

*Affected Public:* Private sector, Business or other for profits, Not-for-profit institutions.

*Respondents:* 3,259.

*Responses:* 3,409.

*Estimated Total Burden Hours:* 815.

*Estimated Total Burden Cost (Operating and Maintenance):* \$0.

Description: The three prohibited transaction class exemptions (PTEs) included in this ICR, (1) PTE 76–1, (2) PTE 77–10, and (3) PTE 78–6, exempt certain types of transactions commonly entered into by “multiemployer” plans from certain of the prohibitions contained in sections 406 and 407(a) of ERISA. The Department determined that, in the absence of these exemptions, the affected plans would not be able to operate efficiently or to enter into routine types of transactions necessary for their operations. In order to ensure that the class exemptions for these necessary transactions meet the statutory standards, the Department imposed conditions contained in the exemptions that are information collections. The information collections consist of recordkeeping and third-party disclosures.

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0058. The current approval is scheduled to expire on June 30, 2025.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Notice for Health Reimbursement Arrangements Integrated with Individual Health Insurance Coverage.

*Type of Review:* Extension of a currently approved collection of information.

*OMB Number:* 1210–0160.

*Affected Public:* Private sector, Business or other for profits, Not-for-profit institutions, Individuals or Households.

*Respondents:* 177,480.

*Responses:* 2,140,197.

*Estimated Total Burden Hours:* 53,131.

*Estimated Total Burden Cost (Operating and Maintenance):* \$24,831.

Description: On June 21, 2018, the Department published the Definition of Employer under Section 3(5) of ERISA—Association Health Plans final rule. On August 3, 2018, the Department of Labor, HHS and the Treasury Department (the Departments) published the Short-Term, Limited-Duration Insurance final rule. These final rules remove the prohibition on integrating health reimbursement arrangements (HRAs) with individual health insurance coverage, if certain

conditions are met. The final rules also set forth conditions under which certain HRAs are as limited excepted benefits. In addition, the Treasury Department and the IRS finalized rules regarding premium tax credit (PTC) eligibility for individuals offered coverage under an HRA integrated with individual health insurance coverage, and DOL finalized a safe harbor to provide HRA plan sponsors with assurance that the individual health insurance coverage that is integrated with an HRA would not become part of an ERISA plan if the conditions of the safe harbor are met. Finally, HHS finalized rules that provide a special enrollment period in the individual market for individuals who gain access to an HRA that is integrated with individual health insurance coverage or who are provided a qualified small employer health reimbursement arrangement (QSEHRA).

The following five information Collections are contained in the final rules: (1) Verification of Enrollment in Individual Coverage; (2) HRA Notice to Participants; (3) Notice to Participants that Individual Policy is not Subject to Title I of ERISA; (4) Participant Notification of Individual Coverage HRA of Cancelled or Discontinued Coverage; (5) Notice for Excepted Benefit HRAs. These information collections notify the HRA that participants are enrolled in individual health insurance coverage, help individuals understand the impact of enrolling in an HRA on their eligibility for the PTC, and help individuals understand that coverage is not subject to the rules and consumer protections of the Employee Retirement Income Security Act (ERISA).

The Department has received approval from OMB for this ICR under OMB Control No. 1210–0160. The current approval is scheduled to expire on June 30, 2025.

## II. Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the collections of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the information collection; they will also become a matter of public record.

Signed at Washington, DC, this 2nd day of July, 2024.

**Lisa M. Gomez,**

*Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.*

[FR Doc. 2024–15030 Filed 7–8–24; 8:45 am]

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Exemption Application No. D–12073]

### Proposed 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, Department of Labor.

**ACTION:** Notice of proposed exemption.

**SUMMARY:** This document provides notice of the pendency before the Department of Labor (the Department) of a proposed individual exemption from certain of the 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) for the reinsurance of risks and the receipt of a premium by MSK Insurance US, Inc. (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) to provide pension annuities to Plan participants and beneficiaries if the conditions in Section III are met in conformance with the definitions in Section I.

**DATES:** If granted, this proposed exemption will be in effect on the date specified by the Department in a grant notice published in the **Federal Register**.

*Comments due:* Written comments and requests for a public hearing on the proposed exemption must be submitted to the Department by August 23, 2024.

**ADDRESSES:** All written comments and requests for a hearing should be

submitted to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Attention: Application No. D-12073, via email to [e-OED@dol.gov](mailto:e-OED@dol.gov) or online through <http://www.regulations.gov>. Any such comments or requests should be sent before the end of the scheduled comment period. The application for exemption and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue, NW, Washington, DC 20210. See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

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

**SUPPLEMENTARY INFORMATION:**

**Comments**

Persons are encouraged to submit all comments electronically and not to follow their submissions with paper copies. Comments should state the nature of the person's interest in the proposed exemption and how the person would be affected by the exemption, if granted. Any person who may be adversely affected by an exemption can request a hearing on the exemption. A hearing request must state: (1) the name, address, telephone number, and email address of the person making the request; (2) the nature of the person's interest in the exemption and how the person would be adversely affected by the exemption; and (3) a statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. The Department will grant a request for a hearing made in accordance with the requirements above where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. A notice of such hearing would be published by the Department in the **Federal Register**. The Department may decline to hold a hearing if: (1) the hearing request does not meet the requirements above; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

**WARNING:** All comments received will be included in the public record without change and may be made available online at <http://www.regulations.gov>, including any

personal information provided, unless the comment includes information claimed to be confidential, or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. If EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment.

