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Statement
Of
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Subcommittee on Government Operations
Committee on Oversight and Government Reform
On
The Growing Use of the Unclassified Designation of Information in
the Executive Branch Departments and Agencies
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Thank you, Chairman Mica, Ranking Member Connolly, and Members of the Subcommittee, for the opportunity to speak today about the continued use of Sensitive But Unclassified markings in the Executive Branch, three and one-half years after the issuance of President Obama's Executive Order. My name is Patrice McDermott and I am the Executive Director of OpenTheGovernment.org, a coalition of nearly ninety organizations dedicated to openness and accountability. My remarks here today do not necessarily represent the positions of all our partner organizations.

Let me start with a little history on the issue of the use of Sensitive But Unclassified markings in the Executive Branch. In May 2008, President Bush issued a Presidential Memorandum with the stated intent 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 CUI Council called for in the Memorandum was a subcommittee of the Information Sharing Council within the Office of the Director of National Intelligence and, therefore, entirely outside any public access or accountability.

That memorandum did nothing to rein in the use of what were called Sensitive But Unclassified markings; in fact, the memo allowed agencies to continue to make control determinations as a matter of "department policy" — meaning that the public was given no notice or chance to comment on the proposal. Under President Bush's proposed framework, control designations could easily have been treated as simply another level of classification — reducing the public's access to critical information.

On November 3, 2010, President Obama issued the Executive Order on Controlled Unclassified Information. The Order limits control markings to those based on government-wide policy, as well as statute or regulation. This is an enormous victory for openness. This limitation will, when fully enacted, both significantly limit the number and end the spiraling proliferation of "agency policy" markings, most particularly "For Official Use Only."

Organizations working on government openness and accountability and on whistleblower protection welcomed the release of the Executive Order, which rescinded the Bush Administration CUI memorandum, and which requires standardizing and limiting the use of control markings on unclassified information. The openness community applauded the Obama Administration for making this an open government document when it could have become quite the opposite.

Earlier drafts of the Obama order would have allowed agencies to continue using designations that were not based in either statute or regulation, but were created by "agency policy." Previous drafts would have created a system of sanctions, which the openness community was concerned would impede needed sharing and could lead to repercussions outside current law for whistleblowers. The new Order has none of this language, reflecting its role as government-wide information management policy.

A key aspect of the Order is that it makes clear that a CUI marking has no bearing on the decision to disclose information under the Freedom of Information Act, or on disclosure to the legislative or judicial branches of the U.S. government. Finally, the Order involves the public in consultation on the implementation of the new framework.

It was significant that the process in the Obama Administration began in a manner not dissimilar to that under the Bush Administration. While we did have opportunities to meet with the government officials involved in the work on CUI – and there were officials involved who were deeply committed to government transparency – the early discussions and drafts were led by the National Security Staff and based on the Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information, a task force led by the Attorney General and the Secretary of Homeland Security. They came to this with an approach quite similar to that of the Bush Administration – that this was about controlling dissemination of and access to 'sensitive but unclassified' information to those with a recognized need-to-know. Recognized within the information sharing environment, of course.

We had numerous meetings and were able to review drafts in the meetings, and we provided extensive comments. Finally, we were presented with what the government officials considered the final draft of an Executive Order and we were asked for our 'headline.' We responded that the headline of the openness and whistleblower communities would be "Obama Creates 4th Level of Classification."

Apparently, this de-railed the train that had been moving down the track. At some point in this timeframe, the Office of Management and Budget also became involved in the process. The next thing we heard was that a new draft was in the works. That draft took what essentially had been a national security driven effort and turned it into what it properly was – a government-wide information management policy.

So, the "agency policy" markings are to be ended. The question for us is "When?" Regrettably, here is where the rub comes in.

Implementation

The CUI staff worked extraordinarily hard, with very limited resources, to create the Registry of approved CUI categories and subcategories. It was released in November 2011. It is accompanied, however, with a "Reminder from the Executive Agent: **Existing practices for sensitive unclassified information remain in effect until the CUI marking implementation deadline (TBD).**"

I want to stipulate that the CUI staff housed at ISOO (at NARA) have been very open: they have initiated meetings with our communities and have been willing to meet with us at our request; they have taken our concerns and our comments on various implementation drafts very seriously and have made changes along the way.

Our concern is that the process is – from our perspective, at least – a long way behind schedule. We suspect that this is due to intransigence and resistance from some agencies and the "adjudication" the CUI staff has had to do with them. We saw and commented on draft language in March 2011, again – after two years – in January 2013, and most recently in the early part of this year. The process has now moved to OIRA and to agency comment and, again, adjudication. Later this summer, the public will have an opportunity to comment.

It is the timeline after the review process that especially troubles us. The Executive Agent expects the CFR to become effective in April 2015. Then begins an extended process, in 6-month segments, of agencies only then *beginning* to develop the budget, IT, and training toward a requirement of which they will have been aware for almost five years. Agencies will not begin to "implement CUI practices" or to "phase out obsolete practices" until April 2016. And not until 2017 – and beyond into the next decade – will agencies finally *begin* to "eliminate old markings" and "assure use of only new marking" that are on the Registry. The Executive Agent indicates an expectation that this process will extend into 2018, 2019 and beyond. Well beyond the end of the current Administration and its openness impetus.

So, bearing in mind the Executive Agent's reminder that "Existing practices for sensitive unclassified information remain in effect until the CUI marking implementation deadline (TBD)," the public – and Congress – will not stop seeing markings like FOUO until sometime in the third decade of this century.

What does this mean in practice?

The president was clear that "the mere fact that information is designated as CUI shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion, including disclosures to the legislative or judicial branches."

Agencies, however, continue to use -- not CUI-registry markings -- but the "existing practices," especially FOUO, to either withhold or to make it difficult for requestors to get information that should otherwise be public. As an example, the Project on Government Oversight recently reported on a DOD IG report that the Pentagon labeled FOUO: in such cases the DoD IG will post only the report's title or a summary on its website. The complete report must be requested through the Freedom of Information Act (FOIA).

POGO was fortunate enough to have obtained the contract overbilling report through non-FOIA means, but they are still waiting on requests for two other DoD IG reports, one of which they filed nine months ago. Both of these reports are unfavorable assessments of other defense contracting programs.

We are as frustrated as you and continue to push the Executive Agent and OMB to move the implementation along in a more timely manner.

Thank you for the opportunity to speak to you on this important issue. I am happy to answer any questions you might have.