

PANDEMIC BUSINESS INTERRUPTION INSURANCE



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**Pandemic
Business Interruption
Insurance**

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Executive Summary

This report by the Committee on Capital Markets Regulation (the “**Committee**”) assesses the role of business interruption insurance (“**BII**”) during the COVID-19 pandemic and evaluates proposals to reform BII so that U.S. businesses can insure against losses from future pandemics.

BII is a type of property insurance that offers businesses protection against revenue loss and certain expenses resulting from events that cause direct physical loss or damage to insured property that prevents them from using that property.¹ The Insurance Information Institute estimates that 30-40% of small businesses carry BII,² which translates to approximately ten million small businesses in the U.S.³

The COVID-19 pandemic and resulting business losses from closures and other disruptions have brought attention to whether and how BII should cover pandemic-related losses. These discussions have prompted government and the private-sector to explore forward-looking BII reforms to address business interruption risks arising from future pandemics. However, the correlation and magnitude of the risk of a future pandemic make BII for such events difficult to design.

In Part I of this report, we review the experience of BII during the COVID-19 pandemic. First, we examine the structure of BII policies and litigation between insurers and policyholders over whether existing BII policies cover losses arising from the pandemic and associated government-mandated shutdowns. We find that, because BII policies typically require physical damage or contain pandemic-related exclusions, insurers have mostly prevailed in arguing that current BII policies do not cover COVID-related losses. Next, we survey efforts at the state and federal level to require insurers to cover COVID-related losses retroactively. Due to the constitutional and economic obstacles to this approach, these proposals have not been implemented.

In Part II, we evaluate the three main proposals for the federal government to ensure that businesses have access to pandemic BII. The first proposal, the Pandemic Risk Insurance Act (“**PRIA**”), was introduced in Congress by Representative Carolyn Maloney (D-NY). Modeled after the Terrorism Risk Insurance Act (“**TRIA**”), PRIA would rely on participating insurers to offer pandemic coverage, and the government would cover a portion of insured losses over certain thresholds up to \$750 billion. Unlike TRIA, participation in PRIA by insurers is optional. Given the enormity and unpredictability of pandemic-related losses, there are serious risks that too few insurers would participate in PRIA for it to be effective. The second proposal, the Business Continuity Protection Program (“**BCPP**”), was proposed by the insurance industry. Under the BCPP, which is modeled after the federal flood insurance program, the federal government would offer pandemic coverage directly to businesses and seek reinsurance from the capital markets. Lastly, the Chubb insurance company has put forward a third option, the Pandemic Business Interruption Program (“**PBIP**”), which is similar to PRIA but with modifications that place more

¹ CTR. FOR INS. POL’Y & RSCH, NAT’L ASS’N INS. COMM’RS. [hereinafter “**NAIC**”], *Business Interruption/Business Owner’s Policies (BOP)*, (Dec. 29, 2020),

https://content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm.

² Suzanne Barlyn, *U.S. insurers want taxpayers to back pandemic coverage for business*, REUTERS, Apr. 29, 2020, <https://www.reuters.com/article/health-coronavirus-insurance-pandemics/u-s-insurers-want-taxpayers-to-back-pandemic-coverage-for-businesses-idUSL2N2CF270>.

³ American Property and Casualty Insurance Association [hereinafter “**APCIA**”], *Commercial Insurance and Business Interruption Coverage in COVID-19 (2020)*, <https://www.apci.org/covid-19-resources/>.

limits on insurers' aggregate exposure. The issue with the PBIP is whether the combination of insurer and government contributions cover a meaningful portion of possible pandemic losses.

In Part II we compare the terms of each proposal, measure the government and insurers' maximum possible exposure under each proposal and assess concerns regarding each program's design. We then compare these proposals with the government support programs that addressed the economic impact of COVID-19 on small businesses, including the Small Business Administration's Paycheck Protection Program (the "PPP") and the Federal Reserve's Main Street Lending Program (the "MSLP").

In the conclusion, we consider the key difficulties in designing a pandemic BII program. We conclude that the best course for policymakers may be to: (i) establish a modest BCPP program to be quickly triggered at the onset of a pandemic; and (ii) supply any further government support as necessary through enhanced versions of the PPP and MSLP.

Part I: Background: Coverage of BII under Existing Policies

In response to policyholders' claims for coverage of losses arising from the COVID-19 pandemic, insurers contend that existing BII policies do not cover pandemic risk.⁴ Their arguments rest both on textual analysis of BII contract language and on a policy-based argument that "pandemics cannot be insured because they are uninsurable," due to the difficulty of pricing such risk and the scale of potential losses.⁵ This position has led to considerable litigation, which is still playing out in courts.⁶

A. Policy Coverage and Litigation

BII policies typically cover losses from the suspension or reduction of operations caused by direct physical loss or physical damage to covered property that results from a covered peril.⁷ So far, insurers have mostly prevailed in litigation over whether shutdowns resulting from the COVID-19 pandemic constitute physical loss or damage and whether they fall under the covered perils of most BII policies.⁸

Insurance companies have argued that a pandemic does not constitute physical loss or damage to commercial property, unlike from a fire or other physical event.⁹ However, plaintiffs have countered, and most courts have agreed, that the common meaning of "physical loss" includes the "inability to utilize or possess something in the real, material, or bodily world" and the loss of "the full range of rights and advantages of using or accessing...property," and thus includes losses from the COVID-19 pandemic.¹⁰

⁴ See, e.g., *id.* ("Generally, business interruption losses must result from a risk (like a fire) that is covered in the purchased business insurance policy that causes actual damage to the building or its contents. This type of damage does not exist in the context of the COVID-19 pandemic.").

⁵ *Id.* See also Insurance Information Institute [hereinafter III], Fact Sheet: Understanding Business Interruption Insurance and Pandemics, https://www.iii.org/sites/default/files/docs/pdf/business_interruption_101_041320_2.pdf; Russ Banham, *This Insurance Would Have Helped in Coronavirus Crisis But Nobody Bought It*, INS. J., Apr. 3, 2020, <https://www.insurancejournal.com/news/national/2020/04/03/563224.htm>.

⁶ COVID COVERAGE LITIGATION TRACKER, <https://cclt.law.upenn.edu/> (last visited Mar. 17, 2021).

⁷ Danielle B. Gatto & Joseph V. Cuomo, *Analyzing Business Interruption Insurance Clauses – A Primer for New York Business Owners*, FORCHELLI LAW, <https://www.forchellilaw.com/announcements/analyzing-business-interruption-insurance-clauses-a-primer-for-new-york-business-owners/> (last visited Mar. 17, 2021). See also Jill M. Bisco, Stephen G. Fier & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Policy Implications*, 39 J. INS. REG. 1, 8 (2020), <https://content.naic.org/sites/default/files/inline-files/JIR-ZA-39-05-EL.pdf>; ISO Business Income (and Extra Expense) (BIEE) Coverage Form (CP 00 30 10 12), <http://pacificcoastes.com/assets/BusinessIncomeEE1.pdf>.

⁸ Jef Feeley & Katherine Chigliński, *Insurers Winning Most, But Not All, COVID-19 Business Interruption Lawsuits*, INS. J., Nov. 30, 2020, <https://www.insurancejournal.com/news/national/2020/11/30/592047.htm>; Tyrone R. Childress, Edward M. Joyce & Jason B. Lissy, Jones Day, Policyholders Notch Victory in Fight for COVID-19-Related Business Interruption Insurance Coverage (Oct. 2020), <https://www.jonesday.com/en/insights/2020/10/policyholders-notch-victory-in-fight-for-covid19related-business-interruption-insurance-coverage>; Jim Sams, *Plaintiffs Win One, Lose One in COVID-19 BI Legal Fight*, INS. J., Oct. 5, 2020, <https://www.insurancejournal.com/magazines/mag-features/2020/10/05/585133.htm>.

⁹ APCI, *Commercial Insurance and Business Interruption Coverage in COVID-19 (2020)*, <https://www.apci.org/covid-19-resources/>.

