

Controlled Unclassified Information (CUI) Positions

When Syensqo receives information or generates information on a government contract, and the information may be subject to a CUI authority (law, regulation or Government-wide policy), Syensqo has adopted the following general positions regarding Proprietary Data, Customer Documents, and Technical Data. These statements are designed to enable policy development for safeguarding information using National Institute of Standards and Technology (NIST) Special Publication SP 800-171 *Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations*.

Executive Summary

Proprietary Data

- Technical data that Syensqo generates and maintains ownership of is not CUI. When possessed by the U.S. Government, this same information becomes General Proprietary Business Information (PROPIN) for the Government, requiring agency safeguarding and dissemination control.

Customer Documents:

- Syensqo will receive and store all customer technical documents using a shared process.
- Syensqo will safeguard the following documents using NIST SP 800-171:
 1. Documents marked with a CUI Designation Indicator
 2. Documents marked with DoD Distribution statements B through F with defense categories tied to specific CUI Authorities
 3. Documents marked with generic "CUI" banner markings

Technical Data:

- Information that is lawfully available in the Public Domain is not Controlled Technical Information (CTI).
- Information determined to be "Not Technical Data" is not CTI.

Regulatory References

All references to regulatory language enclosed here are excerpts from the full documents which are linked for reader convenience. Underline indicates the most relevant language supporting the positions stated in this document.

Proprietary Data (PD)

Technical data that Syensqo generates and maintains ownership of is not CUI. When possessed by the U.S. Government, this same information becomes General Proprietary Business Information (PROPIN) for the Government, requiring agency safeguarding and dissemination control.

Regulatory Language

National Archives and Records Administration (NARA) ISOO *CUI Stakeholders Update* (2020)¹

Q: *Is my Proprietary Information CUI?*

A: "The government will protect it as CUI (and may even send it back to you as CUI) but the proprietary information you create internally and maintain ownership of is not CUI (though it may require protections pursuant to other laws or regs)."

United States Court of Appeals for the Federal Circuit Case 2019-2147, *The Boeing Company v. Secretary of the Air Force*²

"Neither party disputes that, when a contractor delivers technical data to the government, the contractor maintains ownership of the data and at least some rights in the data. For example, in this case, both parties agree that, notwithstanding the Air Force's unlimited rights in technical data Boeing delivers, Boeing still owns those data."

DFARS 252.204-7012 *Safeguarding Covered Defense Information and Cyber Incident Reporting*³

(m) *Subcontracts*. The Contractor shall—

(1) Include this clause, including this paragraph (m), in subcontracts, or similar contractual instruments, for operationally critical support, or for which subcontract performance will involve covered defense information, including subcontracts for commercial products or commercial services, without alteration, except to identify the parties. The Contractor shall determine if the information required for subcontractor performance retains its identity as covered defense information and will require protection under this clause, and, if necessary, consult with the Contracting Officer;

¹ <https://isoo.blogs.archives.gov/2020/02/13/cui-q2-stakeholders-update-slides/>

² https://www.cafc.uscourts.gov/12-21-2020-19-2147-the-boeing-company-v-secretary-of-the-air-force-opinion-19-2147-opinion-12-21-2020_1705433/

³ <https://www.acquisition.gov/dfars/252.204-7012-safeguarding-covered-defense-information-and-cyber-incident-reporting>.

Customer Documents (CD)

Syensqo will safeguard the following documents using NIST SP 800-171:

1. Documents marked with a CUI Designation Indicator
2. Documents marked with DoD Distribution Statements B through F with defense categories tied to the following CUI Authorities:
 - Contractor Performance Evaluation
 - Controlled Technical Information
 - Critical Technology
 - Direct Military Support
 - Export Controlled
 - International Agreements
 - Operations Security
 - Patents and Inventions
 - Proprietary Business Information
 - Small Business Innovation Research (SBIR)
 - Software Documentation
 - Vulnerability Information
3. Documents marked with generic “CUI” banner markings (pending clarification of CUI Yes/No from the Customer)

Regulatory Language

Department of Defense Instruction Controlled Unclassified Information (CUI) DoDI 5200.48⁴

Sec. 5.3 Requirements for DoD Contractors

a. Whenever DoD provides information to contractors, it must identify whether any of the information is CUI via the contracting vehicle, in whole or part, and mark such documents, material, or media in accordance with this issuance.