Additionally, the <http://www.regulations.gov> website is an "anonymous access" system, which means EBSA will not know your identity or contact information unless you provide such information in the body of your comment. If you send an email directly to EBSA without going through <http://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

**Background**

Under the proposed exemption, the Memorial Sloan Kettering Cancer Center Pension Plan (the Plan) would enter into a single premium group annuity insurance contract (the GAC) with an unrelated insurance company (the Fronting Insurer) who would be selected by an independent fiduciary in compliance with the requirements of the Department's Interpretive Bulletin 95-1.<sup>1</sup> The Fronting Insurer would, in turn, enter into a reinsurance contract (the Reinsurance Arrangement) with MSK Insurance US, Inc. (MSK US or the Captive), a captive reinsurer that is wholly owned by MSKCC, the Plan sponsor. Under the Reinsurance Arrangement, MSK US would reinsure 100 percent of the Plan's risks. Importantly, the Fronting Insurer would remain fully responsible for the benefits of participants and beneficiaries for the entire duration of the GAC and Reinsurance Arrangement if MSK US does not 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 beneficiaries.

In connection with the Reinsurance Arrangement, all Plan participants and beneficiaries would receive an increase to their monthly pension benefit that is currently expected to be 5.37 percent.<sup>2</sup> The Department expects that this benefit increase would add a total of \$64,440,000 in additional benefits to the Plan's participants and beneficiaries in the form of a 5.37 percent increase to their monthly annuity payment for the rest of their lives. Importantly, this increase will remain in place for the entirety of Plan participants' and beneficiaries' lives and, as a condition of this exemption, MSKCC would not reduce any benefits that employees receive from MSKCC, including the benefits Plan participants receive from the Plan, as a result of the Reinsurance Arrangement described in this proposed exemption. Absent this exemption, participants and beneficiaries would not receive this benefit increase.

**Proposed Exemption**

The Department is considering granting an exemption under the authority of ERISA section 408(a) and Code section 4975(c)(2) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (75 FR 66637, 66644, October 27, 2011).<sup>3</sup> If

<sup>2</sup> As discussed in more detail below, the exemption requires that Plan participants and beneficiaries receive the majority of the benefits derived from the Reinsurance Arrangement. While, as noted above, it is "currently expected" that a 5.37% 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 Fiduciary Counselors, the independent fiduciary appointed to solicit bids and select the Fronting Insurer in accord with the requirements of IB 95-1. As described in further detail below, once 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, calculate and demonstrate to the Department in a written report that Plan participants and beneficiaries received the appropriate percentage increase in their monthly pension benefits. The written report of the independent fiduciary would be available to the publicly contacting EBSA's Public Disclosure Office and referencing Exemption Application D-12073.

<sup>3</sup> For purposes of this proposed exemption: (1) references to specific provisions of ERISA Title I, unless otherwise specified, should be read to refer as well to the corresponding provisions of Code section 4975; and (2) if granted, this proposed exemption does not provide relief from the requirements of any law not noted above. Accordingly, the Applicant is responsible for

<sup>1</sup> 29 CFR 2509.95-1.

the proposed exemption is granted, the Plan will purchase the GAC from an unrelated Fronting Insurer, and the Fronting Insurer will, in turn, enter into a reinsurance contract with MSK US.

As described below, MSKCC is expected to receive a financial benefit from this exemption that will equal approximately \$126,444,000. This exemption would require MSKCC to ensure that Plan participants and beneficiaries will receive the majority of that derived benefit in the form of a uniform percentage increase to the monthly retirement benefit of all participants and beneficiaries. Currently, the Department expects that MSKCC would implement a 5.37% increase in each participant's and beneficiary's monthly annuity payment. This benefit increase will continue, without reduction, for the lifetime of each participant and beneficiary until the final annuitant is paid their final monthly annuity payment under the GAC.

This proposed exemption also would require MSKCC to delegate fiduciary oversight of the Plan and Reinsurance Arrangement to a qualified fiduciary who is independent of MSKCC and MSKCC's affiliates (the Independent Fiduciary). Among other things, the Independent Fiduciary must approve the Reinsurance Arrangement in advance, ensure that the Reinsurance Arrangement is in the interest of and protective of the Plan's participants and beneficiaries, and submit written annual reports to the Department confirming that MSKCC has met all of the exemption's conditions.<sup>4</sup>

This exemption would provide relief from certain restrictions described in ERISA section 406 and Code section 4975(c)(1). These restrictions are discussed below. No relief or waiver of a violation of any other law is provided by the exemption. When interpreting and implementing this exemption, MSKCC, the Captive, the Independent Fiduciary, and the Fronting Insurer would resolve any ambiguities by considering the exemption's protective purposes. To the extent additional clarification is necessary, these persons or entities should immediately contact

ensuring compliance with any other laws applicable to the transactions described herein.