¹⁰ *N. State Deli, LLC v. Cincinnati Ins. Co.*, 2020 WL 6281507 at *3 (Super. Ct. N.C., 2020). See also *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 798–803 (W.D. Mo. 2020) (holding plaintiffs' adequately alleged "physical loss" of property from COVID-19 and closure orders). *But see T&E Chi. v. Cincinnati Ins. Co.*, 2020 WL 6801845 at *5 (N.D. Ill. 2020) (holding COVID-19 closure was not a physical "loss to" business property).

BII policies either follow an “all risks” format, covering all causes of direct physical loss except those that are specifically excluded,¹¹ or they limit their coverage to the causes of damages enumerated in the policy.¹² Enumerated risk policies may include a “communicable disease event” risk, but such coverage is rare.¹³ On the other hand, many “all risks” policies contain exclusions for losses caused by viruses or bacteria.¹⁴ These exclusions are typically contained in a clause excluding damage caused by “bacteria,” alongside “fungus, wet or dry rot, or other pollutants” (“fungus or pollutant” exclusion) or a clause excluding damage caused by “virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease” (“virus or bacteria” exclusion).¹⁵ So far, certain judges have been skeptical of the argument that the “fungus or pollutant” exclusion applies to pandemic-related events,¹⁶ whereas insurers have fared better in cases where the policy contained a “virus or bacteria” exclusion.¹⁷

Some “all risks” policies also have language that excludes risks related to “virus or bacteria” from coverage for losses arising when civil authorities prohibit access to business premises as a result of physical damage.¹⁸ Civil authority action is defined as an event where a covered cause of losses causes damage to property *other* than the insured business premises and a civil authority takes an action to prohibit access to the business premises because of the damage to the other property.¹⁹ Coverage typically applies only if (1) the civil authority prohibits access to the area immediately surrounding the damaged property because of the damage, and the covered business premises are within one mile of the damaged property and within the area to which the civil authority has prohibited access; and (2) the civil authority has prohibited access because of dangerous physical conditions resulting from the damage or continuation of the covered loss that caused/is causing the relevant damage.²⁰ These policies are also typically time-limited, with coverage beginning only after a 72-hour waiting period and ending three or four consecutive weeks

¹¹ T&E Chi., 2020 WL 6801845 at *1; Studio 417, 378 F. Supp. 3d at 797; Jill M. Bisco, Stephen G. Fier & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Policy Implications*, 39 J. INS. REG. 1, 8 (2020); Jane Massey Draper, 30 A.L.R.5th 170, §2(b) (Originally published in 1995).

¹² Jill M. Bisco, Stephen G. Fier & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Policy Implications*, 39 J. INS. REG. 1, 8–9 (2020). *See also* Danielle B. Gatto & Joseph V. Cuomo, *Analyzing Business Interruption Insurance Clauses – A Primer for New York Business Owners*, FORCHELLI LAW, <https://www.forchellilaw.com/announcements/analyzing-business-interruption-insurance-clauses-a-primer-for-new-york-business-owners/> (last visited Mar. 17, 2021).

¹³ *See* COVID COVERAGE LITIGATION TRACKER, <https://cclt.law.upenn.edu/> (last visited Mar. 17, 2021).

¹⁴ *See id.*

¹⁵ Jill M. Bisco, Stephen G. Fier & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Policy Implications*, 39 J. INS. REG. 1, 9–10 (2020), <https://content.naic.org/sites/default/files/inline-files/JIR-ZA-39-05-EL.pdf>.

¹⁶ *See, e.g.,* Urogynecology Specialist of Florida LLC v. Sentinel Insurance Company, Ltd., 2020 WL 5939172 at *4 (M.D. Fla. 2020) (“Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants...”). *But see* Nahmad v. Hartford Cas. Ins. Co., 2020 WL 6392841 at *4 (S.D. Fla. 2020) (holding plaintiffs’ claims excluded by similar “fungus or pollutant” language).

¹⁷ *See, e.g.,* Kahn v. Pa. Nat’l Mut. Cas. Ins. Co., 2021 WL 422607 at *3 (M.D. Pa. 2021) (policy stated “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”).

¹⁸ Jill M. Bisco, Stephen G. Fier & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Policy Implications*, 39 J. INS. REG. 1, 10 (2020), <https://content.naic.org/sites/default/files/inline-files/JIR-ZA-39-05-EL.pdf>.

¹⁹ ISO Business Income (and Extra Expense) (BIEE) Coverage Form (CP 00 30 10 12), <http://pacificcoastes.com/assets/BusinessIncomeEE1.pdf>.

²⁰ *Id.* Furthermore, civil authority coverage typically has a duration limited to 4 consecutive weeks.

after coverage began.²¹ Pandemic closure losses are unlikely to qualify for civil authority coverage, unless a court adopts a broad understanding of damaged property and views all property within a municipality or state adopting a closure mandate as the “damaged property” for purposes of the policy coverage.

The National Association of Insurance Commissioners (“NAIC”) reports that as of November 2020, 210,454 property and casualty insurance claims had been filed in relation to the COVID-19 pandemic, at a value of over \$1.3 billion.²² As of that date, 84% of claims had been closed without payment, 13% remained open, and 2% had been closed with payment.²³ Total paid claims were for \$420 million – a very small sum compared to total pandemic-related losses.²⁴ According to the Covid Coverage Litigation Tracker, run by University of Pennsylvania Law School Professor Baker, BII policyholders have filed approximately 1,500 cases in state and federal court in relation to disputes over BII coverage relating to COVID-19.²⁵ So far, results at the motion to dismiss phase have favored the insurance companies, which have won dismissals in 90% of cases that have been decided in federal court and 51% of cases in state court.²⁶

According to the American Property Casualty Insurance Association (“APCIA”), COVID-19 closure losses for U.S. small businesses were between \$255 billion and \$431 billion per month.²⁷ This estimate translates to annual losses of \$3.06-5.17 trillion for small businesses alone. Using the Insurance Information Institute’s estimate that 30-40% of small businesses carry BII,²⁸ these losses could translate to insurance exposures of \$76.5-172.4 billion per month.²⁹ These losses are extremely large, especially when considering that U.S. home, auto, and business insurers together have only \$800 billion in policyholder surplus to cover all future losses,³⁰ and that commercial property insurance policies collect only \$6 billion per month in premiums.³¹ However, the total number of claims and cases filed, as well as the dollar value of total property

²¹ See, e.g., Larry P. Schiffer, Aaron C. Garavaglia, Kelly Mihocik, *COVID-19 and Waiting Periods Under Business Interruption Coverage*, THE NATIONAL LAW REVIEW (March 23, 2020),

<https://www.natlawreview.com/article/covid-19-and-waiting-periods-under-business-interruption-coverage>.

²² NAIC, Covid-19 Property & Casualty Insurance Business Interruption Data Call, Part 2: Claim and Loss Information (Nov. 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%271%20Claims%20Aggregates_Nov.pdf.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ This estimate appears to have made at the beginning of the pandemic, when losses were likely substantially higher than at other times during the year, as closure mandates eased and businesses adapted to operating in the new conditions. It would be useful to see how losses evolved over the past year of the pandemic to get a fuller understanding of the BII risks that actually arise from a pandemic. See APCIA, Commercial Insurance and Business Interruption Coverage in COVID-19 (2020), <https://www.apci.org/covid-19-resources/>.

²⁸ Suzanne Barlyn, *U.S. insurers want taxpayers to back pandemic coverage for business*, REUTERS, Apr. 29, 2020, <https://www.reuters.com/article/health-coronavirus-insurance-pandemics/u-s-insurers-want-taxpayers-to-back-pandemic-coverage-for-businesses-idUSL2N2CF270>.

²⁹ This estimate assumes that losses would be evenly distributed between insured and non-insured businesses, i.e., the lower bound estimate was calculated by taking 30% of \$255 billion.

³⁰ APCIA, Commercial Insurance and Business Interruption Coverage in COVID-19 (2020), <https://www.apci.org/covid-19-resources/>.

