DEPARTMENT OF THE TREASURY
FEDERAL INSURANCE OFFICE (FIO)
FEDERAL ADVISORY COMMITTEE ON INSURANCE (FACI)

MINUTES – September 29, 2020

The Federal Advisory Committee on Insurance (FACI) convened at 12:30 pm on 29 September 2020 via teleconference, with Dan Glaser, Chair, presiding.

In accordance with the Federal Advisory Committee Act, the meeting was open to the public.

Committee Members Present

DAN GLASER, Marsh & McLennan (Chair)
ERIC ANDERSEN, Aon
AMY BACH, United Policyholders
BIRNY BIRNBAUM, Center for Economic Justice
QUINCY BRANCH, Branch Benefits Consultants
GREG CRABB, Amerisure
BETH DWYER, Rhode Island Insurance Division
ROB FALZON, Prudential
DOUG HELLER, Consumer Federation of America
PETER KOCHENBURGER, UConn School of Law
GEORGE KEISER, North Dakota House of Representatives
JAMES KELLEHER, Liberty Mutual
SEAN McGOVERN, AXA XL
VICKI SCHMIDT, Kansas Insurance Department
ANDREW STOLFI, Oregon Division of Financial Regulation
MARK THRESHER, Nationwide
BETSY WARD, MassMutual
BILL WHEELER, Athene

Also Present

ROBERT HARTWIG, Clinical Associate Professor and
Director, Risk and Uncertainty Management
Center, University of South Carolina
LLOYD DIXON, Senior Economist, Director, RAND
Kenneth R. Feinberg Center for Catastrophic
Risk Management and Compensation

L. CHARLES LANDGRAF, Arnold & Porter

Department of Treasury Staff Present

STEVEN SEITZ, Director, Federal Insurance Office (FIO)
LINDSEY BALDWIN, Senior Insurance Regulatory Policy Analyst, FIO (Designated Federal Officer)

Welcome and Opening Remarks

Ms. Baldwin performed a roll call to confirm attendance on the call.

Chairman Glaser announced that Jillian Froment and Kent Sullivan have departed their positions and that their FACI terms had ended. Chairman Glaser also announced two new committee members, Commissioner Vicki Schmidt from the Kansas Insurance Department and Superintendent Beth Dwyer from the Rhode Island Insurance Division. Ms. Schmidt and Ms. Dwyer have both joined the Availability subcommittee.

Chairman Glaser reported that FACI received two public comments prior to the meeting. Jason Schupp of the Center for Better Insurance submitted a comment regarding pandemic insurance programs. Chubb submitted their pandemic business interruption proposal and supporting program summary.

All interested members of the public are invited to submit comments to FACI, which will be distributed to the committee members prior to the next public meeting. All public comments are available to members of the public upon request, as outlined in the meeting's Federal Register Notice. The process for submitting public comments is also outlined in each Federal Register Notice.

Chairman Glaser outlined the meeting's agenda. FIO Director Steven Seitz would provide an update, followed by an update from the COVID-19 Subcommittee's workstreams. At this time, the committee would also hear presentations providing perspectives on the role of insurance in addressing pandemics. The committee would then take a short break followed by updates from the Protection Gap Subcommittee and the International Subcommittee. The meeting would end with a discussion led by the Availability Subcommittee relating to its work on long-term care insurance and disparate impact.

Update on Federal Insurance Office Activities

Director Seitz reviewed FIO's continued work in connection with the COVID-19 pandemic. He reported that FIO is fulfilling its statutory mandate to monitor the insurance sector and is closely tracking how COVID-19 is affecting U.S. insurance markets and stakeholders. FIO has been

engaging with stakeholders and monitoring the various proposals to address losses attributable to the current and future pandemics.

Director Seitz reported that FIO continues to coordinate data collection with the NAIC and the states regarding business interruption losses. He emphasized that access to a complete set of data, particularly as related to business interruption losses, is critical in understanding the impact of COVID-19 on the insurance sector and FIO's monitoring of the sector. He added that FIO is continuing to work with the NAIC and the states, and the office is in the process of evaluating the data.

Director Seitz reported that FIO is preparing an October 2020 Joint Committee meeting under the U.S.-EU Covered Agreement in October. The joint committee provides a forum for consultation and information exchange on the administration of the Covered Agreement. The Joint Committee last met in April 2019 in Washington D.C. The October 2020 meeting will be held virtually.

Director Seitz reported that FIO is closely monitoring how developments in the United Kingdom may affect the entry and support of the U.S.-U.K. Covered Agreement. He added that working with the United Kingdom on the new U.S.-UK Insurance Project is a priority for FIO.

Director Seitz also reported that FIO continues to track the progress of the NAIC and the states regarding the implementation of laws for credit for reinsurance, the group capital calculation, and the adoption of the Model Holding Company Act.

Director Seitz reported that FIO is also continuing to represent the United States at the International Association of Insurance Supervisors, and has been actively engaged in the IAIS's work monitoring the COVID-19 pandemic. FIO is also working with Team USA on the insurance capital standard and the work on comparability, including the aggregation method being developed by the United States

Director Seitz announced that FIO's annual report would be published on September 30, 2020. The report contains information and analysis on the financial, operational, coverage, and regulatory implications of the COVID-19 pandemic in the insurance sector. The report also contains sections on domestic and international regulatory developments, and an analysis of the insurance industry's financial performance for 2019.

Director Seitz reported that FIO published its 2020 report on the Effectiveness of the Terrorism Risk Insurance Program (TRIP) in June 2020. The report reflected findings of a stable market for terrorism risk insurance coverage in the United States, with terrorism risk insurance coverage obtained by roughly 70 percent of policyholders at a cost of 1-2 percent of total policy premiums. The report also discussed the market for cyber terrorism insurance based on significant stakeholder outreach conducted earlier in the year.

Director Seitz reported that FIO is analyzing recommendations from the Advisory Committee on Risk-Sharing Mechanisms (ACRSM). FIO has begun performing market research related terrorism risk modeling, threat assessment, and mitigation, and will potentially undergo contract initiatives on these topics.

Director Seitz reported that, on August 11, 2020, Treasury released a report by the Federal Interagency Task Force on Long-Term Insurance. The report includes recommendations to improve the regulation of long-term care insurance in the United States, and notes that implementation of the recommendation would remove barriers to innovation and increase regulatory efficiency and alignment. This could make long-term care insurance more affordable and accessible while allowing the market to continue shaping evolution of the product line.

Director Seitz summarized the contents of the report. Subject areas included innovation and product development, regulatory efficiency and alignment, financial literacy and education, and tax incentives. He also summarized the report's recommendations to FIO: that FIO should coordinate analysis on the impact of combination products for LTCI risk protection; and FIO should continue to monitor and report on the development of a consistent national approach by the NAIC to regulatory review on LTCI rate increase proposals and requests.

Subcommittee COVID-19 Discussion

Chairman Glaser summarized the COVID-19 Subcommittee's workstreams and outlined the planned agenda for this portion of the meeting.

Workstream 1 ("Protection") is charged with assisting FIO in analyzing the various pandemic proposals submitted by the industry and assisting FIO in addressing congressional inquiries about the role of insurance as a prospective pandemic solution.

Prior to the meeting, the committee's members received a pandemic proposal comparison chart along with supporting materials for the speaker presentations.[1] Chairman Glaser reminded the committee that the proposals are works in progress, and that the COVID-19 Subcommittee should play a role in galvanizing the industry around a set of principles that can guide in the development of a pandemic solution that assists all policyholders.

Workstream 2 ("Preparedness") is charged with analyzing the lessons learned from the current pandemic and making recommendations on how to streamline processes and procedures for future events. Chairman Glaser stated that to be responsive for future pandemics, a partnership must be formed between insurance and risk management that facilitates coverage and aligns the needs of insurance buyers and insurers to avoid losses while incentivizing pandemic risk preparedness and mitigation. He added that because pandemic risk is complex, strong national

[1] All documents are available at https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/federal-advisory-committee-on-insurance-faci.

pandemic management is needed. Recent history has provided examples of how this can be accomplished, through a range of risk-pooling models from pure private partnerships to state-financed funds for non-insurable risks.

Chairman Glaser announced that the committee would hear presentations from three industry experts providing their perspective on the role of insurance in developing a pandemic solution. Each speaker was provided with 25 minutes to speak, including Q&A.

Mr. Crabb introduced the first presenter, Dr. Bob Hartwig. Dr. Hartwig is the Director of the Risk and Uncertainty Management Center at the Darla Moore School of Business at the University of South Carolina. Dr. Hartwig was previously the president and chief economist at the Insurance Information Institute, where he educated insurance stakeholders on key issues. He has testified before Congress, state legislatures and regulatory bodies. and has written and published numerous research papers, including a recent paper on the Uninsurability of mass market business continuity risks and viral pandemics., and on communicable disease exclusions maintaining stability in property/casualty insurance markets amid a global pandemic

Presentation by Robert Hartwig, Clinical Associate Professor; Director, Risk and Uncertainty Management Center, University of South Carolina

Dr. Hartwig's presentation focused on the question of whether or not large-scale pandemic risk is insurable. He noted that the issues discussed in his presentation are largely captured in a series of three co-authored papers which were provided to members of the committee prior to the meeting.

Dr. Hartwig stated that the insurability of pandemic risk is a direct function of certain issues, particularly the severity of potential or actual losses, correlation, and diversification. Dr. Hartwig said that these problems are intrinsically difficult for insurance markets to manage, adding that pandemic risk has an intrinsically systemic nature.

Dr. Hartwig described the challenge of severity as related to pandemic-related risks. He said that the economic losses from pandemic-related risks are beyond the combined claims-paying resources of the global insurance and reinsurance industry. Dr. Hartwig estimated that in the United States, business interruption losses have been $1.1 trillion per month. He compared that to the total U.S. policyholder surplus for the P&C industry, which is about$800 billion. He added that about $4.5 billion in premiums are written each month in relevant P&C lines of insurance. Dr. Hartwig provided a state-level example, citing $160 million in monthly premiums generated in Illinois, compared to estimated business continuity losses of $2-8 billion.

Dr. Hartwig cited an estimated $9 trillion in total economic losses from COVID-19. He added that other pandemics such as H1N1 and SARS were also multi-billion-dollar events, which demonstrates an insurability issue based on the severity of the event.

Dr. Hartwig then analyzed the business interruption losses experienced by U.S. small businesses with fewer than 100 employees, which he said resulted in losses of at least $52 billion a month. Dr. Hartwig said that losses of this magnitude are far beyond anything the insurance industry has seen in the past.

