



EMPLOYEE BENEFITS SECURITY ADMINISTRATION

[Prohibited Transaction Exemption 2025-02; Exemption Application No. D-12073]

Exemption from Certain Prohibited Transaction Restrictions Involving

Memorial Sloan Kettering Cancer Center (MSKCC or the Applicant)

Located in New York, New York

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of exemption.

SUMMARY: This document contains a notice of exemption issued by the Department of Labor (the Department) from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This exemption permits the reinsurance of risks and the receipt of a premium by MSK Employee Benefits IC (MSK EB or the Captive), a captive insurance and reinsurance subsidiary that is wholly-owned by MSKCC, in connection with a single premium group insurance contract sold by an unrelated fronting insurer (the Fronting Insurer or the Fronter) to provide pension annuities to participants and beneficiaries in the Memorial Sloan Kettering Cancer Center Pension Plan (the Plan). The relief provided in the exemption will only be available if the conditions in Section III are met in conformance with the definitions in Section I.

DATES: The exemption will be in effect on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department at (202) 693-8456. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Applicant submitted an exemption application requesting an individual exemption pursuant to ERISA section 408(a) in accordance with the Department's exemption procedures set forth in 29 CFR part 2570,

subpart B.¹ On July 9, 2024, the Department published a notice of proposed exemption in the *Federal Register*.² Based on adherence to the conditions of this exemption by MSKCC, the Independent Fiduciary, and the IB 95-1 Independent Fiduciary (as defined below), the Department makes the requisite findings under ERISA section 408(a) that this exemption is: (1) administratively feasible for the Department, (2) in the interest of the participants and beneficiaries of the Plan, and (3) protective of the rights of the participants and beneficiaries of the Plan. Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, individually and taken as a whole, necessary for the Department to grant the relief provided herein. The Department would not have granted this exemption without these conditions.

BACKGROUND

Overview of the Exemption

1. Under the exemption, the Plan will enter into a single premium group annuity insurance contract (the GAC) with an unrelated Fronting Insurer that will be selected by an IB 95-1 Fiduciary in compliance with the requirements of the Department's Interpretive Bulletin 95-1.³ The Fronting Insurer will, in turn, enter into a reinsurance contract (the Reinsurance Arrangement) with the Captive. Under the Reinsurance Arrangement, the Captive will reinsure 100 percent of the Plan's risks under the GAC. Importantly, the Fronting Insurer will remain fully responsible for the benefits of participants and beneficiaries for the entire duration of the GAC and Reinsurance Arrangement if the Captive fails to fulfill its contractual obligations to the Fronting Insurer, without any caveats, contingencies, or conditions that would relieve or limit the Fronting Insurer's contractual obligation to pay benefits to the Plan's participants and

¹ 76 FR 66637, 66644, (October 27, 2011).

² 89 FR 56422 (July 9, 2024).

³ 29 CFR 2509.95-1.

beneficiaries.

In connection with the Reinsurance Arrangement, all Plan participants and beneficiaries will receive an increase to their monthly pension benefit that is currently expected to be 5.55 percent.⁴ The Applicant expects that this benefit increase will provide \$66,408,000 in additional benefits to the Plan's participants and beneficiaries. Importantly, this increase will remain in place for the entirety of Plan participants' and beneficiaries' lives and, as a condition of this exemption, MSKCC will not reduce any benefits that participants and beneficiaries receive from MSKCC, including benefits they receive from the Plan, as a result of the Reinsurance Arrangement. Absent this exemption, participants and beneficiaries would not receive this estimated 5.55 percent benefit increase.

The Plan

2. The Plan is a defined benefit pension plan that provides retirement and death benefits for eligible participants.⁵ The Plan administrator and named fiduciary is the MSK Executive Benefits Committee and the Plan trustee is JPMorgan Chase. In 2012, MSKCC amended the Plan to close enrollment to employees hired on or after December 16, 2012. In 2020, MSKCC amended the Plan to freeze future benefit accruals effective December 20, 2020. As of December 31, 2023, the Plan covered 8,089 participants and

⁴ As discussed in more detail below, the exemption requires the Plan participants and beneficiaries to receive the majority of the benefits derived from the Reinsurance Arrangement. While, as noted above, it is "currently expected" that a 5.55% increase in Plan's participants' and beneficiaries' monthly pension benefits will achieve this objective, the exact percentage increase needed to ensure that Plan participants and beneficiaries receive the majority of the benefits derived from the proposed arrangement will not be known until the Plan actually enters into the GAC, which will occur after the Fronting Insurer is selected by the IB 95-1 Fiduciary. As described in further detail below, after the Plan enters into the GAC, Milliman, a second independent fiduciary acting solely on behalf of the Plan, must determine, based on objective data, that the Plan participants' and beneficiaries' monthly pension benefits have been increased by a percentage that ensures they will receive the majority of the benefits derived from the Reinsurance Arrangement. The methodology for making this calculation is discussed below. Milliman as independent fiduciary must, among other things, conclude, in a written report submitted to the Department, that Plan participants and beneficiaries received the appropriate percentage increase in their monthly pension benefits. The written report of the independent fiduciary will be available to the public by contacting EBSA's Public Disclosure Office and referencing Exemption Application D-12073.

⁵ Under the Plan, the normal form of payment for an unmarried participant is a single-life annuity, and the normal form of payment for a married participant is a joint and 50% survivor annuity.

held \$1,384,897,170 in total assets.

The Captive

3. MSK Insurance US, Inc. (MSK US) is MSKCC's wholly-owned captive insurance and reinsurance subsidiary. MSK US writes approximately \$75 million in premiums and insures the property and equipment of MSKCC. The Captive (MSK EB) is a segregated cell within MSK US that will be used to reinsure the risks related to the Reinsurance Arrangement and this exemption. While MSK US will contract with the Fronting Insurer as part of the Reinsurance Arrangement, MSK EB will hold the reserves that will be used to pay benefits to the Plan's participants and beneficiaries under the GAC.

The IB 95-1 Fiduciary and the Selection of the Fronting Insurer

4. MSKCC has engaged Fiduciary Counselors Inc. (FCI) as the IB 95-1 Fiduciary that is responsible for selecting a Fronting Insurer based on a competitive bidding process. The Applicant represents that FCI will send requests for proposals to potential Fronting Insurers and will then select a Fronting Insurer in compliance with the Department's Interpretive Bulletin (IB) 95-1, which provides several factors that fiduciaries must consider to ensure they select the safest annuity available for a plan.⁶ Within 30 days after the GAC has been executed, FCI must provide the Department with a written report that: (a) identifies the Fronting Insurer selected; (b) contains a detailed representation regarding the methodology used to make the selection and how that methodology determines that the selected Fronting Insurer and GAC met the

⁶ 29 CFR 2509-95-1. As stated in IB 95-1, when conducting a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims-paying ability and creditworthiness. Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things: (a) the quality and diversification of the annuity provider's investment portfolio; (b) the size of the insurer relative to the proposed contract; (c) the level of the insurer's capital and surplus; (d) the lines of business of the annuity provider and other indications of an insurer's exposure to liability; (e) the structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts; and (f) the availability of additional protection through state guaranty associations and the extent of their guarantees.

requirements of IB 95-1; and (c) prudently concludes that it would have been consistent with IB 95-1 to select the Fronting Insurer as the insurer for a final termination buy-out annuity had MSKCC adopted that approach.