³¹ Contessa Brewer, *Insurers lobby for federal pandemic insurance program*, CNBC, July 21, 2020, <https://www.cnn.com/2020/07/21/insurers-lobby-for-federal-pandemic-insurance-program.html>.

and casualty claims made in relation to the COVID-19 pandemic – \$1.3 billion³² – is low. The small dollar value of claims filed suggests that few policyholders are sufficiently confident that their policies cover pandemic losses to file claims.

B. Retroactive COVID-19 Coverage Mandates and Compensation Funds

In 2020, legislators in eleven states and Puerto Rico introduced bills to require insurers to cover some or all COVID-19 losses.³³ Some of the bills took the approach of construing typical policy language to include pandemic risks,³⁴ while others laid down a more direct mandate.³⁵ Both approaches would trigger constitutional scrutiny if passed. The U.S. Supreme Court has held that the Contracts Clause of the U.S. Constitution prohibits states from passing laws that retroactively and substantially interfere with private contracts absent limited exceptions,³⁶ and the National Council of Insurance Legislators has argued that a legislative mandate for retroactive coverage would run afoul of this prohibition.³⁷

A few bills were also introduced in Congress in 2020 that would have provided some BII coverage for past COVID-19 losses, either by mandating compensation to policyholders and subsequently reimbursing insurers, or by invalidating exclusions in existing policies as applied to losses arising from the pandemic.³⁸ Reimbursing insurers for payments would avoid the constitutional issue that invalidating exclusions would raise, but this would place the cost of

³² NAIC, Covid-19 Property & Casualty Insurance Business Interruption Data Call, Part 2: Claim and Loss Information (Nov. 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%271%20Claims%20Aggregates_Nov.pdf.

³³ See tracking at *Business Interruption Insurance 2021 Legislation*, NAT'L CONF. STATE LEGISLATURES (Feb. 12, 2021), <https://www.ncsl.org/research/financial-services-and-commerce/business-interruption-insurance-2021-legislation.aspx> (last visited Mar. 18, 2021); *Business Interruption Insurance 2020 Legislation*, NAT'L CONF. STATE LEGISLATURES (Dec. 11, 2020), <https://www.ncsl.org/research/financial-services-and-commerce/business-interruption-insurance-2020-legislation.aspx>; *Business Interruption Legislation*, WHOLESALE & SPECIALTY INS. ASS'N (Feb. 9, 2021), https://www.wsia.org/wcm/Legislative_Advocacy_Compliance_PAC/COVID-19/Business_Interruption_Legislation/wcm/Legislative_Advocacy_PAC/Business_Interruption_Legislation.aspx?hkey=ac65ce8a-5295-409d-ba17-f97d14f954a0 (last visited Mar. 18, 2021). Some bills requiring insurers to provide coverage were accompanied by other legislation to create a fund to compensate insurers for some or all of their losses. See, e.g., A.B. 3844, 219th Leg., 2020-21 Reg. Sess. (N.J. 2020).

³⁴ See, e.g., A.B. 3844, 219th Leg., 2020-21 Reg. Sess. (N.J. 2020); H.B. 858, 2020, H.R., Reg. Sess. (La. 2020); S.B. 1188, 2019-20 Gen. Assemb. 123d Sess. (S.C. 2020).

³⁵ See, e.g., H.B. 589, 133d Gen. Assemb., 2019-2020 Reg. Sess. (Ohio 2020); A.B. AO1937, 2021–22 H.R., Reg. Sess. (N.Y. 2021), S.B. S04711, 2020-21 S., Reg. Sess. (N.Y. 2021).

³⁶ *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 400 (1983). See also *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); Robert J. Kaler, Holland & Knight, Proposed COVID-19-Related Business Interruption and Property Loss Insurance Legislation (Apr. 24, 2020), <https://www.hklaw.com/en/insights/publications/2020/04/proposed-covid19-related-business-interruption-and-property>.

³⁷ Letter from Matt Lehman, Majority Leader, Indiana House of Representatives, NCOIL President & Tom Considine, Chief Executive Officer, NCOIL to Nydia M. Velazquez, Chair, House Committee on Small Business (Mar. 25, 2020), <https://us.eversheds-sutherland.com/portalresource/TC-ML-letter-to-Congress-re-COVID-3-25-2020.pdf>.

³⁸ Business Interruption Relief Act, H.R. 7412, 116th Cong. (2020); Business Interruption Insurance Coverage Act, H.R. 6494, 116th Cong. (2020). See Mark A. Packman, *Proposed Legislation Regarding Business Interruption Insurance for COVID-19 Claims*, NAT'L L. REV. (July 15, 2020), <https://www.natlawreview.com/article/proposed-legislation-regarding-business-interruption-insurance-covid-19-claims>; DIANE P. HORN & BAIRD WEBEL, CONG. RSCH. SERV., IN11383, BUSINESS INTERRUPTION INSURANCE AND COVID-19: FEDERAL LEGISLATIVE INITIATIVES 2 (May 11, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11383>. See also Never Again Small Business Protection Act of 2020, H.R. 6497, 116th Cong. (2020) (providing prospective coverage only, by requiring insurers to offer coverage for government-ordered closures).

coverage with the government. As of June 2021, neither Congress nor any state had passed any such legislation.

There were also several proposals at both the state and federal levels to establish funds to directly compensate businesses and employees who suffered losses from the pandemic, not attached to any insurance coverage mandate.³⁹ For instance, a consortium of trade associations proposed a federal compensation program for affected businesses, modeled loosely after the September 11 Victims Compensation Fund (“VCF”).⁴⁰ The National Council of Insurance Legislators (“NCOIL”), an organization primarily composed of state legislators serving on insurance and financial institutions committees also expressed support for this proposal.⁴¹ The proposals would have established a federally funded administrator that would be responsible for helping businesses affected by COVID-19 to retain and rehire employees, maintain employee benefits, and meet operating expense obligations.⁴² Neither Congress nor any state has passed any legislation modeled after these compensation proposals.

³⁹ See, e.g., Letter from American Booksellers Association, American Hotel & Lodging Association (AHLA), American Land and Title Association (ALTA), American Property Casualty Insurance Association (APCIA), Asian American Hotel Owners Association (AAHOA), Certified Commercial Investment Member Institute (CCIM Institute), Coalition of Franchise Associations (CFA), CRE Finance Council, The Council of Insurance Agents & Brokers (CIAB), Franchise Business Services (FBS), Independent Insurance Agents & Brokers of America (IIABA), Institute of Retail Estate Management (IREM), International Council of Shopping Centers (ICSC), International Foodservice Distributors Association (IFDA), International Franchise Association (IFA), Mortgage Bankers Association (MBA), NAIOP, the Commercial Real Estate Development Association, National Apartment Association (NAA), National Association of Convenience Stores (NACS), National Association of Mutual Insurance Companies (NAMIC), National Association of Professional Insurance Agents (PIA), National Association of REALTORS®, National Association of Theatre Owners (NATO), National Franchise Association (NFA), National Multifamily Housing Council (NMHC), National Retail Federation (NRF), National Waste and Recycling Association (NWRA), The Payroll Group (TPG), The Petroleum Marketers Association of America (PMAA), Real Estate Board of New York (REBNY), The Real Estate Roundtable (RER), Retail Industry Leaders Association (RILA), Reinsurance Association of America (RAA), Society of Independent Gasoline Marketers of America (SIGMA), U.S. Travel Association & Wholesale & Specialty Insurance Association (WSIA) to President Donald J. Trump, Secretary of the Treasury Steven T. Mnuchin, U.S. Senate Majority Leader Mitch McConnell, U.S. Senate Democratic Leader Charles Schumer, U.S. House Speaker Nancy Pelosi & U.S. House Republican Leader Kevin McCarthy (Mar. 31, 2020),

https://www.namic.org/pdf/20memberadvisory/200331_joint_trades_covid-19_business_and_employees_fund_letter.pdf [hereinafter Business and Employees Fund Letter]; Rob Bordelon & Joseph Annoti, Texas Public Policy Foundation, *The Workplace Recovery Act: A Public-Private Solution* White Paper (April 2020), https://files.texaspolicy.com/uploads/2020/04/02184520/Bordelon-Annoti-Workplace-Recovery-Act.pdf?utm_source=hs_email&utm_medium=email&hsenc=p2ANqtz--M4Pj7PdbxqrqVhytv0XrSKpUpPuY11n4uYnlTv5s7KYClnwex7GST7je9eAc7vZUOA_SY3. See also Pat Hatler, Brandon Roman & Kelly Mihocik, *A Survey of Recent Biz Interruption Insurance Legislation*, LAW 360, June 9, 2020, <https://www.law360.com/articles/1278954/a-survey-of-recent-biz-interruption-insurance-legislation>.

