

PROPOSED MODIFICATION TO THE DEATH MASTER FILE SUBSCRIBER CERTIFICATION FORM AND INCLUSIONS FOR THE INTERIM FINAL RULE

Modification:

In the Subscriber Certification Form, in certification paragraph number 1, add the following underlined phrase:

“The undersigned hereby certifies that access to the NTIS Limited Access DMF (as defined in 15 CFR §1110.2) is appropriate because the undersigned, or the persons to whom it discloses DMF information, (a) has (i) a legitimate fraud prevention interest...”

Justification: The modification described above gives effect to section 203(c)(1)(A)-(B) of the Bipartisan Budget Act, which sets forth a framework for the lawful redistribution of the Limited Access DMF. In its current form, paragraph 1 of the Subscriber Certification Form does not incorporate the section 203(c)(1)(A)-(B) framework, which permits—and expects¹—the redistribution of Limited Access DMF information to third parties or end users that meet the requirements for certification. Including the language above would give effect to this statutory framework by permitting subscribers to certify that access to the file is based on the legitimate purposes of the persons to whom the information will be disclosed, thus giving effect to the framework of 203(c)(1)(A)-(B).

Inclusion:

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The Interim Final Rule should include guidance on the meaning of key terms to which subscribers are being asked to certify and through which subscribers are accepting liability. Statutory terms such as “legitimate fraud prevention interest” and “legitimate business purpose” are not defined in the statute, and while such terms may ultimately be defined through the full rulemaking process, in the interim period the Department of Commerce must provide some guidance on their meaning rather than leaving subscribers guessing as to which recipients will be deemed as “meeting the requirements” of certification. Leaving out guidance on these terms exposes lawful disseminators to potential liability for engaging in DMF activities that they undertake in good faith but are second-guessed by the Department’s enforcement bureau.

The Department can avoid this situation by publishing in the Interim Final Rule a set of “safe harbors” that identify other legal frameworks and regimes that would constitute de facto compliance with the permissible purpose and security requirements for dissemination during the pendency of the interim rule. While it may seem apparent that distributing DMF information to recipients who meet the safe harbors listed below would more than comply with the statutory terms, for the purpose of this interim process, inclusion of these safe harbors in the interim final

¹ As corroborated and documented by congressional authors in the legislative history.

rule text would go a long way to alleviate concerns of the legitimate user community and facilitate the continued operation of key channels of distribution of the DMF.

Safe Harbor No. 1: Safe Harbor for determining that a recipient has a legitimate fraud prevention interest or a legitimate business purpose pursuant to a law, governmental rule, regulation, or fiduciary duty:

For the purpose of the Interim Final Rule, a disseminator of DMF information is deemed compliant with the certification requirements of paragraphs A and B [legitimate fraud prevention interest, or legitimate business purpose pursuant to a law, government rule, regulation, or fiduciary duty] if the disseminator determines that:

The recipient is subject to:

- 15 USC §1681c (Fair Credit Reporting Act's requirement that, to obtain consumer reports, recipients must use them only for certain enumerated purposes);
- 15 USC §6801(a) (Gramm Leach Bliley Act's privacy provisions requiring that users of nonpublic personal (financial) information be used only for certain enumerated purposes);
- 18 USC §2721(a) (Driver's Privacy Protection Act's requirement that, to obtain and use personal information from state department of motor vehicle records, recipients must use the information only for certain enumerated purposes);
- 15 U.S.C. § 1692 et seq. (Fair Debt Collection Practices Act's provisions governing the use of information acquired for the purpose of collecting debt)

The recipient is an agency or employee of a federal, state, or local government;

The recipient is a member of the Direct Marketing Association (DMA), which mandates the responsible use of personal data for marketing purposes, including the duty of list brokers and managers undertaking marketing campaigns on behalf of their clients to use the data only for marketing purposes, in accordance with DMA's *Guidelines for Ethical Business Practice*.

Safe Harbor No. 2: Safe Harbor for determining that a recipient meets requirements similar to the requirements of section 6103(p)(4) of the Internal revenue Code:

For the purpose of the Interim Final Rule, a disseminator of DMF information is deemed compliant with the certification requirements of paragraph C [systems, facilities, and procedures...similar to the requirements of section 6103(p)(4)] if the disseminator determines that the recipient is subject to:

- 15 USC §6801(b) (Gramm Leach Bliley Act's safeguards requirements for financial institutions) because they are a financial institution, or
- 15 USC §45 (data security requirements embodied in the prohibition against unfair and deceptive practices) because they do not fall in any of the carve outs to the FTC's jurisdiction.