Mechanics of the Reinsurance Arrangement

5. The Plan will purchase the GAC from the Fronting Insurer by using current Plan assets to pay a one-time premium to the Fronting Insurer. The Fronting Insurer will enter into an indemnity reinsurance contract with the Captive and will transfer the premium amount paid by the Plan to the Captive where it will be held in reserve. The GAC will cover all of the Plan's liabilities and have two phases that are described below.

Buy-In Phase: During the Buy-in Phase, the Plan will hold the GAC as a plan asset and the Plan will remain active. During this phase, the Fronting Insurer will send funds to the Plan Trustee (JPMorgan Chase) to make benefit payments to participants and beneficiaries and, every three months, the Fronting Insurer will submit payment requests to the Captive requesting reimbursement to cover participant and beneficiary distributions paid by the Fronting Insurer during the preceding three months. If the Fronting Insurer and Captive fail to pay benefits during the Buy-In Phase, MSKCC will still be required to fund the Plan, and the Plan will still be required to pay all benefits due to participants and beneficiaries.

Following the purchase of the GAC, and while the Plan is still active, the Plan's fiduciaries will be obligated to manage all Plan assets, including those assets not used to purchase the GAC, solely in the interest of participants and beneficiaries and exclusively for their benefit. Any payments for Plan expenses that do not clearly and exclusively benefit participants and beneficiaries will be subject to additional scrutiny.

Buy-Out Phase: The GAC will contain a "conversion option" (the Conversion Option) that MSKCC can exercise (at any time) if and when it decides to terminate the

Plan.⁷ If exercised, the Conversion Option would transition the GAC from the Buy-in Phase to the Buy-Out Phase,⁸ and the following events would occur: (a) the GAC will no longer be held by the Plan as a Plan asset; (b) MSKCC will replace the Plan as the holder of the GAC; (c) the Fronting Insurer will issue annuity certificates to all Plan participants and beneficiaries; and (d) the Fronting Insurer will take complete control of the administration of the GAC and make benefit payments directly to the former Plan participants and beneficiaries that have become annuitants.⁹ During the Buy-Out Phase the Captive will continue to hold the reserves and the Fronting Insurer will continue to remit quarterly reimbursement payment requests to the Captive.

The relationship between the Fronting Insurer and Captive will remain the same during both the Buy-In and Buy-Out Phases; therefore, the Fronting Insurer will assume full responsibility for benefit obligations to participants and beneficiaries, without conditions or caveats, and the Captive will assume the reinsurance risk. During both phases, the Captive is fully obligated to make payments to the Fronting Insurer under the Reinsurance Arrangement. This means that the Captive is fully obligated to satisfy the benefit obligations, but the mechanism of that obligation flows through the Fronting Insurer rather than directly to the Plan or to participants and beneficiaries.

As a condition of this exemption, the Fronting Insurer must have a direct contractual relationship with the Plan during the Buy-In phase of the GAC and with the Plan's participants and beneficiaries during the Buy-Out phase, without any caveats, contingencies, or conditions that would relieve or limit the Fronting Insurer's contractual obligation to pay benefits to the Plan's participants and beneficiaries.

⁷ This exemption would not relieve the Plan's fiduciaries from their express ERISA duties to manage the assets of the plan solely in the interest of the plan and its participants and beneficiaries, including when the fiduciaries are contemplating terminating the plan.

⁸ The effective date of the conversion would be aligned with the Plan's termination (i.e., the Conversion Option will be exercised only if and when the Plan terminates).

⁹ As a condition of this exemption, after the Buy-In phase for the Reinsurance Arrangement is completed and MSKCC exercises the Conversion Option, MSKCC will terminate the Plan in compliance with all applicable Code and ERISA requirements.

Collateral under the Reinsurance Agreement

6. As part of the Reinsurance Arrangement, the Captive will be collateralized by MSKCC. The Captive is expected to use the assets received as the reinsurance premium to collateralize its obligations under the Reinsurance Arrangement, in each case with such modifications as the Fronting Insurer's regulatory, accounting, or commercial considerations may require.¹⁰ MSKCC will capitalize the Captive in accordance with the requirements of the State of Vermont and will provide a parental guarantee for the benefit of the Fronting Insurer with respect to the Captive's obligations. Parental guarantee assets will be separate and apart from the Plan assets used to purchase the GAC.

Oversight by the Vermont DFR

7. Before MSKCC submitted its exemption request, the Captive requested and received formal approval from the Vermont Department of Financial Regulation (Vermont DFR) to enter into the Reinsurance Arrangement and operate the Captive to reinsure the Plan's pension benefits. The Vermont DFR issued formal approval after reviewing the Captive's Feasibility Report, which included, among other things, actuarial projections, an investment policy statement, and a business plan. The Captive will be required to submit independent audit and actuarial reports to the Vermont DFR annually and, at least once every five years, the Vermont DFR will conduct a thorough review of the Captive and issue an Exam Report.

This exemption requires the Independent Fiduciary to obtain and review all independent audit and actuarial reports submitted by the Captive to the Vermont DFR as well as all Exam Reports issued to the Captive by the Vermont DFR, as long as the plan remains active. Further, the Independent Fiduciary must provide the Department with a

¹⁰ The Fronting Insurer will be required to carry statutory reserves on its financial statements in such amounts as the insurance law in its state of domicile may require, and the collateral requirements will be based on those reserve requirements. The Fronting Insurer will have the right to access the collateral assets in accordance with the Reinsurance Arrangement. Collateral assets will back the Captive's reserves but will not be distinct from them.

detailed summary of each Exam Report in its annual Independent Fiduciary Report covering the year the Exam Report is issued. This exemption also requires the Captive to request a Certificate of Good Standing from the Vermont DFR every year and provide the Department with any Exam Reports it receives no later than 30 days after MSKCC receives such report.

Financial Benefit to MSKCC

8. The Applicant represents that purchasing the GAC in conjunction with the Reinsurance Arrangement will result in an estimated ten percent cost savings. For instance, if the single premium cost to purchase the GAC from the Fronting Insurer *without* the Captive would be \$1.2 billion, the cost to purchase it *with* the Captive would be \$1.08 billion. Since the financial benefit of this cost reduction would inure to MSKCC, this exemption requires MSKCC to provide the majority of the derived financial benefit to the Plan's participants and beneficiaries in the form of a permanent monthly annuity payment increase, as described below.¹¹

The Primary Benefits Test

9. This exemption requires the Plan to receive the majority of the financial benefits flowing from the Reinsurance Arrangement (the Primary Benefits Test). Under this exemption, the Independent Fiduciary must quantify all benefits derived from the Reinsurance Arrangement, including all benefits directly and indirectly received by MSKCC and any entity affiliated with MSKCC, and confirm that participants and beneficiaries receive at least 51 percent of all benefits derived from the arrangement. Throughout the Reinsurance Arrangement, while the Plan remains active, the Independent Fiduciary must continuously review and confirm that the Primary Benefits Test is being met.

¹¹ The Applicant represents that because MSKCC is a non-profit entity, there will be no associated tax advantages flowing to MSKCC from the Reinsurance Arrangement.