⁴⁰ Business and Employees Fund Letter, https://www.namic.org/pdf/20memberadvisory/200331_joint_trades_covid-19_business_and_employees_fund_letter.pdf; Pat Hatler, Brandon Roman & Kelly Mihocik, *A Survey of Recent Biz Interruption Insurance Legislation*, LAW 360, June 9, 2020, <https://www.law360.com/articles/1278954/a-survey-of-recent-biz-interruption-insurance-legislation>; FIN. SERVS. COMM. MAJORITY STAFF, NOVEMBER 19, 2020, HCIDI SUBCOMMITTEE HEARING ENTITLED, “INSURING AGAINST A PANDEMIC: CHALLENGES AND SOLUTIONS FOR POLICYHOLDERS AND INSURERS” 5 (Nov. 16, 2020), <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba04-20201119-sd002.pdf>.

⁴¹ Letter from Matt Lehman, Majority Leader, Indiana House of Representatives, NCOIL President & Tom Considine, Chief Executive Officer, NCOIL to Nydia M. Velazquez, Chair, House Committee on Small Business (Mar. 25, 2020), <https://us.eversheds-sutherland.com/portalresource/TC-ML-letter-to-Congress-re-COVID-3-25-2020.pdf>.

⁴² Business and Employees Fund Letter, https://www.namic.org/pdf/20memberadvisory/200331_joint_trades_covid-19_business_and_employees_fund_letter.pdf.

Part II: Addressing Future Pandemic Risk

Pandemics represent a substantial systemic risk that must be addressed on a market- and economy-wide basis, but the risk of a pandemic does not appear to meet the key characteristics of an insurable risk. For example, for a risk to be insurable, there must be a large number of separate and distinct exposure units, the chance of loss must be calculable, the amount of loss must be measurable in advance, the loss cannot be widespread and catastrophic, and premiums must be economically feasible.⁴³ But pandemic losses are systemic, correlated and subject to millions of simultaneous claims. Pandemic losses also cannot be accurately modeled with respect to shifts in macroeconomic consumer demand and likely too expensive to provide affordable coverage given the size of losses and unknown frequency of future pandemics. In addition, because it is difficult to distinguish direct pandemic losses (that occur due to closure) from the general decline in revenue (that would occur anyways due to falling consumer demand), pandemic-related BII could force insurers to cover general recession-related losses in addition to direct losses from closures.

Without government support and/or effective BII, the economy would suffer substantial contraction in response to a pandemic, especially if the pandemic results in mandatory closure orders to prevent spread of the disease. Under the current private contract system for BII, individual businesses and the wider economy are generally exposed to this risk. In theory, a pre-established BII program may be preferable to the Paycheck Protection Program (“PPP”) or Main Street Lending programs (“MSLPs”) established to address COVID-19 costs to small and medium sized businesses. However, because future pandemics may follow very different paths from COVID-19 and, given the inability of private insurers to predict and cover enormous potential losses, it may be exceedingly difficult to design an effective program. This section discusses options to reform the BII system to address pandemic risk and then compares those options with the government’s actions in response to the COVID-19 crisis.

Before considering the various proposals to reform the BII system, it is important to differentiate between voluntary and mandatory pandemic-related BII. If businesses rely on insurers to *voluntarily* offer pandemic-related BII, then insurers may limit coverage and/or charge prohibitive prices, so a significant portion of losses would go uncovered. Meanwhile, if the government *mandates* pandemic-related BII by requiring any insurer offering BII to offer coverage for pandemic-related losses, then insurers may stop offering BII entirely in order to avoid the unacceptably large losses (and corresponding solvency risk) involved. This could very well result in BII no longer being available for other historically insured perils such as fire, explosion, and windstorm. In addition, if the government requires businesses to buy pandemic-related BII in the marketplace, then coverage would surely come at high premiums. And if losses are too large for insurers to actually meet their coverage obligations, then businesses would suffer the worst of both worlds: no real coverage combined with the dead-weight loss of having paid useless premiums.

We now turn to a summary and evaluation of the major federal proposals to provide businesses with access to pandemic-related BII with government support.

⁴³ Robert I Mehr and Emerson Cammack, *Principles of Insurance*, R.D. IRWIN, 34-37 (1976); George E. Rejda and Michael McNamara, *Principles of Risk Management and Insurance*, PEARSON, 13th Ed. (March 2016).

A. Legislative Proposal: Pandemic Risk Insurance Act

The Pandemic Risk Insurance Act (“**PRIA**”), H.R. 7011, introduced by Representative Carolyn Maloney (D-NY), is the leading legislative proposal to address future pandemic risks.⁴⁴ Modelled on the Terrorism Risk Insurance Act (“**TRIA**”),⁴⁵ PRIA would create a government backstop for insurers to cover pandemic losses.⁴⁶ Importantly, private insurers would voluntarily elect to participate in the program, but when they did, they would have to make coverage for pandemic losses available in all BII policies on the same material terms as coverage for events other than public health emergencies⁴⁷ and businesses could then voluntarily choose to purchase pandemic coverage.⁴⁸ Thus, the terms of pandemic-related BII would vary by participating insurer.

Under PRIA, participating insurers must cover 100% of: (i) the first losses up to an aggregate of \$250 million per public health emergency;⁴⁹ *plus* (ii) each participating insurer’s deductible per calendar year (equal to 5% of the PRIA premiums the insurer collected in the prior year).⁵⁰ Once aggregate insured losses exceed \$250 million *plus* the applicable insurer’s deductible, then participating insurers must cover 5% of the next insured losses up to \$750 billion, with the government covering the other 95% of losses up to \$750 billion. Once aggregate system-wide insured losses exceed \$750 billion in a given calendar year,⁵¹ then federal government coverage would cease for that calendar year, and the Treasury would allocate additional insured losses pro rata among participating insurers until every insurer has covered up to its full deductible amount.⁵² Once every insurer has covered up to its full deductible amount for that calendar year, then neither the federal government nor insurers would cover additional losses in that calendar year.⁵³

⁴⁴ See H.R. 7011, *Pandemic Risk Insurance Act of 2020*, 116TH CONGRESS (2019-2020) (May 26, 2020), <https://www.congress.gov/bill/116th-congress/house-bill/7011/text> [“**PRIA Bill**”].

⁴⁵ FIN. SERVS. COMM. MAJORITY STAFF, NOVEMBER 19, 2020, HCDI SUBCOMMITTEE HEARING ENTITLED, “INSURING AGAINST A PANDEMIC: CHALLENGES AND SOLUTIONS FOR POLICYHOLDERS AND INSURERS” 4 (Nov. 16, 2020), <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba04-20201119-sd002.pdf>. See also Terrorism Risk Insurance Act of 2002, 15 U.S.C. § 6701 note (2020) (Pub. L. No. 107-297, 116 Stat. 2232, renewed through 2027 by Terrorism Risk Insurance Program Reauthorization Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534, tit. 5, § 502 (2019)) [hereinafter collectively referred to as TRIA. Because the TRIA included in the U.S.C. as a note, section references are to the public law rather than U.S.C.].

⁴⁶ See generally PRIA Bill, *supra* note 44.

⁴⁷ PRIA Bill, *supra* note 44, at § 4(c)(2).

⁴⁸ See generally PRIA Bill, *supra* note 44.

⁴⁹ PRIA Bill, *supra* note 46, at § 4(e)(1)(B).

⁵⁰ PRIA Bill, *supra* note 46, at § 3(10), § 4(e)(1)(A).

⁵¹ PRIA Bill, *supra* note 46, at § 4(e)(2)(A).

⁵² PRIA Bill, *supra* note 46, at § 3(10), § 4(e)(2)(B).