<sup>4</sup> The Department notes that the Independent Fiduciary's annual written reports are essential to the Department's tentative finding that this proposed exemption is, and will continue to be, in the interest of and protective of the Plan and its participants and beneficiaries. The Independent Fiduciary must clearly, prudently, and loyally determine whether MSKCC and its affiliates have complied with each term and condition of the exemption and include its findings in its reports.

EBSA's Office of Exemption Determinations at 202-693-8540.

### Summary of Facts and Representations<sup>5</sup>

#### *Memorial Sloan Kettering Cancer Center*

1. MSKCC is a cancer center that is committed to patient care, research, and educational programs. Headquartered in New York City, MSKCC had 29,732 employees as of December 31, 2022. MSKCC's total operating revenue in 2022 was approximately \$6.63 billion, with net assets of \$8.74 billion. MSKCC is a non-profit entity designated as a 501(c)(3) organization.

#### *The Plan*

2. The Plan is a defined benefit pension plan that provides retirement and death benefits for eligible participants. 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. 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, 2022, the Plan covered 8,263 participants and held \$1,347,320,040 in total assets.

#### *The Captive*

3. MSK US is MSKCC's wholly-owned captive insurance and reinsurance subsidiary. MSK US was organized on August 21, 2003, to provide coverage to operating subsidiaries of MSKCC, and on August 28, 2003, received a Certificate of Authority to transact insurance business in the State of Vermont. MSK US insures the property and equipment of MSKCC. Today, MSK US writes approximately \$75 million in premiums and has expanded its business to include other insurance product lines for MSKCC, such as

<sup>5</sup> The Summary of Facts and Representations is based on the Applicant's representations provided in its exemption application and does not reflect factual findings or opinions of the Department unless indicated otherwise. The Department notes that the availability of this exemption is subject to the express condition that the material facts and representations contained in application D-12073 are true and complete at all times, and accurately describe all material terms of the transactions covered by the exemption. If there is any material change in a transaction covered by the exemption, or in a material fact or representation described in the application, the exemption will cease to apply as of the date of the change.

warranty coverage for health care equipment and bio-medical health care equipment, group life insurance, and group long-term disability insurance. In December 2008, MSKCC received a prohibited transaction exemption from the Department that permits MSK US to reinsure the risks of MSKCC's Group Term Life and Long Term Disability Programs (PTE 08-22E).<sup>6</sup>

MSK Employee Benefits IC (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. MSK US and MSK EB are collectively referred to herein as "the Captive."

#### *The Reinsurance Arrangement*

4. The transaction at issue involves the purchase by the Plan of the GAC from an unrelated Fronting Insurer, and the reinsurance of the GAC through the Captive. The Plan has engaged Milliman, Inc. (Milliman) to serve as its Independent Fiduciary with respect to the Reinsurance Arrangement (the Independent Fiduciary).

#### *Fiduciary Counselors Inc. and the Selection of the Fronting Insurer*

5. MSKCC has engaged Fiduciary Counselors Inc. of Washington, DC to select a Fronting Insurer with respect to the Reinsurance Arrangement based on a competitive bidding process. The Applicant represents that Fiduciary Counselors 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,<sup>7</sup> which provides several factors that fiduciaries must consider to ensure they select the safest annuity available for a plan.<sup>8</sup> The

<sup>6</sup> The Fronting Insurers under PTE 08-22E are Prudential Insurance Company of America and First Unum Life Insurance Company.

<sup>7</sup> Fiduciary Counselors must submit a written representation in writing to the Department's Office of Exemption Determinations that the selection of the Fronting Insurer met the requirements of IB 95-1 and also 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.

<sup>8</sup> 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

Fronting Insurer ultimately selected by Fiduciary Counselors must be unrelated to MSKCC. 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. Fiduciary Counselors also must represent 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. This information will be available to the public as part of the record attributable to D-12073.

#### *Mechanics of the Reinsurance Arrangement*

6. 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. The Fronting Insurer would simultaneously enter into an indemnity reinsurance contract with the Captive, which would cede the Plan's risk from the Fronting Insurer to the Captive. 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. The GAC would cover all of the Plan's liabilities and have two phases: (1) a Buy-In Phase and (2) a Buy-Out Phase that are explained below.

*Buy-In Phase:* During the Buy-in Phase, the Plan would hold the GAC as a plan asset. This means that the Fronting Insurer and Captive would guarantee the payment of Plan benefits and the Plan would remain in place. During the Buy-In Phase, the payment of the participants' and beneficiaries' benefits would be secured by the Plan, the Plan Sponsor, ERISA, and the PBGC, while the Plan's funding of benefit

payments would be secured by the Fronting Insurer and Captive.

