

## Letter from Mayor Bill de Blasio

Friends,

We have a once-in-a-generation opportunity to get a historic issue right for future New Yorkers. Legal cannabis is coming to New York State. When it does, we must do all we can to make sure that happens in a way that is safe, takes the health of New York City residents into account, and above all, provides opportunity while righting historic wrongs.

We've seen these kinds of new industries spring up before. Legalization can follow two routes. In one, corporate Cannabis rushes in and seizes a big, new market, driven by a single motive: greed. In another, New Yorkers build their own local cannabis industry, led by small businesses and organized to benefit our whole diverse community.

Tragically, we know what happens when corporations run the show.

For decades, Big Tobacco knew its product was both deadly and addictive. But it denied, obscured, advertised, and lobbied its way into America's homes, targeting children. For decades, Big Oil knew its product was choking the human race on the only planet we have. Yet, it did its level best to create an economy based on fossil fuels. More recently, Big Pharma peddled opioids as a safe, non-addictive cure for pain. Now, Americans are crushed by a plague of overdose deaths. We can't let cannabis follow that course.

In July, I asked a task force to set forth New York City's vision of what legal cannabis should look like here. That is the report you hold in your hands. As we plan for legalization, we are guided by three principles: safety, health, and equity.

Safety means regulating the market, to ensure that supply is clean and safe. It means keeping people from driving while under the influence. And it means making sure that kids don't have access to cannabis.

Health means educating the whole community, and young people especially, about the real public health risks that legalization may pose, including dependence, traffic collisions, and impaired cognitive capacity.

Equity is especially important, because we have a painful past to overcome. The burden of current cannabis laws has not been shared equally. For far too long, one's race has played too big a role in determining criminality. Too many people of color have seen their lives ruined by low-level arrests, locked out of jobs and prosperity by a single joint on the street.

Our administration took office to right those wrongs. We've already stopped the vast majority of arrests for smoking and low-level possession, and seen crime continue its historic decline. Now, legalization offers an opportunity to automatically expunge low-level marijuana convictions, giving New Yorkers a clean slate and clear future.

But we must do more. We have to make sure that those who bore the brunt of past burdens reap the most future benefit. That means that a majority of the opportunity generated in this new industry must go to people of color, to low-income New Yorkers, to people whose lives have been stalled by marijuana convictions, or who live in neighborhoods where there have been the highest number of marijuana arrests. It means using part of future marijuana revenues to fund public health campaigns, job training programs, and low-interest loans to support local entrepreneurs and workers in this new field.

Our mission is clear: We want New York to be the fairest big city in America. If we get legalization right, marijuana can be an important new part of the solution.

A handwritten signature in black ink, reading "Bill de Blasio". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mayor Bill de Blasio  
City of New York

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# Executive Summary

## A. Introduction

New York State may be poised to legalize non-medical adult cannabis<sup>1</sup> use in the coming year, joining ten other states and the District of Columbia. This crossroads presents New York City with unique challenges and opportunities. These challenges include working to see that the State legislation is best structured to protect New York City residents and visitors to avoid unwanted consequences from adult legalization. The legislation, and State and City regulations that follow, must do all they can to protect the health and safety of New Yorkers. At the same time, we have the responsibility to use this turning point to help redress the disproportionate harms that criminalization of cannabis use has caused the City's communities of color. Legalization also poses unique opportunities to build a new industry in ways that advance our City's commitment to promote economic opportunities for economically disadvantaged New Yorkers and small businesses. The State legislation should forge a path to opportunities not for big corporations but for New Yorkers who need them most. Ongoing federal criminalization of cannabis adds further complexity to these challenges, perpetuating potential ill-consequences particularly for disadvantaged communities while limiting access to financial, tax, and other services and benefits to support the burgeoning industry.

To help chart the City's course for cannabis legalization, Mayor Bill de Blasio convened the Task Force on Cannabis Legalization with the charge of identifying the goals and challenges that should guide the City's preparations for potential legalization. The Task Force includes representatives of City agencies that engage in areas affected by cannabis legalization, including those concerned with public health, public safety, education, economic opportunity, and finance, among others.<sup>2</sup>

The Task Force reviewed the range of regulatory regimes in other jurisdictions that have legalized adult cannabis use and the practical experiences of those jurisdictions. It conducted interviews with public health and public safety officials throughout the nation and in Canada, and consulted with academic and other experts, New York City officials, and community organizations. Task Force members also attended community listening sessions in New York City to hear the views of New Yorkers on the issues posed by legalization.

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<sup>1</sup> The terms "cannabis", "marijuana", and "marihuana" are often used interchangeably. This report primarily uses the term "cannabis" in light of its direct reference to the plant from which marijuana products derive.

<sup>2</sup> The Task Force is coordinated by the Mayor's Office of Criminal Justice. City agencies and offices participating on or consulted by the Task Force include: the Administration for Children's Services; the Business Integrity Commission; the City Commission on Human Rights; the Department of Buildings; the Department of City Planning; the Department of Consumer Affairs; the Department of Education; the Department of Finance; the Department of Health and Mental Hygiene; the Department of Homeless Services; the Department of Parks and Recreation; the Department of Probation; the Economic Development Corporation; the Fire Department; the Human Resources Administration; the Law Department; the Mayor's Office for Economic Opportunity; the Mayor's Office of Minority and Women-Owned Business Enterprises; the Mayor's Office of Operations; the Mayor's Office of Policy and Planning; the New York City Housing Authority; the New York City Police Department; the Office of the Deputy Mayor for Health and Human Services; the Office of the Deputy Mayor for Housing and Economic Development; the Office of the First Deputy Mayor; the Office of Management and Budget; the Department of Small Business Services; and others.

Based on this research, the Task Force developed the following guiding principles for cannabis legalization and the recommendations summarized in the Executive Summary and detailed in the report below.

## **B. Guiding Principles**

The framework for legalization should advance four overarching goals.

### **1. Protect public health and safety while minimizing interactions with the criminal justice system**

Legalization must allow the government to protect New Yorkers from the adverse impacts of cannabis legalization through robust regulations aimed at ensuring the safety and health of people in our City, particularly youth. At the same time, the new enforcement regime must be carefully tailored to avoid inequitably criminalizing the same communities that have already borne the brunt of cannabis and mass incarceration.

### **2. Redress past disparities from cannabis criminalization**

Legalization will bring with it an enforceable obligation to redress the historical harms that occurred when cannabis was criminalized. This will require, at minimum, (i) automatic expungement of cannabis-related convictions, giving people with prior cannabis-related convictions a chance to start over, free of the stigma of criminalization, and (ii) investment of cannabis revenues directly into communities most impacted by past criminalization in order to improve education, job prospects, and overall quality of life.

### **3. Extend economic opportunities to diverse participants**

Legalization must promote a diversity of participants in the cannabis industry, assuring that communities disproportionately affected by past criminalization have an equitable stake. The new industry should be constructed to promote economic empowerment of those disproportionately harmed by criminalization, not profits for those seeking to benefit from legalization. This will require preferential licensing opportunities, as well as legislative and programmatic solutions to the challenges equity applicants will face, including lack of capital, information asymmetry, compliance with changing State and local regulations, and the demands of commercial competition with large established businesses. This should also include mandated job opportunities for those most impacted by past criminalization. Ongoing federal criminalization of cannabis, with attendant costs and obstacles for industry participants, poses challenges to advancing economic empowerment for those with fewer resources. Achieving the reality of a diverse industry will require thoughtful and intentional action to overcome these obstacles, so that promoting small business and job opportunities is more than an empty promise.

#### **4. Balance needed State regulation to set statewide standards with ample local government control**

Legislation should strike the right balance between State regulation establishing uniform statewide standards and resources, and local control to chart the course for the diverse communities throughout New York that will be directly impacted by legalization. What will best serve this City may not meet the needs of other areas of the State. Localities should be given broad discretion under State law to determine how to advance their communities' public health, safety, and equity goals. Also critical will be sufficient time before new State law takes effect for careful planning and coordination by the State and City to ensure a sound foundation for the advent of legalized cannabis.

New York City supports a regulatory framework for cannabis legalization that effectively protects the health and safety of all New Yorkers. Critically important as well must be a commitment to use legalization as a platform to redress historic inequities that cannabis criminalization has produced in communities of color. Any legalization regime must produce new opportunities to redress—not perpetuate—historic disadvantages suffered by these communities.

### **C. Summary of Task Force Recommendations**

#### **1. Recommendations to Establish State-Level Infrastructure Paired with Local Control**

Strong coordination between the State and local governments will be crucial to building a legalized adult-use cannabis industry that protects public health and safety while advancing social policy goals. Cannabis regulation should incorporate substantial local control within the context of an effective State-level infrastructure. This structure of State and local balance has permitted the City to respond in other contexts to local needs, and in the process adopt policies that ultimately became national models. In the cannabis legalization context as well, localities should have the freedom to chart courses that fit their diverse communities, and advance local public health, safety, and equity goals.

The Task Force supports creation of a State office to coordinate statewide issues and set statewide regulations, while permitting local authority in appropriate areas. Local control is critical to deal with sharply differing local imperatives, such as those in New York City, where sheer population density demands specific regulation that the rest of the State may not require. In particular, local authority is essential to determine whether to permit and how to regulate designated public places of consumption, home cultivation, and consumer delivery services; licensing, location, and regulation of commercial cultivation, production, and retail sites; the most effective public health and safety educational campaigns; and how best to advance economic opportunity and equity imperatives.

Development of a regulatory structure and promulgation of specific regulations should be a measured process, allowing time for consultation and coordination between the State and

localities. The City has benefitted from learning from jurisdictions that were less deliberate in their implementation, producing patchwork regulation and markets dominated by big business.

## **2. Recommendations to Lift Burdens of Criminalization While Protecting Public Health and Safety**

The City's priority for legalization is a robust framework aimed at ensuring public health and safety, especially that of young New Yorkers. Purchase and possession of cannabis should be limited to adults ages 21 and over, while public consumption should be prohibited unless at locally-regulated consumption sites. Commercial cannabis activities should be subject to restrictions similar to those applied in the context of alcohol regulation, while additional tools for measuring impaired driving should be developed to maintain road safety.

At the same time, legalization should seek to redress the harms produced by prior criminalization, and avoid creating new punitive structures susceptible to perpetuating the disparate treatment of New York's residents that characterized prior cannabis enforcement.

The City would defer to imposing civil rather than criminal penalties to violations of cannabis regulations to the greatest extent possible consistent with public safety. Balancing public health and safety goals and impeding the illicit market on the one hand, with lifting the weight of criminalization disproportionately borne by communities of color on the other, should guide legislative solutions.

Central to these goals is automatic expungement of prior criminal records relating to now legal conduct, such as adult possession or use of small amounts of cannabis. By giving a fresh start to thousands of New Yorkers whose job, education, housing, and other prospects have been significantly burdened by cannabis-related criminal records, New York would be empowering them to learn, and to earn, in ways previously barred to them. Expungement should occur as an automatic process—subject to notice and opportunity by District Attorneys' Offices to raise objections in specific cases—to minimize procedural burdens on those with past convictions.

Related recommendations include limiting cannabis testing for job applicants with exceptions for safety-sensitive jobs, treating cannabis consistently with alcohol in child custody determinations, and eliminating criminal penalties for minors. These measures are important to ensure that we do not recreate a system that imposes harms disproportionately by community.

Education of the public and of key professionals such as educators and health care workers is critical to ensuring safe cannabis use; some of the resources that adult use legalization can produce should be directed to these areas. Other states have experimented with a range of approaches to achieve the most effective delivery of harm reduction education, and New York City would build on those experiments to craft comprehensive and persuasive campaigns.

Public health and safety regulations have always had a strong local component because of the practical need to match general policy objectives to the specific conditions that prevail where enforcement is taking place. Overall statewide regulation balanced by local flexibility in

appropriate areas has been a successful model in tobacco regulation, and it is even more necessary in the adult-use cannabis context.

### **3. Recommendations to Establish Consumer Protections and Product and Information Tracking Systems**

Regulation will be critical to establishing product safety and other consumer protections, as well as to ensure that cannabis commerce and regulation can be effectively tracked and coordinated throughout the State.

The City would benefit from statewide standards for product safety, labeling and packaging, and marketing and advertising, but localities should be allowed to place further restrictions and prohibitions as necessary. To prevent cannabis products from moving between regulated and illicit markets, the City recommends creation of a statewide traceable supply chain through a seed-to-sale system accessible to regulators and financial institutions serving cannabis-related businesses.

### **4. Recommendations to License and Regulate the Commercial Cannabis Industry to Promote Economic Opportunity and Public Health and Safety**

New York City should develop a licensing framework sufficiently flexible and permissive to allow development of the legal market and suppression of the illicit one, while also promoting the well-being of all communities and extending economic opportunities to those previously stymied by criminalization and discrimination.

Big business should not get a stranglehold on this new industry. Licenses to operate through the multiple stages of the cannabis industry should not be granted to single conglomerates; diversification of licensing should be required instead. Any licensing regime should have a tiered and capped system, with licenses distributed fairly among businesses of different sizes.

Localities should have flexibility to regulate commercial cannabis activities, as well as cultivation, extraction, and public consumption, to permit appropriate integration of policy concerns with local conditions and community preferences.

A dual State-local licensing structure will permit the City to pursue its own innovations to promote economic opportunities created by this new market, subject to the minimum standards set by the State. A dual system is a key element in facilitating programs that target select populations in the most need of redress from past harms. Massachusetts, San Francisco, Oakland, and Los Angeles already are staking out similar programs.

### **5. Recommendations to Afford Local Governments Authority over Land Use Determinations**

Localities should also have the authority to determine zoning and density restrictions for cannabis businesses. The City should be empowered to determine how cannabis commerce can best fit into the fabric of its communities.

## **6. Recommendations to Support Access to Financial Resources and Services**

Ongoing federal criminalization of cannabis, which poses obstacles to access federally-regulated banking and other financial services, would benefit from special State focus and resources to ensure that cannabis enterprises—particularly small businesses—have access to financial services. The City advocates for State legislation expressly providing that banking and professional services for cannabis-related businesses do not violate State law. The City would seek allocation of State funding to localities to provide technical assistance and access to capital through locally-administered equity initiatives. Further study and expanded guidance on financial services for cannabis-related businesses would aid the emerging industry. Developing alternatives to cash-only transactions will also deter potential criminal activity.

## **7. Recommendations for Tax-Related Policy and Revenue Use**

The framework for taxing and use of revenues from legal cannabis-related activities should focus on core goals of creating a viable legal market while suppressing the illicit market, promoting only safe cannabis use, and building economic opportunities for disadvantaged communities.

The City will seek authority to establish an option for an add-on local sales tax on retail sales of adult-use cannabis. New York City must ensure that the total tax burden imposed on cannabis activity does not raise legal cannabis prices to a level that incentivizes illicit market and illegal cross-border sales. At the same time, the total tax levied should reflect a better balance between State and City taxes so that the City retains a fairer distribution of revenues commensurate with the City's needs to respond to public health and safety challenges of cannabis legalization and advance local equity initiatives.

To further help local businesses, the City recommends that local and State level deductions for business expenses compensate for the lack of federal deductions. The City will seek establishment of new State mechanisms, such as a State and local advisory body, to study and adjust tax rates in response to shifts in the cannabis market. Finally, no change is recommended to the tax treatment of medical use cannabis under the New York State Compassionate Care Act.

The City will pursue the legislative authority to allocate tax revenue, licensing fees, and other sources of financing through the City general fund to administer the new industry and support cannabis businesses and workers, with a focus on target populations and community reinvestment. Furthermore, the City proposes tax revenues collected at the State level be earmarked for local communities and fairly distributed according to local priorities.

## Current Landscape for Cannabis Reform

New York State is actively considering legalization of adult cannabis use, which is now permitted in 10 states and the District of Columbia. Given legalization in Canada, Vermont, and Massachusetts, as well as active consideration of bills in Connecticut and New Jersey, New York could soon find legalized adult-use cannabis across many of its borders. As recently as November 2018, a comprehensive bill was proposed in Albany for cannabis legalization (the “2018 Proposed Bill”).<sup>3</sup> In a July 2018 report, the New York State Department of Health recommended legalization as well, based on substantial evidence that the benefits of regulating an adult cannabis market outweigh the potential risks.<sup>4</sup> In August 2018, Governor Andrew M. Cuomo announced that he supports legalization, and has appointed a working group to study the issue.<sup>5</sup> And in December 2018, the Governor stated that legalization would be a central legislative priority for 2019.

New York City Mayor Bill de Blasio announced in June 2018 and convened in July 2018 the Mayor’s Task Force on Cannabis Legalization to propose goals and challenges to be considered in State legislation and to guide the City’s preparations for potential legalization.

### 1. Costs of Criminalization

Criminalization of adult cannabis use imposes high costs on society, felt most acutely by communities of color. In 2017, approximately 599,284 people were arrested in the United States for cannabis possession, accounting for more than a third of all arrests nationwide for drug offenses.<sup>6</sup> Despite similar usage rates across racial lines,<sup>7</sup> arrests are predominantly of people of color. In New York, 86% of arrests statewide for possession of cannabis in the fifth degree of people of color.<sup>8</sup> In 2017, of the 16,925 people in New York City arrested on the charge of

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<sup>3</sup> The most recent State cannabis bill was introduced in November 2018 as the Marihuana Regulation and Taxation Act, S. 3040-C, A. 3506-C. This report will reference the Senate Bill 3040-C, which is identical to the bill introduced in the New York Assembly as A. 3506-C. Senate Bill 3040-C amends the bill introduced in January 2018 as S. 3040-B and the bill introduced in January 2017 as S. 3040-A.

<sup>4</sup> See N.Y. Dep’t of Health, *Assessment of the Potential Impact of Regulated Marijuana in New York State* (July 2018) [N.Y. Dep’t of Health, *Assessment of the Potential Impact of Regulated Marijuana in New York State*], [https://www.health.ny.gov/regulations/regulated\\_marijuana/docs/marijuana\\_legalization\\_impact\\_assessment.pdf](https://www.health.ny.gov/regulations/regulated_marijuana/docs/marijuana_legalization_impact_assessment.pdf).

<sup>5</sup> See Press Release, Governor’s Press Office, Governor Cuomo Announces Workgroup to Draft Legislation for Regulated Adult-Use Marijuana Program (Aug. 2, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-workgroup-draft-legislation-regulated-adult-use-marijuana-program>; Press Release, Governor’s Press Office, Governor Cuomo Announces Series of Listening Sessions on Regulated Marijuana (Aug. 30, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-series-listening-sessions-regulated-marijuana>; Press Release, Governor’s Press Office, Governor Cuomo Announces Two Additional Regulated Marijuana Listening Sessions (Sept. 21, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-two-additional-regulated-marijuana-listening-sessions>.

<sup>6</sup> According to the Federal Bureau of Investigation (“FBI”), 1,632,921 people were arrested in 2017 nationwide for drug abuse violations. See Fed. Bureau of Investigation, Unif. Crime Reporting Program, *2017 Crime in the United States: Table 29*, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-29>. Of these people, the FBI reported that 36.7%—or approximately 599,284—were arrested for marijuana possession, comprising the single largest cohort of people arrested for drug abuse violations that year. See Fed. Bureau of Investigation, Unif. Crime Reporting Program, *2017 Crime in the United States: Arrest Table*, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/arrest-table>.

<sup>7</sup> Substance Abuse & Mental Health Servs. Admin. Ctr. for Behavioral Health Statistics and Quality (“SAMHSA”), *Results from the 2016 National Survey on Drug Use and Health 229* (Sept. 2017) [SAMHSA, *Results from the National Survey*], <https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.pdf>.

<sup>8</sup> Of this 86%, 48% were Black, 38% were Hispanic, and only 9% were White. See N.Y. Dep’t of Health, *Assessment of the Potential Impact of Regulated Marijuana in New York State*, at 12.

Criminal Possession of Marihuana in the Fifth Degree, 48% were black, 38% were Hispanic, and 9% were white.<sup>9</sup> Additionally, arrests of Blacks and Hispanics accounted for between 86% and 89% of cannabis possession arrests in each of the years from 2013-2017.<sup>10</sup> This disparate enforcement has led to poorer economic outcomes, poorer health outcomes, and poorer youth outcomes for communities of color.<sup>11</sup>

In states where adult use is legalized, total numbers of arrests have decreased, resulting in significantly lower numbers of people of color suffering criminal justice interactions because of their cannabis use. Nonetheless, disparate arrest rates for violations of cannabis laws have persisted in these jurisdictions. In fact, while total numbers of arrests have decreased, the proportion of arrests for people of color has remained constant or even increased, indicating that systemic disparities still flourish.<sup>12</sup> No state with cannabis legalization laws has fully decriminalized cannabis-related offenses. This means that individuals who use, possess, sell, or purchase cannabis outside of the cannabis regulations are still subject to arrest, prosecution, and incarceration, including in states allowing regulated legalized use.

