United States House of Representatives
Committee on Financial Services
Subcommittee on Housing, Community Development and Insurance

Hearing on
"Insuring against a Pandemic: Challenges and Solutions for Policyholders and Insurers"

Thursday, November 19, 2020

Statement of the
Business Continuity Coalition

The Business Continuity Coalition (BCC) represents a broad range of business insurance policyholders—large and small—from across the American economy, employing more than 50 million workers. The group was launched earlier this year to develop a public/private program with policymakers and stakeholders to limit future economic damage from pandemics and other national emergencies that cause business interruptions.

The BCC Steering Committee includes the American Gaming Association, American Hotel & Lodging Association, Fox Corporation, International Council of Shopping Centers, Live Nation, Marriott International, Motion Picture Association, Nareit, National Association of Broadcasters, National Association of Realtors, National Restaurant Association, National Retail Federation, The Real Estate Roundtable, Sony Pictures Entertainment, ViacomCBS and the Walt Disney Company. A full list of member organizations as of this date appears at the end of this statement but the coalition continues to expand and the most up-to-date list of members can always be found at the BCC website here.

Executive Summary

The magnitude of the COVID-19 pandemic's financial and social impacts has exposed significant shortcomings and vulnerabilities in our country's preparedness for and resilience to systemic catastrophic events of this scale and nature. This includes coverage gaps in insurance protection for losses from business interruption occurring arguably in the absence of "physical damage" to the business location. Equally important, coverage gaps for the pandemic risk have also been revealed or developed as a result of this year's crisis in other lines of insurance, including event cancellation, film & TV production package, general liability, and employment practices liability insurance. The crisis has also put stress on workers compensation insurance.

Although overshadowed for the moment by other effects of the pandemic, if not remedied, these insurance gaps will hinder any recovery, especially impacting business lending, new leasing activity, retail and hospitality, as well as media production. Private insurance alone cannot and will not remedy the gaps -- at least not in the sort-term -- but private insurers need to be part of the solution. What is urgently needed is a federally-backstopped availability mechanism similar to the highly successful one which Congress put in place for terrorism following 9/11—in short, a TRIA-style program for pandemic risk.

All of the impacted lines of insurance, not just business interruption, need to be supported with both a "make-available" mandate and a robust federal backstop for the private insurers making the insurance available. During at least a five-year economic recovery period (subject to reset if the pandemic recurs), the federal backstop should be provided without charge (as is the case with TRIA) to ensure affordability and maximum take-up, and the economic resiliency that will foster.

As recognized by all other major proposals currently being vetted, the business interruption line of insurance needs a special rule given the particular gap exposed by the COVID-19 crisis. That is, the insurance product needs to be both for non-physical-damage business interruption (NDBI)[1] and provided on a parametric basis,[2] which may be the only way to ensure widespread, rapid delivery of assistance to America's businesses in future pandemic crises. Liquidity to meet these rapid pay-outs should be guaranteed. Insurers can be given an option to satisfy their availability duty by supporting a joint underwriting facility which would itself have a federal backstop. Maximum utilization of global reinsurance capacity and capital markets should also be encouraged. Long-term program continuity is paramount given the time horizon needed for financing this risk.

Discussion

The BCC brings together more than two dozen industries and companies to develop a plan with policymakers and other stakeholders to protect American jobs and to limit future economic damage from pandemics and other national emergencies that cause business interruptions.

The BCC thanks the Subcommittee for its leadership and for holding today's hearing to address the challenges facing our nation stemming from the coronavirus pandemic. Contributing to the severe economic and employment headwinds we face is the nation-wide business insurance crisis that has impacted all aspects of our economy.

Closures and shutdowns caused by COVID-19 have significantly impacted the employees and operations of businesses across the country, and the BCC, representing more than 50 million workers in the restaurant, entertainment, hospitality, gaming, retail, communications, broadcasting and real estate industries, encourages policymakers to take urgent steps to prepare for future risks.

Beginning in March 2020 when many sectors of the economy experienced dramatic interruptions of demand or production, often but not always as a result of government-ordered lockdowns or shelter-in-place orders, the insurance which is vital to resuming production also ceased to be available in many cases.

When COVID-19 began, insurers and policyholders initially focused on non-physical damage business interruption claims and coverage, or lack thereof. As COVID-19 has evolved over time,

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[1] As a general matter, standard business interruption policies include a condition of coverage that suspension of business "must be caused by direct physical loss or damage to property" at the insured premises. While the exact extent of "direct physical loss" as it relates to COVID-19 is the subject of litigation, any physical impact caused by the virus has not typically been sufficient to sustain a claim in many jurisdictions.