During the Buy-In Phase, the Fronting Insurer would send funds to the Plan Trustee (JPMorgan Chase) to make benefit distribution payments to the Plan's participants and beneficiaries and, every three months, the Fronting Insurer would submit payment requests to the Captive requesting reimbursement to cover participant and beneficiary distributions paid during the preceding three months and the Fronting Insurer's ongoing fees.<sup>9</sup> If the Fronting Insurer and Captive fail to pay benefits during the Buy-In Phase, the Plan Sponsor would still be required to fund the Plan, and the Plan would 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 would 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 benefits. Any payments for Plan expenses that do not clearly and exclusively benefit participants and beneficiaries would be subject to additional scrutiny.

*Buy-Out Phase:* The GAC would contain a "conversion option" (the Conversion Option) that the Plan Sponsor could exercise (at any time) if and when it decides to terminate the Plan.<sup>10</sup> If exercised, the Conversion Option would transition the GAC from the Buy-in Phase to the Buy-Out Phase,<sup>11</sup> and the following events would occur: (a) the GAC would no longer be held by the Plan as a Plan asset; (b) the Plan Sponsor would replace the Plan as the holder of the GAC; (c) the Fronting Insurer would issue annuity certificates to all Plan participants and beneficiaries; and (d) the Fronting Insurer would 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.<sup>12</sup> During the

<sup>9</sup> See Representation 7 below for more information on the Fronting Insurer's fees.

<sup>10</sup> 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.

<sup>11</sup> 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).

<sup>12</sup> 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.

Buy-Out Phase, the Captive would continue to hold the reserves and the Fronting Insurer would continue to provide quarterly reimbursement payment requests to the Captive to cover: (1) participant and beneficiary distributions paid by the Fronting Insurer over the preceding three months, plus (2) the Fronting Insurer's ongoing fees.

The relationship between the Fronting Insurer and Captive would remain the same during both the Buy-In and Buy-Out Phases; therefore, the 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. Accordingly, both the Fronting Insurer and the Captive would assume full responsibility for making pension benefit payments to participants and beneficiaries throughout the duration of the Reinsurance Arrangement (during both the Buy-In and Buy-Out Phases). Thus, even after conversion to the Buy-Out phase, the Fronting Insurer and the Captive would remain 100 percent liable for making benefit payments to participants and beneficiaries.

As a condition of this exemption, the Fronting Insurer would be required to 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 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 in accordance with the terms of this exemption and the Plan.

#### *Fees and Other Costs*

7. Throughout the duration of the Reinsurance Arrangement, the Captive would pay fees to the Fronting Insurer that are based on a percentage of the reserve held by the Captive. The Applicant represents that the Fronting Insurer's fee would be less than one percent of the total reserve amount held by the Captive and would remain the same throughout the duration of the Reinsurance Arrangement. The Fronting Insurer's fees cover both the risk assumed by the Fronting Insurer to make benefit payments to participants and beneficiaries and the services the Fronting Insurer provides (including administering benefit payments during the Buy-Out Phase). All costs associated with the operation of the Captive would be paid by the Captive (or MSKCC) and not by the Plan. Further, no

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.

commissions would be associated with the Reinsurance Arrangement and no fees would be shared by the Fronting Insurer with MSKCC, the Captive, or any affiliates thereof.

#### *Collateral Under the Reinsurance Agreement*

8. 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. The Applicant represents that the 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. The assets held in the collateral account would be legally owned by MSKCC, but the Fronting Insurer would have a statutory reserve credit on the assets.<sup>13</sup> 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 would also provide a Parental Guarantee to the Captive and would provide cash as needed if the Captive's general and separate account asset balances were extinguished. In its Feasibility Report submitted to the Vermont Department of Financial Regulation (Vermont DFR), MSKCC noted that it has a substantial endowment of approximately \$6.4B that would provide the Parental Guarantee.

#### *Oversight by the Vermont DFR*

9. Before submitting this exemption request, the Captive requested and received formal approval from the Vermont DFR to enter into the Reinsurance Arrangement and operate the Captive to reinsure the Plan's pension benefits. The Vermont DFR issued its formal approval after reviewing the Captive's Feasibility Report, which included, among other

things, actuarial projections, an investment policy statement, and a business plan. If this exemption is granted and the Reinsurance Arrangement takes effect, the Captive would be required to submit an independent audit report and actuarial report to the Vermont DFR on an annual basis. Further, at least every five years, the Vermont DFR would conduct a thorough review of the Captive and issue an Exam Report.

This proposed exemption requires the Independent Fiduciary to obtain and review all independent audit reports 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. The Independent Fiduciary would be required to provide the Department with a detailed summary of each Exam Report in its annual Independent Fiduciary Reports, as described below. This proposed exemption also would require the Captive to request a Certificate of Good Standing from the Vermont DFR on an annual basis. Also, as part of this proposed exemption, MSKCC must provide the Department with any Exam Reports it receives no later than 30 days after MSKCC receives such report.

#### *Investing the Reserves*

10. The Captive would be required to invest the reserves in accordance with the regulations, and under the supervision, of the State of Vermont. Under Vermont state law all captives must file an annual audit report with the state insurance commissioner and such audit report must include the auditor's opinion as to the adequacy of the captive's reserves. In addition, the Fronting Insurer would have oversight of the reserves throughout the duration of the Reinsurance Arrangement.

