Business Continuity Coalition

Statement by the

BUSINESS CONTINUITY COALTION

Before the

HOUSE SUBCOMMITTEE ON HOUSING, COMMUNITY DEVELOPMENT AND INSURANCE

Panemic Risk Insurance Roundtable

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1875 I Street, NW, Ste 500
Washington, D.C. 20006-5413
ph: 202-739-9400 fax: 202-739-9401

businesscontinuitycoalition.com

Business Continuity Coalition

Statement of the
Business Continuity Coalition

Today, pandemic risk is one of the largest unhedged risk exposures in the U.S. economy. Commercial insurance is an important component to an efficient and vibrant advanced economy. Leaving this massive risk un-hedged in response to the first significant event in a century should not and does not satisfy anyone, including an insurance sector that wants to remain relevant. Closures and shutdowns caused by COVID-19 over the past 23 months had massive impacts on business activity and employment, not to mention all of our lives in myriad ways.

The Business Continuity Coalition (BCC) represents over 50 associations and companies – large and small – in dozens of industries that represent most sectors of the economy and more than 70 million workers. The group hopes to develop a plan with policymakers and other stakeholders to protect American jobs and to limit economic damage from future pandemics and other national public health emergencies leading to economic disruption.

The BCC members span most sectors of the economy, from healthcare and dining/hospitality – the two largest employment sectors in the economy – to manufacturing, construction, finance, real estate, media and film, live entertainment, professional sports, and professional services, to name some of the sectors represented by the Coalition. A more comprehensive 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

BCC believes that a public-private backstop program for pandemic risk insurance, similar to the Terrorism Risk Insurance Act (TRIA) program enacted the year following the 9/11 attacks, is urgently needed. BCC has put forward our own recommended proposal, and we also support the Pandemic Risk Insurance Act of 2021 (PRIA, H.R. 5823), which like TRIA consists of a general "make-available" requirement on insurers applicable to all relevant lines of commercial property and casualty lines of insurance and, like TRIA, a broad federal reinsurance backstop. BCC's preferred proposal includes important differences from TRIA in other respects, chiefly to respond to insurers' expressed concerns about aggregation of risk and also to ensure program continuity (along the lines of the program administered by the Federal Crop Insurance Corporation). We also support including a parametric revenue-replacement benefit, which if widely purchased could be a more efficient, pre-sold alternative to the Paycheck Protection Program (PPP).[1] Such a proposal would also restore and solidify the pandemic coverage in other commercial property and casualty lines of insurance which are so crucial

[1] According to the National Association of Insurance Commissioners (NAIC), "[t]he term parametric insurance describes a type of insurance contract that insures a policyholder against the occurrence of a specific event by paying a set amount based on the magnitude of the event, as opposed to the magnitude of the losses in a traditional indemnity policy."

to a modern advanced economy. A program like this is necessary to achieving a recovery – and growth beyond recovery – that is as robust and inclusive as America deserves.

An Acute, Urgent, and Continuing Problem

BCC was launched in 2020 to develop a public/private program with policymakers and stakeholders to respond to the insurance market disruption resulting from the COVID-19 pandemic, in hopes of limiting further economic damage that would result from continued unavailability of pandemic or communicable disease coverage in commercial property and casualty lines of insurance.

Closures and shutdowns caused by COVID-19 over the past 23 months had massive impacts on business activity and employment, not to mention all of our lives in myriad ways. These closures/shutdowns brought immediate focus on the "business interruption" insurance which many American businesses – small, medium and large – had purchased to protect basic operating revenue needs in times of disruption. It also brought into relief the disagreement between insurers and policyholders over whether a pandemic infection constituted "physical damage" necessary to trigger coverage under many of those business interruption policies.

