opening the government. We urge the Senate to hold full hearings on each of the bills.

In 2006, the Government Accountability Office (GAO) [identified](#) over 107 unique markings agencies use to control unclassified information: 81% of these markings are based not on statute or approved regulations, but are the product of department and agency policies. The Executive Branch has also identified over 130 different labeling or handling processes and procedures for SBU information. Ultimately, these efforts to control and restrict information make it harder for authorities to inform the public about potential dangers in their own communities, and easier to block the free flow of information necessary in a democratic, open society.

The intent of the Bush Presidential Memorandum is to standardize control markings and handling procedures across the “information sharing environment,” a term codified in Intelligence Reform and Terrorism Prevention Act of 2004 to indicate the intelligence, law enforcement, defense, homeland security, and foreign affairs communities. The Memo creates a tiered system of designations that relate primarily to the allowable dissemination of documents.

Unfortunately, though, the memorandum does nothing to rein in the use of these markings; in fact, the memo allows agency’s to continue to make control determinations as a matter of department policy—meaning that the public is given no notice or chance to comment on the proposal. Further, under the President’s proposed framework, control designations could easily be treated as simply another level of classification—reducing the public’s access to critical information.

Like the Presidential memo, [H.R. 6193](#), the Improving Public Access to Documents Act of 2008, applies the CUI framework only within the information sharing environment and the emphasis of the legislation is standardizing control markings. It’s scope is limited to the Department of Homeland Security (DHS). Unlike the President’s framework, H.R. 6193 takes the public’s right to know into account and includes important provisions to improve public access and accountability. The bill also requires the Department to coordinate with organizations with expertise in civil liberties, civil rights and government oversight.

The definition of controlled unclassified information in the legislation is overly broad, however, potentially encouraging agency heads to increase the use of markings on classes of information, such as “business prudence, legal privilege, and protection of commercial rights.” This language, the bill’s incorporation of the opaque definition of CUI contained in the Presidential Memorandum, and the inclusion of information that “is pertinent to the national interests of the United States or to the important interests of entities outside the Federal Government,” raise serious concerns about the bill’s ability to limit the continued proliferation of such markings or to improve public access to information.

[H.R. 6576](#), the Reducing Information Control Designations Act, responds on a government-wide basis to the White House CUI framework and to the proliferation of SBU-type markings. The intent of the bill is both to reduce the number of control markings and the number of marked documents. The presumption established by the bill is that information control designations are not necessary. H.R. 6576 also further improves public access by requiring the Archivist to establish procedures for members of the public to challenge control markings, whereas HR 6193 only requires the Secretary to allow the public to protest the policy by notifying the DHS Inspector General of any concerns regarding the implementation of the controlled unclassified information framework, including the withholding of controlled unclassified information under the FOIA.