#### *Prohibition on Distributions From the Captive to MSKCC*

11. The Applicant represents that the amount of the premium is expected to match the value of the Plan's liabilities and that no excess amounts will be transferred to the Fronting Insurer when the GAC is purchased. When the Fronting Insurer pays the premium to the Captive, the assets held by the Captive will be set aside to fund the liabilities under the GAC until all benefits are paid to participants and beneficiaries, which MSKCC expects will occur after more than 20 years.

#### *Financial Benefit to MSKCC*

12. The Applicant represents that purchasing the GAC in conjunction with the Reinsurance Arrangement is estimated to result in a ten percent

savings on the overall cost of purchasing the GAC without the Captive. For instance, if the single premium cost to acquire the GAC from the Fronting Insurer without the Captive was \$1.2 billion, the cost to acquire it with the Captive in place would be \$1.08 billion. Since the financial benefit of the cost reduction would ultimately flow to MSKCC, this exemption requires a majority of the cost reduction to purchase the GAC to be provided to the Plan's participants and beneficiaries in the form of a benefit enhancement to their monthly annuity payment, as described below.

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.

#### *The Primary Benefits Test*

13. The proposed exemption requires the Plan to receive the majority of the financial benefits flowing from the Reinsurance Arrangement (the Primary Benefits Test). For the purposes of the Primary Benefits Test, the Independent Fiduciary must quantify all of the benefits derived from the Reinsurance Arrangement, including all benefits directly and indirectly received by MSKCC and any entity affiliated with MSKCC. The Primary Benefits Test requires MSKCC to provide Plan participants and beneficiaries with a meaningful benefit enhancement that must exceed 50 percent of the total financial benefit MSKCC derives from the Reinsurance Arrangement. So, for example, if the Independent Fiduciary determines that MSKCC will receive a total financial benefit of \$126,444,000 over the term of the Reinsurance Arrangement, the Independent Fiduciary would be required to ensure that MSKCC enhances the Plan's benefits that would be paid to participants and beneficiaries by more than 50 percent of that amount. Throughout the Reinsurance Arrangement, the Independent Fiduciary must continuously review and confirm that the majority of the financial benefits flowing from the Reinsurance Arrangement inure to the Plan's participants and beneficiaries.

#### *MSKCC-Provided Benefit Enhancement*

14. MSKCC represents that it would implement a one-time benefit increase sufficient to pass the Primary Benefits Test (the Benefit Enhancement). MSKCC represents that if the savings generated from the Captive Arrangement equals 10 percent, it will implement a Benefit Enhancement in the form of a 5.37

<sup>13</sup> The Department understands that a statutory reserve is the amount of money, securities, or assets that must be set aside as a legal requirement by the Fronting Insurer to cover claims or obligations due. This pool of funds is called a statutory reserve because state laws and regulations require the Fronting Insurer to hold these funds in reserve on their balance sheet. A reserve credit is a financial statement credit to the Fronting Insurer for the reinsurance ceded by the Fronting Insurer to the Captive. The Fronting Insurer would receive a credit because the reserves and collateral would be held by the Captive. Thus, the Fronting Insurer will not have to carry the equivalent statutory reserve on its balance sheet.

percent<sup>14</sup> increase to the monthly benefits of all Plan participants and beneficiaries that will continue without reduction for the remainder of their lives. Collectively, Plan participants and beneficiaries would receive \$64,440,000 in increased pension benefit payments, and Plan participants and beneficiaries would therefore receive the majority of the financial benefit derived from the Reinsurance Arrangement. So, for example, a participant with a monthly benefit of \$4,000 under the original plan terms would receive a 5.37 percent increase that would increase their monthly benefit payment to \$4,214.80 as a result of the Reinsurance Arrangement. This Benefit Enhancement will be applied uniformly to the monthly benefit of all of the Plan's participants and beneficiaries and will continue to be applied for the remainder of all of their lives.

MSKCC represents that: (1) apart from the conditions of this exemption, if granted, MSKCC otherwise had no preexisting obligation to provide a benefit increase to the Plan participants and beneficiaries; and (2) before its submission of the exemption application for this exemption, MSKCC had not considered or offered any increase to the current value of the benefits of the Plan's participants and beneficiaries.

The amount of the Benefit Enhancement must be adjusted to the extent that the Independent Fiduciary determines such an adjustment is necessary to pass the Primary Benefits Test. Ultimately, the Independent Fiduciary would determine the actual benefit to MSKCC from the proposed Reinsurance Arrangement and would ensure that the Plan's participants and beneficiaries receive the majority of that amount. The Applicant submits that the value of the Benefit Enhancement is transparent, easily determined, and simplifies compliance and oversight with respect to the terms of the exemption, if granted.