⁵³ PRIA Bill, *supra* note 46, at § 4(e)(2).

PRIA compared to TRIA

Table 1 below sets forth how the PRIA proposal compares to the existing TRIA program.

Table 1: Comparing TRIA and PRIA

Layer of Coverage	TRIA	PRIA
First losses before the Program Trigger	Insurers cover 100% <i>Up to \$200 million in aggregate losses per terrorist act</i>	Insurers cover 100% <i>Up to \$250 million in aggregate losses per public health emergency</i>
Insurer Deductible	Each Insurer covers additional losses equal to 20% of the TRIA premiums it collected in the prior year <i>Estimated \$45 billion</i>	Each insurer covers additional losses equal to 5% of the PRIA premiums it collected in the prior year <i>Unknown</i>
Second losses after the applicable insurer has met its deductible	Government covers 80%, insurers cover 20% <i>Up to \$100 billion aggregate losses</i>	Government covers 95%, insurers cover 5% <i>Up to \$750 billion aggregate losses</i>
Above second losses maximum	No coverage.	The Treasury allocates losses above \$750 billion pro rata among participating insurers that have not yet met their full deductible. <i>Until every participating insurer has met its deductible.</i> Then, no coverage.
Surcharge on Policyholders	Government recovers any outlays by imposing a surcharge on subsequent TRIA policies	N/A

Two key differences between PRIA and TRIA are also noteworthy. First, in contrast to PRIA’s voluntary participation, all property and casualty insurers are required to participate in TRIA.⁵⁴ Such mandatory participation has been acceptable to the insurance industry because of the TRIA limitations on their total losses. We also note that, under TRIA, the government must impose surcharges on TRIA policyholders in order to recover 140% of its coverage outlays over

⁵⁴ TRIA §§ 102(6), 103(a), (c); 30 C.F.R. § 50.3 (2021).

time (i.e., its 80% share of losses from \$200 million to \$100 billion).⁵⁵ However, these surcharges progressively decline to zero once a terrorist attack has caused more than \$37.5 billion in insured losses.⁵⁶ PRIA does not have a similar provision, so the government would not directly pass its costs onto PRIA policyholders the way it does under TRIA.

Total Insurer Exposure

Under TRIA, private insurers' total exposure is approximately \$56.2 billion, which consists of: the first \$200 million of losses, *plus* their deductible, which CCMR staff estimates at \$45 billion,⁵⁷ *plus* 20% of the balance of insured losses up to \$100 billion. In contrast, under PRIA, we estimate insurers' aggregate exposure per calendar year to be approximately \$37.75 billion *plus* 4.75% of the prior year's premiums.⁵⁸ The \$37.75 billion minimum includes the first \$250 million of losses *plus* 5% of losses up to \$750 billion, which is the minimum of insurer exposure before taking insurer deductibles into account. Because we do not know the relevant premiums, we cannot estimate insurers' total annual exposure over \$37.75 billion.

Crucially, whereas terrorist incidents are typically limited in time and scope, pandemics can affect entire economies for extended periods of time, and this will increase PRIA premiums.⁵⁹ While the 9/11 attacks caused the largest insured losses from a nonnatural disaster on record at \$45 billion,⁶⁰ APCIA's estimate of small business pandemic losses of \$251-431 billion *per month* are far greater.⁶¹ Given the much-larger losses associated with pandemics compared to terrorism, PRIA premiums will likely be much larger than TRIA premiums, which means that insurer deductibles would increase aggregate insurer exposure well beyond \$37.75 billion.

Potential Issues with PRIA

Insurers may avoid participating in PRIA to avoid large losses from a future pandemic.⁶² For instance, while PRIA's deductibles and program cap apply per calendar year,⁶³ pandemics can span more than one calendar year, and multiple pandemics may occur in close proximity to one another, making aggregate losses from future pandemics (and the effective ceiling on insurer liability) hard to predict in advance. In addition, since insurer participation in PRIA is voluntary,

⁵⁵ TRIA § 103(e).

⁵⁶ *Id.*

⁵⁷ A Congressional Research Service Report estimated the deductible in 2017 to be \$42 billion. See CONGRESSIONAL RESEARCH SERVICE, *Terrorism Risk Insurance: Overview and Issue Analysis for the 116th Congress*, 4-5 (Dec. 27, 2019), <https://fas.org/sgp/crs/terror/R45707.pdf>. Using the Bureau of Labor Statistics' estimate of annual core CPI inflation, CCMR staff estimates the inflation-adjusted deductible at \$45 billion for 2021.

⁵⁸ In order to supply this estimate, the Committee has assumed that: (i) every insurer meets its deductible before aggregate insured losses surpass \$750 billion in the calendar year (in which case insurers are not exposed to losses above \$750 billion); and (ii) aggregate insured losses are at least \$750 billion in the relevant calendar year. The 4.75% of the prior year's premiums is the insurer deductible, *adjusted downward* in order to avoid double-counting the 5% of losses up to \$750 billion already counted in the \$37.75 billion.

⁵⁹ Susanne Sclafane, *Carrier Groups Ready Proposal for Federal Pandemic Loss Fund – Not PRIA*, CARRIER MGMT., May 19, 2020, <https://www.carriermanagement.com/news/2020/05/19/206826.htm>.

⁶⁰ CONGRESSIONAL RESEARCH SERVICE, *Terrorism Risk Insurance: Overview and Issue Analysis for the 116th Congress*, 1 (Dec. 27, 2019), <https://fas.org/sgp/crs/terror/R45707.pdf>.

⁶¹ APCIA, *Commercial Insurance and Business Interruption Coverage in COVID-19* (2020), <https://www.apci.org/covid-19-resources/>.

⁶² See, e.g., Robert Armstrong, *US insurance industry rift deepens over pandemic cover*, FIN. TIMES, July 9, 2020, <https://www.ft.com/content/4d7249eb-efa5-4b51-86ec-fe36a1467185>.

⁶³ See PRIA Bill, *supra* note 46, at § 3(10), § 4(e)(1)(A), § 4(e)(2)(A).

when fewer insurers choose to participate, each participating insurer must assume a larger portion of risk up to the \$750 billion annual maximum, so unless a critical mass of insurers chooses to participate, the program may not have any participation at all. Thus, although the approximate cap on insurer liability may at first seem tolerable in relation to *all* property and casualty insurers' aggregate net income (\$66.2 billion in 2019) or surplus reserves (\$866.2 billion in June 2020),⁶⁴ the risk of in a multi-year pandemic with too few PRIA-participating insurers may deter any single insurer from participating in PRIA.

Moreover, BII insurers do not have enough specialized claims adjusters capable of simultaneously examining millions or potentially tens of millions of individual business interruption claims in a widespread pandemic – especially as the industry enters hurricane, flood, and wildfire season. BII insurers are normally able to expect that only a very small percentage of their BII customers are likely to be shut down at any one time from covered perils such as fires and windstorms – but a pandemic could impact practically all customers at the same time.

Indeed, insurance trade groups oppose the PRIA proposal.⁶⁵ One of industry's core arguments against the PRIA is that insurance is an inappropriate mechanism to address pandemic risks.⁶⁶ NAMIC, APCA, and the Independent Insurance Agents of America (“**Big ‘I’**”) have argued that the nature and scope of each pandemic cannot be readily determined in advance, so there is limited opportunity to diversify against the risk of a pandemic geographically or otherwise in advance⁶⁷ and insurers therefore lack the capacity to manage such risks.⁶⁸

However, executives for Chubb, Farmers, and Marsh have disagreed with the broader industry position that pandemic risks are uninsurable.⁶⁹ They have argued that insurers do have the risk management capacity to handle these risks, and that they are not impossible to diversify.⁷⁰ One would assume that a basic risk management technique would be to charge higher premiums to businesses in the most exposed industries, including travel and leisure. This would then raise

⁶⁴ See NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *U.S. Property & Casualty Insurance Industry, 2019 Full Year Results* (2020), <https://content.naic.org/sites/default/files/inline-files/YE2019%20Industry%20Report.pdf>. See also NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *U.S. Property & Casualty Insurance Industry, 2020 First Half Results* (2021), <https://content.naic.org/sites/default/files/inline-files/Property%20%26%20Casualty%20and%20Title%202020%20Mid-Year%20Industry%20Report%20%281%29.pdf>.