As discussed in greater detail below, if cannabis is legalized in New York State, the City will continue to work to reduce disparate enforcement of cannabis laws, mitigate previous harms, and empower those disproportionately affected by criminal enforcement.<sup>13</sup>

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<sup>9</sup> See Manhattan Dist. Att’y, *May 2018 Report*, at 31. Other statistics in the report underline the vast overrepresentation of people in color in cannabis arrest numbers: Forest Hills, Queens is 16% Black and Latinx, but people of color make up 80% of arrests; in Flushing, Queens, people of color make up 19% of the population and 71% of arrests; Greenpoint, Brooklyn’s numbers are 19% and 71%; Park Slope, Brooklyn is 24% and 73%; and Williamsburg, Brooklyn is 37% and 83%. *Id.* at 32.

<sup>10</sup> In the most recent 10-year period, arrests in New York City for open cannabis possession hit a peak in 2011, with 51,051 arrests, declining to 17,881 in 2017. Source: Mayor’s Office of Criminal Justice Analysis of Computerized Criminal History Data provided by DCJS.

<sup>11</sup> See N.Y. Dep’t of Health, *Assessment of the Potential Impact of Regulated Marijuana in New York State*, at 12.

<sup>12</sup> While arrest rates for cannabis possession and distribution have decreased across the board, the benefits have been more pronounced for White people. For instance, the number of cannabis arrests initially after legalization of cannabis in Colorado decreased by 51% for Whites, 33% for Hispanics, and 25% for African-Americans, and the cannabis arrest rate for African-Americans in 2014 was almost three times the arrest rate of White people. See Colo. Dep’t of Pub. Safety, *Marijuana Legalization in Colorado: Early Findings* (Mar. 2016), at 21, <https://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf>. Colorado cannabis arrests decreased overall by 52% between 2012 and 2017, but the 2017 cannabis arrest rate for Blacks was nearly double that for Whites. See Colo. Div. of Criminal Justice, Dep’t of Pub. Safety, *Impacts of Marijuana Legalization in Colorado. A Report Pursuant to Senate Bill 13-283 1* (Oct. 2018), at 20, [http://cdpsdocs.state.co.us/ors/docs/reports/2018-SB-13-283\\_report.pdf](http://cdpsdocs.state.co.us/ors/docs/reports/2018-SB-13-283_report.pdf). In addition, while the rate of juvenile cannabis arrests in Colorado decreased between 2012 and 2017 by 22%, White juvenile arrests decreased by 21%, whereas Hispanic juvenile arrests decreased by 4% and Black juvenile arrests decreased by 15%. See *id.*

In Oregon, the arrest rate for Black adults was more than 50% higher than that of White adults in the year after legalization. See Or. Health Auth. Pub. Health Div., *Marijuana Report: Marijuana Use, Attitudes, and Health Effects in Oregon* 69 (Dec. 2016), <https://apps.state.or.us/Forms/Served/le8509b.pdf>.

In Washington, D.C., in 2017, 92% of arrests for cannabis distribution and 75% of arrests for cannabis consumption were Black residents in Washington D.C., who comprise only 47% of the District’s population. See Drug Policy Alliance, *Stark Racial Disparities and Disturbing Growth in Washington D.C. Marijuana Arrests Despite Legalization* (Aug. 8, 2018), <http://www.drugpolicy.org/press-release/2018/08/stark-racial-disparities-and-disturbing-growth-washington-dc-marijuana>.

<sup>13</sup> Other states have started to address past harms as well. For example, California recently enacted a law providing automatic expungement for certain previous cannabis convictions. See Cal. Health & Safety Code § 11361.9. California has also developed an extensive equity program geared toward providing opportunity to those in communities most negatively affected by cannabis enforcement. See Cal. Bureau of Cannabis Control, *Overview of California Cannabis Equity Programs* (Feb. 2018), [https://bcc.ca.gov/about\\_us/meetings/materials/20180301\\_equ\\_overview.pdf](https://bcc.ca.gov/about_us/meetings/materials/20180301_equ_overview.pdf); S. 1294, 2018 Leg., Reg. Sess. (Cal. 2018) (creating a statewide cannabis equity program through the California Cannabis Equity Act).

## 2. Public Health Risks of Legalization

While legalization has demonstrated benefits, it is not without potential risks to public health. Cannabis can have negative effects on individual health outcomes if misused. The potential for health harms due to cannabis use is greatest when use occurs at a younger age.<sup>14</sup> In particular, individuals who initiate cannabis use during adolescence are more likely to engage in heavy use or to develop cannabis use disorder than people who start cannabis use during adulthood.<sup>15</sup> Adults also face some cannabis-related health risks, which are usually associated with heavy use.<sup>16</sup>

The majority of research on harms associated with cannabis use show these harms occurring in the short term. For example, although there is some evidence that cannabis use is associated with short-term cognitive impairment,<sup>17</sup> these cannabis-associated effects have not been shown to persist over time.<sup>18</sup>

For young people, while cannabis use may only temporarily diminish cognitive and academic function and is not associated with permanent cognitive damage,<sup>19</sup> frequent use can have adverse effects on academic performance and educational attainment over time.<sup>20</sup>

While long-term cannabis smoking is associated with respiratory symptoms like cough, asthma, and bronchitis,<sup>21</sup> evidence indicates that cannabis smoking may not increase an individual's risk for cancers associated with tobacco use, including lung, head, or neck cancers.<sup>22</sup>

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<sup>14</sup> See David M. Fergusson, et al., *Cannabis Use and Later Life Outcomes*, 103 *Addiction* 969, 975 (2008).

<sup>15</sup> See Nat'l Acad. of Sci., Eng'g, & Med. ("NASEM"), *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* (2017) [NASEM, *The Health Effects of Cannabis and Cannabinoids*].

<sup>16</sup> For example, there is strong research evidence showing that long-term cannabis smoking causes chronic respiratory problems in adults and that smoking cannabis while pregnant increases the risk of lower birth weights for babies. See *id.*

<sup>17</sup> See Madeleine H. Meier, et al., *Persistent Cannabis Users Show Neuropsychological Decline from Childhood to Midlife*, 109 *PNAS* E2657 (2012); J.C. Scott, et al., *Association of Cannabis With Cognitive Functioning in Adolescents and Young Adults: a Systematic Review and Meta-analysis*, 75 *JAMA Psychiatry* 585 (2018) [J.C. Scott, et al., *Association of Cannabis With Cognitive Functioning in Adolescents and Young Adults*].

<sup>18</sup> See J.C. Scott, et al., *Association of Cannabis With Cognitive Functioning in Adolescents and Young Adults*; I. Grant, et al., *Non-acute (Residual) Neurocognitive Effects of Cannabis Use: A Meta-analytic Study*, 9 *J. Int'l Neuropsychol. Soc'y* 679 (2003); A.M. Schreiner, et al., *Residual Effects of Cannabis Use on Neurocognitive Performance After Prolonged Abstinence: A Meta-Analysis*, 20 *Experimental & Clinical Psychopharmacology* 420 (2012).

<sup>19</sup> See Dustin Pardini, *Unfazed or Dazed and Confused: Does Early Adolescent Marijuana Use Cause Sustained Impairments in Attention and Academic Functioning?*, 43 *J. Abnormal Child Psychol.* 1203 (2015). For resources regarding limits on educational attainment and exposure to the criminal justice system, see Amelia M. Arria, et al., *The Academic Consequences of Marijuana Use During College*, 29 *Psychol. of Addictive Behav.* 564 (2015) [Amelia M. Arria, et al., *The Academic Consequences of Marijuana Use During College*]; Kerry M. Green, et al., *Does Heavy Adolescent Marijuana Lead to Criminal Involvement in Adulthood? Evidence from a Multiwave Longitudinal Study of Urban African Americans*, 112 *Drug & Alcohol Dependence* 117 (2010).

<sup>20</sup> While research on the association between cannabis use and educational attainment remains scant, at least one study has found that early use may have an adverse impact. See Amelia M. Arria, et al., *The Academic Consequences of Marijuana Use During College*.

<sup>21</sup> See NASEM, *The Health Effects of Cannabis and Cannabinoids*.

<sup>22</sup> See *id.*

Recent studies show that following legalization in other states, past-month use generally remained stable or declined among adolescents and college students.<sup>23</sup> A Colorado poll indicated that cannabis use among teenagers had actually dipped and that the rate of use by Colorado teens was somewhat lower than the national average.<sup>24</sup> In New York State, 19.3% of teens reported using cannabis in the prior 30 days.<sup>25</sup> In the City, more than one-third (33%) of New Yorkers aged 18 to 25 reported cannabis use in the prior year. More than one-quarter (26%) aged 26 to 34 reported prior year use.<sup>26</sup>

As discussed below, the City supports measures to deter cannabis use by individuals under the age of 21, in addition to measures that will mitigate or eliminate legal and academic consequences relating to cannabis for young individuals. Moreover, the City supports launching public awareness campaigns relating to cannabis use, providing harm-reduction services, and implementing statewide labeling, packaging, and advertising standards, so that consumers can make informed decisions about the safe use of cannabis.

### **3. Legalization of Adult Cannabis Use in Other States**

Ten states and the District of Columbia have legalized the use of cannabis for adults 21 and older. Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, and Washington legalized the possession, cultivation, distribution, and sale of cannabis, while the District of Columbia and Vermont legalized possession but not commercial cultivation or sale. The clear trend in New York's peer and neighboring states is toward legalization of both possession and sale of cannabis: an adult-use cannabis bill was passed out of legislative committee in Connecticut in April 2018,<sup>27</sup> a bill passed out of legislative committee in New Jersey in November 2018,<sup>28</sup> another bill was introduced in Pennsylvania in September 2018,<sup>29</sup> and a report was recently issued describing a pathway for legalization in New Hampshire.<sup>30</sup> In addition, Canada, with which New York State shares a long border, also recently legalized adult use of cannabis.

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<sup>23</sup> See David C. R. Kerr, et al., *Changes in Undergraduates' Marijuana, Heavy Alcohol and Cigarette Use Following Legalization of Recreational Marijuana Use in Oregon*, 112 *Addiction* 1992 (2017) (college students); SAMHSA, *National Survey on Drug Use and Health: Comparison of 2014-2015 and 2015-2016 Population Percentages*, <https://www.samhsa.gov/data/sites/default/files/NSDUHsaeShortTermCHG2016/NSDUHsaeShortTermCHG2016.htm>; SAMHSA, *Results From the 2016 National Survey* (Table 4.10 A Past Year Initiation of Substance Use among Persons Aged 12 or Older Who Initiated Use Prior to Age 18, by Gender: Numbers in Thousands, 2015 and 2016).

<sup>24</sup> See Colo. Div. of Criminal Justice, Dep't of Pub. Safety, *Impacts of Marijuana Legalization in Colorado. A Report Pursuant to Senate Bill 13-283* 5 (Oct. 2018), [http://cdpsdocs.state.co.us/ors/docs/reports/2018-SB-13-283\\_report.pdf](http://cdpsdocs.state.co.us/ors/docs/reports/2018-SB-13-283_report.pdf).

<sup>25</sup> Current New York State rates are close to national averages. See N.Y.C. Dep't of Health & Mental Hygiene, *Youth Risk Behavior Survey, Table 1d: Prevalence of Marijuana Use (Past 30 Days) Among Youth in the United States, New York City, and New York State, 1999-2015*, <https://www1.nyc.gov/assets/doh/downloads/pdf/basas/youthdrugtrends/mj.pdf>. Note that New York statistics are collected only from public schools, while U.S. statistics are collected from both public and private schools.

<sup>26</sup> SAMHSA, *National Survey on Drug Use and Health, 2003-2005, 2006-2010 (revised 3/12), and 2011-2016*.

<sup>27</sup> See H. 5394, Gen. Assemb., Feb. 2018 Sess. (Conn. 2018).

<sup>28</sup> See S. 2703, 218th Leg., Reg. Sess. (N.J. 2018).

<sup>29</sup> See H. 928, Gen. Assemb., 2017 Sess. (Pa. 2017).

<sup>30</sup> See Patrick Abrami, State of New Hampshire, *Final Report of the Commission to Study the Legalization, Regulation, and Taxation of Marijuana* (Nov. 1, 2018), <http://mediad.publicbroadcasting.net/p/nhpr/files/201811/PotReport.pdf>.

This underscores the importance of a deliberate approach to ensuring safe use of cannabis and generating economic opportunities for diverse communities to thrive in a competitive marketplace.

#### **4. Federal Prohibition**

Even as state legalization efforts are realized, , cannabis continues to be prohibited under federal law, causing special complexities and hurdles in legalized states. Cannabis has been classified as a Schedule I drug under federal law since passage of the Controlled Substances Act in 1970, placing cannabis in the same category as addictive drugs like heroin, which has greater health risks (including high risk of fatal overdose) and is not permitted for medical uses in the United States.<sup>31</sup> Under federal law, doctors are prohibited from prescribing Schedule I drugs, and criminal penalties—including both fines and substantial prison sentences—can be imposed on anyone convicted of possessing, producing, or distributing them.<sup>32</sup>

The federal cannabis prohibition poses significant legal and practical complications in jurisdictions that have legalized at the state level. Federal cannabis enforcement has the potential to severely undermine state efforts to permit cannabis possession, use, and distribution. Accordingly, states have sought guidance from the federal government about whether and how it will enforce the federal prohibition in states that move toward decriminalization and legalization.

In 2011, Congress passed an appropriations rider forbidding the Justice Department from spending funds on enforcement against medical cannabis in states with approved reforms.<sup>33</sup> Under the Obama administration, the Department of Justice, acknowledging the states' role in the enforcement of federal cannabis laws, permitted states to establish their own regulatory structures to legalize adult cannabis use, as long as they abided by eight federal enforcement priorities (the "Cole Memo").<sup>34</sup>

These priorities are to prevent: (i) distribution of cannabis to minors; (ii) cannabis revenue from funding criminal enterprises, gangs, or cartels; (iii) diversion of cannabis to other states; (iv) use of state-authorized activity as a cover or pretext for trafficking other illegal drugs or for other illegal activity; (v) violence and use of firearms in cultivation and distribution of cannabis; (vi) drugged driving and exacerbation of other adverse public health effects; (vii) growing cannabis

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<sup>31</sup> See 21 U.S.C. § 801 *et seq.*

<sup>32</sup> See 21 U.S.C. § 841 *et seq.*

In fiscal year 2016, 18% of all federal drug sentences were cannabis-related, with an average prison sentence of 28 months. See U.S. Dep't of Justice Drug Enf't Admin., *2017 National Drug Threat Assessment* 114–15 (Oct. 2017), [https://www.dea.gov/sites/default/files/2018-07/DIR-040-17\\_2017-NDTA.pdf](https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf).

<sup>33</sup> See Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, H.R. 2578, *amended by* H. Amend. 332, 114th Cong. (2015) (the "Rohrabacher-Farr Amendment"). This amendment is not permanent law and is contingent on the continuing resolutions that fund the federal government.

<sup>34</sup> See James M. Cole, Deputy Attorney Gen., Memorandum for all United States Attorneys: Guidance Regarding Marijuana Enforcement, at 1-2 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

on public lands and attendant public safety and environmental dangers posed by cannabis production on public lands; and (viii) cannabis possession or use on federal property.<sup>35</sup>

The Cole Memo states that the federal government would opt not to prosecute more localized or lower-level cannabis cases in jurisdictions with some form of cannabis legalization so long as they have “implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession” of cannabis.<sup>36</sup> The jurisdictions that have legalized adult-use cannabis have followed this enforcement regime.<sup>37</sup>

On January 4, 2018, then Attorney General Jeff Sessions released a memorandum for all United States Attorneys rescinding the Obama administration’s cannabis enforcement guidance and leaving enforcement to the prosecutorial discretion of each U.S. Attorney.<sup>38</sup> Despite the rescission of the Cole Memo, there are indications that federal enforcement practices may not change dramatically.<sup>39</sup>

Nevertheless, federal criminalization creates unique problems for the cannabis industry in legalized states. Federally chartered banks are hesitant to lend to cannabis businesses for fear of violating federal anti-money-laundering statutes. Forced to rely on cash transactions, cannabis businesses face added operational and security challenges. The potential that they could be used for money laundering remains a law enforcement concern. In the tax context, federal criminalization is also costly, as federal deductions for business expenses are not available to cannabis companies legal under state law. Employees whose income is derived from state-licensed cannabis businesses may face their own challenges in holding bank accounts and obtaining federally-secured mortgages. Moreover, non-citizens convicted of consuming or

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<sup>35</sup> See *id.* at 1-2.

<sup>36</sup> See *id.* at 3.

<sup>37</sup> In addition to the 11 jurisdictions (including Washington, D.C.) that have legalized adult-use cannabis to varying extents, 33 states and D.C. have approved medical cannabis programs. See Nat’l Conference of State Legislatures, *State Medical Marijuana Laws* (Nov. 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. Another nine have legalized medical only use. Nine states—New York, Connecticut, Delaware, Illinois, Maryland, Mississippi, Nebraska, New Hampshire, and Rhode Island—have decriminalized possession of small amounts of cannabis for adult personal use, but not fully legalized adult personal use. See Cyrus R. Vance, Jr., Office of the Manhattan Dist. Attorney, *Marijuana, Fairness and Public Safety: A Report on the Legalization of Recreational Marijuana in the United States*, at 6 (May 2018) [Manhattan Dist. Att’y, *May 2018 Report*], <https://www.manhattanda.org/wp-content/uploads/2018/05/DANY-Report-on-the-Legalization-of-Recreational-Marijuana-Final.pdf>. Four states (Minnesota, Missouri, North Carolina, and Ohio) still classify cannabis use as a criminal misdemeanor, but no longer punish with jail time. See *id.* at 5.

<sup>38</sup> See Jefferson B. Sessions, III, Attorney Gen., Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>39</sup> See Ian Stewart & Dean Rocco, *Federal Cannabis Legalization May Be Closer Than You Think*, Law360.com (July 16, 2018), <https://www.law360.com/articles/1063280/federal-cannabis-legalization-may-be-closer-than-you-think>; Andrew Blake, *Sessions: States Have Right to Legalize Pot, but Federal Ban Should Stay in Place*, Wash. Times (July 27, 2018), <https://www.washingtontimes.com/news/2018/jul/27/jeff-sessions-says-states-have-right-legalize-mari/> (A.G. Sessions statement that “states have a right to set their own laws and will do so, and we will follow the federal law”). See also Press Release, U.S. Attorney’s Office, Statement from U.S. Attorney Andrew Lelling Regarding the Legalization of Recreational Marijuana in Massachusetts (July 10, 2018), <https://www.justice.gov/usao-ma/pr/statement-us-attorney-andrew-elling-regarding-legalization-recreational-marijuana> (providing that the areas of focus for the U.S. Attorney of Massachusetts reflect the priorities contained in the Cole Memo).

possessing cannabis in states where such conduct is legal may face deportation by the federal government.<sup>40</sup>

## 5. New York City-Specific Considerations for Cannabis Regulation

Enforcement of cannabis possession in the City has already moved toward decriminalization. The Marijuana Reform Act of 1977 decriminalized private possession of small amounts of cannabis, with a maximum penalty of a fine of no more than \$100.<sup>41</sup> On September 1, 2018, the New York City Police Department changed its cannabis enforcement policies in recognition that public safety does not demand arrests for all cannabis-related offenses,<sup>42</sup> resulting in a precipitous drop in cannabis arrests. In the five weeks after the New York City Police Department's new enforcement policy went into effect, cannabis arrests dropped from between 266-342 arrests per week, to between 21-31 arrests per week for the same period.<sup>43</sup> In an effort to reduce disparate outcomes, the Manhattan District Attorney's Office announced that as of August 1, 2018, it would not prosecute cannabis possession or smoking charges "in the absence of an identifiable public safety risk," instead recommending issuance of summonses. Brooklyn's District Attorney's Office has adopted a similar policy, declining to prosecute most cases involving small amounts of cannabis and inviting those convicted to request conviction dismissals.<sup>44</sup>

However, with respect to broader legalization, New York City has specific concerns that other states and localities may not share. For example, New York City has the highest population density of any major U.S. city, with over 27,000 people per square mile.<sup>45</sup> The City's population density means that certain potential regulations (e.g., fire safety with home growth, secondhand smoke in apartment buildings and City parks) will impact the City differently than in other areas where legalization has been attempted to date.<sup>46</sup>

The City has had a decidedly positive experience with the New York City Criminal Justice Reform Act ("CJRA"), enacted in 2016, which created civil enforcement alternatives for certain low-level, non-violent offenses that had been subject to criminal enforcement, including arrest, such as having an open container of alcohol, littering, public urination, unreasonable noise, and violating Parks Department rules. CJRA's intent was to "create more proportional penalties" for offenses

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<sup>40</sup> In 2013, cannabis possession was the fourth most common cause of deportation for any offense. See Drug Policy Alliance, *S. 1689, H.R. 4815 Marijuana Justice Act: Ending Prohibition with a Racial Justice Focus* (Sept. 2018), [http://www.drugpolicy.org/sites/default/files/mjfactsheet\\_0.pdf](http://www.drugpolicy.org/sites/default/files/mjfactsheet_0.pdf).

<sup>41</sup> See *id.* at 4.

<sup>42</sup> See Comm'r James O'Neill, N.Y.C. Police Dep't, *Prepare for Fewer Pot Arrests: The Police Commissioner Explains the NYPD's New Approach* (Aug. 31, 2018), <https://www1.nyc.gov/site/nypd/news/s0831/prepare-fewer-pot-arrests-police-commissioner-explains-nypd-s-new-approach>

<sup>43</sup> . Source: NYPD.