#### *Independent Fiduciary*

15. Milliman would serve as the Plan's Independent Fiduciary with respect to the Reinsurance Arrangement. Kathleen E. Ely of Milliman would perform the functions required of the independent fiduciary on behalf of Milliman with respect to the

requirements of this exemption, and Milliman's consultants, actuaries, and analysts would support this work. Ms. Ely and Milliman represent that they are independent of all parties associated with the Reinsurance Arrangement, including the Plan, MSKCC, and the Captive. Ms. Ely and Milliman do not have: (a) an interest in any party involved in the Reinsurance Arrangement; (b) any economic stake or financial interest that is contingent upon the implementation of the Reinsurance Arrangement; or (c) an ownership interest in MSKCC, the Captive, or the Fronting Insurer, nor are they directly or indirectly, controlled by, or under common control with them.

Milliman and Ms. Ely have acknowledged to the Department in writing that they accept the fiduciary obligations associated with the duties of the Independent Fiduciary and have agreed not to participate in any decisions with respect to any transaction in which they may have an interest that may affect their best judgment. Milliman 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.

This proposed exemption requires the Applicant to represent that no party involved in this exemption transaction has or will indemnify Milliman or Ms. Ely 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 in performing its duties under the Reinsurance Arrangement. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation. Further, as a condition of this proposed exemption, neither Milliman nor Ms. Ely will enter into any agreement or instrument that violates ERISA section 410 or 29 CFR 2509.75-4.<sup>15</sup>

#### *Independent Fiduciary Duties*

16. 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 GAC purchase and consummation of the Reinsurance Arrangement, Milliman must confirm that the Benefit Enhancement is sufficient to meet the Primary Benefits Test under this exemption.

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 (or, due to timing requirements, can reasonably be expected to be met consistent with the terms of this proposed exemption). This confirmation must include copies of each document relied on 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.

Milliman would be required to continue monitoring, enforcing, and ensuring compliance with all conditions of this exemption throughout the duration of the Reinsurance Arrangement, including all conditions and obligations imposed on any party dealing with the Plan, and report any instance of non-compliance immediately to the Department's Office of Exemption Determinations. Milliman must also take all appropriate actions to safeguard the interests of the Plan and its participants and beneficiaries, and review all contracts pertaining to the Reinsurance Arrangement, and any renewals of such contracts, to determine whether the requirements of this proposed exemption and the terms of Benefit Enhancement continue to be satisfied.

Throughout the duration of the Reinsurance Arrangement, Milliman would be required to 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. Each report would be: (a) 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 (b) submitted to the Department within 60 days

<sup>14</sup> 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.

<sup>15</sup> ERISA section 410 provides, in part, that "except as provided in ERISA sections 405(b)(1) and 405(d), any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [meaning Part 4 of Title I of ERISA] shall be void as against public policy."

thereafter. In preparing the Independent Fiduciary Report, Milliman must review: (a) the Captive's annual audit and actuarial reports as submitted to the Vermont DFR; (b) any Certificate of Good Standing received by the Captive; and (c) any Exam Report completed by the Vermont DFR.

Finally, the Independent Fiduciary must 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).

#### *The Independent Fiduciary Report*

17. On June 27, 2023, Ms. Ely completed an Independent Fiduciary Report in which she confirms that the Benefit Enhancement would provide the Plan's participants and beneficiaries with the majority of the benefits derived from the Reinsurance Arrangement. Ms. Ely confirms that the Benefit Enhancement will be provided to all Plan participants and beneficiaries at no cost to them, and that MSKCC will not offset the cost of the Benefit Enhancement by making any corresponding reductions to other benefits already received by participants and beneficiaries. Ms. Ely also affirms that the Plan will pay no more than adequate consideration for the GAC and that no commissions will be payable with respect to the GAC or the Reinsurance Arrangement.

In the Independent Fiduciary Report, Ms. Ely states the purchase of the GAC to fund the Plan's participant and beneficiary pension benefit payments will protect the participants and beneficiaries from investment risk that may impact the reserves used to fund future distributions. With the GAC and Reinsurance Arrangement in place, participant and beneficiary pension benefit payments will be guaranteed by the Fronting Insurer, with an additional layer of security provided by the Captive.

Also in her Report, Ms. Ely confirms that the Captive was organized as a captive insurer in the State of Vermont on August 28, 2003, and that under Vermont captive insurance law captives may conduct reinsurance operations. Ms. Ely confirms further that on June 22, 2023, she received written confirmation from the Vermont DFR that the Captive has an active license, is in good standing, and underwent an examination by an independent

certified public accounting firm for the fiscal year ending December 31, 2022.

#### *ERISA Analysis*

18. MSKCC is a party in interest with respect to the Plan pursuant to ERISA section 3(14)(C) because it is an employer whose employees are covered by the Plan. In addition, the Captive is a party in interest with respect to the Plan pursuant to ERISA section 3(14)(G)<sup>16</sup> because it is wholly owned by MSKCC.

ERISA section 406(a) prohibits a wide variety of transactions between plans and parties in interest. For example, ERISA section 406(a)(1)(D) prohibits a plan fiduciary from causing a plan to engage in a transaction that results in the transfer of plan assets to a party in interest. The Reinsurance Arrangement would violate ERISA section 406(a)(1)(D) because it would result in the premium payment used to purchase the GAC (which consists of plan assets) being transferred indirectly from the Plan, via the Fronting Insurer, to the Captive, a party in interest to the Plan.

