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Bipartisan Bill Would Provide Federal Safe Harbor for Insurance for the Cannabis Industry

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On March 18, US Senators Robert Menendez, D-NJ, Rand Paul, R-KY, and Jeffrey Merkley, R-KY, introduced legislation meant to encourage insurer penetration in the cannabis industry. Under the Clarifying Law Around Insurance of Marijuana Act, or CLAIM Act, federal law would provide certain protections and assurances to insurers that transact with cannabis-related businesses.

Despite being legal for medicinal or adult recreational purposes in many states, at the federal level, cannabis is a Schedule 1 substance under the Controlled Substances Act of 1970. Therefore, under federal law, it is generally illegal to manufacture, distribute or sell cannabis in the US for any purpose. In addition, federal law makes it illegal for a company to knowingly (i) manage or control a place, including leasing a premises, for the purpose of manufacturing, distributing or using a controlled substance, (ii) distribute equipment or materials for the manufacture of a controlled substance or (iii) engage or attempt to engage in a monetary transaction with "criminally derived property" worth more than $10,000. Because cannabis is illegal at the federal level, many individuals and businesses, including in the insurance industry, are hesitant to operate in a space with such legal uncertainty and potential liability.

As identified in a 2019 white paper by the National Association of Insurance Commissioners titled "Understanding the Market for Cannabis Insurance," given the particularities of the cannabis industry supply chain, there are several types of insurance policies that are relevant to this sector, including general liability, workers' compensation, product liability and property insurance. Further, certain states require insurance for operating in the cannabis sector, with some states, such as California and Massachusetts, requiring insurance as a prerequisite for licensing.

The CLAIM Act would protect insurers in two ways. First, the bill provides that no federal agency may prohibit, penalize or otherwise discourage a company in the business of insurance from transacting with "cannabis-related legitimate businesses." Such businesses include any companies or persons involved in the cultivation, manufacture, distribution or sale of cannabis or cannabis products that are operating in compliance with applicable local or state law. Second, the proposed law specifically states that insurance businesses "may not be held liable pursuant to any Federal law or regulation" solely for engaging in the business of insurance with a cannabis-related legitimate business.

The effect of the bill would be to encourage insurers to serve cannabis-related businesses and increase their insurance capacity for this multibillion-dollar industry that is rapidly expanding across much of the country. To date, many companies working in or with the cannabis industry may face difficulties in procuring adequate insurance coverage.

The bill, however, reflects a relatively piecemeal approach to cannabis regulation, with various legal uncertainties remaining for cannabis operators. For example, the bill, while providing assurances to insurers, does not explicitly guarantee that policyholders can collect under an insurance policy and have it enforced in court, including as part of a bankruptcy proceeding. Indeed, some courts have refused to enforce insurance policies or, more broadly, allow cannabis companies to receive the full benefit of enforcing their rights in court based on the doctrine of "illegality." Instead, the bill simply limits the authority of the executive branch.

Until Congress addresses these issues and other wider legal tensions around the cannabis industry, insurers, insurance producers and other insurance-related service providers face legal uncertainty given the piecemeal and divergent regulatory regimes that apply to this sector.

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Key Contacts

Robert Jacques Washington, DC	rjacques@cooley.com +1 202 728 7103

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