Dr. Hartwig stated that the ability to measure and model frequency and severity is fundamental to pricing insurance. Although pandemics have historically occurred, the government shutdown associated with COVID-19 was unprecedented and effectively un-modellable. This makes it difficult to price insurance products within standard pricing models.

Dr. Hartwig then discussed correlation, stating that insurance operates best when losses are largely independent of each other. He said that in the United States, during the COVID-19 pandemic, the S&P 500 declined 34 percent in value in weeks and some of the largest point declines in U.S. history occurred within the span of several weeks, with volatility continuing to present day. He added that emergency measures put in place by the Federal Reserve and others have caused interest rates to decrease to their lowest levels since World War II, and will remain depressed for years. Dr. Hartwig stated that the Federal Reserve has signaled that it plans to keep interest rates low for the next several years, which will essentially guarantee lower yields on the industry's portfolio. Dr. Hartwig also stated that that policyholder surplus fell by $75 billion (9 percent) in the first quarter of 2020, largely in response to declining asset values. He described this as a measure of the industry's capacity, and said the decline is only paralleled by the financial crisis.

Dr. Hartwig presented a chart demonstrating the volatility in equity markets that has occurred in 2020. He said that 9 out of the 10 largest point drops in the S&P 500's history (i.e., since 1923) have occurred since the beginning of the pandemic; among these have been the 3rd, 6th, and 19th largest percentage drops in the history of the S&P 500.

Dr. Hartwig opined that the longer lasting and more important consideration is the bond market and declining interest rates. Following a fairly sharp climb in 2019, Dr. Hartwig described a very sharp decline, particularly for shorter-term yields, in 2020. He said this was a response to the Federal Reserve's efforts to stimulate the economy through accommodative monetary policy, and reiterated that this is expected to be the case for years. In addition, he added that ten-year Treasury notes have dropped more than 100 basis points from the beginning of the year.

Dr. Hartwig stated that this has resulted decreasing yields on the industry's portfolio, and added that although he previously estimated 3 percent yield, he believes this could be an overestimate and drop to 2.9 percent. He said this would rival the lowest recorded yield on invested assets since 1961. Dr. Hartwig concluded that all of these factors have a direct impact on the cost and availability of insurance.

Dr. Hartwig then discussed May 2020 COVID-19 loss estimates published by Willis Towers Watson for multiple lines of insurance, including workers' compensation, business interruption, general liability, and other types of insurance; these are likely to result in a multi-billion dollar event. Dr. Hartwig also noted that mortgage insurance has seen an increase in default rates, and D&O is likely to increase due to litigation, among other impacts.

Dr. Hartwig emphasized that these facts demonstrate that pandemics produce unexpected losses, and some of the ways these losses happen can outlast the pandemic itself.

Dr. Hartwig described assessment of losses as an additional challenge to the insurability of pandemics. He said that six criteria must be established for insurers to actively participate in insurance markets:

1. A sufficiently large number of exposure units must exist
2. Losses must be random and unintentional in nature or accidental
3. Losses must be definite and measurable
4. Losses cannot be not exceedingly catastrophic
5. Probability of losses must be calculable
6. Premium charged must be affordable

Dr. Hartwig said that pandemic risk does not satisfy these criteria and he considers large-scale pandemics to be uninsurable events.

Dr. Hartwig reviewed the history of pandemic insurance, noting that only a few products have been offered in the market. PathogenRX which was brought to market by Marsh and Munich Re, partnering with Metabiotica. The product was brought to market about 18 months prior to the first confirmed case of COVID-19, and only one policy was issued. Dr. Hartwig noted that although the bond was targeted to a specific industry group, this demonstrated that there was not demand for the product.

Dr. Hartwig described the World Bank's Pandemic Emergency Financing Facility, a catastrophe bond with multiple triggers. The bond was criticized as being slow to pay, because all triggers were not met when the money was most needed to prevent the spread of the pandemic. While the Pandemic Emergency Financing Facility did pay out approximately $200 billion to developing countries, the World Bank abandoned its plans for a second Pandemic Emergency Financing Facility.

Dr. Hartwig stated that apart from a limited number of event cancellation policies, no products are designed for manage pandemic risks in general. Dr. Hartwig noted that the policy designed to manage losses from Wimbledon did pay out, but listed other exposures that are not covered

such as workers' compensation (only indirect or tangential), travel insurance, D&O, mortgage, trade credit, and others. Products manage some risks around the edges, but there is an enormous protection gap for large-scale pandemic risks.

Dr. Hartwig defined pandemic risk as truly systemic with the ability to adversely impact the entire economy ($9 trillion per the IMF). Dr. Hartwig concluded that only governments, which uniquely possess taxing and borrowing authority, can spread losses over time and bring the necessary relief and mitigation to the market. Litigation functions as a destabilizing force in the P&C insurance industry and complicates the area.

Dr. Hartwig discussed the challenges in the reinsurance markets. Reinsurers are concerned about managing their aggregate exposure with communicable disease exclusions being filed and incorporated within reinsurance treaties. Primary insurers are filing similar exclusions, but these exclusions are not being approved by regulators. The rejection of the exclusions by the regulators and the imposition of the exclusion by the reinsurers is adversely affecting the long-term relationship between insurers and reinsurers and threatens market stability. Because of this disconnect, insurers have three options:

1. File for parallel communicable disease exclusions.
2. Non-renew policies in their entirety.
3. Allow the un-reinsured exposure to accumulate on their books.

Dr. Hartwig opined that gaining regulatory approval for communicable disease exclusions would be the least disruptive to the insurance industry. He added that this issue is growing, particularly as the January 1 renewal period for policies approaches.

Dr. Hartwig concluded that based on the magnitude of losses and correlation effects, there is a role for government and private insurer involvement can only be relatively limited. Dr. Hartwig said that the government's taxing and borrowing power allows pooling, diversification, and spreading the risk over time. He added that insurers' ability to do this is extremely limited and its ability to be involved in large scale pandemic risk is essentially negligible. He stated that there are numerous potential approaches, and his academic paper does not take a position on what role the government should play, but reiterated that the government is the only entity that can bring a full solution to the pandemic risk issue.

Member Bach asked Dr. Hartwig if the insurance industry could have benefitted the overall economy, the investment picture, and insurer solvency by paying some claims (rather than denying all claims), and helping some of their customers stay in business. Dr. Hartwig answered that he saw logic in the concept, but the question is how to mitigate the economic impact associated with large scale pandemic risk. The government responded through the CARES Act, other pieces of legislation, and an accommodative Federal Reserve policy. He said the

cumulative effort of these fiscal and monetary stimuli were quite effective and had a very substantial impact and lessened economic suffering of individuals and businesses.

Dr. Hartwig added that the question is what role insurers can play going forward, which would be discussed by Mr. Dixon. He said there is a constructive role, but differences of opinion exist as to whether insurers should bear risk as opposed to leveraging their administrative and logistical capabilities. Dr. Hartwig added that in terms of actual risk bearing in areas such as business continuity losses, the insurance industry cannot meaningfully participate without jeopardizing its solvency. He stated that $1.1 trillion per month in business continuity losses in the United States is 25 percent more than the entire industry's claim capacity in one month.

Ms. Bach asked whether it would have been more prudent for insurers to quickly pay losses that are arguably covered, rather than spending money on litigation to fight the claims. Dr. Hartwig responded that insurers are paying covered losses (e.g., an individual who becomes ill at work as a result of COVID-19 exposure would receive workers' compensation coverage; Wimbledon's claims will be paid because it had specific coverage). However, Dr. Hartwig added that according to the NAIC, approximately 80 percent of business interruption policies have explicit virus exclusions, and all have basic requirements for direct physical loss and damage as a result of a covered peril. In these cases, insurers did not pay on these claims because the claim was not insured under the policy. He added that insurers will pay as required under contracts, but pandemic risk is outside the boundaries of the contract, and never priced in, therefore insurers are upholding the integrity of the contract and not paying claims.

Mr. Kochenburger commented that some articles have discussed parametric insurance as potentially being very effective in some areas. and asked Dr. Hartwig if he thought programs like these should be considered. Dr. Hartwig responded that parametric insurance is an important tool in creating risk protection products, reinsurance products, and capital market vehicles that could respond to pandemic risks in the future. Dr. Hartwig added that parametric triggers raise questions about subjectivity (i.e., who would make the official declaration of a pandemic as well as what triggers would cause a declaration?). He added that In the case of the World Bank programs, there was a view that the triggers were not appropriately or optimally set, and it diminished the ability of countries to prevent the spread of the virus. Dr. Hartwig said parametric insurance also raises the question of moral hazard, because it could be tempting to make a declaration of a pandemic so payments could be made. This raises a question of whether parametric triggers can be designed to avoid moral hazard, and Dr. Hartwig opined a great deal of thought would need to go into that process. Dr. Hartwig added that parametric triggers would be useful because adjusting claims in a traditional manner [in a pandemic] would be infeasible with millions of claims occurring simultaneously.

Presentation by Lloyd Dixon, Senior Economist, Director, RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation

Mr. Crabb introduced Lloyd Dixon, Rand Corporation. Mr. Dixon is an economist and the Director of the Rand Center for Catastrophic Risk Management and Compensation. Mr. Dixon has extensive expertise in insurance compensation and liability issues and has authored recent papers on public entity risk management practices, options for a flood insurance affordability program, and attitudes towards risk spreading and insurance. Mr. Dixon is currently examining the financial risk management practices of state and local governments and identifying issues that might arise in allowing state and local governments to use parametric insurance policies to satisfy the insurance requirements of FEMA's public assistance program.

Mr. Dixon presented on key issues that should be asked in designing a pandemic insurance program. Mr. Dixon described the overreaching policy objective as establishing a risk transfer mechanism for epidemic infectious disease. He said that such a mechanism would enable businesses to obtain loans at favorable rates, address liability risk, and keep key personnel employed during shutdowns. He added that a risk transfer mechanism would also serve larger social goals, such as maintaining payroll across the workforce and dampening a broad economic downward spiral.

Mr. Dixon discussed different approaches to achieving these policy objectives, such as through fiscal policy, government policy, and insurance policy. He said that from a government assistance point of view, programs like a payroll protection plan could provide a liability shield, with a form of compensation program for injured parties.

Mr. Dixon said that insurance mechanisms are attractive in many ways, and could function through business expense policies, which would include coverage for payroll expense. Mr. Dixon said the benefit of such a mechanism would be having the ability to set benefits in advance (unlike ad hoc government programs which much be crafted and implemented in the heat of the moment), businesses would know the assistance and benefits available in advance. Mr. Dixon added that that the insurance approach can take advantage of the current claims payment infrastructure, leverage insurer expertise and risk mitigation, and ideally transfer risk to the private sector. However, Mr. Dixon noted that there are drawbacks of the approach, such as the small amount of risk insurers are willing to take in this area. He added that a high take-up rate is not guaranteed with an insurance approach, there is difficulty in determining appropriate rates, there is a potential for coverage litigation, and in some cases claim payments can be delayed and it could take a while for policyholders to receive benefits.