MSKCC-Provided Benefit Enhancement

10. MSKCC will implement a one-time benefit increase sufficient to pass the Primary Benefits Test (the Benefit Enhancement). If the savings generated from using the Captive, as determined by the Independent Fiduciary, equals 10 percent, MSKCC will implement a Benefit Enhancement in the form of a permanent 5.37 percent¹² increase to the monthly benefits of all participants and beneficiaries that will continue without reduction for the remainder of their lives. In addition, and as discussed below, MSKCC will add a second layer benefit enhancement of .18% for participants and beneficiaries—which is derived from the present value of the Independent Fiduciary’s fees over the expected life of the GAC, post-plan termination.¹³ Thus, if the savings from the Captive equals 10 percent, all plan participants and beneficiaries will receive a permanent pension benefit increase of 5.55 percent. Collectively, Plan participants and beneficiaries would receive increased pension benefit payments with a present value of \$66,408,000 and, therefore, will receive the majority of the financial benefit derived from the Reinsurance Arrangement plus the present value of the Independent Fiduciary’s fees over the expected life of the GAC.

As noted in the proposed exemption, MSKCC represents that: (a) apart from the conditions of this exemption, MSKCC otherwise had no preexisting obligation to provide a benefit increase to participants and beneficiaries; and (b) before its formal submission for exemptive relief, MSKCC had not considered or offered any increase to the current value of the benefits of the Plan’s participants and beneficiaries.

¹² The formula underlying the 5.37 percent calculation is based on the actual percentage of savings in the annuity purchase, including the value of the pension benefit enhancement. All details regarding the formula used to calculate the Benefit Enhancement are included in the exemption application file and available to the public upon request.

¹³ The Independent Fiduciary confirmed that the present value of its fees over the expected life of the GAC would be \$1,968,000. As a condition of this exemption, MSKCC will add this entire amount into the GAC as a second-layer benefit enhancement which will result in an additional .18 percent permanent monthly pension increase for all participants and beneficiaries. Thus, the total benefit enhancement under this exemption is expected to be 5.55 percent.

Department’s Note: The Department notes that the ratio of the benefit enhancement to MSKCC savings described in this exemption should not be relied upon as a precedent for future exemption applicants. If the Department receives applications for similar reinsurance exemptions in the future, it may require a higher ratio of participant and beneficiary benefit enhancements to plan sponsor savings, based upon the specific design of the transaction and financial circumstances of the plan and plan sponsor. In this regard, the Department’s exemption procedure regulation provides that “[t]he existence of previously issued administrative exemptions is not determinative of whether the Department will propose future exemptions for applications with the same or similar facts, or whether a proposed exemption will contain the same conditions as a similar previously issued administrative exemption.”¹⁴ As the Department stated in the preamble to that regulation, “. . .this language reinforces the Department’s existing policy that it has the sole discretionary authority to issues exemptions and is not bound by the facts or conditions of prior exemptions in making determinations with respect to an exemption application.”

Independent Fiduciary

11. Milliman will serve as the Plan’s Independent Fiduciary with respect to the Reinsurance Arrangement and Kathleen E. Ely of Milliman will perform the functions required of the independent fiduciary on behalf of Milliman with respect to the requirements of this exemption. As the Plan’s Independent Fiduciary, Milliman must represent the Plan in accordance with the obligations of prudence and loyalty under ERISA sections 404(a)(1)(A) and (B) and determine whether the Reinsurance Arrangement is in the interests of the Plan's participants and beneficiaries. In this regard, before the Plan purchases the GAC, Milliman must prudently and loyally confirm that the Benefit Enhancement is sufficient to meet the Primary Benefits Test.

¹⁴ 29 CFR 2570.30(g).

Further, not later than 30 days after the purchase of the GAC and consummation of the Reinsurance Arrangement, Milliman must confirm to the Department in writing that all terms and conditions of the exemption have been met. This confirmation must include copies of each document relied upon and the steps taken to make this determination. In this written determination, the Independent Fiduciary must confirm the actual cost savings associated with the Reinsurance Arrangement by obtaining documentation from the Fronting Insurer that compares the cost to purchase the GAC without the Captive in place to the cost to purchase the GAC with the Captive in place. The Independent Fiduciary must include this documentation from the Fronting Insurer with its written determination to the Department.

The Independent Fiduciary must also monitor and ensure that any assets that remain in the Plan during the Buy-In phase of the Reinsurance Arrangement are managed and used exclusively to provide benefits to Plan participants and beneficiaries and to defray reasonable expenses of administering the Plan in compliance with ERISA sections 403(c)(1) and 404(a)(1)(A).

Ms. Ely and Milliman represent that they are independent of all parties associated with the Reinsurance Arrangement, including the Plan, MSKCC, and the Captive. Milliman also represents that its gross income received from parties in interest to the Plan in connection with the Reinsurance Arrangement represents less than 0.1 percent of Milliman's gross annual income from all sources.

Milliman will be required to continue monitoring, enforcing, and ensuring compliance with all conditions of this exemption until the plan is terminated, and report any instance of non-compliance immediately to the Department. As long as the plan is active, Milliman must submit written annual Independent Fiduciary Reports to the Department certifying under penalty of perjury whether each term and condition of the exemption has been met over the applicable period. In this regard, Milliman's final

Independent Fiduciary Report will be due to the Department no later than six months after the Plan's termination date. Please see below for a discussion regarding the removal of the Independent Fiduciary after plan termination.

In its final independent fiduciary report, Milliman must determine that the plan termination, transfer of assets, and new contractual arrangements accord with all conditions of this exemption at the time of termination, and that it remains the case that the primary benefits of this arrangement are expected to inure to the plan for the entire duration of the arrangement. The Independent Fiduciary must also represent that MSKCC has not managed plan assets in a way that results in MSKCC receiving a greater benefit from this arrangement than plan participants and beneficiaries.

WRITTEN COMMENTS

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by August 23, 2024. The Department received written comments from the Applicant and Plan participants and beneficiaries and no requests for a public hearing.

I. Comments from the Applicant

1. Removal of the Independent Fiduciary after Plan Termination

The proposed exemption requires an Independent Fiduciary to act on behalf of the Plan's participants and beneficiaries and provide oversight through the end of the Reinsurance Arrangement. Section III(h)(4) of the proposed exemption would require the Independent Fiduciary to: "Represent and protect the interests of the participants and beneficiaries of the Plan during both the Buy-In and Buy-Out Phases to ensure they receive everything that they are entitled to receive under this exemption, the terms of the Plan, and the GAC." Further, Section III(i)(1) of the proposed exemption would require

the Independent Fiduciary to submit annual Independent Fiduciary Reports to the Department until the end of the Reinsurance Arrangement. The proposed exemption also provides that the Independent Fiduciary must prudently and loyally confirm that the Primary Benefits Test is met throughout the Reinsurance Arrangement and continue to monitor, enforce, and ensure compliance with all conditions of the exemption throughout the Reinsurance Arrangement.

MSKCC requests the Department remove the independent fiduciary requirement following the Plan's termination. MSKCC states that the phrases "throughout the Reinsurance Arrangement" and "throughout the duration of the Reinsurance Arrangement" should be modified, as they suggest that there is a Plan fiduciary obligation that extends beyond the termination of the Plan. MSKCC asserts that the Plan will terminate in connection with the Buy-Out conversion of the GAC and cease to exist, and once the Plan terminates, there will be no ongoing fiduciary obligations with respect to the Plan. MSKCC further asserts that at the time of the Plan's termination, Plan fiduciaries must ensure that the Plan's obligations are discharged, and that determination would include ensuring that the structure of the Reinsurance Arrangement complies with the exemption's conditions.

