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National Technical Information Service
U.S. Department of Commerce
5301 Shawnee Road
Alexandria, VA 22312

RE: RIN 0692-AA21
Comment on Notice of Proposed Rulemaking Regarding Certification Program for
Access to the Death Master File

Dear Sir or Madam:

The American Benefits Council (Council) and the SPARK Institute appreciate the opportunity to provide comments and information in response to the notice of proposed rulemaking (NPRM) published by the National Technical Information Service (NTIS) of the U.S. Department of Commerce regarding a Certification Program for Access to the Death Master File.¹

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third-party administrators, trade clearing firms, and benefits consultants. Collectively, the SPARK Institute's members serve approximately 70 million employer-sponsored plan participants.

¹ 79 Fed. Reg. 78,314 (Dec. 30, 2014).

As the Council explained in its comments² on the Interim Final Rule (IFR)³ that provided a temporary certification program for access to the Death Master File (DMF), many of our members regularly access the DMF in order to administer retirement plan benefits. The NPRM's proposal to revise the IFR's definition of Limited Access DMF⁴ would provide limited relief with respect to some of the concerns the Council expressed in its previous comment letter regarding important information exchanges between parties legitimately involved in the administration of a retirement plan. However, ***we remain very much concerned that the NPRM fails to address the critical need for a DMF certification program that will allow parties to exchange recent death information in circumstances where there is no opportunity for abuse.*** To address this concern, we propose below a new safe harbor under which a Certified Person will be deemed to have satisfied the certification program's disclosure requirements with respect to the sharing of certain Limited Access DMF when specified conditions are met.

Our second key concern relates to the newly proposed requirement that a Person seeking certification submit a written attestation from an Accredited Certification Body (ACB) and that such ACBs conduct the required scheduled and unscheduled audits on behalf of NTIS. There are no ACBs that are prepared to do this work. In order for the contemplated system to work, at a minimum, we would need far more specificity regarding how these ACBs would work and a very lengthy transition period for an entire new industry to develop and be accredited. Without this specificity and long transition period, we are once again concerned about the possibility that our members will temporarily lose access to the DMF. Even with a long transition period, there can be no assurance that a whole new industry will spring up. Accordingly, we offer an alternative approach below.

The Council and the SPARK Institute appreciate the NTIS's significant undertaking last year to produce an IFR that enabled entities with a legitimate interest in the DMF to meet the statutory deadline for certification and maintain access to the DMF. We fully support the goal of protecting confidential DMF information from abuse. Our comments in this letter are intended to suggest clarifications and changes to the NPRM that would make the final rule more workable by providing for our members' continued use of Limited Access DMF for legitimate retirement plan administrative purposes without opening the door to the types of abuse that led to the inclusion of section 203 of the Bipartisan Budget Act of 2013, which required the implementation of a DMF certification program.

We believe that our requests fit well within the statute and would help meet Congress's desire to ensure that a DMF certification program does not interfere with entities' ability to continue utilizing DMF information for legitimate fraud prevention and business purposes.

² Letter from Jan Jacobson, Senior Counsel, Retirement Policy, American Benefits Council, to John Hounsell, Nat'l Technical Info. Servs., U.S. Dep't of Commerce (April 24, 2014), *available at* http://www.americanbenefitscouncil.org/documents2014/death-master_ntis_letter042314.pdf.

³ 79 Fed. Reg. 16,668 (Mar. 26, 2014).

⁴ Capitalized terms not defined herein have the meaning given to them in the IFR or, where the NPRM has proposed a new or amended definition, in the NPRM.

SUMMARY OF COMMENTS AND REQUESTS REGARDING THE NPRM

As explained in more detail below, we have the following comments and requests in response to the NPRM:

1. To ensure the proper administration of retirement plans, it is critical that the entity with access to the DMF (whether a service provider or the plan sponsor itself) be allowed to disclose the date of death (when that information is not otherwise obtained from a source independent of the DMF) to other parties involved in the administration of a particular plan *without regard to whether the parties with whom the date of death is shared meet the requirements for certification*. In this regard, we propose below a new safe harbor that would permit this continued exchange of information under certain circumstances that are designed to maintain the proper safeguarding of Limited Access DMF information.

