



November 30, 2011

Mr. Julian Thrash
Defense Acquisition Regulations System
OUSD (AT&L) DPAP (DARS)
Room 3B855
3060 Defense Pentagon
Washington, DC 20301-3060

Re: Docket No. DFARS-2011-D039
Defense Federal Acquisition Regulation Supplement: Safeguarding Unclassified DOD
Information, 76 FR 38089

Dear Mr. Thrash:

OMB Watch welcomes the opportunity to comment on the Department of Defense's (DOD) proposed regulations regarding safeguarding unclassified information. As a nonprofit organization dedicated to open government, accountability, and citizen participation since 1983, OMB Watch has long worked for improvements to the controlled unclassified information (CUI) system.

OMB Watch praised President Obama's Executive Order 13556 on CUI as an important step to rein in the chaos of the previous system, under which the *ad hoc* proliferation of categories created confusion and inhibited public access and information sharing. Successful implementation of E.O. 13556 is essential for ensuring transparency in government.

However, **the proposed rule runs counter to the spirit of President Obama's order and would imperil the usefulness of the entire CUI program currently under development.** OMB Watch recommends that DOD withdraw the rule entirely. Barring a full withdrawal, OMB Watch urges DOD to significantly revise the proposed rule. DOD should address the following concerns in any revised or future proposed rule:

- The proposed regulation would establish secrecy as the presumptive status of unclassified DOD information, contrary to the president's directives;
- The proposed regulation does not clearly specify which information requires safeguarding or dissemination controls, which could result in inappropriate withholding of information; and

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- The proposed regulation could be construed to circumvent the CUI executive order or to prematurely establish a new CUI category.

The proposed regulation would establish secrecy as the presumptive status of unclassified DOD information, contrary to the president's directives

OMB Watch is concerned that the proposed regulation does not seem to embrace the presumption of government openness, contrary to President Obama's directives and democratic principles. President Obama's 2009 memorandum regarding the Freedom of Information Act directed agencies to "adopt a presumption in favor of disclosure."¹ E.O. 13556 also expressed this principle, stating, "If there is significant doubt about whether information should be designated as CUI, it shall not be so designated." However, the proposed rule would effectively establish a presumption that DOD information should not be publicly accessible. Although contractors would have basic safeguarding responsibilities for any nonpublic information, there is no practical way of knowing whether particular information had been cleared for public release. As a result, contractors would have to treat all information as presumptively nonpublic, thus contradicting the president's intentions and increasing government secrecy. OMB Watch recommends DOD clarify in any future versions of the rule that contractors are only expected to safeguard information that is specifically designated for protection.

The proposed regulation does not clearly specify which information requires safeguarding or dissemination controls, which could result in inappropriate withholding of information

The proposed rule does not define which information is subject to enhanced safeguarding requirements but instead refers to definitions in internal DOD policies. Without describing the scope and definition of the information to be controlled, the proposed rule's enhanced safeguarding requirements are essentially meaningless and preclude substantive public comment. Unless controlled information is specifically delineated, there is a risk that information will be overly controlled beyond actual legal authorization. OMB Watch recommends that any future version of this rule should include a specific definition and scope of the information being addressed.

The proposed regulation could be construed to circumvent the CUI executive order or to prematurely establish a new CUI category

The proposed rule would enshrine several of DOD's internal legacy sensitive but unclassified categories as the basis for enhanced safeguarding requirements. OMB Watch objects to the use of such categories as part of any description or definition. These categories are vague, overly broad, and only understood internally by DOD: were exactly the problems that President Obama's new CUI system aims to address. While E.O. 13556 is clear that agencies may only safeguard information where required by law, regulation, or government-wide policy, the proposed rule seeks to include categories with no such authorization. If the proposed rule is adopted, it could then be used as a regulation that would justify the creation of a new CUI category. Due to the breadth and vagueness of the proposed rule, if DOD submitted the proposed rule as the justification to create a new CUI category, OMB Watch would recommend that NARA reject the category as inconsistent with the intent of the executive order and damaging to government transparency. Moreover, the establishment of such a category would be premature, as the National Archives and Records Administration (NARA) only released its initial registry of CUI categories under the executive order in November 2011. DOD should work through the NARA before proposing the creation of any new categories. If DOD later discovers a category of unclassified information that truly requires safeguarding, then DOD should propose a specifically-targeted regulation regarding that class of information, after consulting with NARA, with clear definitions and the need for safeguarding clearly explained. In the meantime, OMB Watch recommends DOD remove all references to legacy sensitive but unclassified categories of information in any future versions of this rule.

Alternatively, the proposed rule could be construed to establish safeguarding requirements outside the context of the CUI system. However, E.O. 13556 is clear that the categories approved by NARA "shall serve as exclusive designations for identifying unclassified information throughout the executive branch that requires safeguarding or dissemination controls." DOD is not authorized to create safeguarding requirements outside the system established by the executive order. If agencies did otherwise, it would recreate the chaos of the previous system.

Conclusion

OMB Watch appreciates the opportunity to comment on DOD's proposed CUI regulations. We hope that you will take our recommendations into consideration. If you have questions about our comments or want to discuss the issues further, please feel free to contact us.

Sincerely,



Sean Moulton
Director, Federal Information Policy
OMB Watch



Gavin Baker
Federal Information Policy Analyst
OMB Watch