

Two recent announcements in Washington DC highlight a significant divide in public policy regarding the appropriate level of the federal government's involvement in future business interruption (BI) losses resulting from pandemic or contagious disease events. This alert summarizes (1) legislation introduced this week that would create a private/public pandemic risk insurance program and (2) a proposal announced last week by three large insurance trade associations for a new type of federal insurance program that would provide federal payments to businesses impacted by BI resulting from a national pandemic.

The Policy Debate

The two new proposals reflect very different approaches to federal involvement in responding to BI losses from pandemic events. One method is intended to create a new market for private commercial insurance coverage for pandemic driven business interruptions. Insurer participation in this approach is voluntary. It would provide insurers that choose to offer BI coverage for pandemic events a federally funded backstop to reimburse them for a portion of their loss payments. The concept is that with a federally-funded backstop available for pandemic BI events, insurers will be motivated to offer the coverage and charge an appropriate premium for it. This approach is viewed as a public/private partnership approach.

The second approach reflects the view of many insurers and many insurance industry trade associations, that pandemic risk simply cannot be undertaken by the private insurance market. The concern is that the risk is so substantial it easily could overwhelm the entire US commercial insurance infrastructure and introduce instability across insurance lines of business. This view starts from the premise that only the US federal government has the scale and financial capacity to address pandemic event BI losses.

The Two Proposals

1. Pandemic Risk Insurance Act (PRIA) of 2020 – A Public/Private Partnership

On May 26, 2020, Representative Carolyn Maloney (D-NY) introduced H.R. 7011, the Pandemic Risk Insurance Act of 2020.¹ The bill would establish a program similar in design to the Terrorist Risk Insurance Act (TRIA) passed after the 9-11 terrorist attack and reauthorized several times since then.² It is intended to create a new market for private BI insurance that would cover future BI losses from pandemics. The purposes of the bill are stated as:

"To establish a Federal program that provides for a transparent system of shared public and private compensation for business interruption losses resulting from a pandemic or out-break of communicable disease, in order to –

- (1) protect consumers by addressing market disruptions and ensure widespread availability and affordability of business interruption coverage for losses resulting from a pandemic or outbreak of communicative disease; and*
- (2) allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections."*

Key elements of the PRIA program include,

- Voluntary insurer election to participate in the program, apparently annually
- Creation of the federal Pandemic Risk Reinsurance Program to be administered by the Treasury Department
- Triggered when there is any outbreak of infectious disease or pandemic for which a public health emergency is declared under the Public Health Service Act and certified by the Secretary of Health and Human Services
- Participating insurers are required to:
 - Make BI coverage for covered public health emergencies available on materially the same terms as coverage for other BI events and
 - Provide notice to insureds of the premium charged for the coverage and of the maximum cap on federal payments under the program.

1 May 25, 2020 H.B. #7011 PRIA <https://www.congress.gov/bill/116th-congress/house-bill/7011?r=3&s=1>

2 TRIA 2019 Reauthorization, Division I Title V <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR1865SA-RCP116-44.PDF>

- Insurer-specific deductibles
- Federal payments of 95% of insurer losses above insurer deductible
- Program threshold trigger of US\$ 250,000,000 aggregate insured losses
- A maximum aggregate annual cap of US\$ 750,000,000,000 on federal payments

This PRIA proposal appears to implement a March 30, 2020 proposal made by Marsh CEO, John Q. Doyle. His letters to the Treasury Department and National Economic Council³ and to Congressional Leadership⁴ propose a general framework for pandemic risk insurance program similar to TRIA, in which policyholders, insurers and the federal government would all share in the risk associated with pandemic BI events.