The key significance of the DMF for purposes of retirement plan administration is the ability of plan sponsors and/or service providers to update plan records with participants' dates of death. Each party involved in a plan's administration typically already possesses data on participants' names, social security numbers, and dates of birth. Although often very burdensome to obtain by other means, an individual's date of death is regularly reported in public sources; sharing this data, simply because it is obtained from the DMF, among the parties involved in retirement plan administration does not increase the risk of fraud. Rather, the burden of essentially requiring that every retirement plan sponsor and each of their service providers meet the DMF certification requirements (or become certified) would be tremendous and extremely unworkable. Being forced to obtain dates of death from alternative sources would be equally unworkable.

2. Greater clarity and flexibility are needed in regard to the NPRM's proposal to require that Persons seeking certification submit a written attestation from an ACB and that such ACBs conduct the scheduled and unscheduled audits required by the statute. As noted, currently, there are no ACBs that are prepared to do this work, so the proposal is dependent on an entire industry being created and accredited. That is a very uncertain basis on which to base a proposed regulation.

Accordingly, we strongly urge NTIS to provide an alternative certification method that does not require the engagement of an ACB. Specifically, we recommend that NTIS allow independent third parties to sign attestations by stating in writing that they are qualified to perform the necessary assessments and audits of Persons' systems, facilities, and procedures related to the safekeeping of information and to provide the attestation required for certification. (This is referred to below as "self-accreditation.") Even this would require a significant transition period, such as 18 months, because again this industry does not exist today.

Alternatively, we recommend that NTIS provide a *very substantial* period of time, such as 36 months, to allow ACBs to enter and begin serving the newly created market

related to retirement plans and DMF certification. During the latter portion of that interim period, the self-accreditation process described above could be in effect.

3. During any transition period, we ask that NTIS permit Persons certified under the IFR to be automatically certified, i.e., certifications under the temporary certification program would remain valid during the transition period.

BACKGROUND

Why access to the DMF is important for retirement plan administration:

The following examples illustrate why workable access to Limited Access DMF – especially information concerning an individual’s death – is critical to the functioning of all types of retirement plans.

- Unless plans have up-to-date information on the death of a participant (or joint annuitant) from the DMF, plans making benefit payments in the form of a life or joint life annuity risk continuing payments to the participant (or joint annuitant) after death and making payments to the wrong person (e.g., by making a direct deposit to the account of a deceased individual rather than to a surviving spouse or beneficiary) and/or in the wrong amount (e.g., by not knowing when to pay a reduced spousal benefit upon the death of a participant or when to cease the payment of benefits entirely).
- Plans need DMF information regarding a participant’s death to determine when a plan beneficiary becomes (1) eligible for benefits and (2) eligible to take over the investment direction of an account (for participant-directed plans only).
- Tax rules require that a retirement plan know the year in which a participant died. For example, a death on December 31 would trigger different requirements under the required minimum distribution rules than a death on January 1 of the following year.
- The Employee Retirement Income Security Act of 1974 (ERISA) subjects retirement plan fiduciaries to a duty to pay plan benefits to the appropriate party, which would change upon the death of a participant. Plans are very often not timely informed of a participant’s death other than via access to DMF information.
- Accurate and complete plan participant information (e.g., date of death) is important for determining required plan funding and plan liability measurement.
- Knowledge of a participant’s or joint annuitant’s date of death triggers many critical plan administration steps, such as disabling Internet access to the individual’s account to prevent unauthorized access, ceasing benefit payments to the individual, and mailing a confirmation notice to the deceased individual’s last known address.⁵

⁵ Information concerning an individual’s death is important for the proper administration of a variety of other benefits, including but not limited to retiree medical plans. Our comments in this letter, however, focus on the effect that the proposed rule, if finalized, would have on retirement plans.