Mr. Dixon outlined six key questions policymakers and stakeholders should ask in designing an insurance-based program, first discussing the policy objective for each question, and second providing examples of how proposals have addressed the questions (noting that the examples were not comprehensive across all current proposals).

Question 1: How much risk should the private sector bear?

Mr. Dixon described the policy objective for this question as moving some risk to the private sector and providing insurers with incentives to carefully underwrite and adjust claims. Mr. Dixon presented a slide summarizing three different proposals: (1) the Business Continuity Protection Plan (BCCP), proposed by several large reinsurance groups with no private sector retention for its primary program (although it would have an excess program); (2) the Pandemic Risk Insurance Act (PRIA) proposal by Rep. Carolyn Maloney (D-NY), in which insurers would pay five percent of claim costs over the deductible up to a cap, with an estimated insurer exposure of $50 billion, and (3) Chubb's Small-and Medium-Sized Enterprise Program, in which insurers would pay five to six percent up to an industry cap, with industry exposure estimated to increase from roughly $30 billion to $60 billion over 20 years.

Mr. Dixon noted that, consistent with Dr. Hartwig's presentation, each program's insurer outlays are modest in comparison to government outlays. He acknowledged that this raises questions about the purpose of setting up an insurance mechanism when insurer payments would be a small percentage of total outlays, but suggested that society may improve at managing pandemic risk and the insurance component would then be a meaningful proportion of the response. He added that private sector involvement aligns insurer and government incentives in paying claims, although there is a tradeoff in creating a program that attracts private sector participation. He noted that determining the appropriate tradeoff is a difficult question to answer, adding that TRIA could serve as a model of setting initial parameters and adjusting those parameters over time as more information becomes available.

Question 2: How much protection should the program provide?

Mr. Dixon described the policy objective for this question as providing protection that meaningfully reduces or transfers risk from affected businesses. PRIA provides coverage on the same terms and conditions as the business interruption policy, with a cap of $750 billion. The Chubb plan also covers 80 percent of expenses up to three months, but with a cap. Mr. Dixon noted that current experience has shown that closures could last much longer than three months, and having a cap could result in prorating claims, which is not desirable to policyholders. This demonstrates the issues with determining the appropriate amount of coverage. Mr. Dixon said it is important to understand up front how to best extend or augment benefits, keeping in mind that, benefits must be coordinated between the public sector and the insurers.

Question 3: Should the government charge a premium for the risk it bears?

Mr. Dixon described the policy objective for this question as imposing program costs on those who benefit, in order to reduce moral hazard and create the right incentives for policyholders to take risk mitigation behaviors. There is also an objective of accumulating funds to pay future claims. Mr. Dixon said that the BCCP advocates pricing to ensure widespread take-up and reduce

moral hazard. PRIA and Chubb plans have no charge to the federal government and with insurers pricing the product to cover their risk. Mr. Dixon stated there cannot be an expectation for businesses to pay the full risk-rated premium, because part of the program's social goal is to provide payroll replacement for all employees, and businesses do not necessarily want to pay for this (because they have the ability to layoff and rehire employees as needed). Mr. Dixon also stated that the government benefits from limiting a downward economic spiral and reduced tax base, which demonstrates that risk-based rates are not being considered. In contrast, Mr. Dixon said that premium revenue is desirable to cover smaller regional events, and having meaningful premium provides opportunities for rate reductions for risk mitigation premiums. Mr. Dixon noted that this is included in some of the current proposals (e.g., providing a premium reduction for complying with social distancing and other mitigation measures). Mr. Dixon said he agrees with the BCPP approach of considering premium rates that businesses are willing to pay, but underscored the importance of having premiums.

Question 4: Should businesses be required to purchase coverage?

Mr. Dixon described the policy objective for this question as having a widespread take-up of pandemic risk insurance. Mr. Dixon said that none of the program proposals have a mandatory purchase requirement, but some do have an opt-out or a strong opt-out option. He said that a strong opt-out would require the policyholder to acknowledge that if they do not purchase coverage, they will not be eligible for federal benefits.

Mr. Dixon stated that mandatory purchase requirements are not popular, citing the National Flood Insurance Program, and FEMA's requirement that state and local governments and individuals receiving FEMA assistance must purchase coverage as a condition of receiving federal assistance. Mr. Dixon questioned whether withholding government through strong opt-outs would be politically credible.

Mr. Dixon stated that relying on lenders could achieve the goal of widespread take-up. He suggested that if lenders see that insurance is available and reasonably-priced, they may have incentives to require it.

Mr. Dixon suggested that an educational campaign could help, although the balance between premiums and costs would still need to be addressed. He also said that having an ongoing understanding of take-up rate (similar to TRIA's assessment of take-up rates in annual reports) would help understand if the premium pricing is producing the desired take-up results.

Question 5: Should eligibility and program benefits vary by firm size?

Mr. Dixon described the policy objective for this question as targeting program benefits to firms that need them. He stated that the National Flood Insurance Program has subsidies across income categories, and questioned whether this is an effective use of government resources. In

comparison, he said targeting benefits can take advantage of efficiencies gained by tailoring the program to actual market structure and policyholder characteristics. Mr. Dixon stated that neither the BCCP nor PRIA consider size; Chubb uses separate approaches for firms with less than 500 employees and firms with 500 or more employees. Mr. Dixon said that bifurcation of the market is attracted given the large disparity between the number of small- and mid-sized firms versus large firms. He reported figures of six million U.S. firms with at least one employee, but only 20,000 of these firms have more than 500 employees. Mr. Dixon added that traditional claims adjusting for six million firms during a nationwide pandemic does not seem realistic, therefore for a large set of firms, a parametric approach makes sense. In comparison, he said larger firms, which are smaller in number, may want to better tailor their risk management strategy, and this could warrant a different approach. He said that having more risk management options than smaller firms makes larger firms a different type of consumer, and these capabilities may warrant lower subsidies for larger firms.

Question 6: Should liability and workers' compensation coverage be included in a program?

Mr. Dixon described the policy objective for this question as making available the types of insurances that businesses need to sustain economic activity and providing a mechanism for compensating injured parties. Mr. Dixon said that the proposals focus on business interruption, and although adding additional lines of business (i.e., liability and workers' compensation) would add costs, the focus should not be on business interruption just because it was the component that received the most attention in the current pandemic.

Mr. Dixon said that in order to understand the proper approach, further work is needed to understand the implications of liability and workers' compensation exposure on firm business and risk management behavior.

Mr. Dixon concluded that these six questions can be answered with others to create elements designing an overall program, adding the combined features of each proposal are likely to be desirable. He added that the debate over pandemic risk insurance provides an opportunity to better understand if and how insurance can remain an integral part of a U.S. strategy to address a variety of considerable risks. Mr. Dixon stated that from a social point of view, he favors using an insurance mechanism as much as possible; and said insurance shouldn't be avoided because a risk is difficult to insure, but rather we should understand how insurance should best be used.

Mr. Heller said that in listening to Mr. Dixon's presentation, he considered whether there may be a role to keep the insurance industry involved for larger businesses (500-1,000+ persons), but noted that Mr. Dixon asserted that a government-based structure could not operate using benefits in advance. Mr. Heller highlighted unemployment insurance as a model that operates without a policy and claims structure, and serves as a federal tax structure to build a response to benefits-in-advance development. Mr. Dixon responded that Mr. Heller raised good potential designs for a program, but expressed he was wary of the government's ability to implement this type of program,

noting the time and effort required in the U.S. post-disaster declaration process and Congressional approval of community block grants. He questioned how this issue could be best addressed, as there are many established safety net programs in the United States.

Ms. Bach asked Mr. Dixon how BCCP and PRIA arrived at establishing three-month limit for benefits, and asked if there was an assumption that a business should be back on its feet with three months of help. Mr. Dixon deferred to the groups who created these proposals, but based on conversations it seems to be based on the size of program which would be acceptable or plausible for Congress, and three months was deemed to provide some meaningful level of response.

Mr. Andersen asked if the approach being considered in the United Kingdom and Europe are similar to other approaches being considered. Mr. Andersen also commented that the past 6.5-7 months have shown that different businesses have been impacted differently (e.g., while some businesses have done better, others (such as aviation, entertainment, hotels, and restaurants), have done worse). He asked whether Mr. Dixon thought It was possible that that a structure could evolve to address industries facing an existential crisis over others. Mr. Dixon responded that the current proposals take a binary approach of whether a business is closed or not, but this does not reflect the reality where many businesses are partially open. He said that that programs should be designed to acknowledge this as an important factor. Mr. Dixon added that this also raised the question of whether pricing should be flat across industries or be a form of "risk-based" pricing. Mr. Dixon suggested that more thought is needed on this topic, since risk-based pricing could discourage certain undesirable activities but could also discourage take-up for high-risk businesses which should purchase coverage (e.g., restaurants). Mr. Dixon deferred answering Mr. Dixon's questions about approaches being taken in other countries.

Presentation by L. Charles Landgraf, Senior Counsel; Arnold and Porter

Chairman Glaser introduced the next speaker, Charley Landgraf. Mr. Landgraf is Senior Counsel at Arnold & Porter, and he co-chairs the firm's the legislative public policy practice. Mr. Landgraf has represented a broad range of clients in the insurance industry and played a role in shaping provisions in the Dodd-Frank Act, Terrorism Risk Insurance Act, and the CARES Act. Mr. Landgraf is also serving as counsel to the Business Continuity Coalition, a broad policyholder coalition advocating for solutions to pandemic risks.

Mr. Landgraf stated that a significant protection gap has been identified, and there is agreement that non-damage business interruption insurance has largely not been available or covered within the pandemic, although variations in coverage terms have given rise to claims. Mr. Landgraf opined that saying this coverage has not historically existed should be considered a challenge going forward, rather than the end of an observation. Mr. Landgraf added that it is important to focus on the fact that there is potential accumulation across a variety of lines other than business interruption, and he noted that some of the current proposes do focus on other lines of businesses.

Mr. Landgraf agreed with Mr. Dixon's observation that the pandemic has affected different parts of the sector in different ways, and this may be important in approaching a solution. Mr. Landgraf acknowledged that the policyholder coalition he represents wants to ensure that proposals do not risk the solvency of the industry or the willingness of the industry to continue offering coverage in other lines of insurance. He added that in the past, many perils have been described as uninsurable but later proved to be, in part, insurable.