ERISA section 406(b)(1) prohibits a fiduciary from dealing with plan assets for its own interest or own account, ERISA section 406(b)(2) prohibits a fiduciary from acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan, and ERISA section 406(b)(3) prohibits a fiduciary from receiving any consideration for the fiduciary's personal account from any party dealing with the plan in connection with a transaction involving the plan's assets. The MSK Executive Benefits Committee is comprised of individuals who also serve as officers of MSKCC. The Reinsurance Arrangement would thus raise issues under ERISA sections 406(b)(1), (b)(2), and (b)(3) because the plan fiduciaries on the Committee would cause the Plan premium to be paid to the Fronting Insurer with the understanding that Fronting Insurer will enter into a reinsurance arrangement with, and the Plan premium will ultimately be paid to, the Captive.

#### *Statutory Findings*

19. Based on the conditions included in this proposed exemption, the Department has tentatively determined that the relief sought by the Applicant

<sup>16</sup> Under ERISA section 3(14)(G), a corporation is a "party in interest" with respect to an employee benefit plan if 50 percent or more of the combined voting power of all classes of the corporation's stock entitled to vote, or the total value of shares of all classes of stock of the corporation, is owned by an employer any of whose employees are covered by the employee benefit plan.

would satisfy the statutory requirements for an exemption under ERISA section 408(a).

20. *The Proposed Exemption is "Administratively Feasible."* The Department has tentatively determined that this proposed exemption is administratively feasible for the Department. This determination is based on the Department's understanding that the Independent Fiduciary will provide important oversight with respect to the Reinsurance Arrangement and will represent the Plan throughout the duration of the Reinsurance Arrangement by monitoring, enforcing, and ensuring compliance with all conditions of this exemption. This proposed exemption also requires the Independent Fiduciary to submit annual written reports to the Department confirming that all conditions of this exemption have been met. This determination is also based upon the Department's understanding that the Vermont DFR will provide meaningful ongoing oversight of the Captive's operations.

21. *The Proposed Exemption is "In the Interest of the Plan and its Participants and Beneficiaries."* The Department has tentatively determined that the proposed exemption is in the interest of the Plan and its participants and beneficiaries. The Department notes that the Benefit Enhancement represents significant value that will apply equally across the Plan and help MSKCC's more than 8,000 participants and beneficiaries enjoy a more secure retirement. Importantly, the Department notes that the Plan is not conceding anything in exchange for the Benefit Enhancement because, as confirmed by the Independent Fiduciary, MSKCC will not make any corresponding reductions to other benefits the Plan currently provides to the Plan's participants and beneficiaries.

22. *The Proposed Exemption is "Protective of the Rights of the Plan's Participants and Beneficiaries."* The Department has tentatively determined that the proposed exemption is protective of the rights of the Plan's participants and beneficiaries. The selection of the Fronting Insurer by Fiduciary Counselors is critical to the Department's finding that the proposed exemption is protective of the rights of participants and beneficiaries. The Department would not have proposed this exemption without a requirement that Fiduciary Counselors provides 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, meets the requirements of IB 95–1.

In addition, the Department notes that the Captive would guarantee to pay the annuitized Plan benefits, which would provide a second layer of protection for the Plan's participants and beneficiaries that would not exist if only the Fronting Insurer were insuring the benefits. Finally, the Department notes that the Independent Fiduciary will represent the Plan's interests for all purposes with respect to the Reinsurance Arrangement and will: (1) monitor, enforce, and ensure compliance with the exemption conditions, in accordance with its obligations of prudence and loyalty under ERISA; (2) report any instance of non-compliance immediately to the Department; and (3) submit written annual reports to the Department throughout the Reinsurance Arrangement.

#### Summary

23. Based on compliance with the conditions that are included in this proposed exemption, the Department has tentatively determined that the relief sought by the Applicant would satisfy the statutory requirements for an individual exemption under ERISA section 408(a) and Code section 4975(c)(2).

#### Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within fifteen (15) days of the publication of the notice of this proposed exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner approved by the Department and will contain the documents described therein and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. All written comments and/or requests for a hearing must be received by the Department within forty-five (45) days of the date of publication of this proposed exemption in the **Federal Register**. All comments will be made available to the public.

**Warning:** If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an

unlisted phone number), or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

#### 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) and/or Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of ERISA and/or the Code, including 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 participants and beneficiaries of the plan and in a prudent fashion in accordance with ERISA section 404(a)(1)(B); nor does it affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under ERISA section 408(a) and/or Code section 4975(c)(2), the Department must find that the exemption is administratively feasible, in the interests of the plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemption would be supplemental to, and not in derogation of, any other provisions of ERISA and/or the Code, 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 of whether the transaction is, in fact, a prohibited transaction; and

(4) The Department notes that all of the material facts and representations set forth in the Summary of Facts and Representations must be true and accurate at all times and that the relief provided herein is conditioned upon the veracity of all material representations made by the Applicant.