How the DMF has traditionally been accessed on behalf of retirement plans:

Most employers that sponsor retirement plans do not directly access the DMF on behalf of the plan, but rather they hire a third party service provider (referred to herein as “DMF service providers”) to keep them informed of the status of plan participants. *Critically, these plans routinely and almost exclusively rely upon DMF service providers to provide notification that a participant has died along with the date of death.*

DMF service providers also provide confirmation to a plan that the social security number of a deceased individual in the DMF matches the social security number of a plan’s participant or joint annuitant. This use of a social security number is needed to confirm that the deceased is actually the participant or joint annuitant; plans cannot simply rely on the fact that a person in the DMF with the same name as one of its participants or joint annuitants has died. Importantly, the DMF service provider need not newly provide an actual social security number obtained from the DMF to a plan; the DMF service provider simply acts to confirm whether the social security number already on record with the plan matches the number in the DMF.

Some plan sponsors (typically large employers) have historically accessed the DMF directly, but many of these plans use other types of service providers (referred to herein as “non-DMF service providers”) to perform, for example, administrative, payment processing, actuarial, or accounting services. In order for these non-DMF service providers to perform their functions, the plan sponsor needs to provide them with the same Limited Access DMF that a DMF service provider would provide (i.e., date of death and/or the confirmation of a social security number).

In other cases, a DMF service provider provides Limited Access DMF to a non-DMF service provider on behalf of a plan sponsor for which both service providers perform services with respect to that plan sponsor’s retirement plan.

The new safe harbor that we propose below is intended to continue to allow for the use of Limited Access DMF by the parties discussed above and in the manner described above, all while ensuring that the DMF is not subjected to greater risks of fraud.

Request #1: Create a new safe harbor allowing Certified Persons under certain circumstances to disclose a participant’s date of death to other parties involved in the administration of a plan without regard to whether those other parties meet the requirements for certification.

In our experience, DMF service providers and those plan sponsors that have historically accessed the DMF directly have generally sought to become certified under the IFR. We expect that these entities will again seek certification when the proposed rule is finalized. We continue to be extremely concerned about the IFR’s prohibition on a Certified Person from disclosing Limited Access DMF to persons not meeting the requirements for disclosure (e.g., most plan sponsors and non-DMF service providers), and *we remain even more so concerned that the NPRM has not adequately addressed this concern.*

The NPRM retains the IFR’s unworkable disclosure restrictions on date of death information obtained from the DMF.

Under the IFR, a DMF service provider is required to ensure that all of its retirement plan customers who receive Limited Access DMF from the DMF service provider (when not also obtained independently from the DMF) (1) have systems to safeguard the information, (2) have experience in maintaining such safeguards, (3) agree to satisfy requirements similar to section 6103(p)(4) with respect to such information, and (4) have a legitimate fraud prevention interest or a legitimate business purpose. (Certified plan sponsors are subject to the same restrictions with respect to disclosing Limited Access DMF to a non-DMF service provider.)

There are literally hundreds of thousands of retirement plans maintained by employers of all sizes and thousands more non-DMF service providers. It is not workable to require, for example, that a DMF service provider evaluate thousands of plan sponsor clients for compliance with the requirements. Without a safe harbor, it will become virtually impossible for DMF service providers to continue performing their critical function on behalf of plans due to the impossibility of knowing which of their thousands of clients meet the certification requirements and the limitations on disclosing Limited Access DMF to a client for whom the DMF service provider knows that the client does not meet the certification requirements (or cannot confirm otherwise).