Mr. Landgraf reiterated that the challenge is to construct a useful forward in handling pandemic risk. He noted that there are a number of jurisdictions around the world, such as the UK Pandemic Re Project, that are approaching the issue in a series way rather than labeling the risk as uninsurable.

Mr. Landgraf stated that there is a need to learn much more about what has happened to different sectors of the economy, because it is clear that the business sector is not a single risk unit. He said that the fundamentally different impact on different industries must be understood with more depth and comprehension before making conclusions about how to design a program. Mr. Landgraf added that catastrophe modeling should also be quickly adapted to this challenge.

Mr. Landgraf noted that nuclear hazard was previously thought to be uninsurable, and although it is still excluded from most commercial insurance policies, the commercial nuclear industry has successfully insured against the risk through the Price-Anderson Act. Mr. Landgraf cited this program as a model of public-private cooperation. He acknowledged that it depends, in part, on retrospective funding., but said it has also been based on channeling the risk through appropriate mechanisms rather than assuming that every policy within the economy needs to carry the coverage. Mr. Landgraf opined that similar creativity will be needed in addressing the pandemic.

Mr. Landgraf suggested that prevent measures should also be reflected to the extent possible, and one of the reasons the insurance industry likely needs to be involved is because of its skill at risk mitigation and incorporation of risk mitigation into its products. Mr. Landgraf presented the assumption that any non-damage business interruption coverage would likely be designed as a parametric product, and said that risk and reward signals out of claims handling would be unlikely because the parametric product would respond to the external or exogenous trigger rather than the actual policyholder loss. Mr. Landgraf said it is still important to focus on the fact that other pricing and policy conditions could apply to different industries, which would permit use of signals for risk mitigation and better preparation.

Mr. Landgraf emphasized that every sector and player needs to be involved in a pandemic solution, including the insurance industry itself and the reinsurance industry.

Mr. Landgraf described PRIA as Rep. Maloney's proposal to effectively adapt TRIA for pandemic risk. He said there are many issues with the adaptation, but it makes sense to start with TRIA as a model, in part because the take-up rate for terrorism insurance is extremely high (approximately

70 percent). He added that the PRIA has many good features that could be incorporated. He observed two differences between TRIA and PRIA: first, PRIA is entirely voluntary (while one of the key features of TRIA is the mandatory make-available requirement); second, PRIA would set the universal cap for the private and government sector at $750 billion, but Mr. Landgraf opined that this would only cover a fraction of the amount needed for broad-based non-damage business interruption. Mr. Landgraf proposed that the cap amount should be re-thought.

Mr. Landgraf said that all proposals other than the Business Continuity Coalition focus on a quota share of reinsurance support from the federal government, which is why an overall program cap needs to be imposed. Mr. Landgraf said that the coalition proposes that the federal backstop should have elements of stop loss prevention, which would potentially be less of a draconian haircut to the policyholder community and make the insurance industry more comfortable with the federal backstop as solvency protection.

Mr. Landgraf described the Business Continuity Protection Program (BCPP), advocated for by APCIA, NAMIC, and the Big I, as the first program proposal, and said it contains a thoughtfully developed parametric product for business interruption, based on a double trigger of a national health emergency declaration by the President and a local government shutdown order. He opined that the three-month thresholds within the proposed parametric plans were adopted from the Payroll Protection Program, which provided three months of payroll to small- and medium-sized businesses. Mr. Landgraf suggested that this threshold was adopted as a politically-useful reference point for the models (already accepted by Congress).

Mr. Landgraf described the Chubb plan as purely government risk-taking and resembling the National Flood Insurance Program's "write-your-own" program, in which insurers and their agents would be deputized to distribute the product, collect premiums, and potentially underwrite some risks on behalf of the government; and the entire risk would be held by the federal government.

Mr. Landgraf said that a second version of the BCPP proposal (called the BCPP Plus proposal) added a PRIA-style backstop for other lines businesses. He said the coalition believes it is a useful suggestion, but is skeptical that it will add much capacity if adopted on a voluntary basis.

Mr. Landgraf described the Chubb and Zurich proposals as including parametric products providing non-damage business interruption coverage for three months. He said these would be considered "primary" products written on the industry's paper with a mandatory offer requirement. Zurich's proposal would require any insurance selling fixed property insurance coverage to offer the parametric business interruption product; Chubb would require insurers to offer coverage to small- and medium-sized businesses (500 of fewer employees).

Mr. Landgraf said that Zurich's proposal is modeled after the Federal Crop Insurance Program, and noted that the insurer is one of the largest crop insurance writers in the United States. The Federal Crop Insurance Program is a reinsurer that provides standard forms of reinsurance

agreements to the insurance industry in one of two reinsurance pools. These different levels of reinsurance are based on the direct insurer's perception of the risk of a particular farm operation. Zurich's proposal would create the Pandemic Reinsurance Corporation, offering 90, 95 or 100 percent reinsurance. Mr. Landgraf noted that at 100 percent reinsurance, the private insurer would effectively be a front company for the federal government, but added that Zurich argues the industry's skills and knowledge in helping to shape risk, and its skill in distribution and claims handling are necessary even if an insurer doesn't ultimately want to take any of the risk.

Mr. Landgraf said that Chubb and Zurich both believe that having insurers understand the risk by being involved with the primary business interruption product is important to ultimately understanding how to write excess layers of that product.

Mr. Landgraf said that the Business Continuity Coalition (BCC) has embraced a number of elements discussed in these proposals, and views its own product as a set of draft policy recommendations rather than a proposal. The BCC is focused on the need for other lines of business (beyond business interruption) to be addressed. Mr. Landgraf said that the BCC is currently suggesting that the mandatory offer be modeled on the California Earthquake Authority, and says that any property policy issued must include an offer for parametric business interruption coverage, but an insurer that does not want to take the risk can arrange for an affiliate to write it or support a non-recourse pool that will serve as primary insurer. Mr. Landgraf said that the BCC believes the pool would probably become the primary insurer for the majority of risk in the United States, and insurers would support the pool through purchase of surplus notes.

Mr. Landgraf said that the BCC is also considering a direct government program like the BCPP, but recognize that insurers have access in the program to supporting other lines of business such as credit, travel, general liability, certain events cancellation, cast insurance for the media industry, and other lines. He also noted that that EIOPA and Lloyd's of London have issued papers suggesting the need for a framework that includes multiple that the insurance industry needs to consider all emerging perils, including cyber, pandemic, climate change, and terrorism.

Mr. Birnbaum noted that pandemic risk seems to have the same characteristics as terrorism risk in terms of absence of loss history, ability to model risk, scale of the potential event, ruinous claims, correlated risk, and systemic risk. He said that TRIA has managed to address these foundational issues, and asked Mr. asked Mr. Landgraf whether anything distinguishes pandemic risk from terrorism risk for the purposes of developing a public-private program. Mr. Birnbaum also said that the NFIP has had terrible performance as a direct insurance entity, and the NFIP uses insurers as distributors and claims settlers which creates conflicts of interest: insurers serving as administrators versus the interests of policyholders and government, absence of incentives for insurers to engage in flood loss mitigation or skewing benefits for those who don't needed it; and the encouragement of repetitive claims over resilience and loss mitigation. Mr. Birnbaum compared this to TRIA, which he said has successfully performed in making terrorism insurance

availability and affordable while aligning interests and incentivizing prevention and resilience. He asked why anyone other than insurer program administrators would prefer a program using the NFIP model rather than the TRIA model. Mr. Landgraf responded that alignment between the industry and policy is important and the BCC wants to align incentives of the insurance industry with those of public policy and the government, and is tending toward a program with elements of TRIA without several elements that do not translate very well, like the program cap. Both perils have been called "uninsurable" although Mr. Landgraf emphasized the need to reflect, study, and gather data to understand the pandemic peril both in the United States and elsewhere in the world. He said that pandemic risk is like terrorism in one respect; the government has a unique insight and role that the private sector will never have (in the case of terrorism, the government has knowledge of terrorists that others don't, and with pandemic the government is the only entity that can call for a shutdown – although Mr. Landgraf noted that early analytics on the Paycheck Protection Program suggest that the severity of economic impact was almost as great in states that did not have early lockdowns as in states that did have early lockdowns).

Mr. Landgraf said that lessons can also be learned from World War II's War Damages Corporation, which was set up days after Pearl Harbor to insure against enemy attack – at the time, war risk was thought to be uninsurable so the government held the risk and the private industry was deputized to distribute the product. He added that within one year of creation, the insurance industry wanted to participate because they thought it would be profitable to so do; within 12-18 months, the War Damages Corporation evolved into a public-private partnership in which the industry took a certain amount of downside risk from the overall pool to receive an upside payoff if the pool proved to be profitable.

Mr. Crabb then asked Mr. Landgraf to comment on the BCC's inclusion of workers compensation and general liability insurance in its proposal. Mr. Landgraf responded that these areas are evolving, and the BCC wants to highlight that there are other lines of business affected and more needed is needed before drawing hard conclusions. He said the BCC is working on this and has asked some groups to help with modeling. He stated that the full impact on workers' compensation is still unknown, but he suspects it will be a very hard market because no pandemic exclusions exist. Mr. Landgraf added that states are beginning to make assumptions about whether or not COVID-19 exposure is work-related (and covered by workers' compensation) or not. He reiterated that the BCC believes an architecture needs to be built that will fill in the pandemic and communicable disease exclusions in critical lines for the business sector, but data should be studied to find the best analytics about what actually happened, and build a model on that basis. He added that that designing the program should involve much greater study on risk mitigation efforts (highlighting as an example the use of temperature checkpoints in Thailand).

Director Seitz emphasized the importance of FACI remaining engaged and active on this topic, and suggested that one potential committee activity could be to examine the proposals discussed

in the presentations in greater depth. Director Seitz also stated that FIO would continue its stakeholder engagement process and consider how FIO's convening authority can be used to help advance discussion on this topic.

Ms. Ward provided an update on the COVID-19 Subcommittee's "Preparedness" Workstream's work to provide FIO with specific advice and information that would allow the insurance industry to be better prepared for future pandemics or similar broad-risk events. The subcommittee plans to present formal recommendations for FACI's consideration at the December 2020 meeting, and may suggest further study of certain topics for 2021. The subcommittee seeks to inform FIO on three areas:

1. Emerging lessons: What activities and coordination made a positive difference for consumers, regulators and industry? What should we be ready to coordinate or implement in future pandemics?