⁶⁵ National Association of Mutual Insurance Companies [hereinafter NAMIC], APCA, Independent Insurance Agents of America [hereinafter “Big ‘I’”], Press Release, Insurance Trades Unveil Federal Pandemic Solution (May 21, 2020), <https://www.namic.org/news/releases/200521mr01>; Robert Armstrong, *US insurance industry rift deepens over pandemic cover*, FIN. TIMES, July 9, 2020, <https://www.ft.com/content/4d7249eb-efa5-4b51-86ec-fe36a1467185>.

⁶⁶ See Susanne Sclafane, *Carrier Groups Ready Proposal for Federal Pandemic Loss Fund – Not PRIA*, CARRIER MGMT., May 19, 2020, <https://www.carriermanagement.com/news/2020/05/19/206826.htm>.

⁶⁷ Robert Armstrong, *US insurance industry rift deepens over pandemic cover*, FIN. TIMES, July 9, 2020, <https://www.ft.com/content/4d7249eb-efa5-4b51-86ec-fe36a1467185>; NAMIC, APCA, Big “I”, Press Release, Insurance Trades Unveil Federal Pandemic Solution (May 21, 2020), <https://www.namic.org/news/releases/200521mr01>.

⁶⁸ Robert Armstrong, *US insurance industry rift deepens over pandemic cover*, FIN. TIMES, July 9, 2020, <https://www.ft.com/content/4d7249eb-efa5-4b51-86ec-fe36a1467185>; Robert Hartwig, APCA, Uninsurability of Mass Market Business Continuity Risks from Viral Pandemics (2020), <https://www.uscriskcenter.com/wp-content/uploads/2020/05/Uninsurability-of-Pandemic-Risk-White-Paper-Hartwig-APCIA-FINAL-WORD.pdf>.

⁶⁹ Robert Armstrong, *US insurance industry rift deepens over pandemic cover*, FIN. TIMES, July 9, 2020, <https://www.ft.com/content/4d7249eb-efa5-4b51-86ec-fe36a1467185>.

⁷⁰ *Id.*

the issue as to whether these industries would buy the high-priced insurance that they needed and whether industries with lower or no risk would decide to buy the insurance at all.

Ultimately, given the enormity of pandemic-related losses, the difficulty of predicting them in advance, and the disincentives for any single insurer to participate in PRIA, there is a serious risk that insurers would not participate in PRIA due to the unacceptably large risks involved.

B. Industry Proposal: Business Continuity Protection Program

Insurance industry trade groups have proposed an alternative to PRIA that would be similar to federal flood insurance.⁷¹ Under this proposal, the U.S. Department of Treasury would use federal funds to establish a Business Continuity Protection Program (the “BCPP”), which would sell revenue replacement assistance to any business that wanted it.⁷² Nonprofits would also be eligible for coverage.⁷³ The assistance would cover up to 80% of its policyholders’ payroll and operating expenses for up to three months during a federally-declared viral emergency.⁷⁴ Payouts would be triggered automatically following the president’s declaration of a viral emergency.⁷⁵ Payouts would be limited to those policyholders who had purchased protection at least 90 days before the declaration of the viral emergency.⁷⁶ Businesses receiving payments would be required to use the funds to pay necessary payroll and operating expenses and to follow applicable federal pandemic guidance.⁷⁷

The proposal does not specify the premiums businesses would pay for BCPP coverage,⁷⁸ but this represents an important tradeoff in the program. With higher premiums, fewer businesses will purchase coverage; and with lower premiums, the government itself will be exposed to more net losses over the life of the program.

Except for those insurers that voluntarily offer to sell excess coverage themselves, the BCPP proposal takes pandemic risk entirely outside of the insurance industry, which may be appropriate because of the uninsurable nature of pandemic risks, but it carries a potentially high price tag for the government. The proposal does contemplate that the U.S. Treasury might purchase reinsurance from the private market to protect taxpayers,⁷⁹ but this would raise similar questions about whether reinsurers would undertake this risk any more than insurers themselves. Licensed insurance agents and brokers would be the authorized distribution network to market and sell the

⁷¹ Susanne Sclafane, *Carrier Groups Ready Proposal for Federal Pandemic Loss Fund – Not PRIA*, CARRIER MGMT., May 19, 2020, <https://www.carriermanagement.com/news/2020/05/19/206826.htm>.

⁷² APCIA, *Insurance Trades Unveil Federal Pandemic Solution* (May 21, 2020), <https://www.apci.org/media/news-releases/release/60933/>; APCIA, NAMIC, INDEPENDENT INSURANCE AGENTS & BROKERS OF AMERICA, *Business Continuity Protection Program* (updated Sept. 2020), <https://home.treasury.gov/system/files/311/BCPP-Overview-9-20.pdf>. See also APCIA and NAMIC, *The Business Continuity Protection Program: Building on Experience to Develop an Affordable and Effective Federal Program for Future Pandemic Business Relief* (Dec. 8, 2020), https://content.naic.org/sites/default/files/national_meeting/Don%20Griffin%20APCIA%20Presentation%20on%20BCPP%20120820.pdf.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Termed “viral emergency” in proposal. See *id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *id.*

⁷⁹ *Id.*

BCPP’s revenue replacement assistance.⁸⁰ The proposal also contemplates that the BCPP would work with pandemic risk mitigation experts to develop guidelines and safety standards that would be provided to businesses that purchased coverage.⁸¹

The BCPP would create a new type of presidential declaration to trigger payment.⁸² First, individual state governors would request a viral emergency declaration from the federal government.⁸³ Then, if the U.S. President declared a viral emergency, the BCPP would disburse payment automatically to affected businesses for the portion of their expenses located in the emergency zone (as allocated in the application form).⁸⁴ Given the magnitude of expenditures this declaration would trigger, the contours of this presidential power would be appropriately cabined by parameters in the authorizing legislation.⁸⁵ Indeed, using APCIA’s estimate of small business closure losses between \$255 billion and \$431 billion per month from the beginning of the COVID-19 pandemic,⁸⁶ the government’s total exposure for 90 days of coverage under the BCPP could be between \$612 billion and \$1.04 trillion.⁸⁷

It is difficult to assess how much demand there would be for coverage under the BCPP without specificity as to the premiums to participate in the program. An additional point of concern relating to the BCPP proposal is whether the three-month coverage period would be sufficient. As demonstrated by COVID-19, there is risk that closures and other damages arising from the pandemic may continue beyond that period.

After releasing their initial BCPP proposal, insurance industry trade groups later updated it to provide for excess coverage beyond the base program.⁸⁸ Under the “BCPP Plus” approach, businesses that purchase base BCPP coverage would be eligible to purchase excess coverage from insurers, and the federal government would backstop 90% of these covered losses, with insurers covering the remaining 10%.⁸⁹ Because insurers would not be required to offer excess coverage, businesses would not be required to purchase it, and premiums are unspecified,⁹⁰ we are unable to estimate the ultimate effect of excess coverage on the scope and cost of the base BCPP proposal.

⁸⁰ APCIA, NAMIC, INDEPENDENT INSURANCE AGENTS & BROKERS OF AMERICA, *Business Continuity Protection Program* (updated Sept. 2020), <https://home.treasury.gov/system/files/311/BCPP-Overview-9-20.pdf>.

⁸¹ *Id.*

⁸² *Id.* at 4.

⁸³ *Id.* at 4.

⁸⁴ *Id.* at 4.

⁸⁵ *Id.* at 4.

⁸⁶ This estimate appears to have made at the beginning of the pandemic, when losses were likely substantially higher than at other times during the year, as closure mandates have eased and businesses have adapted to operating in the new conditions. It would be useful to see how losses evolved over the past year of the pandemic to get a fuller understanding of the BII risks that actually arise from a pandemic. See APCIA, Commercial Insurance and Business Interruption Coverage in COVID-19 (2020), <https://www.apci.org/covid-19-resources/>.