In its comments on the IFR, the Council requested clarification that a Certified Person may confirm whether a social security number provided by a plan sponsor, non-DMF service provider, or other person (such as a family member) is the social security number of the deceased without regard to whether that entity or person can meet the certification requirements. In this regard, we appreciate NTIS’s proposed amendment to the definition of Limited Access DMF, which would clarify that an individual element of information (e.g., name, social security number, date of birth, or date of death) in the possession of a Person, whether or not certified, but obtained by such person through a source independent of the Limited Access DMF, will not be considered “DMF information” for purposes of the rule. As we understand it, this amended definition should address this particular concern by, for example, permitting a DMF service provider to confirm a participant’s social security number that is already on record with the plan by comparing it to DMF information.

However, *the NPRM fails to address the more critical concern expressed in the Council’s previous comments that plan sponsors and non-DMF service providers may continue to rely on Certified Persons to provide information on the date of a participant’s death* without themselves having to prove to the Certified Person’s satisfaction that they meet the certification requirements. We urge NTIS to provide workable rules (which we suggest below in the form of a safe harbor) that will enable date of death information from the DMF to be shared with the proper parties.

Why the NPRM is unworkable despite revising the definition of “Limited Access DMF.”

As described above, the NPRM would prohibit a Certified Person from disclosing an individual’s date of death obtained from the DMF to any Person other than a Person who meets the certification requirements.

Plan sponsors, DMF service providers, and non-DMF service providers typically obtain a retirement plan participant’s name, social security number, and date of birth from sources other than the DMF. In most cases, the plan sponsor obtains this information from the participant when he or she begins employment or becomes a participant in the plan. The plan sponsor then shares this information with DMF service providers and non-DMF service providers as needed for purposes of plan administration. But the one new piece of data that the DMF provides – and for which a Person not certified would be most challenged to obtain independently – is a participant’s date of death. Yet because date of death information is generally not obtained from a source independent of the DMF, a Certified Person’s disclosure of a date of death within three years of the individual’s death would be subject to the program’s disclosure restrictions.

To illustrate, consider the immense challenge and additional expenses that a plan sponsor would encounter if a DMF service provider is prohibited from disclosing the date of a participant’s death because the plan sponsor has not or cannot reasonably prove to the DMF service provider that the plan sponsor satisfies the certification requirements (or is itself a Certified Person). Rather than relying on the DMF service provider to make regular updates to the plan’s records, such as adding the date of death where appropriate, the plan sponsor might be forced into a very time-intensive, continuous search of public records and obituaries. Alternatively, a plan could regularly send letters to its participants and their beneficiaries requesting confirmation that the participant remains alive or, alternatively, routinely ask for the participant’s date of death. Neither option is economical, efficient, or effective, or serves the interest of plan administration. And imagine the reaction of participants and their beneficiaries if routinely asked for the date of a participant’s death when that participant is still living.

It is not enough that a Certified Person alert a plan to the mere fact of a participant’s death without providing the date of death because, as described above, the actual date of death remains a critical piece of information for several plan administration purposes. In this situation a plan would still be forced to review public records or contact a family for the participant’s date of death. Moreover, disclosure of the date of an individual’s death alone cannot reasonably be considered confidential – it is only when that information is coupled with a social security number that there is a significant risk of fraud.

NTIS should create another safe harbor to permit the disclosure of Limited Access DMF by a Certified Person to another Person under specific circumstances.

From both a policy and a technical perspective, another safe harbor is necessary to address issues like the one that arises with respect to retirement plans.