Some stakeholders have proposed addressing that basic gap in business interruption insurance coverage with government support. While business interruption coverage is an essential element of any solution to the insurance crisis that the economy is facing, the problem – and therefore the solution – is broader than just the business interruption line of insurance. For one thing, many sectors of the economy operate in a manner or patterns where a traditional business interruption policy – which assumes a more or less continuous operation through a calendar year – is not suitable. Many industries such as live entertainment, broadcast, media and film production, conventions and trade association meetings, all depend instead (or additionally) upon various forms of contingency insurance – including for example, event cancellation, production package, essential elements, and key man insurance – rather than a business interruption policy which, as we have learned in the past 23 months, is inextricably tied to an insured physical location.

Event cancellation coverage is especially critical for the nonprofit association community. In December 2020, the American Society of Association Executives' (ASAE) Research Foundation surveyed nonprofit association executives to examine the financial, programmatic and organizational impact of COVID-19. Of note, 79% of respondents reported they had no coverage available in 2020 for event cancellation and 10% reported insufficient reserves to cover losses due to event cancellations.[2] Only 3% reported being able to secure future coverage that includes communicable diseases.[3]

[2] *See* ASAE Voices Support for Pandemic Risk Insurance Act (November 2, 2021) (accessed February 17, 2022 at https://www.asaecenter.org/about-us/news_releases/2021/asae-voices-support-for-pandemic-risk-insurance-act).
[3] *See* ASAE letter to the Honorable Steven Mnuchin and the Honorable Jovita Carranza (December 22, 2020) (accessed February 17, 2022 at https://nosscr.org/wp-content/uploads/2020/12/ASAE-December-2020-letter-to-SBA-and-Treasury-PPP-Expansion.pdf).

Beyond the whole class of such contingency policies, all businesses and organizations have other insurance needs besides business interruption, such as general liability, employment practices liability, professional indemnity (including medical professional liability), excess liability and directors & officers (D&O) liability insurance.

It would, for example, be ironic if any legislative response provided no relief for the "essential services" that during the lockdown in 2020 continued to operate in food services, distribution, healthcare, assisted living, transportation, manufacturing and so many other sectors (that are represented in our Coalition). Their insurance needs in lines of coverage other than business interruption were greater, not less, than before. And that is true going forward.

It is no exaggeration to say that the U.S. property and casualty insurance industry has had a "full allergic reaction" to pandemic risk or indeed all communicable disease risk. During the pandemic, the insurance industry limited business interruption policies to "physical damage." But those other lines of insurance just mentioned often did not exclude infectious disease from their coverage. It is only since the onset of the COVID-19 pandemic that the U.S. insurance industry has moved – almost universally, it seems – to exclude pandemic or infectious disease from coverage in these other commercial insurance policies. The insurance sector's reaction resembles their immediate reaction to exclude terrorism across the board following the September 11th terrorist attacks.

Widespread Withdrawal and Unavailability of Coverage – The RIMS and NRA Surveys

We are unaware of any systematic review by either the National Association of Insurance Commissioners (NAIC) or the Treasury Department's Federal Insurance Office (FIO) to quantify or catalogue the apparently pervasive imposition of pandemic exclusions by insurers.[4]

However, we do have solid buyer-side evidence on the state of the market. The Risk Management Society, or RIMS, the leading global professional society of risk managers and corporate insurance buyers with a membership of over 10,000 risk management professionals.[5] RIMS represents more than 3,500 industrial, service, nonprofit, charitable, and government entities throughout the world. At the end of 2020, RIMS conducted a survey of its U.S. membership to measure the impact of the pandemic on the insurance market for commercial lines of insurance. Some key take-aways from that survey, which represents viewpoints from all sectors of the U.S. economy:

- Insurers generally require physical damage to trigger business interruption (BI) insurance –

[4] At the September 29th meeting of the Treasury Department's Federal Advisory Committee on Insurance (FACI), an insurance industry expert testified 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. See presentation of Robert P. Hartwig to Federal Advisory Committee on Insurance, September 29, 2020, particularly slide 19 (accessed February 17, 2022 at https://home.treasury.gov/system/files/311/FACI-Presentation-Hartwig-9-20.pdf).
[5] RIMS is a BCC member.