<sup>44</sup> See Manhattan Dist. Att'y, *May 2018 Report*, at 3; Associated Press, *Brooklyn DA's Plan Could Dismiss 20,000 Marijuana Convictions*, CBS N.Y. (Sept. 7, 2018), <https://newyork.cbslocal.com/2018/09/07/plan-to-dismiss-marijuana-convictions/>.

<sup>45</sup> See N.Y.C. Dep't of City Planning, *New York City Population: Population Facts*, <https://www1.nyc.gov/site/planning/data-maps/nyc-population/population-facts.page>.

<sup>46</sup> San Francisco is the second densest major U.S. city, with over 18,000 people per square mile. See Mike Moffitt, *San Francisco's Population Density: A Visual Comparison*, S.F. Gate (Mar. 13, 2017), <https://www.sfgate.com/news/slideshow/San-Francisco-s-Population-Density-A-visual-142338.php>.

that had been “over-criminaliz[ed]” and to address criminal justice enforcement that had disparately impacted communities of color.<sup>47</sup> In enacting the CJRA, the City Council also noted that people in these communities had been burdened by the requirement of personal court appearances in almost all cases and by permanent criminal records resulting from enforcement of these offenses.<sup>48</sup> Between June 2017 and September 2018, criminal court summonses dropped 89% and warrants for CJRA-eligible offenses dropped 94% as the City moved toward enforcement via civil court summonses.<sup>49</sup> The City’s experience with passing and implementing the CJRA informs the City’s vision of how social justice concerns can guide a cannabis enforcement scheme, to appropriately protect public safety while lightening the burdens of criminal justice involvement for communities of color.

## **Recommendations of the Task Force**

### **I. Recommendations to Establish Effective Cannabis Regulation**

#### **1. Develop Effective Local Control to Regulate Adult-Use Cannabis**

Strong cooperation between the State and local governments is essential to building a sound legalized adult-use cannabis industry from the ground up. The City will seek creation of a centralized governing body to coordinate statewide issues and set statewide regulation and safety standards, but, at the same time, reserve substantial powers to local governments to regulate on a wide range of local issues.<sup>50</sup>

The City will support robust state infrastructure to develop and oversee appropriate State-level regulation to facilitate safe and stable implementation of legalization. For example, , the City would benefit from statewide standards for product safety, labeling, packaging, marketing, and advertising to ensure the safety of cannabis products offered for sale in New York City. The City supports a seed-to-sale tracking program to track movement of cannabis and cannabis products throughout the distribution chain across the State. In the absence of federal banking opportunities, City businesses would be well served by State assistance to coordinate access to financing. The City envisions integrating local and State licensing in a dual licensing structure that creates opportunity, not red tape. Moreover, the City will seek to partner with the State Department of Health regarding research into the effects of legalization to ensure comparability

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<sup>47</sup> New York City Council, *The Criminal Justice Reform Act: One Year Later*, <https://council.nyc.gov/the-criminal-justice-reform-act-one-year-later/>.

<sup>48</sup> *See id.*

<sup>49</sup> *See* New York City Mayor’s Office of Criminal Justice, *Summons Reform: One Year After Legislation (CJRA)*, [https://criminaljustice.cityofnewyork.us/wp-content/uploads/2018/09/summons\\_ref\\_factsheet\\_v3.pdf](https://criminaljustice.cityofnewyork.us/wp-content/uploads/2018/09/summons_ref_factsheet_v3.pdf).

<sup>50</sup> California, Colorado, and Massachusetts, for example, each coordinate state and local efforts under cooperative regimes that allow for substantial local input and control on matters involving licensing. *See* Cal. Bus. & Prof. Code §§ 26032(a)(2), 26055(d), (g)(2), 26200; Colo. Rev. Stat. § 44-12-301; Mass. Gen. Laws ch. 94G, § 3.

of data across regional lines. And the City will staunchly advocate for lifting burdens of criminal records for cannabis offenses at the State level.

But substantial local control will also be critical to meet the needs of the State's diverse communities. There is no one-size-fits-all blueprint for implementing cannabis legalization in every New York community. The City will seek authority to regulate the cannabis industry on local issues and to develop innovative programs tailored to the needs of the City's population without State preemption. This consideration holds particular weight in a city like New York, where the diversity of its residents and sheer population density should drive specific regulation distinct from other locales. Areas where local control is particularly key include ensuring economic opportunities for small businesses and those burdened with criminal records, developing licensing programs, determining whether and how to allow public consumption sites, and regulation of home and commercial cultivation and manufacturing.

Authorizing local control would be a shift from New York's existing Alcoholic Beverage Control laws ("ABC laws"). Under the ABC laws, all regulatory authority is vested with a single State agency, the State Liquor Authority, which is not authorized to delegate powers to localities. State preemption on alcohol related regulatory matters is explicit, including with respect to licensing and enforcement. This regulatory scheme severely limits the ability of New York City to respond to alcohol-related quality of life issues that arise at the community level, and makes it difficult for government to respond to the near-constant innovations of the alcohol industry and their interplay with local drinking trends.

Municipalities do not face these constraints in tobacco regulation, which do not preempt local control. For instance, New York City has passed and amended local laws to:

- i. adapt to shifting tobacco use norms, for example, by expanding the Smoke-Free Air Act to include outdoor spaces like parks and benches;
- ii. account for the introduction of new products on the market, like e-cigarettes, or the differentiation of existing products, such as flavored tobacco, that are found to have risks for youth; and
- iii. regulate associated businesses as they emerge, like New York City hookah bars.

Local authority in the tobacco arena allows New York City to develop tobacco control policies that respond to the City's distinct needs and take into account the City's population density, housing landscape, enforcement capacity, social justice context, and epidemiologic data. The net effect is that local tobacco laws address the specific public health and safety concerns arising in New York City. The City proposes that State legislation to legalize adult-use cannabis similarly permits localities to regulate in ways that meet the unique needs of communities across the State.

Municipal governments are closest to grassroots efforts; local control would best ensure that communities disparately affected by historical criminalization are engaged in community and

context-responsive programming and opportunities post-legalization. The City would benefit from State legislation that provides the City ample leeway to build a potential equity license program to increase access to economic opportunity for key target populations.

Moreover, to redress past harms and prevent future health hazards, the City will seek funds be directed to municipalities to support local cannabis regulation and enforcement regimes, as well as innovations. The City would use its local authority to ensure that legalized cannabis can be used and sold safely in the City, while driving opportunities to those who need them most.

## **2. Implementation of Commercial Cannabis Legalization Should Be Carefully Timed to Allow Advance State and Local Preparation**

The City must learn from the growing pains of other jurisdictions that were in the vanguard of legalization. We should avoid hasty implementation of commercial cannabis legalization that results in a patched together regulatory system and outsized influence by special interest groups.

Therefore, legalization should take effect on a timetable allowing the State and City to plan and issue regulations, so that the contours of permissible production and sale are clear before commercialization begins. This can avoid the confusion of rapidly changing regulation and reduce barriers to market entry for equity applicants. It can also allow for public education and deployment of City resources to protect the health and safety of New Yorkers—particularly of our youth.

## **II. Recommendations to Lift Burdens of Criminalization While Protecting Public Health and Safety**

### **1. Limit Legal Sale and Possession of Cannabis to Adults Ages 21 and Over**

As all other jurisdictions have done, cannabis should be legalized only for adults age 21 and over. Possession and use of cannabis by persons under the age of 21 should be prohibited, with limited exceptions relating to medical cannabis. This would be consistent with the federal enforcement guidance in the Cole Memo<sup>51</sup> and address public safety and health concerns.

### **2. Provide Automatic Expungement of Prior Criminal Records upon Legalization of Identical Conduct**

The City strongly endorses State legislation provide that criminal records, including records of arrests and convictions for past cannabis-related conduct that is no longer prohibited, be automatically expunged upon cannabis legalization, subject to an opportunity for prosecutors to raise objections in individual cases.

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<sup>51</sup> See James M. Cole, Deputy Attorney Gen., Memorandum for all United States Attorneys: Guidance Regarding Marijuana Enforcement at 1-2 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

A primary impetus driving efforts to legalize adult cannabis use—and a City imperative—has been to address the impact of past criminal enforcement of cannabis prohibitions, particularly on communities of color disproportionately affected by cannabis-related arrests and incarceration. As is true across the country, and discussed above, African-American and Latinx residents in New York City are arrested for cannabis offenses at much higher rates than white residents, despite similar rates of use.

The economic, emotional, and other burdens of cannabis-related arrests and incarceration are therefore disproportionately borne by communities of color.<sup>52</sup> A criminal record for a past cannabis-related offense can have a devastating impact on an individual's family relationships, employment and educational opportunities, access to student loans and federally-funded housing, and other facets of life.<sup>53</sup>

An automatic process for expunging criminal records for cannabis-related convictions for conduct no longer criminalized offers the surest means to mitigate a legacy of racial disparities and harms of past cannabis enforcement.

Most states that have legalized adult-use cannabis allow an individual to petition for expungement or sealing of criminal records, resentencing of certain past convictions, or both.<sup>54</sup> However, for the vast majority of people with criminal records, these measures have had little practical effect, given the considerable barriers they face in accessing this relief, ranging from

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<sup>52</sup> See N.Y. Dep't of Health, *July 2018 Assessment*, at 4.

<sup>53</sup> See, e.g., Amanda Agan & Sonja B. Starr, *The Effect of Criminal Records on Access to Employment*, 107 Am. Econ. Rev.: Papers & Proc. 560 (2017); Oakland City Council, *Equity Analysis and Proposed Medical Cannabis Ordinance Amendments 5* (Feb. 2017), <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/report/oak063627.pdf>.

<sup>54</sup> California, Colorado, Massachusetts, Nevada, Oregon, Vermont, Washington, and the District of Columbia have statutory provisions to seal or expunge criminal records. Until recently, individuals in California with prior marijuana convictions on their criminal records, including youths under 18, could petition the court where they were convicted to have prior marijuana convictions reduced to misdemeanors or infractions or dismissed, no matter how old the convictions, at little to no cost. See Cal. Health & Safety Code § 11361.8. Colorado allows for misdemeanor cannabis-related convictions to be sealed. See Colo. Rev. Stat. § 24-72-710. In Massachusetts, felonies may be sealed after 10 years if the individual has no subsequent conviction (5 years for misdemeanors). See Mass. Gen. Laws ch. 276, § 100A. In Nevada, sealing is available after a waiting period of 2 to 10 years for felonies (depending on the offense) and a 1-7 year waiting period for misdemeanors, if there is no subsequent conviction during the waiting period. See Nev. Rev. Stat. §§ 179.245, 179.285, 179.301, 453.3365. Oregon allows for less serious non-violent offenses to be set aside and sealed after a waiting period of 1-20 years if the individual has no other conviction for 10 years (or ever, if setting aside a Class B felony) or arrest within 3 years. See Or. Rev. Stat. § 137.225. Oregon also allows for felony cannabis-related convictions to be resentenced as Class A misdemeanors. See Or. Rev. Stat. § 161.705. Vermont allows for sealing or expungement of non-violent misdemeanors and 4 types of minor felonies after 5 years if the individual has no further conviction; if the individual is convicted of a misdemeanor during the waiting period, the waiting period increases to at least 10 years, with no conviction in the previous 5 years. See Vt. Stat. Ann. tit. 13, §§ 7601-09. In Washington, all but the most serious felonies and misdemeanors may be vacated and records sealed after a waiting period of 3-10 years. See Wash. Rev. Code § 9.94A.640. The District of Columbia has a sealing provision for selected misdemeanors and a single felony after a waiting period of at least 2 years. See D.C. Code §§ 16-803, 16-806.

Although they have not yet legalized adult cannabis use, Maryland and New Hampshire have made it easier for people with certain cannabis-related convictions to get their records sealed or expunged. See Sophie Quinton, *In These States, Past Marijuana Crimes Can Go Away*, Pew Charitable Trusts (Nov. 20, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/20/in-these-states-past-marijuana-crimes-can-go-away>.

Although Alaska and Maine do not have general expungement laws, all jurisdictions that have legalized adult cannabis use have some sort of system in place to expunge or seal juvenile records either after a waiting period or when the individual reaches the age of majority. See Alaska Stat. §§ 47.12.300(c), (e), (f); Cal. Health & Safety Code § 11361.5(a); Colo. Rev. Stat. § 19-1-306; Me. Stat. tit. 15, §§ 2251-59, 3308; Mass. Gen. Laws ch. 276, § 100B; Nev. Rev. Stat. § 62H.140; Or. Rev. Stat. §§ 419A.262, 419C.610; Vt. Stat. Ann. tit. 33, § 5119; Wash. Rev. Code § 13.50.260; D.C. Code § 16-2335(a).

lack of resources for legal assistance, to lack of awareness that expungement is available, to reluctance to have further interaction with the criminal justice system. These barriers are reflected in the low numbers of petition filings. For example, according to the Oregon Judicial Department, an estimated 78,000 cannabis-related convictions could be set aside in that state, but courts received only 388 such petitions in 2015, 453 in 2016, and 365 as of November 2017.<sup>55</sup> California saw only 5,000 petitions submitted from an estimated pool of 218,000 eligible individuals.<sup>56</sup>

Responding to criticism that its resealing and resentencing systems for cannabis-related charges were largely inaccessible, California recently enacted a statewide process for automatic sealing and expungement of past cannabis convictions. Under the new system, the state's department of justice must review its database to identify potentially eligible past convictions and notify the prosecutor in the relevant jurisdiction, who then has a year to determine whether to challenge expungement based on a public safety threat.<sup>57</sup> If the prosecutor does not object, the record is expunged. Massachusetts recently enacted legislation that allows for sealing and expungement of criminal records for offenses that are no longer criminalized in that State, like simple cannabis possession.<sup>58</sup>

Earlier this year, the San Francisco District Attorney's Office moved to automatically expunge all cannabis-related misdemeanor convictions since 1975 and to review all cannabis-related felonies from the same period for possible resentencing.<sup>59</sup> Seattle, acting through its City Attorney's

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<sup>55</sup> See Sophie Quinton, *In These States, Past Marijuana Crimes Can Go Away*, Pew Charitable Trusts (Nov. 20, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/20/in-these-states-past-marijuana-crimes-can-go-away>.

<sup>56</sup> See Judicial Council of Cal., Criminal Justice Servs., *Proposition 64 Data Summary Report* (June 2018), <http://www.courts.ca.gov/documents/Prop64-Filings.pdf>; Lindsay Schnell, *Marijuana Reform: New California Law Gives People With Records a Do-Over*, USA Today (Oct. 1, 2018), <https://www.usatoday.com/story/news/2018/09/30/california-passes-landmark-marijuana-law-residents-reclaim-lives/1340729002/> ("The Judicial Council of California estimates at least 218,000 residents would benefit from the new law.").

<sup>57</sup> See A. 1793, ch. 993, 2018 Assemb., Reg. Sess. (Cal. 2018). See also Lindsay Schnell, *Marijuana Reform: New California Law Gives People With Records a Do-Over*, USA Today (Oct. 1, 2018), <https://www.usatoday.com/story/news/2018/09/30/california-passes-landmark-marijuana-law-residents-reclaim-lives/1340729002/>.

<sup>58</sup> See Mass. Gen. Laws ch. 276, § 100A; see also Michael Crowley, *Massachusetts Sets an Example for Bipartisan Criminal Justice Reform*, Brennan Ctr. (May 1, 2018), <https://www.brennancenter.org/blog/massachusetts-sets-example-bipartisan-criminal-justice-reform>.

<sup>59</sup> See Katie Zezima, *San Francisco to Clear All Marijuana Misdemeanor Convictions Dating to 1975*, Wash. Post (Jan. 31, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/01/31/san-francisco-to-clear-all-marijuana-misdemeanor-convictions-dating-to-1975/?utm\\_term=.342583aea2a9](https://www.washingtonpost.com/news/post-nation/wp/2018/01/31/san-francisco-to-clear-all-marijuana-misdemeanor-convictions-dating-to-1975/?utm_term=.342583aea2a9).

The San Diego and Alameda County District Attorneys' offices similarly began independently reviewing all misdemeanor and felony cannabis convictions in their jurisdictions, with the intention to expunge or downgrade them. See David Debolt, *Thousands of Marijuana Convictions Could be Reduced, Tossed Out Under Alameda County DA's Plan*, E. Bay Times (Feb. 20, 2018), <https://www.eastbaytimes.com/2018/02/20/thousands-of-marijuana-convictions-could-be-reduced-tossed-out-under-alameda-county-das-plan/>; Jade Hindmon, *San Diego Attorneys Work to Overturn Marijuana Convictions*, KPBS (Feb. 13, 2018), <https://www.kpbs.org/news/2018/feb/13/san-diego-attorneys-work-overturn-marijuana-convic/>.

Office, followed suit with similar measures.<sup>60</sup> There is also burgeoning federal support for automatic expungement.<sup>61</sup>

Currently, New York State’s Criminal Procedure Law permits sealing of criminal records under certain conditions, including completion of a drug treatment program, or if an individual has no other convictions within a 10-year period.<sup>62</sup> These sealing statutes require individual petitions and impose other requirements.<sup>63</sup> Once sealed, access to these records is severely restricted, and the underlying conviction is “deemed a nullity,” with the subject of the record deemed to be “restored . . . to the status he [or she] occupied before the arrest and prosecution.”<sup>64</sup> However, the record of the sealed arrest and conviction continues to exist, and New York does not currently permit the expungement, or erasure, of criminal records, meaning that sealed records remain available for disclosure in response to certain subpoenas or a court order. In the case of violation-level cannabis offenses, no subpoena or court order is required for disclosure—records remain publicly available, even if other related records are sealed.<sup>65</sup> Further, given that cannabis would remain illegal at the federal level even if legalized in New York State, federal authorities may still gain access to New Yorkers’ sealed records, which could impact their eligibility for federal benefits, disqualify people in need of federal housing assistance, and have negative immigration consequences, including deportation.

The goals of mitigating disparities and reducing harms would best be achieved by an automatic expungement process for conduct no longer criminalized, balanced with notice and opportunity for prosecutors to object based on specific threats to public safety. An automatic expungement process would ensure that previously-convicted individuals can obtain a “fresh start” with least burden.

While this method for expunging records for prior cannabis offenses should be adopted, it should also be acknowledged that consideration of prior cannabis-related convictions may be regarded as appropriate under certain circumstances even for conduct no longer criminal. For example, some may regard such prior convictions as relevant to assess an individual’s candidacy as a law enforcement officer or as a licensee permitted to work with vulnerable populations, scenarios

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<sup>60</sup> The Seattle City Attorney’s Office has opted to vacate misdemeanor cannabis convictions. See Daniel Beekman & Christine Clarridge, *Seattle to Vacate Hundreds of Misdemeanor Marijuana Convictions, Dismiss Charges*, Seattle Times (Feb. 8, 2018), <https://www.seattletimes.com/seattle-news/seattle-to-vacate-misdemeanor-marijuana-convictions-dismiss-charges/>; see also Or. Rev. Stat § 137.225 (establishing a process for setting aside convictions and sealing criminal records).

<sup>61</sup> The federal Marijuana Justice Act currently pending in Congress provides for automatic expungement of convictions related to cannabis use or possession. See Marijuana Justice Act, S. 1689, 115th Cong. § C(3) (2017).

<sup>62</sup> One provision (N.Y. Crim. Proc. Law § 160.58) requires petitioning the court and completion of a drug treatment program for drug-related misdemeanors or felonies. The other provision (N.Y. Crim. Proc. Law § 160.59) permits petitioning the court to seal records if the individual (of any age) has been crime-free for at least 10 years; the record has a maximum of two convictions, only one of which is a felony; and the record being sealed is not a sex offense, violent felony, or serious felony, as listed in the statute.

<sup>63</sup> See *id.*

<sup>64</sup> N.Y. Crim. Proc. Law § 160.60

<sup>65</sup> N.Y. Crim. Proc. Law § 160.55 requires the sealing of records by police departments and other law enforcement agencies upon a person’s conviction of certain violations and traffic infractions, including cannabis-related offenses; however, the law does not require the sealing of court records upon such convictions.

where a person’s ability to follow the law may be especially critical to the performance of their responsibilities. However, on balance, expungement better protects against undue collateral consequences resulting from prior convictions, including in immigration,<sup>66</sup> education,<sup>67</sup> and public housing contexts.<sup>68</sup> Accordingly, the City strongly favors legislation that recognizes automatic expungement as central to mitigating disparities and reducing harms of past cannabis criminalization.

### **3. Establish Parameters for Personal Possession of Cannabis that Reduce Criminalization While Protecting Public Safety**

Legalization should inherently encourage consumers to participate only in the legal market while avoiding unnecessarily exposing cannabis users to criminal liability. New cannabis regulations should permit adults to consume, possess, and share cannabis with other adults, as they can with alcohol, without exposure to criminal enforcement. At the same time, law enforcement should be allowed the means to continue to combat illicit market activity.