2. Uniformity and coordination: Are there situations where it may make more sense for there to be a uniform response? Are there opportunities for additional innovation that would benefit consumers, regulators, and the industry?

3. Temporary to permanent: What certain pandemic-related state and federal temporary changes in approach could be useful if made permanent?

Ms. Ward summarized preliminary recommendations that the workstream has considered:

1. For emerging lessons, the NAIC's guidance has been helpful in providing broader industry guidance in several areas, including but not limited to: accounting and reporting guidance issued with respect to the timing of quarterly filings, handling of delayed premium payments, mortgage loan modifications, and forbearance requests.

2. Identification of technology constraints that may have been experienced by consumers, the industry, and regulators that could be addressed upon—or in advance of—future emergencies.

3. Uniformity of data collection, particularly regarding exposure, and uniformity of premium relief demonstrating consensus between life insurance and property & casualty insurance stakeholders, to the extent possible.

4. Uniformity on how to address potential changes in credit information for consumers and businesses.

5. Measured and specific recommendations on permitting extensions of certain temporary insurance licenses (but not issues of new temporary licenses).

6. Use wet signatures, e-delivery options, and similar practices for which permanent changes in practice could help the industry better serve consumers.

Update from the Subcommittee on Addressing the Protection Gap Through Public-Private Partnerships and Other Mechanisms

Following a committee break from 2:28 p.m. until 2:45 p.m., Mr. McGovern provided an update from the Protection Gap subcommittee. He summarized that the subcommittee presented recommendations to FACI in December 2019, which were ultimately approved and delivered to FIO by FACI. These recommendations involved the National Mitigation Investment Strategy (NMIS) and demonstrating the effectiveness of mitigation investments; ensuring that mitigation is properly coordinated by state and private bodies to ensure that the investment is effective and mitigation becomes a standard practice; providing financial and other incentives to encourage mitigation and promote innovation in the insurance sector to provide insurance solutions that are transparent to policyholders. Mr. McGovern added that the subcommittee asked FIO to use its convening power to bring together relevant stakeholders to discuss mitigation. FIO exercised this power at the June 2020 meeting, and the California Earthquake Authority and spoke about their use of mitigation incentives.

Mr. McGovern reported that the subcommittee had not met since the June 2020 meeting but would schedule a meeting in the next several weeks. Mr. McGovern also requested feedback from members of the subcommittee and the full FACI on potential subcommittee or FACI engagement with the NMIS working group to have a direct discussion on how the insurance sector could assist with raising the profile to support national mitigation efforts.

Mr. McGovern also reported that AXA XL sponsored a recent study by the Cambridge Centre of Risk Studies focused on the role of insurance in building resilience and how insurance increases the speed and quality of recovery after natural events. He said this may be a topic relevant for discussion.

Mr. McGovern also proposed discussing with FIO whether there may be an opportunity to use FIO's convening authority to hear from agencies in addition to FEMA and the California Earthquake Authority.

Mr. Bach reported that United Policyholders has a national project called *Risk: Restoring Insurance Safety Nets* affiliated with Professor Jay Feinman, who has previously presented to the FACI on protection gap topics. Ms. Bach indicated that she would share the link to this project with Mr. McGovern for potential discussion at the next meeting.

Update from Subcommittee on FIO's International Work

Mr. Falzon described the International Subcommittee's work as focusing on market access and level playing fields that impact U.S. insurers as they operate abroad, with a secondary focus on continuing to monitor developments occurring from a regulatory standpoint in the international arena, especially with respect to IAIS.

Mr. Falzon reported that the subcommittee has identified nine areas of specific focus related to market access, and said the subcommittee is in the process of building out the narrative in these nine areas:

1. Restrictions on Foreign Direct Investment (FDI) and Forms of Establishment
2. Restrictions on Management Control / Key Foreign Personnel / Other Corporate Governance Requirements
3. Cross Border Reinsurance Restrictions
4. Data/IT Localization and Digital Protectionism
5. Discriminatory Screening and Approval Mechanisms, and Other Regulatory Trade Barriers
6. Non-Regulatory Barriers
7. Anti-Competitive Advantages of State-Owned Insurers and Reinsurers
8. Capital Outflow Restrictions
9. Implementation, Enforcement and Contract Sanctity

Mr. Falzon reported that the subcommittee has met in full on several occasions, and working groups within the subcommittee have met frequently. He reported that the topic of state-owned enterprises did not have initial consensus and required additional time spent, and noted that it was interested to discuss the topic in the context of how solutions may come about for state "owned" solutions and pandemic risk mitigation.

Mr. Falzon reported that the working group invited a guest speaker from the IMF who had studied the use of state-owned enterprises in financial services (though outside of insurance).

Mr. Falzon reported that the subcommittee is cataloging examples in the nine areas and developing narratives for a "playbook" that Treasury and FIO can use in international trade discussions. He stated that the subcommittee will provide a final report with exhibits at the December 2020 meeting. Mr. Falzon said the industry is generally very supportive of data collection, but suggested before holding a third data collection, there should be an understanding

about how the data is being used, what inferences and conclusions are being drawn, and what insights are being drawn, so that the industry has some idea of how the data is being used.

Mr. Falzon reported that the IAIS has issued a final version of the application paper on liquidity risk management. He said the industry had concerns that the paper was overly granular and prescriptive in its first form, and although this observation is still probably applicable, modifications were made in the final version that reflected some of industry's concerns.

Mr. Falzon reported that the IAIS published the registrar of all insurers that are IAIGs as designated by their local jurisdictions, with the exception of jurisdictions that opted out of disclosure.

Mr. Falzon reported that the Financial Stability Board released its key attributes assessment methodology for the insurance sector, which relates to insurance resolution frameworks. Mr. Falzon identified this as of interest to local regulators which have jurisdiction over resolution powers for insurance companies.

Mr. Falzon summarized upcoming IAIS activities. At the end of October, the industry will submit data for the beginning of the ICS monitoring period and reiterated his statement from a previous meeting regarding industry concern that, in the context of a pandemic, they would potentially suggest extending the monitoring period for a year in order to allow for the review of a full five years' worth of data, since the pandemic would limit engagement between regulators and industry, and could limit the ability of regulators to digest the data. Second, the release of a consultation on the aggregation method is anticipated, which will be a draft definition of the comparable outcomes and high-level principles that came out of the Abu Dhabi IAIS meeting. Mr. Falzon stated that topic is of great interest to industry and regulators in the United States.

Mr. Falzon reported that the IAIS is expecting two application papers: one on resolution powers and planning and the second on climate-related risks.

Finally, Mr. Falzon reported that the IAIS is expected to issue shortly its consultation on liquidity metrics, which are not likely to be in place until 2021. He described this as a substantive consultation, given the role that metrics are likely to play in the IAIS's macroprudential initiatives, including monitoring systemic risk.

Presentation and Discussion Led by the Subcommittee on the Availability of Insurance Products

Mr. Birnbaum provided background on the subcommittee's three workstreams: long-term care insurance, data privacy, and disparate impact/systemic racism.

On data privacy, the subcommittee received presentations from the U.S. Public Interest Research Group and the Chamber of Commerce on the status of data privacy legislation in the states, federal proposals, and their views on what federal data privacy legislation should or should not include.

On long-term care insurance, Mr. Birnbaum reported that the subcommittee was asked to review the work of the Federal Interagency Task Force on Long-Term Care Insurance and the work of the NAIC's Long-Term Care Insurance (EX) Task Force. At the time this work was contemplated, both groups were expected to produce reports and recommendations in 2020.

Mr. Birnbaum said that the subcommittee's work on disparate impact was driven by several factors: (1) Treasury report questioned whether disparate impact under the federal Fair Housing Act (FHA) should apply to insurance as driven by proposed revisions to the Department of Housing and Urban Development's (HUD) rule on disparate impact challenges under the FHA; and (2) the rapid grown in insurers' use of big data analytics, which has increased concerns about the potential for proxy discrimination against protected classes.

Mr. Keiser said that the subcommittee recognized early in its discussions on disparate impact that the landscape had changed dramatically. He added that the George Floyd incident and many others, the involvement of the professional sports teams, and protesting within communities changed the issue, and the topic became very relevant. He identified the timeliness of the subcommittee's efforts as being critical, and said the importance of the industry addressing this issue became obvious when specific insurance companies took strong positions and made recommendations to the subcommittee. Mr. Keiser said that the subcommittee spent the majority of its time working to bring the subcommittee to a unified position, because it is an emotional issue and such an important issue that the subcommittee worked hard to unify around the right answer. Mr. Keiser emphasized that there was agreement that appropriate action was necessary and important, however there was difficulty in identifying and agreeing to what action was appropriate.

Mr. Birnbaum said the subcommittee started its work on disparate impact in 2019, and describe disparate impact in the context of insurance as things that have the effect of discriminating against protected classes, but do not explicitly use protected classes as a characteristic. Mr. Birnbaum said that the FHA has recognized disparate impact claims since its passage, and numerous court cases have affirmed that disparate impact is unfair discrimination, and that disparate impact claims regarding home insurance are covered under the FHA. For additional background, Mr. Birnbaum referred members of the committee to HUD's Reconsideration of Public Comments on Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance (October 2016), which was distributed to the committee prior to the meeting.

Mr. Birnbaum said that disparate impact can also be called proxy discrimination against protected classes, which refers to the use of a proxy for a protected class characteristic that has the effect of discriminating against that protected class. Mr. Birnbaum emphasized that simply showing a disparate or disproportionate effect is not sufficient to prove a disparate impact claim.

Mr. Birnbaum stated that prior to its most recent rulemaking, HUD adopted a three-part burden-shifting process to identify disparate impact. First, the charging party would bear the burden of proving a prima facie case that a practice results in or would predictably result in a discriminatory effect on the basis of a protected class characteristic. If the charging party or plaintiff proved the prima facie case, the burden would shift to the respondent or the defendant to prove that the challenged practice is necessary to achieve one or more of its substantial legitimate non-discriminatory interests. If the respondent or defendant satisfied its burden of establishing a legitimate nondiscriminatory interest, the charging party would then have the burden of establishing liability by proving that the substantial legitimate nondiscriminatory interest could be served by a practice that has a less discriminatory effect.

Mr. Birnbaum provided an example from the 1990s where fair housing groups challenged insurers' use of a home's age and value as underwriting factors for home insurance, because those factors had a disparate effect on communities of color; the fair housing groups were able to show this by testing for declination. by making assumptions regarding the home condition based on these factors. This shifted the burden to insurers to demonstrate a sound business rationale for the use of home age and value and also that there was no less discriminatory manner to achieve the business outcome. Mr. Birnbaum stated that age and value were used as underwriting factors to assess the condition of the home, but because these were crude measures of home condition, insurers turned to better indicators of risky home condition, such as the condition of roof and electrical system; this resulted in improved risk-based underwriting as well as improved availability of insurance.