a difficult threshold for pandemic losses; BI claims have been generally denied or limited

- 98% of risk managers say that pandemic BI coverage is now unavailable in the marketplace
- Pandemics also are excluded or restricted on most other lines of property-casualty insurance
- Insurance premiums in most commercial lines continue to significantly rise
- In the few instances and lines where pandemic coverage might be available, cost would be prohibitive without government support
- Almost 80% of risk managers are interested in a government-supported product for pandemic insurance that meets the needs of both small and large businesses
- Over 90% would prefer to purchase pandemic insurance through their broker or agent
- COVID-19 has changed business risk profiles, particularly with employer, operational, financial, cyber, and supply chain risks

Similarly, the National Restaurant Association (NRA) conducted a survey of 1,500 restaurant operators in April 2021 to assess the usage and availability of business interruption (BI) insurance in particular in the restaurant industry. A majority of restaurant operators continue to buy BI insurance (to answer the question would risk be sufficiently spread) but only one percent (1%) of restaurant operators report being able to find pandemic insurance coverage since March 2020. Ninety-one percent (91%) of operators say they have not found pandemic coverage since March 2020 (8% were not sure).

Similar to the RIMS findings, nearly eight in ten restaurant operators in the NRA survey say they would be interested in a government-supported insurance product for pandemic-related business interruption. In an open-ended question in this survey (which focused on BI), new pandemic or communicable disease exclusions to general liability and other business owner package (BOP) policies were frequently cited as a continuing problem.

Illustrative Sector – Impact of Pandemic and Insurance Unavailability on U.S. Feature Film Production

To take another example of industry impact from the lack of insurance, consider the U.S. film production sector. Feature film production in the United States increased steadily from 2016 to 2019. Over those four years, an average of 651 feature films were completed annually in the U.S. with the total reaching 681 and 676 in 2018 and 2019 respectively. In 2020, the bottom fell out for U.S. film producers with just 302 films completed and the production of an estimated 393 films was halted, delayed, or moved outside of the United States.

Most states allowed film production to resume in mid-2020 (subject to strict safety requirements). However, since March 2020, customary insurance coverage for losses from communicable diseases during production no longer is offered; multi-million dollar productions may be halted completely if a key cast member falls ill. Without that insurance coverage, independent producers – responsible for 70% of U.S. feature film production – may struggle to obtain adequate production financing. Major studios face similar difficult investment decisions as their long-term insurers and re-insurers demand the same exclusions. This factor contributes significantly to the industry's delayed return to full speed. To put it bluntly – "no insurance, no financing." Other countries have recognized this and have acted promptly. Leading countries which represent alternative production locations created pandemic gap funding to offset insurance exclusions as well as other industry support programs, and have successfully attracted many productions that were previously scheduled for U.S. locations. Thus, many of the film productions mentioned above as deferred or delayed may have been permanently lost to other countries. Both the Motion Picture Association and the Independent Film & Television Association are members of BCC and support the BCC proposal as well as PRIA.

What Is Needed

BCC is not unsympathetic to the insurance sector's concerns about aggregation of risk, although there has been no public evidence of widespread insurance claims losses in any lines other than business interruption (mostly denied anyway) and perhaps event cancellation, nor any solvency concerns reported by rating agencies arising from the exposure the industry did hold before moving to prospective exclusions in 2020. We also understand that there has been a tightening of terms in global reinsurance markets – that's a factor but not an answer.

As noted above, pandemic risk is one of the largest unhedged risk exposure in the U.S. economy. Commercial insurance is an important component to an efficient and vibrant advanced economy. Indeed, businesses often distinguish between developed and less developed economies globally by contrasting the degree to which the latter protect against risk through insurance risk-shifting mechanisms (policymakers' so-called "protection gap").