⁸⁷ This calculation assumes full participation to assess the government’s maximum potential liability.

⁸⁸ APCIA, NAMIC, INDEPENDENT INSURANCE AGENTS & BROKERS OF AMERICA, *Business Continuity Protection Program*, 5 (updated Sept. 2020), <https://home.treasury.gov/system/files/311/BCPP-Overview-9-20.pdf>.

⁸⁹ *Id.* at 5.

⁹⁰ *Id.* at 5.

C. Chubb Proposal: Pandemic Business Interruption Program

Chubb, with support from Marsh and Farmers, has argued that the insurance industry *does* have the capacity to cover *some* pandemic risks and has offered its own public-private partnership model to do so. The Pandemic Business Interruption Program (“PBIP”), has two components.⁹¹ First, the Business Expense Insurance Program (“BIP”), would establish a model similar to the PRIA to handle small business losses, but with a lower level of exposure for private insurers. The second component would establish a government-run reinsurance program, the Pandemic Re, for medium and large businesses (those with over 500 employees). Chubb proposes that PBIP coverage would be triggered by the U.S. Centers for Disease Control and Prevention (“CDC”) medical criteria, the declaration of an emergency by the Department of Health and Human Services or the president, or the implementation of a federal, state, or local lockdown.⁹²

Small Businesses: Business Expense Insurance Program

Under the BIP, all property and casualty insurers that offer BII policies would be *required* to participate. As previously observed, if the government compels BII insurers to offer pandemic-related coverage, then insurers may stop offering BII entirely in order to limit their exposure. Purchase of coverage would remain voluntary for businesses.

Under the program, participating businesses would be entitled to receive a pre-determined payment based on their payroll, following a government declaration of a pandemic and ensuing lockdown.⁹³ Chubb proposes that private insurers would cover 6-12% of the first losses of covered businesses (the ratio would rise from 6% in year one of the program to 12% in year twenty), up to a maximum determined by the government, while the government would cover the remainder of first losses. After this unspecified maximum was reached, government would cover all additional losses up to a pre-determined maximum, with no industry participation, unlike PRIA, where second layer losses are shared. After the maximum of government coverage is reached, there would be no private or government coverage.⁹⁴ Importantly, there is no additional cost to insurers based on the premiums they receive.

Chubb envisions that the total coverage amount of the program could float at the government’s discretion, but suggests starting with \$250 billion in first layer losses and \$500 billion in second layer losses, therefore providing a \$750 billion total program limit.⁹⁵ Although the proposal does not specify whether these total coverage limits reset annually (like PRIA) or per pandemic, they appear to apply per pandemic.⁹⁶ Using these numbers, private industry’s maximum exposure under the BIP would rise from \$15 billion in year one (6% of \$250 billion) to \$30 billion in year twenty (12% of \$250 billion). This \$30 billion *maximum* is notably less than the estimated \$37.75 billion insurer exposure under PRIA (before adjusting upward for insurer deductibles based

⁹¹ CHUBB, *Pandemic Business Interruption Program* (July 8, 2020), <https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/about-chubb/pandemic-business-interruption-program/documents/pdf/pandemic-business-interruption-program.pdf>.

⁹² *Id.* at 6

⁹³ *Id.* Chubb envisions a 14-day waiting period for payments and a three-month multiple of payroll expenses to determine eligible payments.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.* (referring to a “program limit” rather than an annual limit).

on premiums). And this coverage would only be for businesses with fewer than 500 employees. There would be no coverage under BIP for larger businesses.

The Chubb proposal further provides that any businesses that decline coverage would be required to acknowledge that their pandemic-related losses would not be covered and that they would not be eligible for any other federal programs rolled out to minimize the impact of the pandemic, like PPP or the MSLPs.⁹⁷ Chubb argues that this opt-out system will encourage participation.⁹⁸ This observation is undoubtedly true, but does it make sense to provide small business with such a Hobbesian choice? Moreover, faced with political pressure to provide strong support to the economy as a whole, it is unclear whether governments will actually exclude opting-out businesses from other support programs. Chubb also contends that the premiums would be affordable, but Chubb does not explain why or estimate what the premiums would be.

Large Businesses: Pandemic Re

The Pandemic Re component of the PBIP proposal would establish a separate program for medium and large businesses using a government-run reinsurance mechanism.⁹⁹ Businesses with more than 500 employees would be eligible to participate in the program on a voluntary basis, and insurer participation would also be voluntary. The maximum payout on these policies would be \$50 million per policy holder.¹⁰⁰ Chubb proposes to have a total program capacity of \$400 billion, with private insurers' maximum share of coverage increasing from \$15 billion in year one to \$30 billion in year ten.¹⁰¹ The balance of covered losses would be covered by Pandemic Re, a newly established government reinsurance entity. Thus, the industry's maximum exposure under the Pandemic Re would be \$30 billion (in year ten) of the total \$400 billion in coverage.

Total Exposure

Without taking premiums into account (which would in this case reduce insurers exposure) and using Chubb's suggested numbers for the layers of coverage, the government's total share of disbursements under the PBIP for both the basic and reinsurance programs would be around \$1.1 trillion, which consists of: (i) \$720 to 735 billion from the BIP (88-94% of the first \$250 billion of losses, *plus* 100% of \$500 billion of additional losses), *plus* (ii) \$370 to 385 billion from the Pandemic Re (92-96% of \$400 billion in losses). Meanwhile, insurers would bear a maximum of \$60 billion in losses, which consists of \$30 billion each for coverage under the BIP and Pandemic Re. The revenue received from premiums would substantially reduce the insurers' exposure.

D. Comparison of Pandemic Insurance Proposals

Table 2 below compares the key terms of PRIA, BCPP, and PBIP. As to PBIP, because insurers' exposure rises progressively over twenty years after adoption, we have supplied the government and insurers' exposure in the first and twentieth years that PBIP would be in effect. Moreover, because PBIP includes one program for small businesses (where insurer participation is mandatory) and another for large businesses (where insurer participation is voluntary), we have supplied two exposure estimates that include and exclude the latter voluntary program.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Table 2: Comparison between Insurance Proposals

Metric	PRIA	BCPP	PBIP
Modelled on	TRIA Terrorism Insurance	FEMA Flood Insurance	TRIA Terrorism Insurance
Structure	Operated by Insurers, Backstopped by Government	Operated within the U.S. Treasury Department.	Operated by Insurers, Backstopped by Government
Insurer Participation	Voluntary, except if an insurer participates it must participate for all covered lines.	None, except to provide administrative support and as voluntary reinsurers and excess coverage providers. Brokers and agents to provide sales and services support.	Mandatory for insurers that offer BII
Business Participation	Voluntary	Voluntary. Businesses declining protection must sign acknowledge they will be ineligible for BCPP benefits.	Businesses that opt out are not eligible for federal program benefits
Program Period (for the purposes of loss coverage limits)	Per Calendar Year	Per Public Health Emergency	Unspecified, but appears to be per pandemic event
Coverage Trigger	Determined by insurer-policyholder contract, predicated on declared public health emergency for a pandemic.	Presidential declaration following finding of public health emergency	Government declares a pandemic or lockdowns take effect. For small businesses, 14 day waiting period after qualifying event.
Covered Losses	Determined by insurer-policyholder contract. Includes event cancellation insurance policies.	Payroll and operating expenses. Event cancellation coverage authorized to be designed within base and excess coverage programs.	Payroll <i>plus</i> operating expenses for certain classes
Loss Coverage Formula	<p>Tranche One: <i>First losses up to \$250mn:</i> Insurers cover 100%</p> <p>Tranche Two: <i>For each insurer, next losses up to 5% of last year's PRIA premiums:</i> Insurers cover 100%</p> <p>Tranche Three: <i>For insurers that have met their</i></p>	<p>Tranche One: <i>First losses up to three months:</i> Government covers 80% Policyholder bears 20% Excess coverage allowed to be purchased by larger businesses.</p> <p>Tranche Two: <i>Next losses after three months:</i> No coverage Policyholder bears 100%</p> <p>Note: Under "BCPP Plus," if insurers voluntarily sell excess coverage, the</p>	<p>Tranche One: <i>First losses up to \$250bn aggregate total:</i> Insurers cover 6% in year one rising to 12% in year twenty. Government covers 94% in year one falling to 88% in year twenty.</p> <p>Tranche Two: <i>Next losses up to \$750bn aggregate total:</i> Insurers cover 0% Government covers 100%</p> <p>Tranche Three: <i>Losses after \$750bn aggregate total:</i> No coverage</p>