Accordingly, MSKCC requests the Department to revise Section III(h)(4) of the proposed exemption to read as follows: "The Independent Fiduciary must... Represent and protect the interests of the participants and beneficiaries of the Plan unless and until the Plan is terminated to ensure they receive everything that they are entitled to receive under this exemption, the terms of the Plan, and the GAC."

Department's Response: After considering this comment, the Department has determined to remove the requirement that the Independent Fiduciary perform duties beyond the date of a plan termination if the Independent Fiduciary calculates the present value of its expected fees over the expected life of the GAC and MSKCC adds that

amount into the GAC as an additional benefit enhancement for participants and beneficiaries. Also, as noted above, the Independent Fiduciary has confirmed that the present value of its expected fees is \$1,968,000. Therefore, as a condition of this exemption, MSK must add an additional \$1,968,000 as a second-layer benefit increase into the GAC to permanently increase the pension benefits for participants and beneficiaries. This \$1,968,000 second-layer benefit increase will add an additional .18 percent increase to the monthly annuity payable to participants and beneficiaries and thus increase the total monthly annuity payable to participants and beneficiaries from 5.37 percent to 5.55 percent.

The Department's determination to allow the Independent Fiduciary to step aside after plan termination is based upon an understanding that the Vermont DFR will be performing substantial oversight over the Captive after the plan is terminated, and that this oversight is similar to the duties the Independent Fiduciary would have had to perform under the proposed exemption. The Department notes that under this exemption, the Captive must request a Certificate of Good Standing from the Vermont DFR every year, and that before issuing a Certificate, Vermont DFR will review the Captive, its reserves, and investments. If Vermont finds anything concerning, including risk, solvency, investments, or compliance issues, they will not issue the Certificate to the Captive. Also, during this review, the Vermont DFR will look into the financial health of MSKCC and the unrelated Fronting Insurer.

Additionally, at least once every five years, the Vermont DFR will conduct a more thorough examination of the Captive and produce an Exam Report. Through its Exam Report process, the Vermont DFR will determine compliance with state insurance laws and regulations and evaluate the Captive's solvency. As part of this report, a team of examiners from Vermont DFR will conduct an in-depth review of the Captive's operations and balance sheet, and if they find something concerning, they will issue a

Company Action Letter or a Regulatory Action Letter to the Captive. The Department notes that this exemption requires MSK to submit all Exam Reports to the Department.

Moreover, the Fronting Insurer will have a strong interest in ensuring the Captive has sufficient reserves to pay benefit liabilities because the Fronter pays pension benefits to participants and beneficiaries from its own account. The Fronter's obligation to participants and beneficiaries is unconditional and will continue even if the Captive becomes insolvent, because the Fronter's arrangement with the Captive is an indemnity reinsurance arrangement. This means that the Captive reimburses the Fronter every three months for pension payments that the Fronter has already paid to participants and beneficiaries over the preceding three months. Under the reinsurance contract between the Fronter and the Captive, the Fronter monitors the investment of the Captive's reserves and also has the contractual right to draw on a collateral account that is funded by the Captive.

Finally, the Department notes that after plan termination, all participants and beneficiaries become individual annuitants with the Fronter, and those annuities are regulated by the state in which the Fronter is domiciled. Under state insurance law, the Fronter is required to submit to an annual independent audit and file that report with their state regulator.

Based on the foregoing, the Department has determined to remove the requirement that the Independent Fiduciary perform duties beyond the date of a plan termination because there will be sufficient oversight of the Captive after the plan terminates to ensure that participants and beneficiaries are protected and their benefits remain secure. Moreover, the second-layer benefit enhancement that will result from adding the additional \$1,968,000 into the GAC is a meaningful additional benefit for participants and beneficiaries that will provide a more secure retirement for all participants and beneficiaries covered by the Plan.

2: Timing of Identifying the Fronting Insurer

In paragraph 5 of the proposed exemption, the Department states that “given the importance of a highly rated Fronting Insurer to the security of the pension benefits provided to the Plan’s participants and beneficiaries, Fiduciary Counselors must provide the Department with a written submission that identifies the Fronting Insurer selected along with a written representation detailing the methodology that it used to select the Fronting Insurer and how that methodology, and the Fronting Insurer selected, met the requirements of IB 95-1.” Section III(e)(1) of the proposed exemption states that this report must be provided to the Department “before this proposed exemption is granted.”

MSKCC maintains in its comment letter, that it will not be practicable for the IB 95-1 Fiduciary to select the Fronting Insurer and provide the IB 95-1 Report to the Department before the exemption is granted. According to MSKCC, FCI would not be able to negotiate every term of the annuity purchase with the Fronter – including final pricing – until the terms of the final exemption are known and the timing of the annuity purchase is certain and imminent. And further, if the final exemption is conditioned upon the selection of a particular Fronting Insurer, MKSCC would lose leverage to negotiate final annuity purchase terms favorable to the Plan’s participants and beneficiaries.

Instead, MSK requests that the Department revise the exemption to require the IB 95-1 Fiduciary to provide its written IB 95-1 Report and identify the Fronting Insurer *after* the exemption is granted. However, in their comment letter, MSKCC offers to provide the Department with a list of Fronting Insurers that FCI has determined should be considered and approached as part of the request for proposal (RFP) process before the Department issues the final exemption, but on a confidential basis to preserve the integrity of the RFP process. Further, if FCI subsequently decides not to select a Fronter from the list, they would provide the Department with 30 days advance notice before selecting the Fronter to provide the Department with an opportunity to comment or

discuss with MSKCC before the Fronter is engaged.

Department's Response: After considering the applicant's request and rationale, the Department accepts the Applicant's request to remove the condition requiring Fiduciary Counselors to provide a written submission that identifies the Fronting Insurer selected along with detail on the methodology it used to select the Fronter and how that methodology, and the Fronter selected, met the requirements of IB 95-1 before the exemption is granted. The Department, instead, has revised the exemption to remove this requirement entirely. Therefore, Fiduciary Counselors will not be required to submit anything to the Department before the exemption is granted. In making this change, the Department emphasizes that Fiduciary Counselors must follow IB 95-1 and prudently and loyally select the safest available annuity for the plan participants and beneficiaries and submit a detailed written report to the Department regarding the methodology the IB 95-1 Fiduciary used to determine that the selected Fronting Insurer and GAC met the requirements of IB 95-1 no later than 30 days after the execution of the GAC.

3: Use of Participant Data

Section III(j) of the proposed exemption states that "neither MSKCC nor any related entity may use participant or beneficiary-related data, or information generated by or derived from the Reinsurance Arrangement in a manner that benefits MSKCC or a related entity." MSKCC contends that this condition is too broad and requests that it be changed to only prohibit MSKCC from using participant data "for purposes unrelated to the administration, funding, or security of retirement benefits (including obligations under the GAC and the Reinsurance Arrangement)." MSKCC states that the proposed condition is too broad because MSKCC benefits by providing retirement benefits to its employees and retirees and ensuring that benefits are secure and appropriately administered.