2. The Business Continuity Protection Program (BCPP) – Federally Funded BI Insurance

On May 21, 2020, three significant insurance industry trade associations announced a proposal for a federally funded program called the Business Continuity Protection Program (BCPP)⁵. The three sponsors are the American Property Casualty Insurance Association (APCIA), the National Association of Mutual Insurance Companies (NAMIC) and the Independent Insurance Agents and Brokers of America (BIGi). Charles Chamness, NAMIC President and CEO, announced the program saying:

“Pandemics simply are not insurable risks; they are too widespread, too severe, and too unpredictable for the insurance industry to underwrite.’ . . . As we’ve seen in the past few months, pandemics are a national problem, and we need a national solution. NAMIC, APCIA, and the Big ‘I’ had one goal in mind in developing the BCPP — crafting a solution that would provide meaningful support for employees, businesses, and the economy as a whole.’

The BCPP is a solution . . . to provide protection against widespread economic shutdowns due to a future viral outbreak. Much of the dialogue to date has involved a program modeled after the Terrorism Risk Insurance Program, created after the 9/11 terrorist attacks under the Terrorism Risk Insurance Act (TRIA). However, a TRIA-like program, with an industry financial role, does not square with the fundamental notion that pandemics are not insurable risks. The risks are too fundamentally different in nature and scope.”

This proposal calls for creation of a federally funded “revenue replacement assistance” program that would provide for assistance of up to 80% of payroll, employee benefits and operating expenses for three months following a presidential viral emergency declaration. The purpose of the BCPP is said to be to provide protection against widespread economic shutdowns due to viral outbreaks and to “bolster the country’s economic resilience by providing timely and efficient financial protection and payroll support to the private sector.” The program would be automatically triggered upon declaration of a federal public health emergency. It also is forward looking and would apply to future pandemic BI events.

Key elements of the BCPP are,

- BCPP would be administered by the Federal Emergency Management Administration (FEMA)
- Businesses would be able to purchase varying levels of revenue replacement protection lasting up to three months from the federal BCPP, covering up to 80% of payroll and other expenses
- Businesses receiving funds would certify,
 - That they will use the funds to retain employees and pay necessary operating expenses, and
 - That they will follow applicable federal pandemic guidance.
- Protection under the BCPP must be purchased at least 90 days before a presidential emergency declaration
- Protection is purchased through voluntarily-participating state licensed insurance companies
- The BCPP would provide for post-relief auditing and oversight
- BCPP is authorized to purchase private reinsurance

Some commentators have suggested that some aspects of the BCPP proposal sound similar to the National Flood Insurance Program⁶ also administered by FEMA.

This proposal is different from the prior March 31, 2020 proposal⁷ for a Business and Employee Continuity and Recovery Fund (the Recovery Fund) announced by more than 30 different trade associations, including the three behind the BCPP proposal. The Recovery Fund proposal also would establish a solely federal financial mechanism. However, it is patterned after the 9-11 Victims Compensation Fund⁸ and is intended to address **current** BI losses resulting from the COVID-19 pandemic. The Recovery Fund would be administered by a special federal administrator. Payments would be tied to requirements to keep employees on the payroll, maintain worker benefits and meet debt and rent obligations.

Since the BCPP would apply only to future pandemics and the Recovery Fund would apply to current COVID-19 driven losses it is possible that the insurance industry could support both ideas.

3 March 30, 2020 Marsh Letter to Treasury https://www.mmc.com/content/dam/mmc-web/Files/Administration_PRIIP_Letter.pdf

4 March 30, 2020 Marsh Letter to Congress https://www.mmc.com/content/dam/mmc-web/Files/Congress_PRIIP_Letter.pdf

5 May 21, 2020 Business Continuity Protection Program <http://www.pciaa.net/pciawebsite/cms/content/viewpage?sitePageId=60933>

6 NFIP https://content.naic.org/cjpr_topics/topic_flood_insurance.htm

7 March 31, 2020 Recovery Fund https://www.namic.org/pdf/20memberadvisory/200331_joint_trades_covid-19_business_and_employees_fund_letter.pdf

8 9-11 Victims Compensation Fund <https://www.vcf.gov/>

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