[2] Parametric insurance is a type of insurance that does not indemnify the pure loss, but *ex ante* agrees to make a payment upon the occurrence of a triggering event. The triggering event is often a catastrophic natural event which may ordinarily precipitate a loss or a series of losses.

the availability of pandemic related insurance has greatly diminished for policyholders when their insurance contracts renew. Pandemic exclusions and related clarifications have since become commonplace in business interruption insurance policies. Similar pandemic exclusions and narrowed policy language are now being applied to many other commercial property and casualty insurance lines, including general liability, employment practices liability, and specialty lines like event cancellation and production package insurance. Like what was experienced with terrorism insurance after 9/11, policyholders are growingly finding themselves in the untenantable position of being limited to no pandemic coverage that leaves them exposed to business threatening risks.

The alarming constriction of coverage that commercial policyholders are now seeing, is presumably being caused by the financial impact of the COVID-19 crisis on the property and casualty insurance sector. While BCC is not in a position to know directly the exact dimensions of the problem, if indeed they have been determined, the evidence being offered by longtime industry spokesmen is instructive. At the September 29th meeting of the Treasury Department's Federal Advisory Committee on Insurance (FACI), an insurance industry expert estimated potential 2020 insured losses from COVID-19 across just five lines of business—workers compensation, business interruption/contingency, general liability, mortgage guaranty, and D&O—at between $3.5 billion and $146.7 billon (to be sure, an extraordinarily wide range), while also acknowledging that there was pandemic risk exposure in several other lines (event cancellation, travel, trade credit, EPL, medical professional liability), even with the patchwork of communicable disease policy exclusions which existed before the COVID-19 outbreak.[3] The same FACI presentation also noted that insurers had begun during 2020 to seek approval from State regulators for "near-absolute communicable disease exclusions" but that "many of those filings" were "not being approved" by State regulators.[4]

Imposition of "near-absolute" exclusions is no more a workable solution for the American economy now than it was after 9/11 when the immediate reaction—albeit understandable—of the insurance industry also was to seek to exclude terrorism risk from coverage across-the-board. Simply put, the ability of American businesses to secure pandemic risk insurance will be a key factor in America's economic recovery and getting our workers back on the job. Collectively we need to find a way to maintain and restore coverage in many lines of commercial property and casualty insurance. A public-private partnership is essential to achieving that objective.

The BCC is advocating for a public/private insurance program that, in the event of a government-declared pandemic health emergency, would enable employers to keep payrolls and supply chains intact, help limit job losses and furloughs, reduce stress on the financial system, and speed economic recovery when government-imposed limitations on operations are lifted. Equally important, as with terrorism risk insurance, the value of a workable insurance program is not just the payment of losses but the confidence that adequate protection gives to businesses and their lenders and workers in the meantime—before, and whether or not there is, a crisis. As such, the plan must meet the needs of a broad range of groups: the businesses and employers directly impacted, insurers, lenders and other creditors, policymakers, and importantly, taxpayers.

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[3] See presentation of Robert P. Hartwig to Federal Advisory Committee on Insurance, September 29, 2020, particularly slides 13 and 17 (accessed November 16, 2020 at https://home.treasury.gov/system/files/311/FACI-Presentation-Hartwig-9-20.pdf).
[4] Hartwig FACI presentation at slide 19.

Several of the initiatives which the Subcommittee will examine at today's hearing are focused on provisions of a parametric NDBI insurance product, whether to be written by private insurers or issued directly as a government benefit contract.[5] The BCC policy recommendations outlined below embrace several elements of those other proposals but also include unique provisions, such as providing coverage for other lines of insurance in addition to NDBI. While mandating availability in these lines, the BCC proposal would give insurers the option of supporting a joint underwriting facility instead of issuing the backstopped NDBI on their own paper. Important backstop support for insurers' developing workers compensation exposure would be provided.

In short, the BCC policyholder proposal seeks not only widespread availability and affordability of NDBI coverage but also restoration and expansion of pandemic coverage in other lines, including event cancellation, movie/TV production package insurance, generally liability, employment practices liability, and other lines that have been hit hard by Covid-19.

A number of successful models can provide guidance in structuring a government-backed pandemic-risk reinsurance program. Besides TRIA, perhaps two of the most salient models are the Federal Crop Insurance Corporation[6] (when the Federal entity reinsures private crop insurers at various quota share levels) and the War Damage Corporation (WDC)[7] developed during World War II (when WDC insured directly but required distributing insurers to share in its risk of loss or profit).