Department's Response: After considering this comment, the Department accepts MSKCC's requested revision with some modifications that narrow the scope of MSKCC's requested change. The Department is limiting the expanded permitted uses of participant data under this exemption to purposes related to the administration, funding, or security of *the GAC, Reinsurance Arrangement, or Plan*. Expanding the scope of permissible data use to administration, funding, and security of the GAC, Reinsurance Arrangement, or Plan is appropriate, but expanding permitted uses to purposes related to the administration, funding, or security of *retirement benefits generally*, as requested by MSKCC, is too broad. Therefore, Section III(j) of this exemption provides that "neither MSKCC nor any related entity may use participant or beneficiary-related data, or information generated by or derived from the Reinsurance Arrangement for purposes unrelated to the administration, funding, or security of the GAC, Reinsurance Arrangement, or Plan."

The Department notes that this exemption does not permit the use of participant and beneficiary data in a way that primarily benefits MSKCC, the Captive, or the Fronting Insurer. Under this exemption, prohibited uses of participant and beneficiary data include, but are not limited to, selling the data to third parties, using the data to cross-sell services, or using the data to target participants and beneficiaries to attempt to sell them new products or services. MSKCC did not explain why they would need to use information derived from the Reinsurance Arrangement for more general purposes. Because the security of participant data is critically important to the Department, the Plan and participants and beneficiaries, the Department has construed its permitted uses as narrowly as possible.

4: Allow MSKCC to take Dividends from the Captive

Section III(p) of the proposed exemption states that "MSKCC may not receive a dividend or any other form of distribution from the Captive at any point during the

Reinsurance Arrangement.” In its comment letter, MSKCC requests a revision that would allow it to receive dividends and distributions from the Captive, provided that MSKCC would contribute the majority of each such dividend or distribution as a benefit enhancement to another MSKCC-sponsored employee benefit plan under the Primary Benefits Test.

Department’s Response: The Department declines to make this requested change because there is no compelling reason to allow MSKCC to take distributions from the Captive. An essential purpose of this exemption is to ensure that Plan participants’ and beneficiaries’ pension benefits are as secure as possible. This objective is best achieved by ensuring that the assets formerly held in the Plan’s trust that will be transferred to the Captive as part of the Reinsurance Arrangement remain in the Captive’s reserves where they can be used to pay the retirement benefits of the participants and beneficiaries of *this* Plan. The Department notes that MSKCC does not provide any detail on the risk impact associated with allowing MSKCC to receive future distributions from the Captive. Furthermore, it is inappropriate for participants in another MSKCC-sponsored employee benefit plan to receive a portion of a dividend taken from the Captive before the Captive has satisfied all liabilities under the GAC.

The Department also notes that MSKCC has consistently represented that the Captive will be funded on a break-even basis and that no excess assets are anticipated at the end of the Reinsurance Arrangement. If this is the case, then all Plan assets used to fund participant and beneficiary liabilities should remain in the Captive where they can be used to pay benefits to the participants and beneficiaries of *this* Plan – rather than as distributions to MSKCC and contributions to another plan.

5. Factual Accuracy

Condition (k) of the proposed exemption provides that “all the facts and representations set forth in the Summary of Facts and Representations must be true and

accurate at all times.” The Applicant requests that section (k) be modified to state, “All the material facts and representations set forth in the Summary of Facts and Representations (*as modified by the clarifications set forth in the comment letter submitted by the Applicant*) must be true and accurate at all times;”

The Department accepts the Applicant’s request to modify Section (k) in part. Instead of expanding section (k) to incorporate all modifications noted in the Applicant’s comment letter, the Department will expand Section (k) to incorporate all modifications from the proposed exemption, as detailed in this final exemption. Section (k) now states: “All the material facts and representations set forth in the Background section of this exemption, including all modifications from the proposed exemption as detailed in this final exemption, must be true and accurate at all times[.]”

6. Factual Clarifications

Paragraph 6 of the proposed exemption’s Summary of Facts and Representations states, “the Plan would purchase the GAC from the Fronting Insurer by using current Plan assets (including an in-kind transfer) to pay a one-time premium amount to the Fronting Insurer... Subsequently, the Fronting Insurer would transfer the premium amount paid by the Plan to the Captive where it would be held in reserve within the captive cell (MSK EB) throughout the duration of the Reinsurance Arrangement.”

MSKCC requests a clarification that the insurance premium and the reinsurance premium may be paid concurrently and that the Captive is expected to use the assets received as reinsurance premium to collateralize its obligations under the Reinsurance Arrangement, in each case with such modifications as the Fronting Insurer’s regulatory, accounting or commercial considerations may require.

The Department accepts MSKCC’s requested clarification but notes that in its application MSKCC stated that: “The Fronter will purchase the reinsurance contract from MSK Insurance through a transfer from the Fronter to MSK Insurance of cash and,

through an in-kind transfer, assets *previously* transferred from the Pension Plan.”

Paragraph 8 of the proposed exemption’s Summary of Facts and Representations states that “as part of the Reinsurance Arrangement, the Captive would be collateralized by MSKCC, and all collateral will be separate and apart from the Plan assets used to purchase the GAC.” Further, the second sentence of paragraph 8 states that “collateral would be distinct from the reserves” and that “pursuant to the GAC, MSKCC would establish a collateral account that the Fronting Insurer can access: (1) in the event the Captive fails to make a required quarterly payment to the Fronting Insurer; or (2) to reduce the financial risk that would arise if, for example, the Captive is holding too large a portion of the reserves in illiquid investments.” Finally, the fourth sentence of paragraph 8 states that “the collateral requirements will be determined by the Fronting Insurer and will be based on the reserve requirements mandated by the State of Vermont.”

MSKCC requests the following clarifications. First, to further support the Captive, MSKCC will capitalize the Captive in accordance with the requirements of the State of Vermont and will provide a guarantee for the benefit of the Fronting Insurer with respect to the Captive’s obligations, and those assets will be separate and apart from the Plan assets used to purchase the GAC. Second, the Fronter will be required to carry statutory reserves on its financial statements in such amounts as the insurance law in its state of domicile may require, and the collateral requirements will be based on those reserve requirements. Third, the Fronting Insurer will have the right to access the collateral assets in accordance with the Reinsurance Arrangement. Collateral assets will back the Captive’s reserves but will not be distinct from them. In addition, other assets of the Captive will support the Reinsurance Arrangement.

Paragraph 6 of the proposed exemption states, “[t]he Fronting Insurer would assume full responsibility for benefit obligations to participants and beneficiaries, without

conditions or caveats, and the Captive would assume the reinsurance risk.” However, paragraph 6 also states that “...both the Fronting Insurer and the Captive would assume full responsibility for making pension benefit payments to participants and beneficiaries...the Fronting Insurer and the Captive would remain 100 percent liable for making benefit payments to participants and beneficiaries.”

The Applicant states that, while it is correct that both the Fronting Insurer and the Captive are fully obligated to satisfy the benefit obligations, paragraph 6 of the Summary requires a technical modification in its description of the mechanism of those obligations. In this regard, (a) during the Buy-In Phase, the Fronting Insurer makes payments to the Plan; and (b) during the Buy-Out Phase, the Fronting Insurer makes benefit payments directly to participants and beneficiaries. During both phases, the Captive is fully obligated to make payments to the Fronting Insurer under the Reinsurance Arrangement. The Captive, thus, is fully obligated to satisfy the benefit obligations, but the mechanism of that obligation flows through the Fronting Insurer, rather than directly to participants and beneficiaries of the Plan.

Department’s Response: The Department accepts MSKCC’s factual clarifications.