Guided by its own experiences and those of other legalized states, which vary on when civil or criminal penalties apply to violations of cannabis regulations, New York City strongly prefers deferring to use of civil rather than criminal penalties to the greatest extent possible consistent with public safety.<sup>69</sup> The City will advocate for an approach that criminalizes only violations of the regulatory scheme substantially threatening health and safety—such as sustained high volume transport and commercial sale of unregulated cannabis cultivated in the illicit market. Striking the appropriate balance between promoting public health and safety goals and impeding the illicit market on the one hand, with lifting the weight of criminalization disproportionately borne by communities of color on the other, should guide policymakers.

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<sup>66</sup> Federal law renders someone deportable upon conviction of controlled substance convictions, including for state convictions of low-level, non-criminal cannabis offenses. See 8 U.S.C. § 1227(a)(2)(B)(i). Upon a determination that a person is eligible for deportation on the basis of such convictions, federal law further requires the person’s automatic detention in federal custody pending adjudication of their immigration matter absent exercise of federal discretion. See 8 U.S.C. § 1226(c)(1)(B). A consequence of leaving criminal records un-expunged—even if sealed—is that the records remain subject to disclosure by subpoena or court order.

<sup>67</sup> Individuals can lose their eligibility for federal student aid as a result of prior low-level cannabis convictions. See 20 U.S.C. § 1091(r)(1) (making individuals ineligible for one year upon a first offense, two years upon a second offense, and indefinitely upon a third offense).

<sup>68</sup> Households may be excluded from public housing as a result of a resident’s current illegal drug use, of which low-level convictions may be indicative. See 24 C.F.R. § 960.204(a)(2).

<sup>69</sup> Of the jurisdictions that have legalized cannabis for recreational use, all except Washington, D.C. have both civil and criminal penalties for violations of their cannabis laws. Most states have civil penalties for possession of amounts of cannabis above a defined threshold and criminal penalties for furnishing cannabis to persons under the age of 21, while all states have criminal penalties for operating a motor vehicle under the influence of cannabis. See Alaska Stat. § 28.35.030(a)(1); Colo. Rev. Stat. §§ 18-18-406 (5)(a)(I), (5)(a)(II); Colo. Rev. Stat. § 18-18-406(1)(d); Colo. Rev. Stat. § 18-1.3-401.5; Colo. Rev. Stat. Ann. § 42-4-1301(1)(a)-(c); Me. Stat. tit. 28-B, § 1501(1)(A); Me. Stat. tit. 29-A, § 2411(1-A)(A)(1); Mass. Gen. Laws ch. 94G, §§ 13(e), 13(i); Mass. Gen. Laws ch. 90, § 24; Nev. Stat. 484C.110(4), § 453D.400(6); Or. Rev. Stat. § 475B.337(1); Or. Rev. Stat. § 813.010(1); Or. Rev. Stat. §§ 475B.329(2)(a); Or. Rev. Stat. 453D.400(6); Vt. Stat. Ann. tit. 18, § 4230(a)(1)(A); Vt. Stat. Ann. tit. 23, §§ 1134(a), 4230f(a); Wash. Rev. Code § 69.50.401; Wash. Rev. Code § 79A.60.040; D.C. Code §§ 48–904.06, 50–2206.11. California, Maine, and Vermont go further and differentiate their penalties for minors under age 18 and those between 18 and 21. See Alaska Stat. § 17.38.020; Cal. Health & Safety Code § 11357; Colo. Const. art. XVIII, § 16(1)(a); Me. Stat. tit. 28-B, § 1501; Me. Stat. tit. 22, § 2383; Mass. Gen. Laws ch. 94G, §§ 7(a), 13(f); Nevada Statewide Ballot Questions 2016, Question 2, Initiative to Regulate and Tax Marijuana, Sec. 2, <http://nvsos.gov/sos/home/showdocument?id=4434>; Or. Rev. Stat §§ 475B.316, 475B.337; Vt. Stat. Ann. tit. 18, § 4230(b); Wash. 2013 ch. 3 § 1 (Initiative Measure No. 502, approved Nov. 6, 2012); D.C. Code § 48-904.01.

Each state legalizing adult-use cannabis to date has maintained criminal penalties for at least some cannabis-related conduct, including illegal sale and distribution.<sup>70</sup> The 2018 Proposed Bill, which sets a legal possession limit of two pounds of cannabis plant and four and a half ounces of concentrated cannabis,<sup>71</sup> differs from approaches taken by the jurisdictions that have already legalized adult-use cannabis, which set lower maximum possession amounts, generally ranging from one ounce to one pound of plant.<sup>72</sup>

As indicated in the sponsor’s memorandum for the 2018 Proposed Bill,<sup>73</sup> one rationale offered for this difference is that setting possession limits at relatively high levels will address the racial and ethnic disparities from cannabis legalization and enforcement in states that have partially decriminalized individual cannabis possession. While partial decriminalization with lower legal possession limits has reduced overall arrests, racial disparities have persisted in all states with legal adult-use cannabis, and have even widened in some jurisdictions.<sup>74</sup>

A shift away from criminal cannabis enforcement would help reduce the profound impact that cannabis enforcement has had on low-income and communities of color, where enforcement has historically been concentrated.<sup>75</sup> Resources that would otherwise be dedicated to low-level cannabis enforcement could be diverted to other public health and safety priorities, and tax revenues from the legal cannabis market could be used to support new initiatives in public health, employment, and education.<sup>76</sup> Regular systematic monitoring, evaluation, and reporting of the

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<sup>70</sup> See Alaska Stat. § 17.38.020 *et seq.*, 11.71.010 – 090, 11.71.190, 12.55.035; Cal. Health & Safety Code Div. 10, ch. 6, art. 2; Cal. Veh. Code §§ 23220, 23222, 23500 *et seq.*; Colo. Rev. Stat. §§ 18-1.3-401.5, 18-1.3-501, 18-18-406; Me. Stat. tit. 28-B, § 602; Me. Stat. tit. 17-A, §§ 1102, 1105-C, 1107-A, 1114, 1117, 1301; Me. Stat. tit. 22, § 2383; Mass. Gen. Laws chs. 90, 94C, 94G; Nev. Rev. Stat. §§ 453.011 *et seq.*; Mich. Prop. 18-1 (2018), [https://www.michigan.gov/documents/sos/Full\\_Text\\_-\\_CRMLA\\_635255\\_7.pdf](https://www.michigan.gov/documents/sos/Full_Text_-_CRMLA_635255_7.pdf); Or. Rev. Stat. § 475B.005 *et seq.*; Vt. Stat. Ann. tit. 18, § 4230 *et seq.*; Wash. Rev. Code §§ 9A.20.021, 69.50.401 *et seq.*; D.C. Code §§ 48-904.01, 48-904.06, 48-904.07, 48-905.02, 48-1201, 69.50.4013 *et seq.*

<sup>71</sup> See S. 3040-C, sec. 15.

<sup>72</sup> Possession of more than one ounce carries a criminal penalty in Alaska, California, Colorado, Massachusetts, Nevada, Vermont, and Washington. Maine has criminal penalties for possession of more than two and a half ounces. Oregon has criminal penalties for possession of more than one ounce in public and eight ounces at home. Washington, D.C. criminally penalizes possession of more than two ounces. More than half of the states, including Colorado, Maine, Oregon, Vermont, and Washington, have graduated penalties for increasing amounts of cannabis, and Massachusetts, Nevada, Vermont, and the District of Columbia also explicitly increase penalties for subsequent offenses. See Alaska Stat. §§ 11.71.040, 11.71.050, 17.38.020; Cal. Health & Safety Code § 11357; Colo. Rev. Stat. § 18-18-406(4), (5); Me. Stat. tit. 28-B, § 1501(1)(B); tit. 17-A, § 1107-A(1)(F); Mass. Gen. Laws ch. 94G §§ 7(a)(1), 13(b); ch. 94C §§ 32C, 32E, 34; Nev. Rev. Stat. § 453.336(4); Or. Rev. Stat. 475B.337; Vt. Stat. Ann. tit. 18, § 4230(a); Wash. Rev. Code §§ 69.50.4013, 69.50.4014; D.C. Code §§ 48-904.01(a)(1)(A), (e)(1); 48-904.08. Michigan’s Proposal 18-1, which passed by voter referendum on November 6, 2018, eliminates any penalty, civil or criminal, for possession of two and a half ounces of cannabis generally, or ten ounces within a person’s home. See Mich. Prop. 18-1 (2018), [https://www.michigan.gov/documents/sos/Full\\_Text\\_-\\_CRMLA\\_635255\\_7.pdf](https://www.michigan.gov/documents/sos/Full_Text_-_CRMLA_635255_7.pdf). Criminal penalties are reserved either for more severe cannabis-related offenses, like operation of a motor vehicle while under the influence of cannabis, or for certain repeat offenses.

<sup>73</sup> See S. 3040-B, Sponsor Memo (Jan. 19, 2017), <https://www.nysenate.gov/legislation/bills/2017/s3040/amendment/b> (“Existing marijuana laws have also disproportionately impacted African-American and Latino communities and cost New York governments millions of dollars every year to enforce. The intent of this act is to . . . end the racially disparate impact of existing marijuana laws and create new industries and increase employment.”).

<sup>74</sup> See *Costs of Criminalization* section above.

<sup>75</sup> See Ezekiel Edwards, et al., Am. Civil. Liberties Union, *The War on Marijuana in Black and White* 4 (June 2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white>.

<sup>76</sup> The New York State Department of Health has cited the potential for tax revenue to support “program initiatives in areas such as public health, education, transportation, research, law enforcement, and workforce development.” See N.Y. Dep’t of Health, *July 2018 Assessment*, at 5.

impacts of these law reforms on racial disparities and the legal market will be critical to guide future regulation, investment, and law enforcement efforts.

#### **4. Prohibit Public Consumption with Certain Exceptions, and Allow Local Regulation**

Like all other jurisdictions with legalized cannabis, New York City proposes to prohibit smoking and consuming cannabis in public. Exception should be made for consumption at locally-authorized licensed consumption sites, detailed later in the report. Violation of this public consumption ban alone should carry only civil, not criminal, penalties.

Informed by conversations with law enforcement in other jurisdictions, including California and Colorado, the Task Force considered whether the greater deterrent to public consumption from a criminal enforcement regime was demanded by harms from public usage, including to quality of life. The Task Force also weighed the important goal to remedy disparate impacts suffered by communities of color from cannabis enforcement, and concluded that these concerns outweigh the deterrent value of criminal enforcement of public use violations.

While all jurisdictions prohibit public consumption,<sup>77</sup> each has grappled with striking a balance between social justice and law enforcement concerns in setting penalties for violations. Among jurisdictions that impose criminal penalties for offenses involving public consumption of cannabis, including Alaska, California, Nevada, Vermont, and the District of Columbia, only D.C. punishes mere public consumption with possible incarceration.<sup>78</sup> Alaska, California, Maine, Massachusetts, Michigan, Nevada, and Washington provide only civil penalties, with limited exceptions in some states when consumption occurs near schools or childcare facilities.<sup>79</sup> Cannabis legalization has thus generally involved decriminalization of public consumption, with violations of prohibitions enforced civilly rather than criminally.<sup>80</sup>

The New York State Clean Indoor Act of 2004<sup>81</sup> and the City's Smoke-Free Air Act of 2002<sup>82</sup> provide local models for regulation that could either be adopted or inform future deliberations

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<sup>77</sup> See Alaska Stat. § 17.38.040; Cal. Health & Safety Code § 11362.3(a)(1); Colo. Rev. Stat. § 18-18-406(5); Me. Stat. tit. 28-B § 1501(2)(A); Mass. Gen. Laws ch. 94G, § 13(c); Nev. Rev. Stat. § 453D.400(2); Or. Rev. Stat. 475B.381; Vt. Stat. Ann. tit. 18, § 4230a(a)(2)(A); Wash. Rev. Code § 69.50.445; D.C. Code § 48-911.01.

<sup>78</sup> See Alaska Stat. § 17.38.040; Cal. Health & Safety Code § 11362.4(a); Colo. Rev. Stat. § 18-18-406(5); Me. Stat. tit. 28-B, § 1501(2)(B); Mass. Gen. Laws ch. 94G § 13(c); Nev. Rev. Stat. § 453D.400(2); Or. Rev. Stat. 475B.381; Vt. Stat. Ann. tit. 18, § 4230a(a)(2)(A); Wash. Rev. Code § 69.50.445; D.C. Code § 48-911.01.

<sup>79</sup> See Cal. Health & Safety Code § 11357(d); Mich. Prop. 18-1 (2018).

<sup>80</sup> As noted in the Manhattan District Attorney's report on cannabis legalization, even jurisdictions with continued criminal prohibitions against public consumption rank cannabis enforcement relatively low among law enforcement priorities. See Manhattan Dist. Att'y, *May 2018 Report*, at 11-13.

<sup>81</sup> See N.Y. Pub. Health Law art. 13-E. See also N.Y. Dep't of Health, *A Guide to the New York State Clean Indoor Air Act* (May 2018), <https://www.health.ny.gov/publications/3402/>.

<sup>82</sup> See N.Y.C. Dep't of Health & Mental Hygiene, *New York City Smoke-Free Air Act of 2002: Important Information for New York City Business Owners and Employers* (last updated Dec. 2006), <https://www1.nyc.gov/assets/doh/downloads/pdf/smoke/tc5.pdf>. See also N.Y.C. Dep't of Health and Mental Hygiene, *Smoke Free Air Act – Information*, <https://www1.nyc.gov/nycbusiness/description/smoke-free-air-act--information>.

on this issue.<sup>83</sup> For example, as the 2018 Proposed Bill contemplates, smoking cannabis could be prohibited in the same locations where smoking tobacco is already prohibited. And the City could treat cannabis burning in public as a violation under these local smoking laws. Aligning penalties for public cannabis consumption with existing penalties for tobacco use would in turn promote equity, as the burden of enforcement for public consumption is more likely to fall on low income communities and communities of color.

## 5. Allow Localities to Restrict or Prohibit Personal Cannabis Cultivation

The Task Force strongly recommends that local jurisdictions be granted authority to entirely prohibit or restrict personal cannabis cultivation to reduce the risk of unlicensed commercial cultivation, safety hazards, and access by minors.

Other than Washington State,<sup>84</sup> all jurisdictions that have legalized adult cannabis use allow adults to cultivate a certain number of cannabis plants in their homes, typically around 4-6 plants per person and 12-18 plants per residence.<sup>85</sup> Some jurisdictions have set additional limitations on how plants must be secured or stored in the home, so as to limit access by minors.<sup>86</sup>

Although Washington is the only state to completely prohibit home cultivation, others, including California and Colorado,<sup>87</sup> permit localities to impose either stricter or more permissive home cultivation regimes than otherwise prescribed by state law. These jurisdictions present two models for delegating authority to localities to regulate private cannabis cultivation.

Personal cultivation presents risks that are cause for caution in urban environments such as New York City. It would allow for growth and distribution of unregulated cannabis, risk increased exposure to minors, and potentially impact cannabis prices and facilitate illicit markets.<sup>88</sup> It also

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<sup>83</sup> Awaited results from the implementation of CJRA may also guide the State use of a civil enforcement model.

<sup>84</sup> Cultivation of any amount of cannabis is a class C felony punishable by up to five years in prison and/or a \$10,000 fine. An additional mandatory fine of \$1,000 applies to a first offense and \$2,000 to a second or subsequent offense. See Wash. Rev. Code §§ 69.50.401, 69.50.430, 9A.20.021 (marijuana as a Schedule I drug).

<sup>85</sup> Alaska, California, Colorado, Maine, Massachusetts, Nevada, and the District of Columbia allow cultivation of up to six cannabis plants (with no more than three mature ones). Oregon and Vermont allow up to four. See Alaska Stat. § 17.38.020; Cal. Health & Safety Code § 11358; Colo. Rev. Stat. § 18-18-406(3); Me. Stat. tit. 28-B, §1501(1)(E); Me. Stat. tit. 17-A, §§ 1105-D, 1117; Mass. Gen. Laws. ch. 94G §§ 7(2), 13(e); Nev. Rev. Stat. § 453.3393; Or. Rev. Stat. § 475B.301; Vt. Stat. Ann. tit. 18, § 4230(a); D.C. Code § 48-904.01(a)(1)(C).

<sup>86</sup> See Alaska Stat. § 17.38.030; Colo. Rev. Stat. § 18-18-406(3); Me. Stat. tit. 28-B, § 1502(2); Mass. Gen. Laws. ch. 94G, §§ 13(a), (b); Nevada Statewide Ballot Questions 2016, Question 2, Initiative to Regulate and Tax Marijuana, sec. 6, <http://nvsos.gov/sos/home/showdocument?id=4434>; Or. Rev. Stat. § 475B.306; H.511, 2018 Gen. Assemb. (Vt. 2018).

<sup>87</sup> See Cal. Health & Safety Code § 11362.2(b) (allowing localities to further restrict, but not completely prohibit, the personal cultivation of cannabis); Colo. Rev. Stat. § 18-18-406(3) (allowing localities to determine the permissibility of residential cultivation of cannabis, including any applicable restrictions or requirements, provided such cultivation occurs within “an enclosed and locked space”).

<sup>88</sup> Wash. State Liquor & Cannabis Bd., *Recreational Home Grow – Legislative Directed Study 7-14* (Dec. 2017) [Wash. Liquor & Cannabis Board, *Recreational Home Grow*], <https://lcb.wa.gov/marj/homegrow-study>; Mass. Special Senate Comm., *Report of the Special Senate Committee on Marijuana* 59 (Mar. 2016), <https://www.umass.edu/ccs/sites/default/files/Report%20of%20the%20Special%20Senate%20Committee%20on%20Marijuana.PDF>; Angela Eykelbosh & Leela Steiner, Nat’l Collaborating Ctr. for Env’tl. Health, *Growing at Home: Health and Safety Concerns for Personal Cannabis Cultivation* 1 (2018), [http://www.nccch.ca/sites/default/files/Growing\\_At\\_Home\\_Health\\_Safety\\_Personal\\_Cannabis\\_Cultivation\\_Mar\\_2018.pdf](http://www.nccch.ca/sites/default/files/Growing_At_Home_Health_Safety_Personal_Cannabis_Cultivation_Mar_2018.pdf). The New York State Department of Health recognizes that private cannabis cultivation could also impact potential tax revenue from legal-market cannabis,

implicates several public health concerns, especially in a densely populated city with multiple-story and attached housing. Indoor cultivation often involves use of pesticides and can create an environment susceptible to indoor mold.<sup>89</sup> It requires heavy use of water and electricity to replicate the tropical environment in which cannabis natively grows, which can create a fire hazard.<sup>90</sup> Identifying and addressing illegal home growing operations presents enforcement challenges.<sup>91</sup> For example, verifying that the correct number of plants are being grown and stored in the proper manner poses significant operational difficulties, particularly given that access to a private home is highly restricted in the absence of a warrant supported by evidence of criminal wrongdoing.<sup>92</sup>

Accordingly, localities should be able to restrict or prohibit private or home cultivation to minimize negative impacts on public health and to ensure that the illicit market is not bolstered by new sources of unregulated cannabis. Further, allowing localities to set more restrictive limitations on private cultivation would permit the City to adopt cannabis control measures that best meet its public safety, health, and enforcement needs.<sup>93</sup>

## **6. Prohibit Unlicensed and Unregulated Cannabis Extraction**

Of the states (plus Washington, D.C.) where personal cultivation of adult-use cannabis is legal, eight restrict processing cannabis for purposes of preparing concentrates, such as hash oil and wax, used to make cannabis dabs or other cannabis-infused products.<sup>94</sup> States such as California and Colorado have banned use of hazardous substances in extraction outside of licensed, regulated environments, since extraction involving solvents like butane or propane can create explosive or ignitable mixtures.<sup>95</sup> Vermont also prohibits unlicensed extraction with butane and hexane.<sup>96</sup>

Some extraction processes do not involve hazardous substances and can be accomplished with water or non-chemical extractors like butter. Rather than a complete prohibition on extraction,

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revenue that could otherwise be used to support health, research, law enforcement, and community investment efforts. N.Y. Dep't of Health, at 21.

<sup>89</sup> See Angela Eykelbosh & Leela Steiner, Nat'l Collaborating Ctr. for Env'tl. Health, *Growing at Home: Health and Safety Concerns for Personal Cannabis Cultivation* 3-4, 6 (2018), [http://www.ncceh.ca/sites/default/files/Growing\\_At\\_Home\\_Health\\_Safety\\_Personal\\_Cannabis\\_Cultivation\\_Mar\\_2018.pdf](http://www.ncceh.ca/sites/default/files/Growing_At_Home_Health_Safety_Personal_Cannabis_Cultivation_Mar_2018.pdf).

<sup>90</sup> See *id.* at 1.

<sup>91</sup> See Mass. Special Senate Comm., *Report of the Special Senate Committee on Marijuana* 59 (Mar. 2016),

<https://www.umass.edu/ccc/sites/default/files/Report%20of%20the%20Special%20Senate%20Committee%20on%20Marijuana.PDF>.

<sup>92</sup> See *id.*

<sup>93</sup> The Manhattan District Attorney's Office has issued a similar recommendation. See Manhattan Dist. Att'y, *May 2018 Report*, at 28-29.

