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Comments of Birny Birnbaum, FACI International Subcommittee Member

To the Federal Advisory Committee on Insurance

December 1, 2020

I write to offer brief comments explaining my agreements and disagreements with the report and recommendations of the FACI International Subcommittee.

I start by expressing my thanks to the Subcommittee Chair for the inclusive process employed to develop the report and recommendations.

First, while I have concerns about the balance of perspectives presented in the white paper describing insurers' international market access issues, I supported sharing the white paper with FACI as part of the December 3, 2020 materials as a starting point to identify potential market access issues. My concern is that the Market Access / Level Playing Field white paper reads like an industry wish list with issues presented in a one-sided fashion. The issue of "Data / IT Localization and Digital Protectionism" is an example. What insurers call "digital protectionism," consumer, privacy, human rights and civil rights advocates call protection of human rights to privacy and protection from unwarranted and consent-less government and corporate surveillance. The discussion of SOEs is the only market access issue in the white paper that presents a more balanced description of the issue.

Regarding the discussion and recommendation regarding data flow, during our subcommittee discussions, subcommittee members noted that the TPP had excluded financial services from the data flow (or e-commerce) provisions of the treaty. It was Treasury who demanded that exclusion in response to the 2008 financial crisis when Treasury was unable to obtain data housed in other jurisdictions. It is also my understanding that in the more recent USMTA, financial services were also excluded from the e-commerce chapter, but data flow provisions regarding financial services were included in the financial services chapter. While these financial services chapter provisions did promote free flow of financial services data, the chapter included specific requirements for financial services regulator access that are stronger than the prudential carve-out. Consequently, we don't see the market access issue regarding data localization as simply including financial services in trade agreement e-commerce provisions.

I note that the EU has ruled the U.S. EU Privacy Shield to be invalid because it didn't provide EU residents with data protections – for EU resident data moved to the U.S. – guaranteed by the EU. This is relevant for any discussion of trade involving the movement of personal consumer information. US citizens have some protections against government surveillance and use of personal consumer information. But, residents from other counties, whose data are moved to the US, do not have those protections. Residents of the EU and other locations have protections against corporate surveillance and corporate use of personal consumer information. But US citizens -- other than those in California -- do not have similar protections.

Consequently, I see the barriers to free flow of data to be, one, lack of data protection for non-US citizens whose data are moved to the US, two, lack of a country-wide data protection scheme for US and non-US people whose data are moved to the US; and, three, lack of a requirement that companies make other-than-personal-consumer data regarding the company available to the relevant regulatory agencies of that country. Consequently, one major impediment to trade agreements regarding data flow is the missing consumer data privacy and security protections for US and non-US residents. I feel the discussion regarding data flow in international agreements should include a recommendation for FIO and Treasury to advocate for these high-federal-minimum standards U.S. data and privacy protections.

The white paper discussion includes some relevant points -- there is no need to keep data on a server located in the country if the relevant data for financial services regulators is promptly available upon demand. But, the paper only mentions the first part of that proposition and not the second.

Further, it is unclear how "digital protectionism" -- defined in the paper as requiring local housing of data -- places US insurers at a competitive disadvantage, generally, since all insurers are subject to that requirement, or at the specific disadvantages "in the use of data for predictive modeling, predictive analytics, claims processing, fraud detection, pricing and risk selection." It is unclear how having to house data in a particular jurisdiction limits an insurer's ability to use those data within that jurisdiction.

Second, the white paper and recommendations suffer from the absence of any reference to proportionality. US insurers have virtually unlimited resources to make their case for policies and practices here in the US and abroad. So-called "equal access" to, say, regulatory processes in a small or developing country can lead to a massive disparity in lobbying and legal pressure by US insurers versus domestic players. Our concern with the white paper is that all the market access issues are presented as binary problems without acknowledgement of the need for proportionality or limitations on foreign players for a country to develop a domestic infrastructure that can realistically compete or benefit from participation and partnership with huge international players.

I greatly appreciate the recent revisions to recommendation 3 regarding data localization to address my concerns, but am still unable to support the recommendation. I believe a recommendation that better articulates the trade agreement issues and better balances stakeholders concerns can be achieved and suggest that this recommendation be held in the subcommittee for further work and presentation to FACI in early 2021.

Finally, I have concerns that the last two recommendation regarding application of IAIS and FSB policies and standards suffers from the lack of reference to the foundational principle of proportionality that runs through not only IAIS, but also U.S. regulatory requirements. In the U.S., for example, application of cybersecurity requirements is done proportionately. Internationally, the IAIS work with A2II is based on a proportional regulatory approach for jurisdictions with emerging insurance markets. In an effort to address this concern, I suggest the following in place of the last two recommendations:

> FIO should advocate for Treasury, the NAIC and the Federal Reserve to advance policies and standards at the IAIS and FSB that, while recognizing the importance of proportionality in supervision, do not create or encourage disparate supervision of similar market participants within a jurisdiction.

Or

> FIO should advocate for Treasury, the NAIC and the Federal Reserve to advance policies and standards at the IAIS and FSB that, while recognizing the importance of proportionality in supervision, do not create or encourage supervisory practices that favor some market players over others, absent objective and verifiable public policy standards to justify such disparate treatment.