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## SENATE COMMITTEE ON INSURANCE

Senator Susan Rubio, Chair

2021 - 2022 Regular

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<b>Bill No:</b>	AB 2568	<b>Hearing Date:</b>	June 22, 2022
<b>Author:</b>	Cooley		
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<b>Urgency:</b>	No	<b>Fiscal:</b>	No
<b>Consultant:</b>	Brian Flemmer		

**SUBJECT:** Cannabis: insurance providers

**DIGEST:** Expressly provides that California Department of Insurance (CDI) licensees are not committing a crime under California law solely for providing insurance or related services to persons licensed to engage in commercial cannabis activity.

**ANALYSIS:**

Existing law:

- 1) Establishes a comprehensive regulatory program for the insurance industry, including insurance agents and brokers, administered by the Insurance Commissioner (IC) as head of CDI.
- 2) Provides for the licensing and regulation of insurance agents and brokers, either as individuals or as a business organization, by CDI.
- 3) Enacts the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) to provide for a comprehensive regulatory framework for the cultivation, distribution, transport, storage, manufacturing, processing, and sale of medicinal and adult-use cannabis.
- 4) Establishes the Department of Cannabis Control (DCC) within the Business, Consumer Services, and Housing Agency (previously established as the Bureau of Cannabis Control, the Bureau of Marijuana Control, the Bureau of Medical Cannabis Regulation, and the Bureau of Medical Marijuana Regulation), for purposes of administering and enforcing MAUCRSA.
- 5) Provides for twenty total types of cannabis licenses including subtypes for cultivation, manufacturing, testing, retail, distribution, and microbusiness; requires each licensee except for testing laboratories to clearly designate whether their license is for adult-use or medicinal cannabis.
- 6) Establishes grounds for disciplinary action against cannabis licensees, including failures to comply with state licensing requirements as well as local laws and ordinances.
- 7) Expresses that state cannabis laws shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate cannabis businesses.

This bill:

- 1) Provides that an individual or firm licensed by CDI does not commit a crime under California law solely for providing insurance or related services to persons licensed to engage in commercial cannabis activity pursuant to MAUCRSA.

## Background

*Recent History.* The Legislature passed the Medical Cannabis Regulation and Safety Act (MCRSA) in 2015. In 2016, not long after the Legislature enacted MCRSA, California voters passed Proposition 64, the Adult Use of Marijuana Act (AUMA).

In early 2017, SB 94 (Chapter 27, Statute of 2017) passed to reconcile the regulation, licensing, and enforcement systems for legal cannabis established under the MCRSA and the AUMA. This resulted in a unified series of cannabis laws, known as the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA).

In early 2019, the Office of Administrative Law approved final cannabis regulations promulgated by the Bureau of Cannabis Control, the California Department of Food and Agriculture, and the California Department of Public Health, who at the time shared cannabis licensing. These final regulations replaced emergency regulations that had previously been in place, and made various changes to earlier requirements following the public rulemaking process.

On July 12, 2021, a new Department of Cannabis Control was created through a consolidation of the three prior licensing authorities' cannabis programs (AB 141, Chapter 70, Statutes of 2021) with centralized authority for cannabis licensing and enforcement activities, including the responsibility for administering and enforcing the majority of MAUCRSA.

*Federal Illegality.* California has allowed for some form of lawful cannabis consumption since 1996 when the voters approved Proposition 215, or the Compassionate Use Act. Federally, cannabis cultivation, sale, and consumption continues to be illegal under the Controlled Substances Act (CSA). The CSA classifies cannabis as a Schedule I drug ineligible for prescription.

The potential for action by the federal government creates apprehension among California's cannabis community, even as the state's legal industry has grown in recent years. A document issued by the United States Attorney General in 2013 known as the "Cole Memorandum" indicated that the existence of a strong and effective state regulatory system, and a cannabis operation's compliance with such a system, could allay the threat of federal enforcement interests.

Federal prosecutors were urged under the memo to review cannabis cases on a case-by-case basis and consider whether a cannabis operation was in compliance with a strong and effective state regulatory system prior to prosecution. The memo was followed by Congress's passage of the Rohrabacher-Farr amendment, which prohibits the United States Department of Justice from interceding in state efforts to implement medicinal cannabis.