<sup>94</sup> See Alaska Rev. Stat. tit. 8, § 8.35.350(A)(1); Cal. Health & Safety Code §§ 11357, 11362.3(a)(6); Colo. Rev Stat § 18-18-406(2)(a)(1); Mass. Gen. Laws ch 94G § 2(c); Nev. Rev. Stat. § 453D.400 (5); Or. Rev. Stat. §§ 475B.090(c), 475B.096; Vt. Stat. Ann. tit. 18, § 4230i(a); Wash. Rev. Code § 69.50.450. Michigan has yet to pass detailed regulations describing permissible uses of personally cultivated marijuana. See Mich. House Fiscal Agency, *Brief Summary of Ballot Proposal* (Oct. 2018), [https://www.house.mi.gov/hfa/PDF/TestPDF/Ballot\\_Proposal\\_2018-1\\_Marijuana\\_Initiative.pdf](https://www.house.mi.gov/hfa/PDF/TestPDF/Ballot_Proposal_2018-1_Marijuana_Initiative.pdf).

<sup>95</sup> See Cal. Health & Safety Code § 11362.39(6); Colo. Rev. Stat. § 18-18-406(2)(a)(1).

<sup>96</sup> See Vt. Stat. Ann. tit. 18, § 4230h.

Oregon’s cannabis law requires licensed cannabis processors to meet “public health and safety standards and industry best practices” established by the regulatory body.<sup>97</sup>

Consistent with these states’ cannabis processing laws, the City proposes that New York State consider restricting cannabis extraction to licensed and regulated environments as a health and safety precaution. And unlicensed extraction be enforced through a regulatory regime, and trigger criminal enforcement only if hazardous substances are used and pose a serious risk to health and safety. Further, any retailer that sells products used in cultivation or processing of cannabis should be required to have signage informing customers of the relevant State and local laws on legal cultivation, processing, and extraction, and their risks.

## **7. Allow Localities to Enforce and Place Legal Limitations on Commercial Cannabis Activities, Similar to the State’s Alcoholic Beverage Control Laws**

The City recommends that State legislation consider implementation of cannabis control laws for licensed commercial enterprises similar to the State’s Alcoholic Beverage Control laws.<sup>98</sup> Based on public health considerations, localities should be granted authority to permit and regulate retail outlets and other cannabis businesses.

All jurisdictions that permit retail sale of cannabis have made it illegal to conduct sales without a State-issued license.<sup>99</sup> Vermont and the District of Columbia are more restrictive, and do not permit the retail sale of cannabis. Both jurisdictions allow personal home cultivation without a legal, licensed cannabis business market.<sup>100</sup> In most jurisdictions, unlicensed sales result in graduated criminal penalties based on the amount of cannabis intended for distribution.<sup>101</sup> As part of the licensed sale and distribution regulatory scheme, each jurisdiction has attached additional penalties for distributing cannabis to a minor, and the majority of these states specifically penalize sale of cannabis within a certain distance from schools and/or other locations where children are likely to be.<sup>102</sup>

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<sup>97</sup> Or. Rev. Stat. §§ 475B.090(3), 475B.096.

<sup>98</sup> See N.Y. Alco. Bev. Cont. Law §§ 1-164 *et seq.*

<sup>99</sup> See Alaska Stat. §§ 11.71.040, 11.71.050; Cal. Health & Safety Code § 11360; Colo. Rev. Stat. § 18-18-406(2); Me. Stat. tit. 17-A, § 1103; Mass. Gen. Laws ch. 94C § 32E; Nev. Rev. Stat. § 453.339; Or. Rev. Stat. § 475B.346, 475B.354; Vt. Stat. Ann. tit. 18, § 4230(b); Wash. Rev. Code § 69.50.401(3); D.C. Code § 48-904.01.

<sup>100</sup> See H. 511, 2018 Gen. Assemb. (Vt. 2018); D.C. Code § 48-904.01(a)(1)(D). The District of Columbia is prohibited by Congress from spending funds to set up a system to regulate or tax the sale of cannabis. See Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 809 (2014).

<sup>101</sup> See New York City Council, *The Criminal Justice Reform Act: One Year Later*, <https://council.nyc.gov/the-criminal-justice-reform-act-one-year-later/>.

<sup>102</sup> For states that impose higher penalties for distributing cannabis to minors, see Cal. Health & Safety Code § 11361; Colo. Rev. Stat. § 18-18-406(1); Me. Stat. tit. 17-A, § 1105-D; Wash. Rev. Code § 69.50.406. For states that impose both higher penalties for distributing cannabis to minors and higher penalties for distributing cannabis near schools, see Alaska Stat. § 11.71.030; Mass. Gen. Laws ch. 94C, § 32J; Nev. Rev. Stat. §§ 453.334, 453.3345, 453.562, 453D.400; Or. Rev. Stat. §§ 475B.109, 475B.211, 475B.371; Vt. Stat. Ann. tit. 18, §§ 4230f, 4230g; D.C. Code §§ 48-904.06(b), 48-904.07a.

The unlicensed sale of cannabis should be prohibited to protect the legal market and tax revenues as well as guard consumers against unregulated, unlicensed products. This prohibition, however, would not extend to circumstances where cannabis is shared among adults absent an exchange of payment. As in several other jurisdictions,<sup>103</sup> such exchanges, including gifting of specified amounts of cannabis, should be explicitly permitted, although any distribution to minors under the age of 21 should be prohibited. However, any gifting allowance should be precisely defined so as to preclude loopholes whereby cannabis is bundled with some other item for sale by an unlicensed seller.

The City recommends that penalties for unlicensed distribution be guided by balancing public welfare and deterrence goals with the goal to redress racial disparities, with graduated civil and criminal penalties imposed against unlicensed cannabis sellers, depending on their post-legalization enforcement history and the nature of their unlicensed sales activity. Penalties should be graduated based on the quantity of cannabis intended for sale or distribution, and the nature of the sale, including whether the sale was to a minor. The City believes it would be beneficial for State legislation to also provide that those who violate criminal prohibitions on unlicensed sale or distribution would remain eligible for adjournments in contemplation of dismissal (“ACDs”) to allow for dismissal of the charge if the defendant incurs no further arrests or convictions during the period of the adjournment, which can last up to one year.<sup>104</sup> Such dispositions could be made mandatory for first offenses and remain an option for subsequent offenses.<sup>105</sup> Use of ACDs would allow the government to intervene as necessary against unlawful distribution of cannabis while reducing penalties for those arrested for illegal cannabis sales.

In conjunction, New York City would consider initiatives that promote participation in the legal market, such as hosting web-based anonymous workshops to educate illicit market participants who want to transition to the legal market.

Additionally, as with enforcement of alcoholic beverage control laws, the focus of criminal enforcement should not extend to employees of cannabis businesses. Given that employees are often uninvolved in licensing and other regulatory compliance issues, they may be unaware of the legality of their employer’s business. Accordingly, the City would advise not focusing penalties on employees of cannabis businesses, and particularly young employees with little knowledge of their employer’s failure to comply with relevant laws and regulations.

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<sup>103</sup> See Alaska Stat. § 17.38.020(3); Cal. Health & Safety Code § 11360; Colo. Const. art. XVIII, § 16(3)(c); Me. Stat. tit. 28-B, § 1501; Mass. Gen. Laws ch. 94G § 7(4); D.C. Code § 48-1201.

<sup>104</sup> N.Y. Crim. Proc. Law § 170.56 makes ACDs available for cannabis offenses and gives judges the option to order immediate sealing of the case; this is in contrast to ACDs issued under N.Y. Crim. Proc. Law § 170.55, which are not exclusive to any particular offense but do not result in early sealing for the defendant.

<sup>105</sup> The continued availability of ACDs under N.Y. Criminal Procedure Law § 170.56 would mark a departure from current law, which makes people ineligible for more than one such ACD. Nonetheless, allowing individuals to retain eligibility for such ACDs even after having received prior ACDs under § 170.56 would give courts, upon motion of the prosecutor, the discretion to determine whether the circumstances of particular cases warrant such dispositions. This allowance would be consistent with ACDs that are available under N.Y. Crim. Proc. Law § 170.55, which can be granted irrespective of a defendant’s prior receipt of an ACD.

## 8. Maintain Prohibitions Against Impaired Driving, and Allocate Funding for Research, Public Safety Education, and Enforcement

The City would prefer that State legislation maintain prohibitions against driving while impaired by a drug, including cannabis. As the 2018 Proposed Bill does,<sup>106</sup> the City would favor State legislation that includes continued application of penalties associated with driving while impaired by a drug (“DWAI-Drug”) under New York’s Vehicle and Traffic Law,<sup>107</sup> including fines and criminal penalties.

Evidence indicates that individuals impaired by cannabis may experience short-term cognitive effects,<sup>108</sup> which may be magnified by the concurrent use of alcohol.<sup>109</sup> At present, limited empirical research has been conducted to estimate the potential impact of cannabis use on motor vehicle crashes, although one study demonstrated no association between non-medical cannabis legalization and motor vehicle crash fatality rates.<sup>110</sup> Reflecting public safety concerns, all jurisdictions that have legalized adult cannabis impose civil or criminal penalties for driving while impaired.<sup>111</sup> Most also have vehicle open container laws that apply to the possession of cannabis and impose criminal penalties for such offenses.<sup>112</sup>

To protect public health and safety, proper enforcement of State laws already prohibiting driving while impaired by cannabis will require reassessing tools for determining a driver’s level of impairment, given cannabis’s changing legal status. Unlike with alcohol, impairment by cannabis cannot be reliably tested by an oral breathalyzer test. Available field testing shows only the presence of cannabis, which can remain in a person’s system for weeks at a time, and does not indicate the concentration or amount in one’s system typically relied upon to determine level of intoxication or impairment and a risk to road safety, as in the case of alcohol.<sup>113</sup> In light of the evidentiary challenges of enforcing impaired driving prohibitions, the State should allocate funding for research and development of reliable methods for testing cannabis impairment.

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<sup>106</sup> See S. 3040-C, sec. 25 (amending 65-E(1)(D) of the Alcoholic Beverage Control Law to say that nothing in the proposed bill “shall be construed to permit any person to . . . smoke or ingest marihuana products while driving, operating a motor vehicle, boat, vessel, aircraft, or other vehicle used of transportation”).

<sup>107</sup> See N.Y. Veh. & Traf. Law § 1192(4).

<sup>108</sup> See J.C. Scott, et al., *Association of Cannabis With Cognitive Functioning in Adolescents and Young Adults*.

<sup>109</sup> G. Li, et al., *Role of Alcohol and Marijuana Use in the Initiation of Fatal Two-Vehicle Crashes*, 27 *Annals of Epidemiology* 342 (2017).

<sup>110</sup> See Jayson D. Aydelotte, et al., *Crash Fatality Rates After Recreational Marijuana Legalization in Washington and Colorado*, 107 *Am. J. Pub. Health* 1329 (2017).

<sup>111</sup> See Alaska Stat. § 28.35.030; Cal. Veh. Code § 23152(f); Colo. Rev. Stat. § 42-4-1301; Me. Stat. tit. 29-a, §§ 2401, 2411; Mass. Gen. Laws ch. 90 § 24; Nev. Rev. Stat. § 484C.110; Or. Rev. Stat. 813.010(1)(b)-(c), 813.010(3)-(5); Vt. Stat. Ann. tit. 23, § 134; Vt. Stat. tit. Ann. 18, § 4230a(2)(A); Wash. Rev. Code § 46.61.502; D.C. Code §§ 50-2206.11, 50-2206.13.

<sup>112</sup> See Cal. Health & Safety Code § 11362.3(4); Cal. Veh. Code § 23222(b); Colo. Rev. Stat. § 42-4-1305.5; Mass Gen. Laws ch. 94G, §13(d); Nev. Rev. Stat. § 453D.400(2); Vt. Stat. Ann. tit. 23, § 1134a; Wash. Rev. Code § 46.61.745; D.C. Code § 48-911.01(a)(2).

<sup>113</sup> See Eric Boodman, *Breathalyzers and Brain Caps: Researchers Race to Devise a Roadside Test for Driving While High*, STAT News (Jan. 9, 2018), <https://www.statnews.com/2018/01/09/marijuana-sobriety-test/>; see also E.L. Karschner, *Do Delta9-Tetrahydrocannabinol Concentrations Indicate Recent Use in Chronic Cannabis Users?*, 104 *Addiction* 2041 (2009).

Most jurisdictions require a “totality of the circumstances” approach to determine impairment, which includes observations from a Drug Recognition Expert (“DRE”) trained to identify signs of drug impairment and intoxication.<sup>114</sup> In addition to observations by a DRE, some jurisdictions require a blood draw to support charges relating to impairment or intoxication by cannabis.<sup>115</sup> While blood draws have been the standard for these cases,<sup>116</sup> obtaining them can be challenging, as they require both a warrant and the testimony of a phlebotomist.<sup>117</sup>

Currently, DREs are deployed as part of the City’s traffic enforcement efforts.<sup>118</sup> Given the difficulties of evaluating impairment and intoxication by other means,<sup>119</sup> DREs have been crucial in the City’s traffic law enforcement efforts, and would play an important role in the City’s enforcement of a cannabis regulatory regime. In light of this, the City hopes that State legislation would include budgetary support for expansion, training, and establishment of statewide standards for DREs, as well as for developing methods to determine a driver’s level of intoxication and impairment. Once cannabis impairment is better understood, the City encourages that the State’s current vehicle and traffic prohibitions and related cannabis impairment penalties be revisited and reconfigured as necessary.

In parallel, the City will seek State support to implement public education programs to deter impaired driving under the influence of cannabis.

## 9. Eliminate Criminal Penalties for Minors

Responses to underage involvement with cannabis should be individualized and focused on provision of education, support, and access to health and social services. The City would support State legislation and regulation in this area that is guided by the goals of: (i) deterring underage cannabis use and attendant potential health risks; (ii) minimizing young people’s exposure to the criminal justice system; and (iii) reducing disparate justice exposure for certain populations.

While the City believes cannabis use and possession should be legalized only for adults at least 21 years old, the City recommends that those younger should face only civil, not criminal,

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<sup>114</sup> New York State offers the New York State Drug Evaluation and Classification Program, which certifies law enforcement officers as DREs. In order to maintain certification, DREs must complete an annual recertification class and pass a re-certification examination with a grade of at least 80%. See N.Y. State Governor’s Traffic Safety Comm., *The New York State Drug Evaluation Classification (DEC) Program*, <http://safeny.ny.gov/DRE/default.htm>; see also U.S. Dep’t of Transp., Nat’l Highway Traffic Safety Admin., *Impact of the Legalization and Decriminalization of Marijuana on the DWI System* 6 (June 2017), [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/expert\\_dwi\\_panel.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/expert_dwi_panel.pdf).

<sup>115</sup> See Colo. Rev. Stat. § 42-4-1301(6)(a)(IV); Nev. Rev. Stat. § 484C.110; Wash. Rev. Code § 46.61.502(1)(b).

<sup>116</sup> See Manhattan Dist. Att’y, *May 2018 Report*, at 23–25.

<sup>117</sup> See U.S. Dep’t of Transp., Nat’l Highway Traffic Safety Admin., *Impact of the Legalization and Decriminalization of Marijuana on the DWI System* 5 (June 2017), [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/expert\\_dwi\\_panel.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/expert_dwi_panel.pdf).

<sup>118</sup> See Press Release, Governor’s Press Office, Governor Cuomo Announces New Public Service Campaign to Combat Drugged Driving in New York State (Nov. 17, 2016), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-public-service-campaign-combat-drugged-driving-new-york-state>; Press Release, Governor’s Traffic Safety Comm., GTSC, DMV And Statewide Law Enforcement Announce Latest Class Of Drug Recognition Experts (Mar. 22, 2018), <https://dmv.ny.gov/press-release/press-release-03-22-2018>.

<sup>119</sup> See David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 Harv. L. & Pol’y Rev. 359, 375–76 (2014).

enforcement of cannabis-related offenses. Consistent with the 2018 Proposed Bill,<sup>120</sup> in which such offenses by youth ages 18-21 are treated like underage drinking and enforced civilly. Under New York’s Alcoholic Beverage Control Law, possession of alcohol by a minor is punishable by no more than a \$50 fine, completion of an alcohol awareness program, or both. Arrests for such offenses are specifically prohibited.<sup>121</sup> This City favors adopting this model of enforcement for minors in possession of cannabis.

The City will instead focus on deterring underage cannabis use by enforcing prohibitions restricting licensed businesses from selling to minors, as well as through the prevention and education efforts discussed below.

In New York City, public schools already have mechanisms for managing violations of school policy related to cannabis that do not involve criminal consequences or lost school time.<sup>122</sup> The City hopes that those programs would remain consistent with State law and in effect.

In addition to meeting the City’s deterrence goals, these recommendations are consistent with prevailing policy trends in New York State. For example, the age of criminal responsibility for all crimes in New York State was recently raised to the age of 17, and will further increase to 18 on October 1, 2019. These measures were undertaken with the goal of reducing crime, recidivism, and costs to the State, while advancing social justice and core progressive values.<sup>123</sup> Underage cannabis decriminalization comports with this current legal framework, without running afoul of other significant competing policy goals.

## **10. Support Development of Prevention and Education Resources for Youth and Educators**

As one measure to prevent underage use of cannabis, the City hopes State legislation provide for funding and development of prevention and education resources. Specifically, support for local governments and organizations to develop and implement youth education campaigns. The City would focus campaigns on risks associated with cannabis use and abuse for adolescents,

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<sup>120</sup> See S. 3040-C, sec. 24.

<sup>121</sup> See N.Y. Alco. Bev. Cont. Law § 65-c.

<sup>122</sup> See Press Release, Mayor’s Press Office, Mayor de Blasio Announces Expansion of Programs to Keep Students in School and Improve Overall School Safety (Feb. 27, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/115-17/mayor-de-blasio-expansion-programs-keep-students-school-improve-overall>; Ben Chapman, *All City High Schools Will Give Warnings for Marijuana Possession, Disorderly Conduct*, N.Y. Daily News (Aug. 10, 2018), <http://www.nydailynews.com/new-york/education/ny-metro-students-get-warnings-for-weed-disorderly-conduct-20180810-story.html>.

<sup>123</sup> See Press Release, Governor’s Press Office, Governor Cuomo Signs Legislation Raising the Age of Criminal Responsibility to 18-Years-Old in New York (Apr. 10, 2017), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-raising-age-criminal-responsibility-18-years-old-new-york>.

including adverse health consequences, limits on educational attainment, and exposure to the criminal justice system.<sup>124</sup>

For example, Denver has implemented a youth education and prevention program geared towards “help[ing] Denver’s youth understand the legal, educational, health, and social risks that come from using marijuana underage.”<sup>125</sup> Denver’s program uses multiple platforms, including billboards, school bus signage, and fence art displayed at local high schools, social media, a gameshow, and a trivia card game.<sup>126</sup> In addition, the program’s campaign is informed by a city-organized youth commission, youth surveys, and focus groups.<sup>127</sup>

The City would recommend revenue generated be directed to substance use and abuse disorder treatment programs for youth and adults.<sup>128</sup>

Critically important will be local participation to develop and implement these programs.

## **11. Support Development of Educational Materials and Harm Reduction Services for Adult Cannabis Consumers**

Revenue generated from legalization of cannabis should support adult consumers with harm reduction services and educational materials. These materials should be developed by local government units to enable the information to be delivered directly to adult cannabis consumers visiting local retail outlets and on-site consumption spaces. The materials should contain accurate, science-based product and safety information. Resources should also be dedicated to cannabis education training for employees at retail and on-site consumption spaces to standardize the educational materials delivered at the point of sale.

Most states with legal cannabis use, including Colorado,<sup>129</sup> Washington,<sup>130</sup> Oregon,<sup>131</sup> and California,<sup>132</sup> allocate tax revenue to fund such public health campaigns and programs for alcohol

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<sup>124</sup> See NASEM, *The Health Effects of Cannabis and Cannabinoids*; Amelia M. Arria, et al., *The Academic Consequences of Marijuana Use During College*; Kerry M. Green, et al., *Does Heavy Adolescent Marijuana Lead to Criminal Involvement in Adulthood? Evidence from a Multiwave Longitudinal Study of Urban African Americans*, 112 *Drug & Alcohol Dependence* 117 (2010).

<sup>125</sup> Dan Rowland, City & Cty. of Denver Dep’t of Excise & Licenses, *Denver Launches “High Costs” Marijuana Education and Prevention Campaign Targeted at City’s Youth*, <https://www.colorado.gov/pacific/marijuana/news/denver-launches-%E2%80%9Chigh-costs%E2%80%9D-marijuana-education-and-prevention-campaign-targeted-city%E2%80%99s-yout-0> (quoting Denver Mayor Michael Hancock).

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See S. 3040-C, sec. 51.

<sup>129</sup> See Colo. Rev. Stat. § 39-28.8-501 (on the activities required in § 25-3.5-1001 through § 25-3.5-1007).

<sup>130</sup> See Wash. Rev. Code § 69.50.540(2)(b)(i)(A).

<sup>131</sup> See Or. Dep’t of Revenue, *Marijuana Taxes* (Mar. 2018), [https://www.oregon.gov/DOR/press/Documents/marijuana\\_fact\\_sheet.pdf](https://www.oregon.gov/DOR/press/Documents/marijuana_fact_sheet.pdf).