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Metric	PRIA	BCPP	PBIP
	<p><i>deductible, next losses up to \$750bn in aggregate:</i> Insurers cover 5% Government covers 95%</p> <p><i>Tranche Four: Losses after \$750bn aggregate total:</i> Reallocated among insurers until each has met its deductible, then policyholder bears 100%</p>	<p>government would backstop 90% of covered losses, and insurers would cover the other 10% of covered losses</p>	<p>Policyholder bears 100%</p>
Businesses with >500 employees	Eligible for insurance alongside small businesses	Eligible for coverage alongside small businesses, and excess coverage would be available under “BCPP Plus”	Ineligible, but there is a separate “Pandemic Re” program for large businesses where insurer participation is voluntary
Insurance Industry: Estimated Exposure	<p>\$37.75bn <i>plus</i> 4.75% of last year’s PRIA premiums¹⁰²</p> <p>Offset by premiums collected.</p>	None, except for those insurers voluntarily offering excess coverage or acting as voluntary reinsurers	<p><i>Excluding Pandemic Re:</i> Rises from \$15bn in year one to \$30bn in year twenty</p> <p><i>Including Pandemic Re:</i> Rises from \$30bn in year one to \$60bn in year twenty</p> <p>Offset by premiums collected.</p>
Government: Estimated Exposure	\$712.25bn <i>minus</i> 4.75% of last year’s PRIA premiums	Government: between \$612bn and \$1,004bn, <i>plus</i> 90% of excess coverage under “BCPP plus”	<p><i>Excluding Pandemic Re:</i> Government: Falls from \$735bn in year one to \$720bn in year twenty</p> <p><i>Including Pandemic Re:</i> Government: Falls from \$1,120bn in year one to \$1,090 in year twenty</p>

¹⁰² Consistent with the discussion in Part II.A, these figures assume that: (i) first, every insurer meets its deductible before aggregate insured losses surpass \$750 billion; and (ii) second, aggregate insured losses do in fact surpass \$750 billion in the relevant calendar year.

E. Insurance Proposals Compared to COVID-19 Legislation

The PRIA, BCPP, and PBIP all have substantial aggregate price tags for the government and insurers roughly \$612 billion to \$1.112 trillion.¹⁰³ These substantial costs are approximately in line with Congress’s spending on small business relief under its pandemic relief legislation. For example, the most comparable portion of the pandemic relief bills to pandemic BII is the PPP, originally introduced in the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act,¹⁰⁴ and expanded in subsequent pandemic relief legislation.¹⁰⁵ The PPP funded low-interest, forgivable loans to small businesses (with under 500 employees) to cover payroll and other specified expenses,¹⁰⁶ and had disbursed a total of \$762 billion in funds as of April 18, 2021.¹⁰⁷ In addition, at its closing, the Fed’s Main Street Program had disbursed \$16.5 billion in loans to businesses with less than 15,000 employees.¹⁰⁸ Many, including Hal Scott and Glenn Hubbard, have argued that that even the COVID-19 relief packages were too small, as well as poorly designed.¹⁰⁹ A more comprehensive response, aimed at avoiding devastation of small businesses, could cost over \$1 trillion.

These comparable figures raise an important policy question: is it more effective to cover pandemic losses through BII or through the PPP and MSLPs? In theory, a preestablished program like pandemic BII may be rolled out more quickly and efficiently than ad hoc spending, because BII could offer prompt disbursements to small businesses, and thereby encourage fast pandemic mitigation measures early on, and thereby (potentially) avoid the extended economic disruption associated with a slow pandemic response. However, Congress enacted (and the executive branch implemented) the PPP quite swiftly, so the marginal gains from a preestablished program may be modest. In addition, even if the preestablished program were affordable, it would be difficult to design BII relief in advance, because different pandemics may follow quite different trajectories. Thus, the unpredictable nature, frequency, and duration of pandemics are major obstacles to designing thoughtful and effective automatic relief.

Given these limitations, any pandemic response must strike a balance between speed, efficiency, and flexibility. To do so, the optimal approach may be to combine modest automatic relief with a larger discretionary package tailored to the specific pandemic at hand. First, at the onset of a pandemic, a short-term and affordable program modelled on BCPP could extend full government coverage for pandemic-related business interruption losses for a limited period of

¹⁰³ This analysis considers only the cost of maximum potential government outlays and does not incorporate analysis of premiums collected, although that would potentially offset some or all the costs in a crisis situation. None of the proposals have provided sufficient information on premium pricing to make premium analysis meaningful.

¹⁰⁴ Pub. L. No. 116-136 (2020).

¹⁰⁵ See ROBERT JAY DILGER, BRUCE R. LINDSAY & SEAN LOWRY, CONG. RSCH. SERV., R46284, COVID-19 RELIEF ASSISTANCE TO SMALL BUSINESSES: ISSUES AND POLICY OPTIONS (Mar. 31, 2021).

¹⁰⁶ *Id.*

¹⁰⁷ Small Bus. Admin., Paycheck Protection Program (PPP) Report: Approvals through 4/18/2021 (Apr. 2021), https://www.sba.gov/sites/default/files/2021-04/PPP_Report_Public_210418-508.pdf.

¹⁰⁸ Fed. Reserve Bd., Periodic Report: Update on Outstanding Lending Facilities Authorized by the Board under Section 13(3) of the Federal Reserve Act 8 (January 9, 2021), <https://www.federalreserve.gov/publications/files/pdcf-mmlf-cpff-pmccf-smccf-talf-mlf-ppplf-msnlf-mself-msplf-nonlf-noelf-01-11-21.pdf#page=7>; Fed. Reserve Bd., For-Profit FAQs, 26 (Final Archived Version) (Dec. 29, 2020), <https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm>.

¹⁰⁹ See Hal Scott, *Here’s how the Fed can do more to support small businesses*, FIN. TIMES, Jan. 11, 2021, <https://www.ft.com/content/0d0b0f48-df3c-4b2f-97b8-d2da0415d8d6>; Glenn Hubbard & Hal Scott, *Main Street Needs More Fed Help*, WALL ST. J., Apr. 16, 2020, <https://www.wsj.com/articles/main-street-needs-more-fed-help-11587055459>.

time. Second, Congress could use this window of opportunity to design further relief tailored to the size, scope, and duration of the disruption. By quickly and efficiently disbursing automatic relief while preserving future policy flexibility, this reduces the enormous pressure for Congress to act as quickly as possible, and it thereby creates a longer runway to consider and debate a thoughtful pandemic relief package.

Conclusion

Ultimately, it is extremely difficult to predict the dimensions of future pandemic risk, and as a result, it is equally difficult to design a pandemic BII program that adequately addresses that risk. Although PRIA attempts to establish a strong public private partnership, it may be simultaneously too big and too small to be effective. On the one hand, future pandemic losses may quickly outstrip PRIA's \$750 billion cap, leaving businesses unprotected beyond that point. On the other, the uncertain duration and frequency of pandemics, combined with the enormity and unpredictability of pandemic-related losses, threaten to deter insurers from participating in the program at all. At the other end of the spectrum, the PBIP offers far less participation from insurers, so the government bears the vast majority of risk. If insurer participation is trivial in relation to aggregate losses, then a pre-established pandemic program may add little to the government response to a future pandemic.

In light of these considerations, the most effective pandemic insurance scheme may be to: (i) establish a modest BCPP program that offers immediate relief at the onset of a pandemic; and (ii) supply any further government support as necessary through a more streamlined version of the PPP and a more generous version of the MSLP employed in 2020. Given this structure, any BCPP-adjacent program should be large enough to afford Congress sufficient time to assemble a thoughtful package tailored to the specific pandemic at hand.

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