7. Scope of Exemptive Relief

Section II of the proposed exemption would grant relief only under ERISA sections 406(a)(1)(D) and 406(b)(1), (2), and (3) and the parallel provisions in Code section 4975(c)(1)(D), (E), and (F). MSKCC states that it is plausible that certain aspects of the Reinsurance Arrangement could constitute a prohibited transaction under ERISA sections 406(a)(1)(A), (B), and (C) (and the parallel provisions under Code Sec. 4975). MSKCC requests that either (1) the exemption be expanded to provide relief under 406(a)(1)(A), (B), and (C), or (2) include an explanation from the Department that, in its view, the Reinsurance Arrangement (including the additional aspects to such arrangement

described above) would not result in prohibited transactions under ERISA sections 406(a)(1)(A), (B), and (C) (and the parallel provisions under Code Sec. 4975), and thus no relief is needed for those sections.

Department's Response: The Department agrees with the Applicant's request to expand the scope of relief under the exemption. The exemption now provides relief under ERISA sections 406(a)(1)(A), (B), and (D) and 406(b)(1), (2), and (3) and the parallel provisions of the Code. However, with respect to ERISA section 406(a)(1)(C), the Department expects MSKCC and the Captive to comply with the statutory exemption codified in ERISA section 408(b)(2) (and the regulations thereunder) for the provision of services to the Plan.¹⁵

II. Comments from Participants

1. Why are Participants and Beneficiaries Not Receiving More?

In their comment letters, several participants asked why they would not receive more than 51 percent of the savings MSKCC would realize through the Reinsurance Arrangement. One participant asked, "how was this number arrived at? Why couldn't or shouldn't the plan participants receive a higher percentage? Would MSKCC still pursue this plan if participants were to receive 90% of the benefit?"

Department's Response: The Department has crafted this exemption to ensure that: (1) plan participants and beneficiaries receive a greater financial benefit from the transaction than any financial savings or benefits accruing to MSKCC; and (2) the participants and beneficiaries are financially better off than they would have been in the absence of an exemption. The Department is granting this exemption, in large part, because the exemption meets these criteria. Moreover, the Department has no basis for believing that MSKCC would have agreed to give even greater benefits to the plan, its participants, and beneficiaries, much less 90 percent of all the cost savings associated

¹⁵ 29 CFR 2550.408(b)(2).

with the captive arrangement.

The Department continually requested that MSKCC increase the benefit enhancement provided under the exemption and the estimated 5.55 percent benefit increase represents a substantial benefit enhancement for the Plan's participants and beneficiaries that will provide an estimated 5.55 percent increase in their monthly retirement annuity for the rest of their lives. As noted above, this benefit increase will result in an estimated \$66,408,000 of additional benefits for participants and beneficiaries which will strengthen retirement security for these individuals. The Department also notes that this estimated 5.55 percent increase is consistent with the Primary Benefits Test used by the Department in its welfare benefit plan captive reinsurance cases.

Moreover, the permanent 5.55 percent benefit increase is substantially more than MSKCC proposed to provide participants and beneficiaries when it submitted its exemption application to the Department. MSKCC initially proposed no benefit enhancements at all, arguing that the entirety of the financial benefit derived from using the Captive would inure to the Plan. The Department, however, pushed back on this position and argued that a discount on the purchase price of the GAC would financially benefit MSKCC, as the plan sponsor, and not the Plan because the participants' and beneficiaries' whose monthly pension benefits are set according to the Plan's benefit formula and would not be increased as a result of a discount to the group annuity purchase price.

MSKCC subsequently amended its application to provide for the following two benefit enhancements: (1) a retirement planning program available upon election for participants and beneficiaries that would cost MSKCC \$300 per election; and (2) an additional \$2,000 incidental death benefit under the plan. The Department told MSKCC that these enhancements were insufficient for the Department to make its finding under ERISA section 408(a) and that it would not move forward with the exemption application

unless MSKCC agreed to provide participants and beneficiaries with the majority of the financial benefits derived from using the Captive.

Finally, the Department notes that absent this exemption, participants and beneficiaries would not receive any benefit increase when MSKCC terminates the plan and purchases a group annuity.

2. Can the Fronting Insurer Sell the GAC to another Insurer?

One participant asked whether the Fronting Insurer would be able to transfer or sell the GAC after the exemption is granted. The Department posed this question to MSKCC and received the following response: “The Fronting Insurer will commit irrevocably to provide the benefits under the terms of the contract and cannot sell the annuity to another insurance company. If the fronting insurer is itself bought by another insurance company or merges with another insurance company, the successor insurance company would also be bound by the contract’s obligations.”

As a new condition of this exemption, the group annuity contract between the Fronting Insurer and the Plan must include language that unequivocally prohibits the Fronting Insurer from selling or otherwise transferring the GAC to another insurer. The Department notes that the appointment of an independent IB 95-1 Fiduciary to prudently select the Fronting Insurer and GAC is an essential part of this exemption and allowing the Fronter to sell the GAC to another insurer after the Plan’s acquisition of the GAC would not be protective of the participants and beneficiaries because the acquiring insurer might not meet the standards of IB 95-1.

3. Will a lump sum distribution option be provided under the GAC?

Two participants asked whether MSKCC will retain the lump sum distribution option currently provided under the Plan in the GAC. The Department referred this question to MKSCC, and they confirmed that the lump sum distribution option will be

retained in the GAC. To ensure this is the case, the Department has added a new condition to the exemption that requires the GAC to include a lump sum distribution option for all participants and beneficiaries who have the right to receive a lump sum distribution under the terms of the Plan.

III. Final Independent Fiduciary Report

The Department has added a new Section III(i)(4) to provide specific requirements for the final Independent Fiduciary Report. In its final Independent Fiduciary Report, the Independent Fiduciary must determine that the plan termination, transfer of assets, and new contractual arrangements accord with all conditions of this exemption at the time of termination, and that it remains the case that the primary benefits of this arrangement are expected to go to the Plan's participants and beneficiaries for the entire duration of the arrangement. The Independent Fiduciary must also represent that MSKCC has not managed plan assets in a way that results in MSKCC receiving a greater benefit from this arrangement than plan participants and beneficiaries.

The complete application file (D-12073) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on July 9, 2024, at 89 FR 56422.

GENERAL INFORMATION

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) does not relieve a fiduciary or other party in interest from certain

requirements of other ERISA provisions, including but not limited to any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404, which, among other things, require a fiduciary to discharge their duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with ERISA section 404(a)(1)(B).

(2) As required by ERISA section 408(a), the Department hereby finds that the exemption is: (a) administratively feasible for the Department; (b) in the interests of the Plan and the Plan's participants and beneficiaries; and (c) protective of the rights of the Plan and the Plan's participants and beneficiaries.

(3) This exemption is supplemental to, and not in derogation of, any other ERISA provisions, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive for determining whether the transaction is in fact a prohibited transaction.