<sup>132</sup> See Adult Use of Marijuana Act, 2016 Cal. Legis. Serv. Prop. 64, sec. 7 § 34019(f)(1).

and drug use prevention. Notably, in Colorado, a state-funded public health campaign addressing legal and safe cannabis consumption and storage has thus far been shown to be effective.<sup>133</sup>

## **12. Support Development of Educational Materials for Health Care Professionals**

Legalization may encourage patients more readily to disclose cannabis use to health care providers. As a body of evidence emerges around the health harms and benefits of cannabis, authoritative and informative guidance and educational materials should be developed. Provider education is needed on such topics as identification and treatment of cannabis use disorder, the role of cannabis in pain management and other medical conditions, and pediatric cannabis use. The City will aim to partner with the State and other local health authorities to develop and distribute guidance around best practices for the integration of cannabis in primary care, psychiatric, pain management, and substance use treatment settings.

As an example, Colorado’s Marijuana Tax Cash Fund, which collects sales tax revenue from retail and medical cannabis, must spend part of the revenue on “health care, monitoring health effects, [and] health education.”<sup>134</sup>

The 2018 Proposed Bill earmarks resources to develop a public health campaign focused on the health effects of cannabis and legal use. This is a measure supported by the Task Force. Additionally, the City recommends providing resources to assist medical professionals integrate cannabis legalization into their healthcare practices.<sup>135</sup>

## **13. Eliminate Routine Testing as a Prerequisite to Social Service Benefit Eligibility**

The City recommends all policies be eliminated that require routine testing for cannabis use as a condition for access to such benefits as housing, medical care, child care, and nutrition or cash assistance.

## **14. Parental Rights Should Not Be Impaired on the Basis of Cannabis Use or Cultivation Unless Endangering the Child**

As the 2018 Proposed Bill provides, child custody or visitation should not be denied on the basis of cannabis use or cultivation unless it places a child in danger.<sup>136</sup> And as the 2018 Proposed Bill also provides, no child should be the subject of a child neglect or abuse investigation or

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<sup>133</sup> See Ali Maffey, Colo. Dep’t of Pub. Health and Env’t, *2017 Annual Report* (Jan. 2018), [https://www.colorado.gov/pacific/sites/default/files/MJ\\_RMEP\\_FinalMJReport17.pdf](https://www.colorado.gov/pacific/sites/default/files/MJ_RMEP_FinalMJReport17.pdf).

<sup>134</sup> Colo. Dep’t of Educ., *Marijuana Tax Revenue and Education Fact Sheet 2* (June 2018), <https://www.cde.state.co.us/communications/marijuana-fact-sheet-marijuana-tax-revenue-for-education-after-july-2018>.

<sup>135</sup> See S. 3040-C, sec. 32 § 99-GG.

<sup>136</sup> See *id.*, sec. 31 § 195.3.

proceeding based solely on a parent’s alleged use of cannabis.<sup>137</sup> Likewise, cannabis use or cultivation should not generate a presumption of child neglect or endangerment.<sup>138</sup> Nor should a positive cannabis test in and of itself equate automatically to a compelling measure of maltreatment in the context of child welfare, particularly given that cannabis can be detected in a person’s body for several weeks after a single ingestion.

Nonetheless, the City recommends that cannabis be defined as equivalent to a “drug” in the Family Court Act in order to remain within the ambit of substances that can lead to investigation or supervision of parents if a child is endangered by parental use, even if the cannabis use is not criminalized at the State level. In effect, cannabis use should be treated the same as alcohol use in the context of child custody.

In line with these principles, Massachusetts has explicitly legislated that a person’s cannabis use, cultivation, or commercial activity cannot justify impairing parental rights in the absence of clear and convincing evidence of unreasonable danger to the child.<sup>139</sup> Courts in other states that have legalized medical and adult-use cannabis have similarly issued decisions establishing guidelines for when cannabis can be a factor in determining parental fitness. For instance, in Colorado, an appeals court held that where a parent’s use of medical cannabis does not present “a threat to the physical and emotional health and safety of the child, or otherwise suggest[] any risk of harm,” such use “cannot support [a] trial court’s restriction on [the parent’s] parenting time.”<sup>140</sup> In Washington State, an appeals court held that trial courts have discretion to require supervised visitation where evidence shows that a parent’s use has detrimental effects on children.<sup>141</sup>

## **15. Enact Measures to Prevent Employment Discrimination**

The City strongly favors prohibiting private and public employers from denying employment solely on the basis of a positive cannabis drug test or prior cannabis arrests or convictions. In addition, pre-employment and random drug testing for cannabis should be prohibited for public employees and individuals under government supervision (i.e., individuals on probation). As an exception, the City proposes permitting cannabis testing for safety-sensitive jobs or when there is evidence of impairment affecting safety or the ability to perform the job, or where required under federal law.

This recommendation comports with the 2018 Proposed Bill, which would make unlawful for an employer to take adverse employment action based only on a positive drug test for cannabis.<sup>142</sup> An employer, may, however, consider the ability to perform the employee’s job abilities while

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<sup>137</sup> See *id.* sec. 2.

<sup>138</sup> See *id.*

<sup>139</sup> See Mass. Gen. Laws ch. 94G, § 7(d).

<sup>140</sup> *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo. App. 2010).

<sup>141</sup> See *In re Marriage of Wieldraayer*, 147 Wash. App. 1048 (2008).

<sup>142</sup> See S. 3040-C sec. 31 § 196.

impaired when the employee manifests specific articulable symptoms while working.<sup>143</sup> Similar to alcohol, employers can take adverse action against employees who use intoxicating substances during work hours.<sup>144</sup>

Maine has similarly legislated revision of employer drug testing policies. Employers are prohibited from refusing to hire job applicants on the basis of a positive cannabis test alone. Employers can still discipline employees who are “under the influence of marijuana in the workplace or while otherwise engaged in activities within the course and scope of their employment.”<sup>145</sup>

The City will need to evaluate additional workforce considerations, including drug testing and criminal justice record review by employers. Employment regulations should reflect substantially similar practices as those provided for the on-duty or off-duty use of alcohol. Jobseekers should not be discriminated against in hiring based on prior arrest or conviction for cannabis use or current lawful consumption of cannabis while off-duty or as prescribed by a medical professional.

## **16. Require Security Programs for Retail Licensees**

Licensees granted to operate for commercial use must have security programs in place. Other jurisdictions have taken similar steps to avoid crime associated with legalized adult-use cannabis commercial activity and its reliance on cash transactions.<sup>146</sup> Specific program requirements should be fleshed out in detail during local licensing and rulemaking processes, but could include features such as cameras, safes, protocols for safe transport of product and cash, and appropriate professional or regulatory qualifications for security guards.

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<sup>143</sup> See *id.*

<sup>144</sup> See *id.* sec. 31 § 196.3.

<sup>145</sup> Me. Rev. Stat. tit. 28-B, § 112(3).

<sup>146</sup> See L.A. Cty. Advisory Working Grp. on Cannabis Regulation, *Meeting Four: Cannabis Retailers 10* (Aug. 2017),

[http://cannabis.lacounty.gov/wp-content/uploads/2017/08/Preparation-packet-Advisory-Working-Group-Week-Four-Retailers\\_FINA....pdf](http://cannabis.lacounty.gov/wp-content/uploads/2017/08/Preparation-packet-Advisory-Working-Group-Week-Four-Retailers_FINA....pdf) (noting the importance of security measures including alarm systems and video surveillance for retail operations because of the relatively high value of cannabis and use of cash for most purchases); Jonathan Raskin, *Cannabis Country: Marijuana Madness and Some Sanity, Too*, Sonoma W. Times & News (Mar. 28, 2018), [http://www.sonomawest.com/cloverdale\\_reveille/opinion/columns/cannabis-country-marijuana-madness-and-some-sanity-too/article\\_350a52cc-32b7-11e8-86d4-9fac15c0ef33.html](http://www.sonomawest.com/cloverdale_reveille/opinion/columns/cannabis-country-marijuana-madness-and-some-sanity-too/article_350a52cc-32b7-11e8-86d4-9fac15c0ef33.html) (noting crime such as robberies in Sonoma County, outside of San Francisco, and security measures dispensaries have taken); cf. Angela Dills, et al., *Dose of Reality: The Effect of State Marijuana Legalizations 14-16*, Cato Inst. (Sept. 16, 2016), <https://www.cato.org/publications/policy-analysis/dose-reality-effect-state-marijuana-legalizations> (finding no measurable increase in violent crime or property crime in Denver, Colorado, Seattle, Washington, or Portland, Oregon in the immediate aftermath of cannabis legalization); Davide Dragone, et al., *Crime and the Legalization of Recreational Marijuana*, 10522 IZA Inst. L. Econ. 12 (Jan. 2017), <http://ftp.iza.org/dp10522.pdf> (finding that legalization of cannabis is associated with a decrease in crime).

### **III. Recommendations to Establish Statewide Consumer Protections and Product and Information Tracking Systems**

#### **1. Establish Product Safety Guidelines, Including Requirements for Pre-Sale Testing for Potency and Contaminates**

The absence of federal safety guidelines and enforcement relating to legalized cannabis leaves a large void, making coordinated State and City measures critically important. Because cannabis remains a prohibited controlled substance under federal law, no oversight of cannabis products is provided by the U.S. Department of Agriculture, the Food and Drug Administration (“FDA”), and other agencies responsible for monitoring compliance with federal laws that ensure consumable products are safe, sanitary, and properly labeled for human consumption.

Consistent with the practices of all states that have legalized cannabis sales,<sup>147</sup> the City would support statewide product safety regulations that include, at minimum, specific standards for pre-sale testing for potency and growing contaminants such as pesticides.<sup>148</sup> The City recommends that food safety protocols should also be established at the State level to ensure safe product distribution and delivery. Additionally, it would be prudent to allow for these regulations to be revised over time as products and markets evolve.

City regulatory agencies would be encouraged to educate small business owners on compliance to meet the dual goals of supporting equitable business development while also ensuring the health and safety of New Yorkers. New regulatory changes should be rolled out with a cure period to allow businesses to adapt to new requirements. Finally, regulatory agencies should coordinate inspections in order to facilitate efficient review for both localities and business owners.

The City proposes that minimum standards be established at the State level, and that authority be delegated to localities to place further restrictions and prohibitions as necessary. For example, the City would have authority to restrict the diversity of cannabis products available in the marketplace. The impact of local control in the context of tobacco regulation helps demonstrate why. After New York City banned the sale of flavored tobacco products citywide to reduce youth tobacco use, teens were 28% less likely to use any tobacco product.<sup>149</sup>

In addition, the City seeks the authority to ban the sale of products that combine cannabis with other substances, like alcohol and caffeine. Public health experts in California advised that New

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<sup>147</sup> See, e.g., Alaska Admin. Code tit. 3, §§ 306.525, 306.735; Cal. Bus. & Prof. Code § 26110; Colo. Code Regs. §§ 212-2.1001-1, 212-2.1115; Me. Stat. tit. 28-b, § 602; 935 Mass. Code Regs. 500.105; Nev. Rev. Stat. § 453D.300; Or. Admin. R. 845-025-5700, 5760; Vt. Stat. Ann. tit. 18, § 4474e; Wash. Admin. Code §§ 314-55-095, 108.

<sup>148</sup> Potency is primarily determined by the amount of THC, the psychoactive compound in cannabis, present in a product. See Genevieve Lafaye, et al., *Cannabis, Cannabinoids, and Health*, 19 *Dialogues Clinical Neuroscience* 309 (2017).

<sup>149</sup> See Shannon M. Farley et al., *New York City Flavoured Tobacco Product Sales Ban Evaluation*, 26 *Tobacco Control* 78 (2017).

York consider such a ban.<sup>150</sup> While there is little research on the health effects of combining cannabis with alcohol and caffeine, there is a concern about the health impact of simultaneous use because of potential drug interactions.<sup>151</sup>

Lastly, the City requests authority to cap potency in cannabis products should it be necessary for public health purposes.

The City intends to promulgate rules and regulations above the statewide minimum standards. This would include promulgation of guidelines governing cannabis producers, processors, and retailers, including: (1) methods of producing, processing, and packaging cannabis, cannabis-infused products, and concentrated cannabis; (2) conditions of sanitation; and (3) standards of ingredients and quality and identity of cannabis products produced, processed, packaged, or sold.

## **2. Adopt Standards for Labeling and Packaging Cannabis Products**

To promote safer consumption of cannabis, the City recommends establishment of statewide labeling and packaging standards, including, at a minimum, requirements that all products have labels: (1) containing a statewide standard warning; (2) clearly indicating potency, suggested dose, and possible side effects; and (3) for edible products, stamped at the serving level with a universally recognizable cannabis symbol. Cannabis packaging should also be child-resistant, tamper-evident (i.e., contain one or more indicators or barriers to entry), opaque, and not include images and colors designed to appeal to children. The labeling and packaging requirements are intended to support and encourage the safe use of cannabis by adults, who can make informed decisions when they know what they are consuming and whether it is a tested product. Regulating imagery and design serves the goal of reducing cannabis products' appeal to children. The City will be vigilant to prevent marketing to children.

The 2018 Proposed Bill requires that products be sold in sealed containers packaged according to guidelines set by the Cannabis Bureau,<sup>152</sup> and that the packaging must provide adequate information about the quality of the product,<sup>153</sup> manufacturing details,<sup>154</sup> ingredients and nutrition information,<sup>155</sup> and allergen warnings.<sup>156</sup> Packaging is required to be child-resistant,

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<sup>150</sup> Discussion with Lynn Silver, MD, MPH, FAAP, Director of Getting it Right From the Start, N.Y.C. Dep't of Health & Mental Hygiene (Oct. 2018).

<sup>151</sup> Research on impaired driving suggests that alcohol may compound the risks of experiencing a fatal crash for a driver who is also impaired by other drugs. See G. Li, et al., *Drug Use and Fatal Motor Vehicle Crashes: A Case-Control Study*, 60 *Accident Analysis & Prevention* 205 (2013).

<sup>152</sup> See S. 3040-C, sec. 31 §§ 175(1), 176(2), 177(4).

<sup>153</sup> See *id.* sec. 31 §§ 181(2), 181(4).

<sup>154</sup> See *id.* sec. 31 § 181(5).

<sup>155</sup> See, e.g., *id.* sec. 31 §§ 180(5), 180(7).

<sup>156</sup> See, e.g., *id.* sec. 31 § 181(5).

not appealing to children, re-sealable, and placed in separate packaging at the serving size level.<sup>157</sup> The Bill also bans deceptive labeling practices.<sup>158</sup>

Other states have undertaken similar efforts to promote safe consumption of cannabis through statewide standards.<sup>159</sup> California, in addition to adopting regulations similar to those recommended here, also requires that labels on cannabis products contain: (1) instructions for use; (2) the ingredient list; (3) a unique identification number; and (4) the date and source of cultivation, manufacturing, and processing.<sup>160</sup> Other states have also adopted an array of regulations on labeling and packaging. For example, in Washington State, packaging for liquid products must include an accurate measuring device.<sup>161</sup> In Massachusetts, labels must include a disclaimer that the product is not FDA tested.<sup>162</sup> In Alaska, labels may not contain any printed images,<sup>163</sup> and in Nevada, labels may not contain specific imagery such as of fruit.<sup>164</sup>

### **3. Adopt Standards for Marketing and Advertising Cannabis Products and Allow Local Regulation**

In accord with the majority of states with legal cannabis sales,<sup>165</sup> the City favors a ban on outdoor advertisements for cannabis products, including on storefronts and public property. Where regulations are more lenient, exposure to cannabis advertising is likely to be prevalent. For example, a study from Oregon, where retailers can advertise their products on signs and billboards,<sup>166</sup> found that exposure to cannabis advertising is widespread among adults, with over half of state residents exposed to advertising in a one-month period.<sup>167</sup>

Generally, the City believes cannabis advertising restrictions should be aligned with those for alcohol, but should also, from the outset, prohibit cannabis advertising on transportation, public property, and near treatment facilities. Public health efforts have attempted to preclude alcohol advertising from these locations based on the research on exposure to youth and youth use rates. The City would also prohibit any cannabis event sponsorship without an appropriate license.

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<sup>157</sup> See *id.* sec. 31 §§ 179(3), 180(2).

<sup>158</sup> See *id.* sec. 31 §§ 179(3), 181(2).

<sup>159</sup> See, e.g., Wash. Admin. Code § 314-55-105; Colo. Code Regs. § 212-2.1004.

<sup>160</sup> See Cal. Dep't of Pub. Health, *Packaging and Labeling FAQs* (last updated Jan. 20, 2018), <https://www.cdph.ca.gov/Programs/CEH/DFDCS/MCSB/Pages/PackagingandLabelingFAQs.aspx>.

<sup>161</sup> See Wash. Admin. Code § 314-55-105.

<sup>162</sup> See 935 Mass. Code Regs § 500.105(4)(a)(6).

<sup>163</sup> See Alaska Admin. Code tit. 3, § 306.470.

<sup>164</sup> See Nev. Rev. Stat. § 453D.310.

<sup>165</sup> See, e.g., Colo. Code Regs. § 212-2.1111; Wash. Admin. Code § 314-55-155.

<sup>166</sup> See, e.g., Or. Admin. R. 845-025-8060.

<sup>167</sup> See Steven C. Fiala, et al., *Exposure to Marijuana Marketing After Legalization of Retail Sales: Oregonians' Experiences, 2015-2016*, 108 Am. J. Pub. Health 120 (2018).

Additionally, clear display of accurate health and safety information in all marketing and advertisement materials should be required. Many jurisdictions with legal sales have regulations prohibiting false or misleading claims about cannabis products.<sup>168</sup> For example, Colorado law bans language “that asserts its products are safe because they are regulated by the State Licensing Authority,”<sup>169</sup> and allows municipalities to add additional language restrictions.<sup>170</sup>

Localities should be allowed to enact additional regulatory standards for marketing and advertising, including online and electronic marketing and advertising. Many localities in states with legalization require, for example, that advertisements include warning statements about potential health and safety risks and prohibit content that specifically targets or would appeal to people under 21.<sup>171</sup> California is one such state, requiring that before any “direct, individualized communication or dialogue” by a cannabis business, the business must confirm that the individual is 21 years or older through user confirmation, birth date disclosure, or another method.<sup>172</sup>

The 2018 Proposed Bill prohibits interior or exterior signage for cannabis advertising purposes,<sup>173</sup> but is silent with respect to the authority of a locality to enact additional regulatory standards for marketing and advertising.

#### **4. Require a Traceable Seed-to-Sale Tracking System, with Information Sharing Between State and Local Regulators**

The City would support creation and enforcement of an efficient and traceable supply chain for legal cannabis that could be used across New York State. Without a traceable tracking system, cannabis products will move between localities and illicit markets,<sup>174</sup> promoting illegality and tax evasion, eroding product safety, and weakening the provision of banking services. A system to track cannabis products and the associated cash flows, from planting to sale to consumer, will be essential to regulate legalized cannabis. The Proposed Bill mandates such a seed-to-sale system, generally following the approach taken in other states.<sup>175</sup>

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<sup>168</sup> See, e.g., Alaska Admin. Code tit. 3, § 306.360(b)(1); Cal. Bus. & Prof. Code § 26151(d); Colo. Code Regs. §§ 212-2.1001-1–212.1115; Or. Rev. Stat. § 475B.605.

<sup>169</sup> Colo. Code Regs. § 212-2.1109.

<sup>170</sup> See *id.* § 212-2.1111(A).

<sup>171</sup> See, e.g., Alaska Admin. Code tit. 3, § 306.360; Cal. Bus. & Prof. Code § 26151(c); Colo. Code Regs. §§ 212-2.1001-1–212-2.1115; Or. Rev. Stat. § 475B.605.

<sup>172</sup> Cal. Bus. & Prof. Code § 26151(c).

<sup>173</sup> See S. 3040-C, sec. 31 §§ 175(4), 177(7).

<sup>174</sup> For example, a California Department of Food and Agriculture report in 2017 concluded that all but 2.5 million of the 13.5 million pounds of cannabis produced in 2016 left California. See Patrick McGreevy, *As The Top Pot-Producing State in the Nation, California Could Be on Thin Ice With the Federal Government*, L.A. Times (Oct. 1, 2017), <http://www.latimes.com/politics/la-pol-ca-marijuana-surplus-export-20171001-story.html>.

<sup>175</sup> See S. 3040-C, sec. 31 § 182.

A seed-to-sale system is a regulatory compliance tool which allows—or requires—each member of the supply chain to report all mandated activities to a central government database, including whenever cannabis is planted, tested, sold, or destroyed.<sup>176</sup> The movement of cannabis through the legal supply chain can be monitored electronically or input by the cannabis-related business manually; however, a key aspect of seed-to-sale systems is linking of the database to tags or other identifiers on the physical product.<sup>177</sup>

Once a tag has been assigned to a plant, it is then possible to track the specific plant (and its evolution into another product), to ensure payment of taxes due and transfer only to other legally authorized individuals or entities.<sup>178</sup> Information collected by a seed-to-sale system can be linked to a state’s licensing, law enforcement, tax, and banking regulatory systems. Information can also be uploaded by a cannabis-related business and used for its own purposes (e.g., inventory analysis or point-of-sale systems) or shared with banks and other counterparties.<sup>179</sup> The seed-to-sale system also allows for product recalls or other measures should contaminants or safety hazards be identified.