Several members of Congress specifically recognized the legitimate use of the DMF by many entities and had called on the Department of Commerce to develop a workable certification

program that would continue to allow for such uses. Senator Hatch specifically mentioned retirement plan administration as one of the “bona fide reasons” for which the DMF is used.⁶ Senator Nelson stated that “[i]t was never the intent of this Senator or the cosponsors to deny access to the master file by the people who need it for legitimate purposes,” and that the Social Security program and Commerce “would still be able to release the information in the file for those who need it.”⁷ Similarly, Senators Casey and Hatch each expressed the need for balance as Commerce engages in the rulemaking process, with Senator Casey stating that such balance is “critical to ensuring the continued legitimate use of this information.”⁸

Section 203(c)(1) of the Bipartisan Budget Act imposes a penalty on any Certified Person who discloses DMF information to any person other than a person who meets the certification requirements. *We respectfully urge NTIS to introduce a safe harbor under which certain Persons to whom a Certified Person discloses certain Limited Access DMF will be deemed to have satisfied the certification requirements.* Clearly, we believe that the statute permits NTIS to develop such a rule (as proposed below), which would be workable for employment-based benefit plans and would result in a certification program that functions the way Congress intended.

In order to permit the forms of necessary information sharing described above in the background section, a safe harbor could be added to the regulations as follows with several safeguards included to preserve the protective intent of the statute. Under that safe harbor, it would be permissible for a Certified Person to disclose Limited Access DMF, other than social security numbers, to another Person as long as that other Person has a contractual relationship with the Certified Person (or both parties have a contractual relationship with the plan sponsor, if neither party is the plan sponsor) and the disclosure is made for a legitimate purpose. This safe harbor completely protects against abuse and facilitates legitimate and needed use of Limited Access DMF. Regulatory language for the safe harbor is provided as an Appendix to this letter.

Request #2: Allow third parties to self-accredit that they are qualified to evaluate a Person’s information safeguards, provide the required attestations, and conduct audits. Otherwise, provide for a very substantial period for ACBs to accommodate the new market for their services relating to DMF certification and retirement plan administration.

The NPRM would newly require that a Person seeking certification to access the DMF must submit a written attestation from an ACB that such Person has the information security systems, facilities, and procedures in place that are required for certification. The NPRM also provides that the NTIS may use ACBs to conduct the periodic scheduled and unscheduled audits that are required by the statute. NTIS noted that it considered developing the capacity itself to evaluate Persons’ systems, facilities, and procedures but ultimately decided to use ACBs. NTIS further commented that the accreditation required of ACBs is used nationally and internationally in

⁶ 159 CONG. REC. S8891 (daily ed. Dec. 17, 2013) (statement of Sen. Orrin Hatch (R-UT)).

⁷ 159 CONG. REC. S8891 (daily ed. Dec. 17, 2013) (statement of Sen. Bill Nelson (D-FL)).

⁸ 159 CONG. REC. S8891 (daily ed. Dec. 17, 2013) (statements of Sen. Bob Casey (D-PA) and Sen. Orrin Hatch (R-UT)).

many sectors and “ensures that a conformity assessment body is technically competent in the subject matter.”

We are very concerned that *the business for ACBs to evaluate our members for purposes of DMF certification does not exist today*. The NPRM would create a new market for entities that could meet the definition of an ACB to evaluate Persons involved in retirement plan administration for purposes of DMF certification. This market will very likely take a substantial amount of time – potentially years – to develop and reach the point where any of our members with a legitimate interest in and need for DMF access will be able to engage an ACB in a timely and cost-effective manner.

To address why this process could take years, consider just some of the steps that will need to occur. Entities seeking to meet the definition of an ACB must: understand the new DMF certification program requirements, make the decision whether to enter the business of reviewing Persons (and plan sponsors and their service providers in particular) for purposes of DMF certification, develop new procedures, train staff, seek accreditation to perform such assessments as a new type of ACB for which accreditation standards would need to be developed, attain such accreditation, seek and obtain bids for business, and schedule and conduct assessments. It is not difficult to imagine that these steps could take years.

To expedite implementation of a final certification program, we respectfully ask that NTIS allow a third party that is independent from a Person seeking certification to self-accredit that they are qualified to evaluate and attest to such Person’s systems, facilities, and procedures as meeting the statutory requirements for certification. Thus, NTIS would accept the attestation required for certification from either an ACB or a self-accredited third party. NTIS could also request that a self-accredited third party conduct the periodic audits.