Continuing with his discussion of background on the topic, Mr. Birnbaum referenced Treasury's 2018 report, *A Financial System that Creates Economic Opportunities: Asset Management and Insurance*, which recommended that HUD reconsider the application of disparate impact to insurance practices under its 2013 rule and analyze whether the application of the rule is consistent with the McCarran-Ferguson Act and relevant state laws. In 2019, HUD proposed revisions to the disparate impact rule and Mr. Birnbaum cited FIO's 2019 annual report, which discussed some features of the proposed revision.

Mr. Birnbaum said that following several conversations on disparate impact, he proposed two recommendations for the subcommittee's consideration:

1. FACI recommends that FIO support disparate impact as unfair discrimination against protected classes in residential property insurance under the Fair Housing Act as currently recognized by the Department of Housing and Urban Development (HUD) and oppose the proposed revisions to HUD's disparate impact rules.

2. FACI recommends that FIO encourage states to modernize insurance regulation by explicit recognition of disparate impact as unfair discrimination against protected classes and further encourage states to develop statutory or regulatory guidance for insurers to identify

and minimize disparate impact against protected classes and for safe harbors for insurers to demonstrate compliance.

Mr. Birnbaum stated that these proposed recommendations were discussed at length, but faced opposition. APCIA's response to the proposed recommendations was distributed to members of the committee prior to the meeting. Both proposed recommendations and several alternatives failed to be passed by the subcommittee.

Mr. Birnbaum stated that the issue was revisited after George Floyd was killed in May 2020 and several industry leaders spoke out against systemic racism and inherent bias in society at large, and pledging to address these problems both within their companies and in society. Mr. Birnbaum added that a number of organizations who previously supported revisions to HUD's disparate impact rule also asked HUD to withdraw the rule and study the issue further.

Two new proposed recommendations were presented to the subcommittee for consideration in August. Mr. Birnbaum identified these as: (1) a recommendation to study proxy discrimination against protected classes in personal auto, homeowners, and small business insurance (which would be presented to FACI for consideration later in the meeting); and (2) a recommendation for FIO to request that HUD delay issuance of the final rule pending further study (which was rendered moot because HUD issued a final rule before the subcommittee voted on the recommendation).

Mr. Birnbaum provided a summary of NAIC activities related to race and insurance. He stated that several years ago, the NAIC created the Big Data Working Group to examine issues emerging from insurers' use of big data analytics and artificial intelligence. In 2020, the working group was charged with reviewing current regulatory frameworks used to oversee insurers' use of consumer and non-insurance data, and recommending modifications to model laws governing the insurance life cycle. The working group was also charged with proposing a mechanism to facilitate state sharing of resources for conducting technical analysis and data collection related to the review of complex models used by insurers. Third, the working group was charged with assessing data needs and requiring tools for state insurance regulators to appropriately monitor the marketplace and evaluate underwriting, rating claims, and marketing practices. Mr. Birnbaum characterized these charges as being intended to educate regulators on the status of big data practices and to look at regulators' concerns with big data analytics, including the potential for proxy discrimination or bias.

Mr. Birnbaum said that the efforts of the Big Data Working Group ended up with the NAIC's Accelerated Underwriting (AUW) Working Group. Mr. Birnbaum characterized AUW as the corollary to the property & casualty sector's use of predictive modeling using credit scores and other non-insurance data. Mr. Birnbaum said that the AUW working group has been reviewing these issues for approximately a year, including the potential consumer harms (such as the potential for proxy discrimination) associated with the application of big data analytics predictive models. He added that the AUW Working Group is preparing recommendations for further action by the

end of the year.

Mr. Birnbaum noted that the Big Data Working Group reports to the Innovation and Technology (EX) Task Force. This task force also had an Artificial Intelligence Working Group, which developed NAIC's Principles for Artificial Intelligence, which were adopted at the August 2020 NAIC Summer National Meeting. Mr. Birnbaum quoted these principles as intended to "establish consistent high-level guiding principles for AI actors" and "be used to assist regulators and ANIC committees addressing insurance-specific AI applications." Mr. Birnbaum said the principles addressed four areas: fair and ethical, accountable, compliant, and transparent. The fair and ethical section included, over industry opposition, a principle that insurers should, consistent with the risk-based foundation of insurance, proactively avoid proxy discrimination against protected classes. He added that the fair and ethical section included a principle that insurers should, consistent with the risk-based foundation of insurance, proactively avoid proxy discrimination against protected classes.

Mr. Birnbaum summarized the work of the NAIC's Casualty Actuarial and Statistical Task Force (CASTF) over the last two years. CASTF was directed to develop a white paper on regulatory review of predictive models focusing on personalized pricing. The paper included guidance that regulators should review "the rational relationship" or "rational explanation" between data and the predicted outcome. Mr. Birnbaum stated that this explanation requirement faced opposition from insurers and state legislators who felt that state law only required a simple correlation to meet a standard of "not unfairly discriminatory" and felt that requiring an explanation. Mr. Birnbaum noted that CASTF did not include guidance on proxy discrimination against protected classes. The paper has been adopted by CAST's parent committee, the Property and Casualty Committee, with references to rational explanation intact.

Mr. Birnbaum stated that the NAIC recently created a Special Committee on Race and Insurance, which held its inaugural meeting several weeks before. recently creating a special committee on race and insurance. The committee adopted five workstreams, each of which are intended to make recommendations or action steps and coordinate with other NAIC groups:

1. Research/analyze level of diversity and inclusion within the insurance industry.

2. Research/analyze level of diversity and inclusion within the NAIC and state insurance regulator community.

3. Examine and determine which practices or barriers exist in the insurance sector that potentially disadvantage people of color and/or historically underrepresented groups in the Property and Casualty line of business.

4. Examine and determine which practices or barriers exist in the insurance sector that potentially disadvantage people of color and/or historically underrepresented groups in the

Life Insurance and Annuities lines of business.

5. Examine and determine which practices or barriers exist in the insurance sector that potentially disadvantage people of color and/or historically underrepresented groups in the Health Insurance line of business.

Mr. Birnbaum said that the NAIC's Anti-Fraud Technology Working Group has been revising anti-fraud plan guidelines, and recently rejected a proposal that insurers' anti-fraud plans should include policies and practices to detect systemic racism and proxy discrimination against protected classes and anti-fraud algorithms and practices. He also reported that the Market Conduct Examination Standards Working Group has briefly discussed systemic racism and biased algorithms and the implication for market conduct examiners. He also reported that, at the August NAIC Consumer Liaison meeting, health insurance consumer representatives presented on the on the disparate disproportionate impact of COVID-19 on communities of color, and the Center for Economic Justice presentation on the lack of regulatory action on systemic racism and insurance prior to the death of George Floyd. Mr. Birnbaum also noted that several years ago, the NAIC's Property/Casualty Committee issued a paper on auto insurance affordability, and CASTF issued a paper on price optimization, but he added that neither addressed issues of proxy discrimination or systemic racism in insurance. Mr. Birnbaum summarized the NAIC as having many workstreams directly and indirectly addressing systemic racism and inherent bias in insurance, but opined that he has not identified the proposal or any concrete actions or studies.

Ms. Dwyer disagreed that the NAIC has not addressed issues relating to race until recently, and said she believes commissioners address the topic all the time and are always looking for fairness from industry, adding that it may be a matter of how the topic is being discussed.

Mr. Birnbaum discussed the disparate impact recommendation proposed for FACI's consideration. He said the recommendation was drafted by Mr. Heller in an effort to bridge some of the disagreements among the subcommittee's members. Mr. Birnbaum agreed with Mr. Keiser's statement that there was broad agreement among members for pursuing a study, but there was general disagreement over what entity should carry out the study.

Mr. Birnbaum noted that some members suggested that FIO should recommend that GAO conduct the study, instead of having FIO itself conduct the study. The argument for this is that a FIO study may not be seen as impartial in the current political climate, but the GAO has a strong reputation for independence. Proponents cited an FTC study on credit scoring that had been criticized as support for having an independent agency conduct a study. Mr. Birnbaum said that those supporting having FIO conduct a study argued that FIO has a specific mandate under the Dodd-Frank Act to monitor the availability and affordability of insurance in underserved communities, and the proposed study fits within this mandate. They also argued that FIO has statutory authority to collect data from insurers if not otherwise available from state regulators or other sources. Mr. Birnbaum added that FIO has experience in understanding insurance data due to its work on the

auto affordability index and TRIA data collection, and noted that one of the criticisms of the aforementioned FTC study focused on problems with the data used by the FTC and the agency's lack of experience with insurance data. Mr. Birnbaum noted that the GAO also does not have particular expertise with insurance data and data collection. Mr. Birnbaum identified additional arguments, for FIO to conduct a study, noting that Treasury has previously weighed in on the topic of disparate impact; and FIO is not able to request a study by the GAO, since requests of the GAO must come from Congress.

Mr. Keiser stated his reservation with the proposed recommendation, specifically regarding the second paragraph under discussion, which defines proxy discrimination or disparate impact. Mr. Keiser suggested the definition used in this paragraph was too broad, and places the development of future models (using creative algorithms) at risk; he said this creates the risk that all activities could potentially fall under the definition of disparate impact because one of the groups could be affected. Mr. Keiser added that previous work provided an opportunity for insurers to defend the use of an approach, but this definition does not provide that as a clear option. Mr. Keiser stated hat he raised this concern with the subcommittee and accordingly had voted against the recommendation at the subcommittee level.

Mr. Heller stated that, at the June 2020 FACI meeting, Chairman Glaser had charged the subcommittee with continuing to work on the topic, as there was recognition of the challenges involved but an understanding that if the subcommittee could reach a majority position, then FACI should consider a recommendation again. Mr. Heller said that the subcommittee was not providing a consensus argument *per se*, but suggested there was a significant majority who agreed with the sense that American society has structural elements that foster a persistent bias against Black Americans and other people of color, and that these problems extent beyond law enforcement and into aspects of social and economic life. Mr. Heller expressed his hope that the proposed recommendation captures that sensibility and applies it in a way that fits within FIO's statutory mandate.