In states with legal adult-use cannabis, seed-to-sale systems are mandated by statute and developed through regulation, and the systems are universally implemented by outside vendors.<sup>180</sup> Nearly all the states with legalized cannabis regimes allow seed-to-sale system information to be used by cannabis-related businesses for their own purposes,<sup>181</sup> and some states require shipping manifests to be generated from seed-to-sale systems,<sup>182</sup> which encourages businesses to maintain proper recordkeeping practices. States vary in the explicitly authorized (and permissible) uses of seed-to-sale data, ranging from inspections to broader

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<sup>176</sup> See Ben Curren, *Seed-to-Sale Tracking and Compliance: If Coffee Was Regulated Like Cannabis*, Forbes (Aug. 13, 2018) [Ben Curren, *Seed-to-Sale Tracking and Compliance: If Coffee Was regulated Like Cannabis*], <https://www.forbes.com/sites/bencurren/2018/08/13/seed-to-sale-tracking-and-compliance-if-coffee-was-regulated-like-cannabis/#61a4385253d7>; see also Larry Alton, *How Seed to Sale Systems Are Revolutionizing the Cannabis Industry*, Huffington Post (Aug. 3, 2017) [Larry Alton, *How Seed to Sale Systems Are Revolutionizing the Cannabis Industry*], [https://www.huffingtonpost.com/entry/how-seed-to-sale-systems-are-revolutionizing-the-cannabis\\_us\\_59724910e4b06b511b02c312](https://www.huffingtonpost.com/entry/how-seed-to-sale-systems-are-revolutionizing-the-cannabis_us_59724910e4b06b511b02c312) (explaining benefits of a seed to sale tracking system).

<sup>177</sup> *Id.*; see generally Debby Goldsberry, *Tracking Troubles: Is Seed-to-Sale Tracking Helping or Hurting the Industry?*, Cannabis Dispensary (June 19, 2018), <http://www.cannabisdispensarymag.com/article/tracking-troubles/>; Catherine Goldberg, *Everything You Need to Know About Seed to Sale Technology*, Green Market Report (Sept. 15, 2017) [Catherine Goldberg, *Everything You Need to Know About Seed to Sale Technology*], <https://www.greenmarketreport.com/everything-you-need-to-know-about-seed-to-sale-technology/>.

<sup>178</sup> See Ben Curren, *Seed-to-Sale Tracking and Compliance: If Coffee Was Regulated Like Cannabis*; Larry Alton, *How Seed to Sale Systems Are Revolutionizing the Cannabis Industry* (explaining the benefits of a seed to sale tracking system); Catherine Goldberg, *Everything You Need to Know About Seed to Sale Technology*.

<sup>179</sup> See generally *id.*

<sup>180</sup> See Catherine Goldberg, *Everything You Need to Know About Seed to Sale Technology*.

<sup>181</sup> For example, Alaska permits cannabis-related businesses to use approved third-party applications to manage their interactions with the State-mandated system. See State of Alaska Alcohol & Marijuana Control, *AMCO/Validated Integrator List*, [https://docs.wixstatic.com/ugd/b7d3d1\\_76801fe5add9463c92984ba2599185d2.pdf](https://docs.wixstatic.com/ugd/b7d3d1_76801fe5add9463c92984ba2599185d2.pdf).

<sup>182</sup> For example, California law mandates the creation of “an electronic database containing the electronic shipping manifests to facilitate the administration of the track and trace program.” Cal. Bus. & Prof. Code § 26067(b)(1).

information sharing with other government authorities and financial institutions at the request or with permission of individual cannabis-related businesses.<sup>183</sup>

Implementation of a statewide stable and secure seed-to-sale system, including use of the most advanced tags and tracking systems to improve automation and accuracy, would be in the interest of New York City. The City recommends the seed-to-sale system be developed in consultation with State banking authorities, State and City tax authorities, and representatives of local governmental cannabis-regulating authorities to determine the ideal information to collect and track. The State's experience with its existing medical cannabis seed-to-sale system will be valuable.<sup>184</sup> The City requests that information from the seed-to-sale system be shared with both State and local regulatory and licensing authorities,<sup>185</sup> and that it may be shared with cannabis-related business counterparties.

State and local taxation authorities will find data stored on the seed-to-sale system useful in conducting audits and verifying receipts. Banks seeking to comply with federal banking guidance, State banking regulations, and know-your-customer requirements can each use seed-to-sale data to verify that their client cannabis-related businesses are in compliance with State and local laws. And banking regulators can use the data as well to confirm banks are meeting their obligations.

To facilitate information sharing, the City would support creation of a portal aggregating the seed-to-sale system and other data on cannabis-related businesses from regulators at all levels, which can be accessed by regulators as well as financial institutions<sup>186</sup> with which individual cannabis-related businesses are banking, and with such access for banks either mandated by law or highly encouraged.<sup>187</sup>

If cannabis-related businesses are required to share their uploaded seed-to-sale information and other books and records with banks when entering and continuing a banking relationship, robust provisions for privacy and controlled use of the information will need to be developed as well.<sup>188</sup>

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<sup>183</sup> California permits state and local law enforcement agencies to access the seed-to-sale system data. See Cal. Bus. & Prof. Code § 26067(b)(7).

<sup>184</sup> That system is currently administered by BioTrackTHC. See generally BioTrackTHC, *New York Seed to Sale Traceability Knowledge Center*, <https://www.biotrack.com/new-york/>.

<sup>185</sup> For example, California permits state and local law enforcement agencies to access the seed-to-sale system data. See Cal. Bus. & Prof. Code § 26067(b)(7).

<sup>186</sup> Consideration should be given to whether portal access should be granted mandatorily with a bank doing business with a given cannabis-related business, by explicit permission granted by the cannabis-related business, and if licensing authorities may condition licenses on information sharing waivers, in line with Oregon's House Bill 4094 and California's contemplated Cannabis Authority. See H.R. 4094-B, 78th Leg. Assemb., 2016 Reg. Sess., § 2 (Or. 2016); Cal. State Ass'n of Ctys., *California Cannabis Authority*, [http://www.counties.org/sites/main/files/file-attachments/california\\_cannabis\\_authority\\_cca.pdf](http://www.counties.org/sites/main/files/file-attachments/california_cannabis_authority_cca.pdf).

<sup>187</sup> The Washington State Liquor and Cannabis Board will share the file of a licensed cannabis-related business with a financial institution that signs an appropriate waiver form, and the Department of Financial Institutions encourages banks to make such a request of their cannabis-related business clients. See Letter from Randy Simmons, Deputy Dir. Wash. State Liquor Control Bd. to Wash. State Fin. Instit. (Oct. 16, 2014), <https://dfi.wa.gov/documents/banks/liquor-control-board-letter.pdf>.

<sup>188</sup> A California State Treasurer's report lays out an expansive vision for information sharing, advising the State and local governments to create: "an online portal aggregating data on cannabis businesses from local government units and all 11 state agencies with cannabis regulatory or data-collection responsibilities. The portal should be designed with financial institution compliance needs in mind and provide

An adequate number of analysts will be needed to convert the data entered into the system into actionable information, both for law enforcement purposes as well as to produce useful information for the public.<sup>189</sup>

## **5. Establish an Electronic Licensing Management System, with Coordination at the State and Local Levels**

The City strongly suggests that all license applications and supporting documentation—in both State and municipal licensing systems—be managed electronically.

Electronic management would ease administrative burdens on the government and business owners. In particular, it would facilitate data sharing and analytics by allowing service providers, particularly banking, accounting, and legal professionals, to better conduct customer due diligence. Electronic management would also facilitate monitoring by law enforcement and licensing officials and allow government authorities to study more easily metrics such as demand for licenses by category and demographics of market participants.<sup>190</sup> In addition, information collected by the seed-to-sale system can be more easily linked to the State’s and City’s existing licensing, law enforcement, tax, or banking regulatory systems if the systems are electronically managed.<sup>191</sup>

Because protecting the privacy of all individuals operating in the legal cannabis industry will be important, particularly in an environment of continued federal prohibition, any regulatory record-keeping system (electronic or otherwise) must take special care to appropriately retain but keep confidential, through anonymization or other technical means, all personal identifying information.

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material to help institutions fulfill their know-your-customer responsibilities. The data should include licensing and regulatory information, data on key personnel, product lists, sources of supply, financial records including major transactions, ongoing regulatory activity including citations for violations, adverse comments, and evidence of suspicious or illegal activities, provided such material is not restricted by disclosure rules or other agreements.” John Chiang, Cal. State Treasurer, *Banking Access Strategies for Cannabis-Related Businesses: A Report from the State Treasurer’s Cannabis Banking Working Group 17* (2017), <https://www.treasurer.ca.gov/cbwg/resources/reports/110717-cannabis-report.pdf>.

<sup>189</sup> For example, Washington State has a “Marijuana Dashboard,” which updates regularly with information drawn from the State’s tracking system and other sources. The system is also open to developers to copy and use the underlying data for their own visualizations or research. See Wash. State Liquor & Cannabis Bd., *Marijuana Dashboard*, <https://data.lcb.wa.gov/stories/s/WSLCB-Marijuana-Dashboard/hbnp-ia6v/>.

<sup>190</sup> Any applicants for preferential equity licensing programs could self-report their or their employee/subcontractor’s criminal justice history to indicate that they meet application criteria. Massachusetts follows this practice. Discussion with Shaleen Title, Comm’r, Mass. Cannabis Control Comm’n.

<sup>191</sup> See S. 3040-C, sec. 31 § 182.

## **IV. Recommendations to License and Regulate the Commercial Cannabis Industry to Promote Economic Opportunity and Public Health and Safety**

### **1. Establish a Dual Licensing Structure with Both State and Municipal Authority**

Special care must be taken in crafting State law and launching and regulating this new industry to ensure economic opportunities for small community-based businesses, not for corporate conglomerates. The City hopes to be empowered to create its own cannabis regulatory authorities to conduct licensing and other activities, with staffing and interagency coordination determined in the local legislative and rulemaking processes.

Specifically, the City seeks co-authority with a designated State entity to issue and revoke licenses, as well as the ability to create additional license categories that specifically address local needs. The City's approach to regulating the concentration of retail cannabis outlets will likely differ from less dense locales with more car-centric cultures. In addition, especially given the significant number of people with cannabis-related law enforcement histories, the City will wish to designate certain tiers or initial amounts of licenses to specific "equity" applicants. The City prefers maximum local authority, with coordination between the State and City governments, to to approach these issues most appropriately for local communities.

This is consistent with the approach taken in Colorado<sup>192</sup> and Massachusetts,<sup>193</sup> which each grant local government bodies co-equal licensing authority.

California has also embraced a co-licensing model that allows a degree of local control. California applicants must first obtain local authorization or demonstrate compliance with local ordinances before obtaining a state license.<sup>194</sup> In addition, state licensing authorities are explicitly prohibited from approving a license application if approval would violate the provisions of any local ordinance or regulation.<sup>195</sup> The California legislation created a state oversight committee to advise local licensing authorities, and requires that committee members include "persons who work directly with racially, ethnically, and economically diverse populations."<sup>196</sup> Finally, California gives local jurisdictions explicit power to establish additional standards, requirements, and regulations with respect to, among other subjects, "worker protections."<sup>197</sup> Using the abundant control entrusted to local jurisdictions, cities across California have been able to

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<sup>192</sup> See Colo. Rev. Stat. § 44-12-301.

<sup>193</sup> See Mass. Gen. Laws ch. 94G, § 3.

<sup>194</sup> See Cal. Bus. & Prof. Code §§ 26032(a)(2), 26055(d), (g)(2), 26200.

<sup>195</sup> See Cal. Bus. & Prof. Code § 26055(d).

<sup>196</sup> Cal. Bus. & Prof. Code § 26014.

<sup>197</sup> *Id.* § 26201.

implement innovative programs that promote business diversity within their borders and are sensitive to particular local conditions and history.<sup>198</sup>

The 2018 Proposed Bill currently vests all licensing authority in a Bureau of Cannabis Policy in a structure similar to that of the New York State Liquor Authority.<sup>199</sup> Municipalities would receive 30 days' notice of license applications, and could comment to the Bureau, but would not have the ability either to block or grant a license.<sup>200</sup> The Bureau would also have authority to "limit the total amount of [cannabis] produced in New York based on the demand for [cannabis] and [cannabis] products and in an effort to reduce illicit [cannabis] markets."<sup>201</sup> While such centralization of authority in a State body would promote certainty and uniformity with respect to basic criteria such as age limits, the City believes involvement from municipal officials is critical to navigate the many fundamentally local issues pertaining to licensing.<sup>202</sup>

## **2. Give Local Governments Ample Authority to Promote Equity in Licensing— Which the City Would Use to Promote Economic Opportunities**

The City places heavy weight on ensuring that a legalized cannabis scheme prioritizes economic opportunities for those most disadvantaged by criminalization and discrimination and keeps corporate cannabis from seizing the market. A cornerstone of any legalization scheme must be advancing this goal.

The 2018 Proposed Bill provides for the State to implement "a social equity plan and actively promote racial, ethnic, and geographic diversity" in its licensing practices, including to ensure inclusion of "minority-owned" and "women-owned" businesses.<sup>203</sup>

The City will strive to secure authority to make licensing determinations and implement equity programs tailored to advance the goals expressed in the State's bill and address the priorities and needs of its communities.

Accordingly, the the City seeks broad discretion to enact amnesty and preferential equity licensing programs similar to those in Massachusetts, San Francisco, Oakland, and Los Angeles. Amnesty programs, such as San Francisco's, make licenses available to individuals who may have

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<sup>198</sup> See, e.g., San Francisco Office of Cannabis, *Equity Program*, <https://officeofcannabis.sfgov.org/equity>; City of Oakland, *Become an Equity Applicant or Incubator*, <http://www2.oaklandnet.com/government/o/CityAdministration/cannabis-permits/OAK068455>; L.A., Cal. Municipal Code, ch. X art. 4, § 104.20.

<sup>199</sup> See S. 3040-C, sec. 31 § 166.

<sup>200</sup> In New York City, the Community Board established under Section 2800 of the City Charter, with jurisdiction over the area in which the premises will be located, will be considered the local body to which the Proposed Bill would require notification of intent to file an application for a license. See *id.* sec. 31 § 185.2(B).

<sup>201</sup> *Id.* sec. 31 § 167.4.

<sup>202</sup> See Manhattan Dist. Att'y, *May 2018 Report*, at 28-29.

<sup>203</sup> S. 3040-C, sec. 31 § 190.

previously been selling cannabis illegally.<sup>204</sup> More broadly, equity licensing programs create preferences for applicants who meet certain criteria, such as having a cannabis-related conviction in the past, having an immediate family member with a cannabis-related conviction, being of low-income, or residing in a disproportionately affected neighborhood.<sup>205</sup>

Local control is also essential to ensure that equity licensing applicants obtain the small business support they need upon receipt of their licenses. Under one program, Oakland reserved half of its cannabis permits for city residents earning less than 80% of the average city income who had either lived in a specified high-crime zone for a prescribed period or been convicted of a cannabis crime in Oakland after 1996.<sup>206</sup> Oakland also moved non-equity applicants to the front of the permit line if they “incubated” equity applicants by providing them with 1,000 square feet of free business space for three years.<sup>207</sup>

Any equity licensing program would also incorporate feedback and input from impacted communities. Lacking such initiatives, other states, such as Maryland, have already faced criticism after national conglomerates quickly moved into the state’s medical cannabis market and outcompeted local residents.<sup>208</sup>

To further guarantee the effectiveness of equity programs, New York City will commit to supporting the development of equity applicants and ensuring the application process is straightforward, while collecting necessary information to prevent fraud. Another important step will be to provide support to equity applicants after the concession of licenses. Towards this

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<sup>204</sup> According to the San Francisco Cannabis Office, this category of businesses is referred to as “Existing Cannabis Businesses” in official San Francisco Cannabis Office materials, and the term “amnesty” has been used informally in outreach efforts.

<sup>205</sup> Other criteria may include past criminal conviction in general, residency in historically over-policed neighborhoods, a certain number of years in the City public school system, and/or owning a business with at least 51% verified minority or impacted community participation.

For example, in Oakland, CA, half of the available cannabis business licenses are reserved for neighborhoods with disproportionate rates of drug arrests, and applicants for these licenses must have lived in the neighborhood for at least 10 years over a 20 year period and (i) must earn less than 80% of Oakland AMI or anyone who meets the income requirement or (ii) must have been convicted of a cannabis-related crime since 1996 (when medical use was decriminalized). See Pavithra Mohan, *Is the Cannabis Industry Repeating Silicon Valley’s Worst Mistakes?*, Fast Company (Dec. 18, 2017), <https://www.fastcompany.com/40495250/is-the-cannabis-industry-repeating-silicon-valleys-worst-mistakes>; Oakland City Ordinance No. 13478, § 5.81.060 (2018), <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/agenda/oak070202.pdf>.

San Francisco has included in the definition of equity applicants those who (i) satisfy household income restrictions and have an arrest from 1971-2016 for a cannabis-related offense; (ii) have a parent, sibling, or child with a cannabis-related arrest from 1971-2016; (iii) lost housing in San Francisco after 1995 through eviction, foreclosure, or subsidy cancellation; (iv) attended school in San Francisco for five years since 1971; and/or (v) lived in San Francisco census tracts where at least 17% of households are at or below federal poverty level for five years since 1971. San Francisco also waives permit fees for equity applicants and provides three years of incubator support. Sacramento waives fees for similar equity applicants. See Cal. Bureau of Cannabis Control, *Overview of California Cannabis Equity Programs* (Feb. 2018), [https://bcc.ca.gov/about\\_us/meetings/materials/20180301\\_equ\\_overview.pdf](https://bcc.ca.gov/about_us/meetings/materials/20180301_equ_overview.pdf).

Massachusetts recommends race-neutral criteria for priority review and accounting for gentrification whenever residency is a factor in eligibility. For a full list of the Massachusetts equity applicant requirements, see Mass. Cannabis Control Comm’n, *Guidance for Equity Provisions*, <https://mass-cannabis-control.com/wp-content/uploads/2018/04/FINAL-Social-Provisions-Guidance-1PGR-1.pdf>.

<sup>206</sup> See Oakland, Cal. Municipal Code ch. 5.81, 5.81.060(A), 5.81.060(D).

<sup>207</sup> See *id.* ch. 5.80.045(D).

<sup>208</sup> See Doug Donovan, *National Firms Are Starting to Snap Up Maryland’s Medical Marijuana Licenses. Regulators Want to Prevent That*, Balt. Sun (July 26, 2018), <http://www.baltimoresun.com/news/maryland/politics/bs-md-maryland-marijuana-dispensaries-20180718-story.html>.

end, the City embraces the language in the 2018 Proposed Bill that would establish an incubator program to provide direct support to equity applicants in the form of counseling services, education, small businesses coaching, and compliance assistance.<sup>209</sup>

A final consideration in developing any equity program is the protection of privacy in administering screening for equity eligibility. At the same time, to encourage community participation, eligibility criteria must be clear to the public. There should be a sufficient period before legalization “goes live” to allow the City, with community input, to develop and put in place programs advancing equity participation, so that the cannabis market does not become quickly dominated by large, well-resourced enterprises.

In alignment with equity licensing regulations, the City could create safeguards to prevent licensing regulations and zoning policies from producing inequitable distribution of adult-use cannabis businesses, with respect to every type of license, and protect City residents of color from experiencing disproportionate policing and exposure to advertising and community quality of life issues, as has been the case with density of alcohol sales sites in the City. This could be done through setting neighborhood license caps for each license type and, as part of an equity program, incentivizing businesses to locate in low outlet density areas, for example. The City’s plans for locating cannabis outlets must account for the health and safety of area residents.

The City might also instate a policy that allows non-equity applicants to gain priority to licenses if they provide a percentage of their profits to a City-directed fund for economic opportunity investments and make commitments to such equity measures as providing free space to equity applicants; participating in a joint venture or subcontracting partnership with an equity applicant; and committing to a hiring plan that provides meaningful and well-paying workforce opportunities to low-income populations, those with prior cannabis-related offenses, or those who qualify through the Small Business Services Workforce Career Center.<sup>210</sup>

### **3. Establish a Tiered and Capped Licensing System**

The City recommends that a system of tiers be developed for producers, processors, and retailers based on the volume of goods processed or sold, using the current New York State craft beverage structure as a model.<sup>211</sup> At the same time, after studying the appropriate levels and mechanism, a caps should be determined by City and/or State governments on the number of nursery, producer, and retail licenses.

Creating different license types based on multiple variables allows the regulatory authority to better control the development of the market so as to encourage small business success and

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<sup>209</sup> See S. 3040-C, sec. 31 § 190(4).

<sup>210</sup> For more information, see City of New York, *New York Works: A Jobs Plan for All New Yorkers*, <https://newyorkworks.cityofnewyork.us/overview>.

<sup>211</sup> See N.Y. State Liquor Authority, *Definition of License Classes*, <https://sla.ny.gov/get-license> (license classes include a “microbrewery” license, for businesses producing up to 60,000 barrels of beer per year, and a “restaurant-brewer” or “brew pub” license, for establishments producing up to 5,000 barrels per year).

equity of opportunity. For example, workforce development and technical assistance programs could be targeted to licenses in smaller tiers.