#### Proposed Exemption

The Department is considering granting an exemption under the authority of ERISA section 408(a) and Internal Revenue Code (or Code) section 4975(c)(2) in accordance with the Department's exemption procedures

regulation.<sup>17</sup> Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested by the Applicant to the Secretary of Labor. Therefore, this notice of proposed exemption is issued solely by the Department.

#### Section I. Definitions

(a) An "affiliate" of MSKCC or MSK US includes: (1) any person or entity who controls MSKCC or MSK US or is controlled by or under common control with MSKCC or MSK US; (2) any officer, director, employee, relative, or partner with respect to MSKCC or MSK US; 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.

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

(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

<sup>17</sup> 29 CFR part 2570, subpart B (75 FR 66637 October 27, 2011). For purposes of this proposed exemption, references to ERISA section 406, unless otherwise specified, should be read to refer as well to the corresponding provisions of Code section 4975.



contemplated by this proposed 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 would 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 would provide relief from the prohibited transactions provisions of ERISA sections 406(a)(1)(D), 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) (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 improve the Plan by amending 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 50 percent of the total benefit, including cost savings, derived by MSKCC from the Reinsurance Arrangement (the Primary Benefits Test). Stated another way, MSKCC cannot derive a greater benefit from the Reinsurance Arrangement than the Plan's participants and beneficiaries;

(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 determine in writing whether the Primary Benefits Test has been met. The Independent Fiduciary must submit this written determination to the Department within 30 days after the consummation of the Reinsurance Arrangement. 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 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 proposed 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 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). Before this proposed exemption is granted, Fiduciary Counselors must provide the Department with a written submission that identifies the Fronting Insurer selected, details the methodology used to select the Fronting Insurer, and explains how the methodology used, and the Fronting Insurer selected, meets 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 (29 CFR 2509.95-1);

(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 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,

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. 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 selected and the methodology used by Fiduciary Counselors to make the selection meets 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) 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 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;

(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;

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

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

(i)(1) The Independent Fiduciary must submit an annual Independent Fiduciary Report to the Department's Office of Exemption Determinations certifying under penalty of perjury whether each term and condition of the proposed 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 DRF 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) Finally, the Independent Fiduciary must confirm in each Report that the Primary Benefits Test was met for the year covered. 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;

(j) 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;

(k) All the facts and representations set forth in the Summary of Facts and Representations must be true and accurate at all times;

(l) No party related to this exemption request has or will indemnify the Independent Fiduciary or Fiduciary Counselors, 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 Fiduciary Counselor'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) Following the discharge of all liabilities under the GAC (the Discharge Date), MSK Employee Benefits IC will determine the amount of assets, if any, that remain in MSK EB after all payments and distributions have been made to the Plan's participants and beneficiaries (the Excess Amount), and MSKCC will distribute the Excess Amount in conformity with the Primary Benefits Test within twelve months after the Discharge Date by remitting the majority of the Excess Amount (at least 50.1 percent) as an employer contribution to another ERISA-covered

employee benefit plan sponsored by MSKCC (without any benefit cuts or offsets to other benefits MSKCC provides to its employees) in a manner that does not discriminate in favor of highly compensated employees pursuant to standards set forth in sections 401(a)(4) and 410(b) of the Internal Revenue Code of 1986 (or under similar standards if these provisions no longer are in effect on the Discharge Date).

(r) 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 the Department's request;

(s) 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;

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

(u) 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;

(v) 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;

(w) 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 provide an explanation for the substitution or change including a description of any material disputes between the terminated independent fiduciary and MSKCC; and

(x) 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.

*Applicability Date:* If granted, the exemption will be in effect on the date the Department publishes a grant notice in the **Federal Register**.

Signed at Washington, DC, this 2nd day of July 2024.

**George Christopher Cosby,**

*Director, Office of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

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**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Monthly Employment Utilization Report (CC-257)

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Office of Federal Contract Compliance Programs (OFCCP)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that the agency receives on or before August 8, 2024.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Michael Howell by telephone at 202-693-6782, or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) is requesting Office of Management and Budget (OMB) review and approval of the Monthly Employment Utilization Report (CC-257). The proposed CC-257 would require covered construction contractors and subcontractors to submit monthly reports on their employee count and work hours by race/ethnicity, gender, and trade in the covered area.

OFCCP previously collected the CC-257 under OMB control number 1215-0163 but discontinued the report in 1995. Since that time, DOL restructured OFCCP as a stand-alone agency and OMB transferred OFCCP's information collections to OMB control numbers that begin with a "1250" agency code.

As such, OFCCP is requesting a new "1250" OMB control number for the CC-257 report. This information collection request (ICR) outlines the legal authority, procedures, burden, and costs associated with the collection. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 26, 2024 (89 FR 14109).

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

*Agency:* DOL-OFCCP.

*Title of Collection:* Monthly Employment Utilization Report (CC-257).

*OMB Control Number:* 1250-ONEW.

*Affected Public:* Businesses or other for-profits.

*Total Estimated Number of Respondents:* 9,982.

*Total Estimated Number of Responses:* 119,784.

*Total Estimated Annual Time Burden:* 179,676 hours.

*Total Estimated Annual Other Costs Burden:* \$23,237.