Recommendations for Program Features

For all these reasons, the Business Continuity Coalition urges the design of any pandemic risk insurance program adhere to the following principles:

1) **Scope:** Any Federal backstop should support not only NDBI coverage but also other pandemic impacted lines of insurance, such as event cancellation, workers compensation, production or cast insurance (for film and TV productions), and general and employment practices liability insurance. These lines may need to be supported by a robust backstop even for a recurrence of COVID-19.

2) **Private Insurer Utilization:** Insurers should be included in any pandemic insurance program to involve a number of current industry advantages: (1) determine appropriate premiums to reduce taxpayer outlays; (2) use existing claims-paying infrastructure to pay claims; and (3) leverage insurer expertise in risk mitigation to help businesses understand how they can reduce pandemic risk, comply with imposed requirements, and get their businesses up and running expeditiously.

[5] Each of these proposals envisages an NDBI parametric benefit that would compensate small- and medium-sized businesses for up to 80% of 90-days' ordinary payroll and fixed costs, such as rent, utilities, and taxes.
[6] Public Law 96-365 (Sept. 26, 1980); amended by the Federal Crop Insurance Reform Act of 1994; and by the Federal Agriculture Improvement and Reform Act of 1996 (P.L.104-127).
[7] See Appendix for brief overview of the War Damage Corporation and its interface with private insurance industry.

3) **Availability**: Eligible insurers should be required either to share some portion of the risk in the primary NDBI coverage layer or to support other covered lines of insurance as a condition of being permitted to sell any government-supported NDBI coverage. Any pandemic program must properly balance the need to ensure participation with the reality that insurers cannot take on too much uncertain exposure.

4) **Affordability:** Premiums for the program should not aim to cover full program costs. During an initial economic recovery period, the backstop should be without premium, after which the government should charge at least some premium for the risk it bears, but policymakers should not expect premiums to cover the full cost of the program. Premium levels should be set to result in widespread take-up. Cost recovery should be premised on 50+ years.

5) **Solution Must Meet Needs of Businesses of All Sizes.** TRIA should be the template for both availability and backstop, although there are important differences to the pandemic peril that must be reflected in final design. However, the NDBI benefit and the general availability requirements should avoid an arbitrary headcount cliff (e.g., 500 employees), just as the backstop should avoid "deductibles" or co-shares tied to volume rather than risk exposure.

6) **Rapid Claims Payment/Minimum Transaction Costs:** Any primary NDBI program should be structured as parametric coverage, which would be triggered by defined external conditions (*i.e.,* national health declaration + state/local action affecting specified business categories) without recourse to usual proof-of-loss; although use of proceeds might be audited. A Federal Reserve liquidity facility should be authorized to ensure rapid pay-outs.

7) **Pooling Alternative for Offer of NDBI Coverage:** Insurers that do not wish to underwrite the primary NDBI coverage directly should be given the option to support a joint underwriting facility for that coverage which would also enjoy the Federal backstop support.

8) **Stop-Loss As Well As Quota-Share Protection:** Federal reinsurance protection for both NDBI primary program and for other covered lines should be offered, on an optional paid basis, in the form of stop-loss protection in addition to the co-share element, given the potentially extreme cumulative risk of pandemic losses.

9) **Utilization of Reinsurance and Capital Markets:** The Federal program should, like NFIP, be encouraged to foster development and use of private reinsurance markets as well as capital markets' alternative risk-transfer mechanism to further reduce or protect taxpayer exposure.

10) **Continuity:** A Federal pandemic risk insurance program should be administered by a Federal entity housed within the Department of Treasury with continuous existence, such as the WW II-era WDC (later wound-down) or the Federal Crop Insurance Corporation.

Conclusion

The Business Continuity Coalition and its members are grateful for the opportunity to submit these comments, and we stand ready to assist this Subcommittee and all Members of Congress and the Administration in developing a pandemic risk insurance program.

We urge Congress to move expeditiously to pass bipartisan legislation that creates a public-private insurance solution consistent with the principles offered above to share the financial risk of losses related to pandemics. This urgent task is an essential precondition to the prompt recovery of this nation's economy, and going forward will help protect jobs and reduce economic damage from further pandemics.

The Business Continuity Coalition Members

American Gaming Association
American Hotel and Lodging Association
American Institute of Architects
American Land Title Association
American Resort Development Association
Appraisal Institute
Associated General Contractors
Building Owners and Managers Association
CRE Finance Council
Fox Corporation
Independent Film & Television Alliance
Institute for Portfolio Alternatives
International Council of Shopping Centers
International Franchise Association
Live Nation
Marriott International
Motion Picture Association
National Apartment Association
National Association of Broadcasters
National Association of Home Builders
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National Independent Venue Association
National Restaurant Association
National Multifamily Housing Council
National Retail Federation
NCTA – The Internet & Television Association
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