Mr. Heller quoted FIO's authority under Dodd-Frank to "monitor the extent to which traditionally underserved communities and consumers, minorities, and low and moderate income persons have access to affordable non-health insurance products." Mr. Heller opined that the committee could use its expertise in insurance to assess the possibility that the industry has a role to play—and may have room to improve—with respect to issues of race. He added that he believes that the intent of FACI is for its members to step away from their organizations' specific interest to assist FIO in more fully understanding the insurance industry and its implications for consumers, businesses, and the economy. Mr. Heller addressed Mr. Keiser's concern by expressing his belief that FIO would be able to specify a meaningful definition of disparate impact that reflects the widely-held and understood definition, and provide an analysis of the differences between "fair" discrimination identified by Mr. Keiser (which is an inherent part of insurance) and "unfair" discrimination that results when there is a disparate impact in pricing, underwriting, or practices. Mr. Heller

concluded that he believes the recommendation aligns with FIO's responsibilities and the broader social imperative for FACI to act, and requested the committee's support of the recommendation.

Heller then stated that the FACI can use our expertise to review and assess the possibility that the insurance industry has a role to play and may have room to improve with respect to issues of race. Member Heller further expounded that one is called to serve on FACI, to step away from the specific interests of our companies, our organizations, and our states to assist FIO and the federal government to more fully understand the insurance industry and its implications for consumers, businesses, and the economy.

Mr. Crabb highlighted that the NAIC just launched a major workstream on race and insurance, which has strong support from the insurance industry. He suggested that coordination with the NAIC would be optimal and avoid duplication and potential confusion as the different workstreams progress. He concluded there is an opportunity for FACI and FIO to monitor availability as determined through the NAIC, and noted that this type of oversight would align with how FACI is approaching its role relative to long-term care insurance.

Mr. Crabb expressed the opinion that disparate impact and its application to insurance is unclear, and the subcommittee spent a significant amount of time working to understand the 2013 HUD rule's application of disparate impact to homeowners insurance in light of the subsequent standards set by the U.S. Supreme Court in the *Inclusive Communities* case. Mr. Crabb added that within the past 30 days, HUD issued its updated rule to address the *Inclusive Communities Case*, but the subcommittee has not yet been briefed on the new rule. Mr. Crabb stated that no state has adopted a disparate impact standard in the manner described in the proposed recommendation, and added that there are legitimate concerns that a study focusing on application of such a standard will conflict with current state laws requiring insurers to set rates on objective risk criteria for individuals and businesses. Mr. Crabb said that he therefore did not support this proposed recommendation.

Mr. Crabb expressed his appreciation and agreement with the desire to take meaningful action on the topic of race and social justice, but suggested it is premature for FACI to consider its own study and that if a study is considered, FACI should consider other options, such as the suggestion to request a GAO study.

Mr. Kochenburger expressed strong support for the recommendation and opined that FIO is the best entity to address the issue, because it has insurance experience and a particular mandate. Mr. Kochenburger said that the work would not be duplicative of the NAIC, because a nationwide study is needed. He said that the NAIC's work is important and it will provide essential data and standards for consideration, but by definition, it cannot provide anything other than state-based suggestions for mandates. Mr. Kochenburger said a national approach is needed, rather than multiple different standards, citing "headaches" caused by multiple standards and litigation uncertainty. Mr. Kochenburger added that the recommendation is not for creation of model laws

or regulations or to issue an agenda, but rather to study the issue. He emphasized that the recommendation is not to suggest a definitive definition of disparate impact or proxy discrimination, but rather to evaluate and understand the issues and try to address confusion around the topic (e.g., what does the HUD 2013 standard mean? What do the revisions mean? How would different administrations approach the issue? What information can be used for enforcement?).

Mr. Falzon agreed that there is alignment on the substance of what should be done but there is less alignment on how it should be done. He noted that the membership received the proposed recommendation on Friday (shortly before the meeting), so many FACI members did not have an opportunity to engage on the topic outside of the committee itself. He suggested that FACI may want to take additional time to consider the best way to undertake a study in a non-partisan way which will arrive at the right outcomes for consumers and the industry.

Mr. Kelleher stated that the recommendation feels duplicative of the NAIC's proposed work, but noted that it doesn't appear that the NAIC's work has matured enough to know. He questioned whether FIO has the capacity, resources, and expertise to conduct a comprehensive study across three lines of business in every state. Mr. Birnbaum said that the subcommittees work is monitored by FIO and there has not been any feedback suggesting this is beyond the office's capabilities.

Chairman Glaser responded to Mr. Falzon and stated that the topic has been in front of FACI and the subcommittee for a while, and acknowledged that a time there is a close vote at a subcommittee level there is some level of concern about whether there is consensus. However, if there is a simple majority in a motion at the subcommittee level, a recommendation can be brought to the full FACI for consideration. Then, in order for FACI to send something to FIO as a formal recommendation, a two-thirds majority of the full committee is needed to pass the recommendation. He acknowledged that the question of the best approach to this work is legitimate, and there are many variables to consider because this is a complicated topic. Chairman Glaser explained that procedurally, under the bylaws, a member has the option of requesting to delay a vote by bringing a motion that is passed by a simple majority vote.

Mr. Birnbaum concluded by responding to previous discussion. He stated that the recommendation for a study is not an accusation, but rather a study to determine the presence of impact. He said this responds directly to one of the arguments in opposition of the original recommendations (stating that there was no evidence that disparate impact even exists in insurance). Mr. Birnbaum also stated that monitoring the NAIC is inconsistent with FIO's mission and would result in delaying action. He said that FIO has a very specific mandate under the Dodd-Frank Act to monitor availability and affordability in underserved areas; not to monitor the work at the NAIC. Mr. Birnbaum re-emphasized that the NAIC does not have anything documented on conducting a disparate impact study, and further suggested it is unlikely that a study would be produced in the near future. He added that FIO can coordinate with the NAIC, and has done so on

business data collection, terrorism, and auto affordability. Mr. Birnbaum expressed his concerns that the proposals opposing the present recommendations are delay tactics to prevent substantive action on the issue. Mr. Birnbaum responded to suggestions that that the applicability of disparate impact to insurance is unclear by saying that the industry has made a fundamental error in assuming that disparate impact analysis is inconsistent with cost-base pricing and stated that NAIC regulators have clearly indicated that they believe they have the authority to address proxy discrimination against protected classes. Mr. Birnbaum concluded that the issues have been thoroughly discussed, and while arguments to have a GAO study are well-intentioned, they do not provide as strong as an argument as for why FIO should not conduct a study.

Mr. Thresher disagreed with Mr. Birnbaum's statement that alternative proposals would delay any work.

Mr. Birnbaum summarized the subcommittee's review and evaluation of the recommendations made by the Federal Interagency Task Force on Long-Term Care Insurance. Mr. Birnbaum summarized eight of the recommendations made by the task force:

1. FIO coordinates an analysis of the impact of LTC combination products on the market for LTCI protection;

2. FIO monitors the market for Short Term LTCI;

3. Congress amends the Internal Revenue Code to permit payment of incidental benefits under qualified LTCI policies;

4. Congress amends the Internal Revenue Code to revise inflation protection to authorize Treasury to set inflation protection standards for qualified LTCI policies;

5. Congress authorizes HHS to amend inflation protection for LTC partnership LTCI policies;

6. Congress amends or authorizes HHS to amend federal law references to NAIC models;

7. FIO monitors NAIC action on national approach to LTCI rate reviews; and

8. Federal agencies work through the Financial Literacy Education Commission to assess and improve federal education resources on LTC.

Mr. Birnbaum clarified that "short-term LTCI" refers to insurance that provides similar support and benefits as long-term care, but for a shorter time period of less than one year. He noted that recommendations three through six are legislative proposals for Congressional action, and therefore the subcommittee did not identify a significant role for FIO (particularly since FIO is already a member of the Task Force that made the recommendation). He added that recommendation seven falls within FIO's existing Dodd-Frank responsibilities, and

recommendation eight is not FIO focused, since the Financial Literacy Education Commission has access to organizations with a focus on long-term care services, support activities, and education.

Mr. Birnbaum characterized recommendations one and two as areas of reasonable focus beyond FIO's general activities, and said that he subcommittee's recommendations are oriented around how FIO can and should monitor the long-term care combo market and the shirt-term LTCI markets. Specifically, the recommendations outline the four proposed steps in this monitoring process.

Ms. Dwyer provided a summary of the NAIC's activities on long-term care. She said that the Long-Term Care (EX) Task Force at the NAIC is not looking at the more modern approaches to long-term care, but rather is looking at the legacy blocks of insurance that have potential solvency and rate issues, because each of the states is receiving filings for these legacy blocks and it is difficult to coordinate information. She said that the task force is looking at these issues on a national basis so the information can be used in each of the states. Mr. Dwyer said that pre-2000 blocks may have been underpriced, assumed lapse rates and interest rates were low, and insured are living longer and accessing more services under these policies. She said these are very difficult rate reviews for states to conduct and they examine them closely on a state-by-state basis, but the NAIC is working to try to coordinate information.

Ms. Schmidt described the work of the multi-state rate review workstream, one of five workstreams established by the Long-Term Care (EX) Task Force. She noted that each state has separate authority over the review of long-term care rates, and the workstream does not change that fact. Previously, states were informally sharing approaches to rate review, but there was no formal mechanism for the states to share information and try to understand actions taken by other states with respect to a particular rate filing. Accordingly, the workstream discussed ways for states to best share information and analysis with regard to rate increases that insurers proposed to make on a national basis. The intent is for states to better understand the methodology and analysis being employed in other states before considering specific rate proposals. Ms. Schmidt emphasized that this process does not supplant the individual state's statutory authority over long-term care rate reviews, but rather provides context and information that a state can consider in conjunction with a filing.

Ms. Schmidt said that several pilot projects are underway to determine what information would be valuable and what input individual states would like to provide to the national product. She said that the task force's 2021 workstreams will be changing slightly, but the multi-state rate review workstream will remain ongoing. The workstream will be called the LTCI Multi-State Rate Review Subgroup, and be charged by Commissioner Mike Conway of Colorado.

Ms. Dwyer described the restructuring techniques workstream of the task force, which looks at, in part, statutes available in states that allow the restructuring of solvent insurers. The workstream is gathering information on (rather than recommending) available restructuring mechanisms to make

available for commissioners' consideration. Ms. Dwyer explained that restructuring options vary depending on the solvency of the carrier, and in most cases, when a carrier is solvent, there are several state statutes that might provide an opportunity for the company to restructure a long-term care book. However, she added that there are strict statutory guidelines to do so, primarily to ensure protection of the consumers of these long-term care products. Ms. Dwyer noted that if an insurer is in rehabilitation, the rehabilitation court may have additional powers to effectuate restructuring. She added that if an insurer is insolvent, there are additional court-supervised alternatives and guarantee fund obligations as well. Ms. Dwyer confirmed that consumer interests are of primary concern to regulators and the courts in each of these situations.