*California Strain*. In May 2019, the National Association of Insurance Commissioners (NAIC) issued a report identifying gaps and issues pertaining to insurance in the cannabis industry. The report identifies hesitancy from insurers to enter the market due to perceived high risk and the federal legality of cannabis. However, it also notes that for states that have legalized cannabis, moving toward an admitted market for cannabis business insurance is a key objective.

The hesitancy of insurance providers to provide insurance for commercial cannabis is attributed to high risk, since cannabis is classified as a Schedule I substance under the Federal Controlled Substances Act. This does not align with the federal government's longstanding determination that it is in the public's interest for states to regulate their own insurance marketplaces.

However, the risk calculus may be changing. In *Green Earth Wellness Center v. Atain Specialty Insurance Company* (2016), an insurer that sold a policy to a cannabis business sought to disqualify "contraband" as insurable under the policy because the production and sale of cannabis is illegal federally. The Colorado Federal District Court ruled that federal classification of cannabis is not relevant in an insurance provider's determination to write an insurance policy and that cannabis businesses that are legal in the state they operate are insurable.

Despite these incremental movements in policy, insurance for retail cannabis in California is not widely available on the admitted market. According to the CDI cannabis insurance list, there is currently only one admitted insurer providing insurance for cannabis businesses. This puts a strain on cannabis business operators and potentially increases costs for consumers as most cannabis retailers must obtain coverage from the surplus line insurance market, where insurance rates are not regulated in the same manner as in California. There are many surplus line insurers, and the surplus line market functions to place out of state insurance into California when "domestic" insurance is unavailable. Surplus line brokers are licensed by CDI, while the insurance companies writing the policy are licensed by another state.

The insurance products offered on the surplus line market policies only cover the retail market and do not cover cultivation or testing. Cultivating any crop involves the risk of loss, and testing risks revealing a batch does not meet applicable standards and is not marketable. These are risks that producers would likely like to be able to insure, but would require the cooperation of admitted insurers to provide a product. As a result, there is a shortage in the marketplace of providers available to cannabis businesses, and when it comes to businesses involved in cultivation or testing, no backup insurance market exists at all.

## Questions

Will this bill expand insurance options for cannabis growers? This bill expressly states a protection under California Law for CDI licensees. This protection has been implied since the legalization of recreational cannabis in 2016, and in that same year a federal court gave a nod to insurers that writing cannabis is permissible, but only one admitted company has fully waded into the market. On the one hand, insurers are famously risk averse, so this express statement of state law may go a long way for some to take the risk to sell cannabis coverage. But, federal illegality of cannabis could always be the

larger barrier to entry for some companies than what the state laws say. On the other hand, the willingness of some surplus line insurers to 'cross state lines' in order to write cannabis insurance, shows the fear of federal illegality does not appear to affect all insurers equally. This suggests there may be additional issues keeping California insurers out of the market. Therefore, the Committee may wish to study this issue further and consider additional efforts to effectuate the stated goal of growing the domestic market for cannabis insurance.

**Related/Prior Legislation**

AB 1525 (Jones-Sawyer, Chapter 270, Statutes of 2020) clarified that no state law prohibits a financial institution from providing financial services to a licensed cannabis business.

SB 94 (Committee on Budget and Fiscal Review, Chapter 27, Statutes of 2017) combined AUMA and MCRSA into one system for the regulation of cannabis, resulting in MAUCRSA.

**ARGUMENT IN SUPPORT:**

CDI argues in support:

In order to obtain state licensure, under existing law, a commercial cannabis business must provide proof of insurance for commercial general liability and/or coverage for each vehicle used to transport cannabis or cannabis products, depending on the type of license being obtained. AB 2568 would create a safe harbor for insurance companies by clarifying that writing insurance for commercial cannabis businesses does not constitute a crime given that cannabis is part of a legal, regulated market in California. I believe that we must provide commercial cannabis businesses with multiple, affordable options for insurance as they pursue and maintain state licensure. In addition, we must help to promote reliable insurance coverage for all aspects of these cannabis businesses to ensure that these businesses can continue to flourish just like any other business in this state, especially during this pandemic. The clarity in law being pursued in AB 2568 should provide assurances to admitted insurance carriers that they will not be in violation of California law solely for providing insurance or related services to a commercial cannabis business.

**SUPPORT:**

California Department of Insurance  
Origins Council  
The Parent Company  
Western States Council

**OPPOSITION:**

None on File.

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