

Dissenting View of Birny Birnbaum

FACI International Subcommittee Recommendations

February 16, 2021

I respectfully dissent from the recommendations by the International Subcommittee to FACI on

- the proposed recommendation on data flows in trade agreement; and
- the recommendations regarding FIO's Request for Insurance regarding FIO's study of the international insurance capital standards.

Data Flow Recommendation

My concern with the recommendation is how the language of the recommendation will be interpreted in light section 3 of the white paper supporting the barriers to trade recommendation – specifically the Data/IT Localization and Digital Protectionism section of the white paper. The purpose of the white paper is to provide the substantive discussion supporting the recommendations. In my view, the section 3 discussion presents reasonable consumer data privacy protection as onerous and unwarranted.

I can support the proposed data flow recommendation if the white paper discussion is substantially revised. If the white paper section is not revised, then I oppose the proposed recommendation because it falsely suggests reasonable consumer data privacy protections are onerous and a barrier to trade.

For example, "(The EU) General Data Protection Regime (GDPR) restricts (sic) imposes onerous restrictions on the movement of EU citizens' data, including where data was collected outside of the EU." Similarly, the reasonable consumer protections in the Kenya Data Protection Act -- such as consent of a data subject as a condition for cross-border transfer -- is presented as a trade barrier. As pointed out in earlier correspondence, personal data protected in some jurisdictions, like the EU or Kenya, lose that protection once transferred to the U.S.

Further, I don't agree with the proposition that data protection narrows the data pool for a particular jurisdiction. But, even if that were the case, it is unclear how such data pool narrowing places US insurers at a competitive disadvantage versus domestic insurers since the same potential pool of data is available to any competitor.

The requested edits to the white paper section include the following. Revise the introductory section as follows:

U.S. insurers ~~are~~ may be required to follow regulations to physically house customer and company data in country, adhere to ~~severe~~ restrictions on data flows that serve no consumer protection or other public policy purpose, and establish data and call centers in country even in the presence of provisions that permit regulatory agencies to quickly access an insurer's data for legitimate regulatory purposes.

- Data and IT localization restrictions that serve no consumer protection or other public policy purpose are a critical non-tariff barrier to trade in the insurance sector and may confer an advantage to domestic competitors:

~~For U.S. insurers, the~~ mandate for data centers in country adds layers of cost for hardware and maintenance, increases the complexity of global information technology systems, and impairs overall resilience, cybersecurity and risk management practices. ~~[Digital protectionism narrows the data pool — placing U.S. insurers at a competitive disadvantage in the use of data for predictive modeling, predictive analytics, claims processing, fraud detection, pricing and risk selection.]~~

Delete the examples for Kenya, the EU and Switzerland -- these incorrectly conflate reasonable consumer protection with onerous restrictions.

Consider removing Malaysia since the description seems to say the problem has been resolved.

Consider revising the Thailand description to distinguish that jurisdiction's demand for confidential information from the provisions in the USMCA that permit financial regulators to demand confidential information. Otherwise, delete this example.

Perspectives on the FIO RFI for Study of the ICS

The bulk of the subcommittee's perspectives paper provides suggestions for issues and methods for the FIO study. I agree with those portions. ***It is the portions of the perspectives paper in which the "subcommittee agrees" with conclusory statements by other stakeholders with which I disagree. I disagree with the first two bullet points because they assume the outcome of the study instead of presenting the issues as items to be analyzed.***

The first bullet is that the subcommittee agrees with respondents to the RFI who claimed that "Implementation of the Market Adjusted Valuation (MAV) ICS would be detrimental for long-duration life insurance products and related long-term investment."

I don't believe such a conclusory statement is helpful for framing the FIO study. First, I don't agree with this statement as written. There are far too many examples of long-duration life insurance products which have failed to perform as expected, including, for example, long term care insurance, universal life and indexed universal life products. If a different capital standard had been in place that prevented the performance problems of these products -- and resulting retirement insecurity for consumers -- then the net impact of any reduction in availability of such long-term products as a result of said capital standard (if, in fact, that was a result) may be offset by improvements in consumer protection and product performance.

My purpose is not to agree or disagree with the statement in the draft subcommittee report, but to suggest that the issue should be framed as:

"Whether implementation of the MAV ICS would be detrimental for long-duration life insurance products and related long-term investment and, if so, whether such outcomes are offset by improved consumer protection and product performance."

Similarly, for the second bullet, I suggest the issue be framed as a topic for research and not as a conclusion:

"Whether Implementation of the MAV ICS would entail significant costs without commensurate benefits. Such costs might include development and maintenance of systems, processes, expertise, and educating external consumers of capital measures (i.e., regulators, investors, and other stakeholders), among others. Such benefits might include fewer product failures, simpler products and improved consumer confidence in insurance products, among others."

For the third point, I suggest the statement requires both context and framing as an issued to be studied,

"How the MAV ICS and AM operate over time -- covering periods sufficient to capture economic cycles and catastrophic financial events -- and how the performance over time affects the performance of each capital standard individually, relative to one another and relative to the ability of insurers to reliably provide long-duration products with and without guarantees."

For the fourth point, I again suggest framing the statement as an issue to be studied, "Whether the MAV ICS may be applied in a manner by one jurisdiction that usurps another jurisdiction's determination of the appropriate capital standard. For example, the MAV ICS is being developed as a world-wide group capital regime. To the extent it is implemented in a foreign jurisdiction, is guidance needed to ensure a foreign supervisor will not apply it to operations of a U.S. insurer they do not regulate (i.e., apply the framework extraterritorially at the worldwide parent level of the U.S. insurance group)? Is securing the IAIS' recognition of the Aggregation Method (AM) as comparable to the MAV ICS necessary to avoid such misapplication?"