Ms. Dwyer stated that long-term care is a relatively new line of business, and there is virtually no case law interpreting restructuring options for long-term care blocks. She noted that some state statutes are based on the United Kingdom Part Seven transfers, which has some case law, but it is not clear whether this would have any applicability to long-term care. Accordingly, the workstream is working to select a contractor to gather and provide information for commissioners to consider accessing in protecting consumers in the state.

Ms. Schmidt described the work of the reduced benefit options workstream. She said that in reviewing proposed LTC rate increases, most states have required insurers provide some reduced benefit options that are not otherwise available under the contract. This assures that a consumer who has been paying premiums for years will not simply cancel a policy if premium rates become too high. For example, a consumer could avoid most of a rate increase by choosing to reduce the inflation factor included in a policy (Mr. Schmidt noted that many of the legacy policies have a 5 percent or 3 percent compound or simple inflation factor), reduce daily benefits, or reduce the length of coverage. Ms. Schmidt confirmed that these contract changes are solely at the option of the consumer and cannot be imposed by the insurer.

Ms. Schmidt said that regulators are requiring insurers to provide options so consumers can evaluate their individual financial situations and decide what works best for them. She added that while most states have been doing this, little information-sharing was occurring between the states, which resulted in the formation on this workstream. She said that a number of non-actuarial considerations received considerable attention from workstream members, including the use of caps and phase-in periods. The workstream identified best practices and ways to reduce state variances, and referred these guidelines to the multi-state rate review group. Ms. Schmidt noted that the multi-state rate review subgroup has included this guidance in part of its pilot project and advisory report, and will further assess how this guidance will be incorporated into the multi-state rate review process.

Ms. Dwyer discussed the data call design oversight workstream. She said that states review their own data when reviewing rate filings, and although there is a comparison to national data, there has not been an overview of the picture at a whole company or whole industry basis. The intent

of this workstream was to address this issue; a consultant was hired to analyze data that had been provided to the state of Virginia through a data call, and the data was shared on a regulator-only basis through the NAIC's information-sharing agreement. The workstream held two regulatory-only calls to understand the data, and is continuing to review the information and hopes to communicate some findings to the public later in 2020.

Ms. Schmidt reviewed the final LTCI workstream on evaluation of LTCI reserves. She noted that reserves affect both rates and solvency; while too high of reserves will increase rates, too low reserves can result in insolvency. She said that the workstream is coordinating valuation and rating issues affecting reserves by considering issues identified through the review efforts of the actuarial and financial analysis group at the NAIC.

Committee Presentation of Advice and Recommendations to FIO

Chairman Glaser confirmed that the FACI bylaws state that recommendations pass if they receive two-thirds of votes cast. He stated that he would read each proposed recommendation then call for a voice vote. If the result of the voice vote was unclear, a roll call would be conducted. Members were able to abstain from voting, but the two-thirds majority would be calculated based on total votes cast and would not include abstentions.

Chairman Glaser read the proposed recommendations on long-term care insurance:

> *FACI recommends the following actions by FIO in response to two recommendations in the "Report of the Federal Interagency Task Force on Long-Term Care Insurance" ("Report"). Among other things, the Report recommends that:*
>
> - *FIO coordinate an analysis of the impact of LTC combination products on the market for LTCI risk protection; and*
>
> - *Federal policymakers work with their state counterparts and with private sector stakeholders to evaluate and monitor the market for limited LTCI, including potential impacts on the risk pool for longer-term products and on Medicaid.*
>
> *The recommended actions for FIO are:*
>
> 1. *Identify key issues / metrics that should be part of market monitoring for these products;*
>
> 2. *Identify current information about participants, sales, claims and other data relevant to inform the key issues in these two product markets;*
>
> 3. *If needed, propose any additional data collection for states/NAIC or FIO or others to monitor these markets: and*
>
> 4. *Include analysis of these markets in FIO's annual report.*

Mr. Keiser made a motion for FACI to present the recommendation to FIO.

No additional discussion was made on the motion.

Chairman Glaser requested to bypass the voice vote. Ms. Baldwin conducted a roll call vote:

> In favor: Andersen, Bach, Birnbaum, Branch, Crabb, Dwyer, Falzon, Glaser, Heller, Keiser, Kelleher, Kochenburger, McGovern, Schmidt, Stolfi, Thresher, Ward
>
> Opposed: None
>
> Abstentions: None

Motion passed (17-0-0).

Mr. Kelleher asked for clarification on the rule regarding abstentions. Chairman Glaser stated that members can abstain from any vote, and two-third tally is calculated by votes cast. Therefore, abstentions are ignored and only votes casts are counted.

Mr. Falzon asked for clarification on when a motion can be made to amend the language of a recommendation. Mr. Glaser responded that after the recommendation is read, additional discussion can be held and motions can be accepted to change the recommendation.

Mr. Glaser read the proposed recommendation on disparate impact:

> *FACI recommends that the Federal Insurance Office conduct analyses of the presence of disparate impact or proxy discrimination against protected classes in the sale of private passenger auto and residential property to consumers and business owners insurance to small businesses.*

Chairman Glaser called for any edits to the recommendation, additional discussion, or motions.

Mr. Heller made a motion for FACI to present the recommendation to FIO.

Mr. Falzon proposed revising the amendment to remove the phrase "*Federal Insurance Office conduct analysis*" and replace it with the language "*Federal Insurance Analysis have analyses conducted*." He suggested this may bridge the gap and prevent slowing down the study while leaving open the opportunity to look at the most effective way for it to be conducted; it would leave open whether FIO conducts the study or a separate agency is engaged.

Mr. Thresher commented that he was not sure how the amendment would change the vote on the proposal.

Chairman Glaser commented that in reading the proposed recommendation, it appears that a word is missing, and that "*in the sale of private passenger auto and residential property to consumers*"

could be read as involving the purchase of property rather than the purchase of insurance. He suggested the language should be changed to read "in the sale of private passenger auto and residential property insurance to consumers." Mr. Heller responded that when originally drafted, the intent was to consider private passenger auto, residential property to consumers and business owners, and then collectively insurance. He agreed there was a lack of clarity and it would be acceptable to insert the word "insurance" after each term, as this would reflect the original intent.

Ms. Baldwin provided clarification that a two-thirds vote would be required to change the recommendation's language on a proposed amendment, as it would constitute a substantive revision.

Mr. Falzon responded to Mr. Thresher's comment and clarified that his proposed change was intended to leave the door open for a subsequent discussion with FIO to determine whether the analysis would be best done directly by FIO or whether FIO should coordinate with another federal agency or the NAIC to do the analysis.

Mr. Birnbaum expressed opposition to Mr. Falzon's proposed revision and support for Mr. Glaser's proposed revision. He said that the phrase "have analyses conducted" is amorphous, and rather than opening a door it makes the recommendation meaningless, because it is not clear who should be held accountable or who should be acting. Mr. Birnbaum added that if there is concern about FIO coordinating with others, then using the term "conduct analyses" is suitable language, because FIO conducts analyses with TRIA while coordinating with the NAIC; it also conducts analyses of business interruption while coordinating with the NAIC and other federal agencies. He re-iterated that there is no question from his perspective as to whether FIO or GAO should conduct the study. He said that FIO can not recommend that GAO do a study because FIO is a federal agency, and Congress must recommend or request GAO to do a study. If discussion is being opened to have GAO do a study, then Congress should be approached rather than asking FIO to make a request of GAO.

Mr. Falzon responded that he was attempting to address the perception that there was relative unanimity among the subcommittee with doing the work, but disagreement with how the work should get done. Mr. Falzon also noted Mr. Birnbaum's concern that any proposal to modify the "how" would delay moving forward with the recommendation, and said his proposal was intended to navigate to a conclusion that would allow the recommendation to move forward and vote to have the analysis done, while leaving flexibility as to how it gets done. He said that it does create accountability with FIO determining how to perform the analysis, as opposed to conducting the analysis itself.

Mr. Heller expressed opposition to Mr. Falzon's proposed revision, because he said it creates some confusion. He added that the proposal could also allow FIO to hire a third-party firm to conduct a study, which would not address some of the other underlying concerns with possibilities of bias or a lack of credibility. He suggested it would be clearer to reference having a study conducted by a

federal agency, but noted that he would still not be in favor of an amendment.

Mr. Falzon requested feedback from members who opposed the initial recommendation on whether the proposed amended language would address their concerns, as he intended it to serve as a potential compromise to gain support in moving forward with the recommendation.

Mr. Thresher proposed voting on the current motion as worded.

Chairman Glaser proposed using the current language but adding the word "insurance" for clarity to see if the motion passes and fails, and suggested that if the motion failed, the FACI could revisit the recommendation in December with different language.

Mr. Thresher confirmed he would support voting on inserting the word insurance, but would maintain the existing language regarding how the study is performed.

Mr. Birnbaum made a motion to amend the motion on the floor and insert the word "*insurance*" after "*private passenger auto*" and "*insurance*" after "*residential property*"

Chairman Glaser called for a voice vote on the amendment. The motion to amend passed by voice vote.

Due to passage of the amendment, the motion on the floor read:

> *FACI recommends that the Federal Insurance Office conduct analyses of the presence of disparate impact or proxy discrimination against protected classes in the sale of private passenger auto insurance and residential property insurance to consumers and business owners insurance to small businesses.*

Chairman Glaser called for a voice vote on the motion. The results of a voice vote on the motion were unclear. Ms. Baldwin conducted a roll call vote.

During the vote, Mr. Crabb asked whether proxy votes were permitted. Chairman Glaser confirmed that prior to the meeting he verified that proxies are permitted under the bylaws.

During the vote, Mr. Stolfi requested that FIO coordinate with the NAIC and states on any work that is done for the data collection analysis.

> In Favor: Andersen, Bach (by proxy of Kochenburger), Birnbaum, Dwyer, Falzon, Glaser, Heller, Kochenburger, Schmidt, Stolfi, Ward
>
> Opposed: Branch, Crabb, Keiser, Kelleher, McGovern, Thresher, Wheeler (by proxy of Glaser)
>
> Abstentions: None

Motion failed (11-7-0).

New Business and Closing Remarks

No new business was presented.

Chairman Glaser announced that the final FACI meeting of the year would be held on December 3. The International Subcommittee will lead discussion on its work.

Chairman Glaser confirmed that 2021 meeting dates are under consideration, and members would receive an email in the near future requesting availability for 2021.

At 4:37 pm, Chairman Glaser concluded the meeting.

I hereby certify these minutes of the September 29, 2020 Federal Advisory Committee on Insurance public meeting are true and correct to the best of my knowledge.

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Dan Glaser
Chair