(4) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describe all material terms of the transactions that are the subject of the exemption and are true at all times.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the following exemption under the authority of ERISA section 408(a) in accordance with the Department's exemption procedures set forth in 29 CFR part 2570, subpart B:16

EXEMPTION

SECTION I. DEFINITIONS

(a) An “affiliate” of MSKCC, MSK US, or MSK EB includes: (1) any person or entity who controls MSKCC, MSK US, or MSK EB or is controlled by or under common control with MSKCC, MSK US, or MSK EB; (2) any officer, director, employee, relative, or partner with respect to MSKCC, MSK US, or MSK EB; and (3) any corporation or partnership of which a person described in (2) above in this paragraph is an officer, director, partner, or employee;

(b) The term “Benefit Enhancement” means the benefit increase, as determined by the Independent Fiduciary based upon the Primary Benefits Test, that will be applied equally to all participants and beneficiaries across the Plan and last throughout the duration of the group annuity contract (the GAC) and Reinsurance Arrangement with no corresponding offsets or reductions;

(c) The term "Captive" means MSK Employee Benefits IC, Inc., a segregated cell within MSK Insurance US, Inc., a captive insurance and reinsurance subsidiary that is wholly-owned by MSKCC and domiciled in the state of Vermont. MSK Employee Benefits IC, Inc. will be used to reinsure the risks related to the Reinsurance Arrangement;

(d) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual; and

(e) The term “Independent Fiduciary” means a person who:

(1) Is not MSKCC or an affiliate of MSKCC, or the Captive and does not hold an ownership interest in MSKCC, the Captive, or their affiliates;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that:

(i) It is a fiduciary and has agreed not to participate in any

decision with respect to any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by this exemption;

(4) For purposes of this definition, no organization or individual may serve as Independent Fiduciary for any fiscal year if the gross income received by such organization or individual from MSKCC, the Captive, or their affiliates for that fiscal year exceeds two percent of such organization's or individual's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department;

(5) No organization or individual that is an Independent Fiduciary and no partnership or corporation of which such organization or individual is an officer, director, or ten percent or more partner or shareholder may acquire any property from, sell any property to, or borrow any funds from MSKCC, the Captive, or their affiliates while the individual serves as an Independent Fiduciary. This prohibition will continue for a period of six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary; and

(6) In the event a successor Independent Fiduciary is appointed to represent the interests of the Plan with respect to the subject transaction, no time should elapse between the resignation or termination of the former Independent Fiduciary and the appointment of the successor Independent Fiduciary.

SECTION II. COVERED TRANSACTIONS

This exemption provides relief from the prohibited transactions provisions of ERISA sections 406(a)(1)(A), (B), and (D), and 406(b)(1), (b)(2), and (b)(3), and the excise tax imposed by Code section 4975(a) and (b) (due to the operation of parallel prohibited transaction provisions contained in Code section 4975(c)(1) (A), (B), (D), (E), and (F)) with respect to: (1) the reinsurance of risks; and (2) the receipt of a premium by the Captive in connection with a single premium group insurance contract sold by an unrelated fronting insurer (the Fronting Insurer) to provide pension annuities to Plan participants and beneficiaries. To receive this relief, the conditions in Section III must be met in conformance with the definitions in Section I.

SECTION III. CONDITIONS

(a) MSKCC must amend the Plan document to provide a universal benefit increase to all participants and beneficiaries that will apply immediately once the GAC is purchased and will continue with no reduction or offsets for the remainder of the participants and beneficiaries' lives (the Benefit Enhancement). The additional benefit provided by the Benefit Enhancement to participants and beneficiaries must be greater than 51 percent of the total benefit, including cost savings, derived by MSKCC from the Reinsurance Arrangement (the Primary Benefits Test). In addition, MSKCC must include an additional \$1,968,000 in the GAC as a second-layer benefit increase that will further permanently increase the monthly pension benefit of all participants and beneficiaries covered by the Plan. This second layer benefit enhancement represents the present value of the expected Independent Fiduciary's fees over the projected life of the GAC;

(b) Following the Plan's purchase of the GAC from the Fronting Insurer and the consummation of the Reinsurance Arrangement between the Fronting Insurer and the

Captive, the Independent Fiduciary must prudently and loyally determine the Primary Benefits Test has been met. The Independent Fiduciary must submit its determination in writing to the Department within 30 days after the GAC is entered into. In this written determination, the Independent Fiduciary must confirm the actual cost savings associated with the Reinsurance Arrangement by obtaining documentation from the Fronting Insurer that compares the cost to purchase the GAC without the Captive in place to the cost to purchase the GAC with the Captive in place. The Independent Fiduciary must include this documentation from the Fronting Insurer with its written determination to the Department;

(c) The Captive or MSK US Insurance US, Inc. must:

(1) Be a party in interest with respect to the Plan based on an affiliation with MSKCC that is described in ERISA section 3(14)(G);

(2) Be licensed to sell insurance or conduct reinsurance operations in Vermont;

(3) Have obtained a Certificate of Authority from the Insurance Commissioner of Vermont to transact business as a captive insurance company and such certificate must not have been revoked or suspended;

(4) Have undergone a financial examination (within the meaning of the law of its domiciliary State, Vermont) by the Insurance Commissioner of Vermont within five years before the end of the year preceding the year in which the reinsurance transaction occurred;

(5) Have undergone, and continue to undergo, an examination by an independent certified public accountant for its last completed taxable year immediately before the taxable year of the Reinsurance Arrangement covered by this exemption; and

(6) Be licensed to conduct reinsurance transactions by a state whose law requires an actuarial review of reserves to be conducted annually by an independent firm

of actuaries and reported to the appropriate regulatory authority;

(d) The Plan must pay no commissions with respect to the purchase of the GAC or the Reinsurance Arrangement;

(e)(1) The Fronting Insurer and GAC must be selected by Fiduciary Counselors, an independent fiduciary to the Plan, in compliance with the Department's Interpretive Bulletin 95-1 (29 CFR 2509-95-1). Within 30 days after the GAC is entered into, Fiduciary Counselors must submit a written report to the Department that identifies the Fronting Insurer selected, details the methodology used to select the Fronting Insurer, and explains how Fiduciary Counselors determined that the selected Fronting Insurer and GAC meet the requirements of IB 95-1. Fiduciary Counselors must also represent in writing to the Department that it would have been consistent with IB 95-1 to select the Fronting Insurer as the insurer for a final termination buy-out annuity had MSKCC adopted that approach. To meet its fiduciary responsibility owed to the Plan's participants and beneficiaries to select and purchase the "safest available annuity," before selecting the Fronting Insurer, Fiduciary Counselors must evaluate such insurer's claims-paying ability and creditworthiness in full compliance with guidance provided in the Department's Interpretive Bulletin 95-1;

(f) (1) The Reinsurance Arrangement between MSK US and the Fronting Insurer must be indemnity insurance only and must not relieve the Fronting Insurer from any responsibility or liability to the Plan's participants and beneficiaries, including any liability that would result if MSK US fails to meet any of its contractual obligations to the Fronting Insurer or any successor Fronting Insurer under the Reinsurance Arrangement;

(2) The Fronting Insurer must have a direct contractual relationship with the Plan during the Buy-In phase of the GAC and with the Plan's participants and beneficiaries after MSKCC exercises the Conversion Option under the GAC when it terminates the Plan, without any caveats, contingencies, or conditions that would relieve

or limit the Fronting Insurer's contractual obligation to pay benefits to the Plan's participants and beneficiaries in accordance with the Plan and the terms of this exemption;

(g) MSKCC must not offset or reduce any benefits provided to Plan participants and beneficiaries in relation to its implementation of the Benefit Enhancement at any time. In this regard, MSKCC must not implement any benefit cuts or offsets of any kind to the benefits the Plan provides to any Plan participant or beneficiary;

(h) The Independent Fiduciary must:

(1) In compliance with its fiduciary obligations of prudence and loyalty under ERISA sections 404(a)(1)(A) and (B): (i) review the Reinsurance Arrangement and the terms of the exemption; (ii) obtain and review all current objective, reliable, third-party documentation necessary to make the determinations required of the Independent Fiduciary by the exemption; and (iii) confirm in writing that all of the exemption's terms and conditions have been met (or, due to timing requirements, can reasonably be expected to be met consistent with the terms of the exemption) and send this confirmation to the Department's Office of Exemption Determinations not later than 30 days after the Captive enters into the Reinsurance Arrangement. In this written report, the Independent Fiduciary must also confirm that the Fronting Insurer and GAC selected, and the methodology used by Fiduciary Counselors to make the selection, meet the requirements of IB 95-1 and that it would have been consistent with IB 95-1 to select the Fronting Insurer as the insurer for a final termination buy-out annuity had MSKCC adopted that approach;

(2) Approve the Reinsurance Arrangement in advance and ensure that the Reinsurance Arrangement is in the interest of the Plan's participants and beneficiaries and protective of the Plan's participants and beneficiaries;

(3) As long as the Plan remains active, monitor, enforce, and ensure

compliance with all conditions of this exemption in accordance with its obligations of prudence and loyalty under ERISA sections 404(a)(1)(A) and (B), including all conditions and obligations imposed on any party dealing with the Plan, throughout the period during which the Captive's assets are directly or indirectly used in connection with a transaction covered by this exemption;

(4) Represent and protect the interests of the participants and beneficiaries of the Plan when the plan is active during the Buy-In Phase to ensure they receive everything that they are entitled to receive under this exemption, the terms of the Plan, and the GAC;

(5) Monitor and ensure that any assets that remain in the Plan during the Buy-In Phase of the Reinsurance Arrangement are managed and used exclusively to provide benefits to Plan participants and beneficiaries and to defray reasonable expenses of administering the Plan in compliance with ERISA sections 403(c)(1) and 404(a)(1)(A);

(6) Report any instance of non-compliance immediately to the Department's Office of Exemption Determinations until the Plan is terminated;

(7) Take all appropriate actions to safeguard the interests of the Plan and its participants and beneficiaries until the Plan is terminated; and

(8) Review all contracts pertaining to the Reinsurance Arrangement, and any renewals of such contracts, to determine whether the requirements of this exemption and the terms of Benefit Enhancement continue to be satisfied until the Plan is terminated;

(i)(1) The Independent Fiduciary must submit annual Independent Fiduciary Reports to the Department's Office of Exemption Determinations as long as the plan remains active, certifying under penalty of perjury whether each term and condition of the exemption has been met over the applicable period. Each Report must be completed

within six months after the end of the twelve-month period to which it relates (the first twelve-month period would begin on the effective date of the exemption grant); and submitted to the Department's Office of Exemption Determinations within 60 days thereafter;

(2) In preparing the Independent Fiduciary Report, the Independent Fiduciary must:

(i) Review the Captive's annual audit and actuarial reports as submitted to the Vermont Department of Financial Regulation (Vermont DFR);

(ii) Review any Certificate of Good Standing received by the Captive;

(iii) Review any Exam Report completed by the Vermont DFR and include a detailed summary of the Exam Report;

(iv) Confirm that MSKCC has not reduced or offset any benefits in relation to its implementation of the Benefit Enhancement; and

(v) Confirm that MSKCC has not reduced the Benefit Enhancement amount at any point during the year covered.

(3) The Independent Fiduciary must confirm in each Report that the Primary Benefits Test was met for the covered year. In this regard, the Independent Fiduciary must determine the value of the Benefit Enhancement and the total value of the Reinsurance Arrangement to MSKCC, including cost savings, and confirm that MSKCC has not received any additional financial benefit that the Independent Fiduciary did not account for when it previously used the Primary Benefits Test to derive the Benefit Enhancement amount;

(4) In its final independent fiduciary report, the Independent Fiduciary must determine that the plan termination, transfer of assets, and new contractual arrangements accord with all conditions of this exemption at the time of termination, and that it remains the case that the primary benefits of this arrangement are expected to go to the plan for

the entire duration of the arrangement. The Independent Fiduciary must also represent that MSKCC has not managed plan assets in a way that results in MSKCC receiving a greater benefit from this arrangement than plan participants and beneficiaries;

(j) Neither MSKCC nor any related entity may use participant or beneficiary-related data or information generated by or derived from the Reinsurance Arrangement for purposes unrelated to the administration, funding, or security of the GAC, Reinsurance Arrangement, or Plan;

(k) All the material facts and representations set forth in the Background section of this exemption, including all modifications from the proposed exemption as detailed in this final exemption, must be true and accurate at all times;

(l) No party related to this exemption request has or will indemnify the Independent Fiduciary or the IB 95-1 Independent Fiduciary, in whole or in part, for negligence and/or for any violation of state or federal law that may be attributable to the Independent Fiduciary's or IB 95-1 Independent Fiduciary's performance of its duties in connection with the Reinsurance Arrangement. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violations;

(m) MSKCC must provide the Department's Office of Exemption Determinations with all Exam Reports issued by the State of Vermont throughout the duration of the Reinsurance Arrangement within 30 days after such Exam Report is received;

(n) The Captive must request a Certificate of Good Standing from the State of Vermont on an annual basis;

(o) MSKCC must notify the Department's Office of Exemption Determinations if there is any change in the Captive's business plan, auditor, or the composition of its board of directors;

(p) MSKCC may not receive a dividend or any other form of distribution from

the Captive at any point during the Reinsurance Arrangement;

(q) MSKCC and the Captive must maintain all the records necessary to demonstrate that the conditions of this exemption have been met for a period of six years from the date of each record. MSKCC must provide these records to the Department's Office of Exemption Determinations within 30 days from the date of a request by the Department;

(r) MSKCC must provide a Parental Guarantee to the Captive and provide cash as needed if the Captive's general and separate account asset balances have been extinguished;

(s) The Captive must invest the reserves in accordance with the regulations and under the supervision of the State of Vermont;

(t) MSKCC must amend the Plan document to memorialize the Benefit Enhancement and provide a copy of the amended plan document to the Department's Office of Exemption Determinations no later than 30 days after the date the Captive enters into the Reinsurance Arrangement;

(u) After the Buy-In phase for the Reinsurance Arrangement is completed and MSKCC exercises the Conversion Option, MSKCC will terminate the Plan in compliance with all applicable Code and ERISA requirements;

(v) MSKCC must notify the Department of any change in the Independent Fiduciary no later than 30 days after the engagement of a substitute or subsequent Independent Fiduciary and must explain the substitution or change, including a description of any material disputes between the terminated Independent Fiduciary and MSKCC;

(w) Once the Benefit Enhancement percentage amount is set (in conformity with the Primary Benefits Test), MSKCC may not reduce that Benefit Enhancement percentage amount at any point;

(x) The GAC between the Fronting Insurer and the Plan must include language that unequivocally prohibits the Fronting Insurer from selling or otherwise transferring the GAC to another insurer; and

(y) The GAC must include a lump sum distribution option for all participants and beneficiaries who have the right to receive a lump sum distribution under the Plan.

Effective Date: This exemption is in effect on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Signed at Washington, DC,

George Christopher Cosby,

Director, Office of Exemption Determinations,

Employee Benefits Security Administration,

U.S. Department of Labor.

[FR Doc. 2025-00813 Filed: 1/14/2025 8:45 am; Publication Date: 1/15/2025]