Leaving this massive risk un-hedged in response to the first significant event in a century should not and does not satisfy anyone, including an insurance sector that wants to remain relevant. A precedent for government involvement in insurance markets exists for a broad range of risks where private markets fail to provide the economy with the coverage it needs. These include terrorism (TRIA), flood (NFIP), and crop risk (FCIC) – as well as other less immediate examples such as –

- War ("enemy attack") risk (e.g., War Damage Corporation during World War II);
- Current aviation and maritime war risk programs;
- Nuclear liability risk for commercial power production (e.g., Price-Anderson Act); and,

- Political risk insurance for U.S. direct foreign investment (e.g., U.S. International Development Finance Corporation (DFC)).

In fact, the program established by the Terrorism Risk Insurance Act (TRIA), enacted the year following the 9/11 attacks, represents an effective public-private partnership model that could be adapted for pandemic risk. Based on the economic challenges posed by the current pandemic, a public-private backstop program – similar to TRIA – is urgently needed for pandemic risk to help many sectors of the economy recover and move forward.

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. As a recent study by the RAND Corporation recognizes, these components, which expands coverage beyond the revenue replacement to address various additional costs or liabilities that firms could face during a pandemic, is "potentially an important part of overall strategy to increase business resilience to pandemic risk."[6] 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 the BCC proposal, PRIA, and other stakeholder proposals, 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)[7] and provided on a parametric basis and tailored to meet specialized industry needs, 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.

Recommendations for Program Features

As noted above, the BCC has put forward a detailed proposal to establish a federal pandemic insurance program, and the BCC has also endorsed the PRIA legislation introduced last year. However, as policymakers continue to consider the proper design of such a program, the Business

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[6] Improving the Availability and Affordability of Pandemic Risk Insurance: Projected Performance of Proposed Programs, by Lloyd Dixon and Jamie Morikawa, The RAND Corporation (June 2021), at page 17. (accessed February 17, 2022 at https://www.rand.org/pubs/research_reports/RRA1223-1.html).

[7] 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.

Continuity Coalition urges, at the conceptual level, that the design of any pandemic risk insurance program adhere to the following principles:

1. **Scope**. Any Federal backstop should support not only non-damage business interruption ("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.

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**. While TRIA should be the template for both availability and backstop, there are important differences to the pandemic peril that must be reflected in final design. 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

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Washington, D.C. 20006-5413
ph: 202-739-9400 fax: 202-739-9401

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 World War II-era War Damages Corporation (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.

Coalition Members

American Gaming Association
American Hotel and Lodging Association
American Institute of Architects
American Land Title Association
American Resort Development Association
American Society of Association Executives
Appraisal Institute
Argentum
Associated General Contractors
Building Owners and Managers Association
CCIM Institute
CHAMPS Healthcare
CRE Finance Council
Exhibitions & Conferences Alliance

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Fox Corporation
Health, Patio & Barbecue Association
Healthcare Information and Management Systems Society (HIMSS)
IAAPA
Independent Film & Television Alliance
Institute for Portfolio Alternatives
Institute of Real Estate Management
International Association of Exhibitions and Events
Innovating Commerce Serving Communities
International Franchise Association
International Sign Association
Live Nation
Marriott International
Motion Picture Association
NAIOP – Commercial Real Estate Development Association
Nareit
National Apartment Association
National Association of Broadcasters
National Association of Home Builders
National Association of Manufacturers
National Council for the Social Studies
National Football League
National Independent Venue Association
National Multifamily Housing Council
National Restaurant Association
National Retail Federation
NCTA – The Internet & Television Association
Partnership for New York City
RIMS, the Risk Management Society
Society of Independent Show Organizers
Sony Pictures Entertainment
The Center for Health Affairs
The Monitoring Association
The Real Estate Board of New York
The Real Estate Roundtable
ViacomCBS
The Walt Disney Company

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