National Archives and Records Administration NARA CUI FAQ⁵

Question: Who is responsible for marking CUI? The CUI EA (ISOO) has run into agencies failing to do so. If we don't generate the material what is [the contractor's] responsibility?

Answer: Upon implementation, agencies are responsible for marking or identifying any CUI shared with non-federal entities. Questions regarding the status of information (marked or unmarked) should be directed back to the government contracting activity. Some agencies are not yet marking CUI and are still implementing the elements of the CUI program. Contractors should not follow CUI program requirements or markings until directed to do so in a contract or agreement.

Executive Order on Controlled Unclassified Information (EO 13556)⁶

Sec. 3. Review of Current Designations

(b) If there is significant doubt about whether information should be designated as CUI, it shall not be so designated.

⁴ <https://www.dodcui.mil/Portals/109/Documents/Policy%20Docs/DoDI%205200.48%20CUI.pdf>

⁵ <https://www.archives.gov/cui/faqs.html>

⁶ <https://www.dodcui.mil/Portals/109/Documents/Policy%20Docs/EO%2013556%20CUI.pdf>

Technical Data (TD) Position 1

Syensqo confirms the following position (1 of 2):

1. Information that is lawfully available in the Public Domain is not Controlled Technical Information (CTI).

Regulatory Language

DFARS 252.204-7012 *Safeguarding Covered Defense Information and Cyber Incident Reporting*⁷

(a) *Definitions.* As used in this clause—

Controlled technical information means technical information with military or space application that is subject to controls on the access, use, reproduction, modification, performance, display, release, disclosure, or dissemination. Controlled technical information would meet the criteria, if disseminated, for distribution statements B through F using the criteria set forth in DoD Instruction 5230.24, Distribution Statements on Technical Documents. The term does not include information that is lawfully publicly available without restrictions.

Department of Defense Instruction Controlled Technical Information (CUI) (DoDI 5200.48)⁸

Sec. 3.7 *General DOD CUI Requirement*

(a) CUI does not include information lawfully and publicly available without restrictions

⁷ <https://www.ecfr.gov/current/title-48/chapter-2/subchapter-H/part-252/subpart-252.2/section-252.204-7012>

⁸ <https://www.dodcui.mil/Portals/109/Documents/Policy Docs/DoDI 5200.48 CUI.pdf>

Technical Data (TD) Position 2

Syensqo confirms the following position (2 of 2):

- Information determined to be “Not Technical Data” is not CTI.

Note: Adoption of this position can enable the determination of all data that could be within this realm and “not subject” to the regulations of technical data. One example to be discussed: performance requirements within a customer specification.

Regulatory Language

22 CFR 120 International Traffic in Arms Regulations (ITAR)⁹

120.33 Technical data.

(a) **Technical data** means for purposes of this subchapter:

(1) Information, other than software as defined in § 120.40(g), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions, or documentation;

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or

(4) Software (see § 120.40(g)) directly related to defense articles.

(b) The definition in paragraph (a) of this section does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in § 120.34 or telemetry data as defined in note 3 to Category XV(f) of § 121.1 of this subchapter. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

15 CFR 772.1 Definitions of terms as used in the Export Administration Regulations (EAR)¹⁰

Technology. *Technology* means: Information necessary for the “development,” “production,” “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “technology”) of an item.

N.B.: Controlled “technology” is defined in the General Technology Note and in the Commerce Control List (supplement no. 1 to part 774 of the EAR).

Note 1 to definition of Technology: “Technology” may be in any tangible or intangible form, such as written or oral communications, blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering designs and specifications, computer-aided design files, manuals or documentation, electronic media or information revealed through visual inspection;

Note 2 to definition of Technology: The modification of the design of an existing item creates a new item and technology for the modified design is technology for the development or production of the new item.

⁹ <https://www.ecfr.gov/current/title-22/chapter-I/subchapter-M/part-120/subpart-C>

¹⁰ <https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-772/section-772.1>