Request #3: Provide a transition period of at least 18 months (depending on final ACB requirements) for Persons certified under the IFR to become certified under the new rules to avoid temporary loss of access to the DMF.

The NPRM states that Persons previously certified under the IFR will need to become certified in accordance with the requirements of the proposed rule when it becomes final and effective. To help ensure that Persons certified under the IFR do not temporarily lose access to the DMF as they work to meet the requirements of the final certification program, we respectfully request that NTIS provide for an adequate transition period between the date the final rule is published and the date by which Persons certified under the IFR must be certified under the new rules.

The length of time required for an adequate transition period depends upon whether and how NTIS accounts for our concern expressed in #2 above related to the ACB requirements. If NTIS provides an alternative method of obtaining the attestation required for certification, such as by allowing an independent third party that self-accredits to provide the attestation, then we ask that a transition period of at least 18 months be provided. However, if the final rule retains generally the same ACB-related requirements as proposed in the NPRM, we believe that a transition period of at least 36 months will be required for the reasons we described above in #2. If 36 months would be too long a period, then the two approaches could be combined: after an 18-

month transition period, attestations could be provided by self-accredited independent third parties, with the full ACB requirement becoming effective after 36 months.

During the period prior to the effective date of any new attestation process, Persons that are certified today should continue to be treated as certified. Because such Persons have already met the certification requirements of the IFR, allowing for a sufficient transition period (during which certification under the IFR would remain valid) should not put any Limited Access DMF obtained during that period by a Person certified under the IFR at any greater degree of risk.

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Again, we appreciate the opportunity to provide information and comments on the NPRM. We believe that by making the changes requested above and providing additional clarification, NTIS would provide a workable DMF certification program that enables plan sponsors and their service providers to continue to properly and efficiently administer the many thousands of retirement plans that impact millions of workers. If you have any questions or would like to discuss our comments or requests further, please contact either one of us.

Sincerely,

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Appendix

APPENDIX
REGULATORY LANGUAGE FOR NEW SAFE HARBOR

We suggest the following regulatory language for a new safe harbor that would allow Certified Persons to disclose Limited Access DMF, other than social security numbers, to another Person as long as certain conditions are met, which are intended to protect the DMF against abuse.

- Revise § 1110.103 to read as follows:

§ 1110.103 Disclosure ~~to a certified person~~.

(a) Disclosure to a certified person. Disclosure by a Person certified under this part of Limited Access DMF to another Person certified under this part shall be deemed to satisfy the disclosing Person's obligation to ensure compliance with § 1110.102(a)(4)(i)-(iii).

(b) Disclosure to other persons. Disclosure by a Person certified under this part of Limited Access DMF to another Person regardless of whether that other Person meets the requirements for certification under this part shall be deemed to satisfy the disclosing Person's obligation to ensure compliance with § 1110.102(a)(4)(i)-(iii) provided the following conditions are met:

(1) The parties are bound by contractual obligations to each other or to a third party in common for the performance or receipt of services that have a legitimate fraud prevention interest or a legitimate business purpose, and the disclosure of Limited Access DMF is related to that interest or purpose; and

(2) The only Limited Access DMF that may be disclosed pursuant to this limited exception is the name, date of birth, and date of death of an individual. Social security numbers may not be disclosed under this limited exception unless the Person not certified is ascertained to be already in possession of the social security number of the individual.

- Revise § 1110.200 by adding § 1110.200(d).

§ 1110.200 Imposition of penalty.

(d) Disclosure to other Persons. No penalty shall be imposed under paragraphs (a)(i) through (iii) of this section on a Certified Person who discloses, to another Person where the conditions of § 1110.103(b)(1)-(2) are satisfied, DMF information of any deceased individual at any time during the three-calendar-year period beginning on the date of the individual's death, where the sole basis for imposition of the penalty on the Certified Person is that the other Person has been determined to be subject to penalty under this part.