Other jurisdictions have taken similar approaches. California’s legislation called for a minimum of twenty license types, with tiers for cultivators and manufacturers based on output, lighting, and whether growth takes place indoors or outdoors.<sup>212</sup> Massachusetts similarly created eleven tiers for cannabis cultivators based on canopy size and tied some retail licenses to specified cultivation tiers.<sup>213</sup>

The City, in partnership with non-profit and community development organizations, could target some of its existing small business support programs (for example, access to capital financing, “starting a business” courses, and similar trainings and offerings)<sup>214</sup> to help equity program applicants obtain low volume production and distribution licenses, thereby diversifying the cannabis industry while supporting social justice policy goals.

Similarly, capping the number of available licenses for nurseries, producers (the most sought-after), and retail establishments should help prevent over-saturation and product leakage into the illicit market. Anticipating the reality that the illicit cannabis market may persist only underscores the importance of enacting policies that encourage market participants to produce, distribute, and sell cannabis only through legal channels.<sup>215</sup>

States without caps have experienced oversupply problems.<sup>216</sup> Oregon, a relatively low population state that did not set a cap on the number of production licenses,<sup>217</sup> saw the cannabis production rate saturate its domestic market.<sup>218</sup> The Oregon State Police estimate that the state may be producing over one million pounds of cannabis per year above what its residents are consuming.<sup>219</sup> This likely contributes to illegal export of Oregon-grown cannabis to states where cannabis remains illegal. Colorado and Washington State are also experiencing over-saturation in their retail markets.<sup>220</sup> Washington saw a 63% increase in the number of plants started in 2017

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<sup>212</sup> See Cal. Bus. & Prof. Code § 26050.

<sup>213</sup> See 935 Mass. Code. Regs. 500.105(d).

<sup>214</sup> See N.Y.C. Bus., *Business Services*, <https://www1.nyc.gov/nycbusiness/topicpage/support-for-businesses>.

<sup>215</sup> See Manhattan Dist. Att’y, *May 2018 Report*, at 3.

<sup>216</sup> See *id.* at 16 (citing interviews with the Denver District Attorney’s Office and the Denver Police Dept. (Mar. 19, 2018), the Boulder County District Attorney’s Office and the Boulder Police Dept. (Mar. 20, 2018), and U.S. Attorney for the Dist. of Colo. Robert Troyer (Mar. 30, 2018); see also Gillian Flaccus, *Glut of Marijuana in Oregon is Cautionary Tale, Experts Say*, Chi. Trib. (May 31, 2018), <http://www.chicagotribune.com/news/nationworld/ct-marijuana-oregon-cautionary-tale-20180531-story.html>.

<sup>217</sup> See Or. Rev. Stat. §§ 475B.070, 475B.074, 475B.075, 475B.085.

<sup>218</sup> See Or. State Police, *A Baseline Evaluation of Cannabis Enforcement Priorities in Oregon 9* (Jan. 2017), [https://mass-cannabis-control.com/wpcontent/uploads/2017/12/A-Baseline-Evaluation-of-Cannabis-Enforcement-Priorities-in-Oregon\\_.pdf](https://mass-cannabis-control.com/wpcontent/uploads/2017/12/A-Baseline-Evaluation-of-Cannabis-Enforcement-Priorities-in-Oregon_.pdf).

<sup>219</sup> See *id.*

<sup>220</sup> See *How Many Dispensaries are in Denver, Colorado?*, My 420 Tours (Feb. 28, 2018), <https://my420tours.com/many-dispensaries-denver-colorado>; Wilson Criscione, *Industry Experts Say Washington Grew Too Much Cannabis, and It Could Be a Serious Problem*, Inlander (Aug. 16, 2018) [Wilson Criscione, *Industry Experts Say Washington Grew Too Much Cannabis, and It Could Be a Serious Problem*], <https://www.inlander.com/spokane/industry-experts-say-washington-grew-too-much-cannabis-and-it-could-be-a-serious-problem/Content?oid=11473656>.

as compared to 2016, continuing an upward trend since legalization.<sup>221</sup> In contrast, retail volumes, taking into account price decline, were up less than 20%.<sup>222</sup>

To avoid over-supply problems such as those experienced in Oregon, Colorado, and Washington State, New York should consider establishing caps at different points in the supply chain. Comprehensive analyses will be needed to determine an approach to license caps that encourages applications and market participation, with the goal of reaching an equilibrium of supply and demand that brings participants out of the illicit market and prevents gluts in the marketplace.

#### **4. Localities Should Control Whether to Permit and Regulate On-Site Consumption Establishments**

Similar to most other legalized states,<sup>223</sup> New York City seeks the power to enact a legal structure that grants licenses for on-site consumption establishments. The flexibility to approve and regulate consumption locations will be particularly important in the City, where residents living in NYCHA housing and other buildings that prohibit smoking could have no lawful place to smoke cannabis and could face loss of housing for use in their homes.<sup>224</sup> For a municipality like New York City, access to legal, regulated on-site consumption sites is thus a matter of fairness and equity. Permitting designated on-site consumption establishments would also allow legal consumption by adult tourists and visitors to the City.

The City therefore aims to obtain the flexibility to explore regulatory approaches to commercial distribution and sale that allow greater control over access to cannabis, like government-controlled sales systems or non-profit membership clubs. The City wants the responsibility to oversee the licensing process, with authority to enact regulations that address the density and distribution of businesses throughout their jurisdiction, hours of operation, and concurrent sales of food or beverages. The City would also seek to regulate ventilation and filtration to protect residents of buildings above and adjacent to on-site consumption spaces from second-hand smoke.

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<sup>221</sup> See Wilson Criscione, *Industry Experts Say Washington Grew Too Much Cannabis, and It Could Be a Serious Problem*.

<sup>222</sup> See *id.*

<sup>223</sup> Alaska, California, Colorado, Maine, Massachusetts, Michigan, and Nevada permit some form of on-site consumption establishment.

<sup>224</sup> The Department of Housing and Urban Development prohibits the use of cannabis products in all multifamily assisted properties, including those in states that have decriminalized or legalized cannabis. See Benjamin T. Metcalf, U.S. Dep't of Hous. & Urban Dev., Memorandum on Use of Marijuana in Multifamily Assisted Properties (Dec. 29, 2014), <https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.pdf>. All New Yorkers are prohibited from smoking or vaping in most public areas by the City's Smoke Free-Air Act, which includes "common areas" of residences with three or more units. Although smoking inside one's apartment is not prohibited by the Act, Local Law 127 passed in New York City in 2017 requires multifamily residential buildings to adopt a smoking policy, which may prohibit smoking in non-exempt units. See N.Y.C. Dep't of Health & Mental Hygiene, *Disclosure of Policies on Smoking in Residential Buildings: What You Need to Know* (last updated June 2018), <https://www1.nyc.gov/assets/doh/downloads/pdf/smoke/smoking-disclosure-guide-policy-residential.pdf>.

## **5. Localities Should Control Whether to Permit and Regulate Licensed Delivery Businesses**

The City is pursuing securing the authority to prohibit or permit and regulate licenses to deliver cannabis products to consumers.<sup>225</sup> In urban areas like New York City, residents are generally accustomed to delivery of products and services. This culture has existed for decades, predating the advent of internet and smartphone application-based delivery services. Moreover, cannabis delivery to consumers in the illicit market already occurs. Accordingly, following adult-use cannabis legalization, a high demand for cannabis product delivery will likely persist. Moreover, providing for home delivery services can mitigate concerns about consumers driving under the influence of cannabis. Indeed, a licensed, carefully regulated delivery system may be the best approach to safely address demand.

Cannabis delivery service poses serious concerns, however, and New York City would need to undertake careful consideration and study before formally authorizing this step. A key concern, as with the delivery of alcohol products, is limiting sales only to adults over the legal consumption age and preventing delivery to minors. The City would need to explore a number of restrictions to address this and other issues. For example, cannabis delivery transactions would need to be highly regulated to ensure minors would be unable to place orders or accept delivery, potentially with mandatory customer identity checks online at time of purchase and again at time of delivery. To mitigate concerns about over-consumption, the City might consider restricting same-day delivery. Additionally, delivery licensees might be limited to working with appropriately licensed dispensaries. In keeping with the proposed general prohibition on vertical integration, discussed below, most types of delivery licensees might be permitted to hold licenses only in other consumer-facing cannabis businesses (i.e., retail dispensaries).

Given the unique needs of communities across the State—including, for example, New York City's density and consumer patterns—the City hopes to have the ultimate authority over delivery licenses, ranging from prohibiting delivery entirely to setting stringent license requirements and limits.

## **6. Prohibit Vertical Integration, with Certain Exceptions, To Promote Equity Opportunities**

The City supports largely prohibiting vertical integration of cannabis businesses, with an exception for microbusinesses. Vertical integration refers to the ability of businesses to own and control each stage of the supply chain, which may otherwise be owned by different, specialized businesses. In this context, vertical integration relates to the ability of a business to own and control multiple stages in the cannabis industry, from seed cultivation to consumer retail.

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<sup>225</sup> California, Maine, Nevada, and Oregon permit locales to license home delivery services.

The basic purpose of the proposed vertical integration restriction is to create a barrier between consumer-facing licensees and more business-to-business licensees operating in parts of the supply chain that require greater capital investment. Cultivation and processing, as well as distribution, often require significant capital investment and economies of scale. Producers and processors could be permitted to hold limited licenses in other categories, to allow such companies to control the product from seed to manufactured product.

But to curb well-capitalized “upstream” cannabis businesses from dominating access and communications with consumers, with the exception of microbusinesses, ownership of retail and delivery licenses should be prohibited by any other licensee type. Restricting vertical integration will thus allow small businesses to compete and increase consumer choice by preventing conglomeration and domination of the industry by large businesses.<sup>226</sup>

Carving out an exception for microbusinesses will curtail adverse effects that a prohibition on vertical integration may have on artisanal producers. Significantly, the microbusiness exception also increases opportunities for equitable participation in the cannabis industry. It creates an opportunity for targeted outreach to promote microbusiness licenses for specific groups of applicants, which further promotes access to economic opportunity. Microbusinesses should be permitted to cultivate, process, and sell cannabis in a retail capacity. As a microbusiness might replicate the business model of a microbrewery, the State legislation’s definition of “microbusiness” should also permit locally-licensed consumption of cannabis. Given the flexibility that should be permitted for microbusinesses to vertically integrate, localities will need the leeway over time to adjust the production caps or overall availability of microbusiness licenses to respond to changes in the marketplace.

Other jurisdictions that have legalized adult-use cannabis have struggled with how and to what extent multiple licenses and vertical integration should be allowed, suggesting that this area should be given careful consideration by the State. In California, where vertical integration is largely unrestricted, industry stakeholders have voiced concerns that the lack of constraints could harm competition and that large, integrated firms would crowd out small businesses and entrepreneurs.<sup>227</sup> In Washington, integration between retailers and cultivators or processors is prohibited, but integration between cultivators and processors is permitted.<sup>228</sup> Washington initially limited producers to one license, but amended those rules in 2017 to allow a producer to hold up to three licenses.<sup>229</sup> Small farmers have complained that the rule change has allowed

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<sup>226</sup> See generally Jolene Hansen, *The Pros and Cons of Vertical Integration*, Cannabis Bus. Times (Sept. 21, 2017), <http://www.cannabisbusinesstimes.com/article/the-pros-and-cons-of-vertical-integration>.

<sup>227</sup> See Georgina Moreno, *Balancing Vertical Integration in Calif.’s Cannabis Industry*, Law360 (Jan. 12, 2018), <https://www.law360.com/articles/1001419/balancing-vertical-integration-in-calif-s-cannabis-industry>.

<sup>228</sup> See *id.*

<sup>229</sup> See Bart Schaneman, *Washington State Rule Change Expands Business Options for Marijuana Cultivators*, Marijuana Bus. Daily (Aug. 17, 2017), <https://mjbizdaily.com/washington-state-marijuana-growers-can-multiple-licenses-spurring-potential-mergers/>.

large commercial producers to expand at the expense of small businesses, contributing to problems with oversupply and price depression.<sup>230</sup>

In Colorado, however, regulatory authorities encouraged vertical integration for its economic and administrative benefits. Following legalization, an implementation task force recommended, and the Colorado legislature approved, a mandatory vertically integrated structure in an effort to reduce the complexity of the market, limit diversion to the illicit market, and ease the tasks faced by regulatory enforcers in the industry's early days.<sup>231</sup> Cannabis dispensaries, both retail and medical, were required to cultivate 70% of the products they sold.<sup>232</sup> A counterpoint to these benefits, however, is that vertical integration, coupled with availability of less costly real estate for new businesses, has meant that lower income communities have been disproportionately impacted by cannabis concentration.<sup>233</sup>

While vertical integration carries the administrative benefits inherent to a more concentrated industry, ultimately equity and community impact concerns and the desire to curb the creation of "Big Cannabis" akin to "Big Tobacco" outweigh any benefits of vertical integration. Accordingly, the City supports an approach that impedes vertical integration and, simultaneously, facilitates a robust microbusiness environment, both of which will expand economic opportunities for disenfranchised individuals and communities.

## **7. Set Initial License Terms to Allow Time for a Start-Up Process**

The City recommends initial license terms that accommodate the growth and change inevitable in the early years of the new adult-use cannabis industry. Given the capital and multiple regulatory approvals required to open cannabis businesses (e.g., building and fire permits), licensees should be given additional time to launch their businesses following initial approvals, before being required to apply for renewals. Licensees should be permitted to retain their licenses for a period of at least two years following initial approval. At a minimum, the renewal process should be relaxed in the first five years post-legalization to permit licensees to more easily renew and retain their licenses, even if their businesses have undergone substantial changes. Following an initial ramp-up period, license periods can be shortened to one or two years, which is standard for most business licenses in New York City.

This measure can be coupled with creation of the tiered licensing system discussed earlier, and a special set of licenses to benefit equity applicants. The tiered structure generally allows for smaller and larger businesses to have access to the market on similar timeframes. There may, however, still be applicants, particularly equity applicants, who may face added start-up

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<sup>230</sup> See Wilson Criscione, *Industry Experts Say Washington Grew Too Much Cannabis, and It Could Be a Serious Problem*.

<sup>231</sup> See John Hudak, Ctr. for Effective Pub. Mgmt. at Brookings, *Colorado's Rollout of Legal Marijuana is Succeeding* 9 (July 31, 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/CEPMMJCov2.pdf>.

<sup>232</sup> See *id.* at 9-10.

<sup>233</sup> See David Migoya, *Denver's Pot Businesses Mostly in Low-Income, Minority Neighborhoods*, Denver Post (Jan. 23, 2017), <https://www.denverpost.com/2016/01/02/denvers-pot-businesses-mostly-in-low-income-minority-neighborhoods/>.

challenges, such as securing a loan or space lease. To address this, two-phase licenses for equity applicants can offer staged licensing pending full satisfaction of all requirements. This allows small businesses that otherwise lack the resources to submit complete applications in the same timeframe as larger businesses not to be disadvantaged. For example, in California, where permanent regulations were still being developed after the passage of cannabis legalization, this issue was addressed by provision of temporary licenses to pre-existing cannabis businesses or current medical cannabis businesses.<sup>234</sup>

## **8. Allow Limited Liability Companies to Apply for Licenses**

The City proposes granting limited liability companies (“LLCs”) the ability to apply for licenses to avoid statutory ambiguity and confusion. LLCs offer a more flexible form of ownership that can benefit smaller, individual-owned enterprises.

The City recommends the establishment of reporting standards, with appropriate background checks of relevant owners and shareholders to establish individual accountability and traceability. New York State’s existing rules that govern entities seeking liquor licenses from the State Liquor Authority provide a model.<sup>235</sup>

## **9. Allow Cooperatives to Participate as Licensees**

In addition to licensing LLCs, the City encourages permitting the formation and licensing of cooperatives upon meeting certain special requirements. Cooperatives are more informal arrangements that may encourage individuals to band together and grow their own crops while splitting costs and profits, thereby lowering barriers to entry and infusing more high-quality and specialty products into the market.<sup>236</sup> Washington State and Massachusetts specifically allow craft cannabis cooperatives to participate in the industry.<sup>237</sup> As with LLCs, reporting standards and appropriate background check requirements should be considered.

## **10. Designate License Types for Researchers, Service Workers, and Limited-Purpose Events**

The 2018 Proposed Bill currently provides for nine types of licenses, which are fairly comprehensive: (i) a cannabis nursery license, (ii) a cannabis producer license, (iii) a cannabis processor license, (iv) a cannabis distributor license, (v) a cannabis retailer license, (vi) a cannabis

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<sup>234</sup> See San Francisco Office of Cannabis, <https://officeofcannabis.sfgov.org>.

<sup>235</sup> See N.Y. State Liquor Authority, *Frequently Asked Questions*, <https://www.sla.ny.gov/get-license>.

<sup>236</sup> See Shira Schoenberg, *Massachusetts Farmers Hope to Keep Marijuana Business Local*, Mass Live (Oct. 8, 2017), [https://www.masslive.com/politics/index.ssf/2017/10/massachusetts\\_farmers\\_hope\\_to.html](https://www.masslive.com/politics/index.ssf/2017/10/massachusetts_farmers_hope_to.html).

<sup>237</sup> See Mass. Gen. Laws ch. 94G, § 4; see also Mass. Cannabis Control Comm’n, *Guidance on Types of Marijuana Establishment Licenses*, <https://mass-cannabis-control.com/wp-content/uploads/2018/04/Guidance-License-Types.pdf>; Wash. State Liquor & Cannabis Bd., *Marijuana Licensing*, <https://lcb.wa.gov/mjlicense/marijuana-licensing>.

microbusiness license, (vii) a cannabis on-site consumption license, (viii) a cannabis delivery license, and (ix) a cannabis testing license.<sup>238</sup>

The 2018 Proposed Bill also authorizes a contemplated Bureau of Marijuana Policy to create additional license categories as needed.<sup>239</sup> The City suggests creation of several additional license categories at the outset in order to ensure that the commercial industry has the support structure to develop and grow successfully and responsibly, specifically for research, individuals working in the legal cannabis industry, and industry events.

First, the City recommends consideration of creating a cannabis research license category that grants the holder the ability to produce, process, and possess cannabis for limited research purposes and not for sale. Because cannabis remains a Schedule I substance under federal law,<sup>240</sup> institutions studying its health impacts and medicinal benefits often struggle to conduct reliable and rigorous research.<sup>241</sup> In 2016, Washington State created a research license category to help address that gap.<sup>242</sup> Massachusetts also allows specially designated cannabis research facilities to cultivate, purchase, or otherwise acquire cannabis for research purposes,<sup>243</sup> and Oregon allows private and public entities to apply for research certification through the State's cannabis licensing authority.<sup>244</sup> Permitting and regulating cannabis-related research would allow New York State to occupy a leading position in the field of cannabis research and provide critical data on the public health and social impacts of cannabis, as the types of products and uses of cannabis evolve in a legalized context.

Second, the City advises review of a license for individuals working in the legal cannabis industry, akin to licenses in the food service industry for food handlers.<sup>245</sup> Colorado issues occupational licenses to staff who work in or have access to restricted areas of licensed cannabis facilities.<sup>246</sup> These licenses would help establish any necessary safety and training standards for workers in the industry—including occupational safety regarding exposure and food handling (for edibles)—and a knowledge base for consumer education. Additionally, these licenses could also facilitate the creation of any equity preference for employees with a prior history of justice involvement

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<sup>238</sup> See S. 3040-C, sec. 31 § 169.

<sup>239</sup> See S. 3040-C, sec. 31 § 169(10).

<sup>240</sup> See U.S. Drug Enf't Admin., *Drug Scheduling*, <https://www.dea.gov/drug-scheduling>.

<sup>241</sup> See Robert Gebelhoff, *Good Science on Marijuana Is So Hard to Find*, Wash. Post (Mar. 15, 2017), <https://www.washingtonpost.com/news/in-theory/wp/2017/03/15/good-science-on-marijuana-is-so-hard-to-find/>; Eric Killelea, *Why Is It So Hard to Study Pot?*, Rolling Stone (Feb. 8, 2018), <https://www.rollingstone.com/culture/culture-features/why-is-it-so-hard-to-study-pot-124767>.

<sup>242</sup> See Wash. Admin. Code § 314-55-073; see also Melissa Santos, *Washington's Plans for Pot Research Going Forward, Despite Federal Rules*, News Trib. (Aug. 21, 2016), <https://www.thenewstribune.com/news/politics-government/article96791752.html>.

<sup>243</sup> See Mass. Cannabis Control Comm'n, *Guidance on Types of Marijuana Establishment Licenses*, <https://mass-cannabis-control.com/wp-content/uploads/2018/04/Guidance-License-Types.pdf>.

<sup>244</sup> See Or. Rev. Stat. § 475B.286.

<sup>245</sup> See N.Y.C. Dep't of Health & Mental Hygiene, *Food Protection Certificate*, <https://www1.nyc.gov/nycbusiness/description/food-protection-certificate>.

<sup>246</sup> See Colo. Rev. Stat. § 44-12-401(1)(e).

with cannabis. Additional training on de-escalation might also be useful, given the psychoactive nature of cannabis products and the associated impacts on behavior that might occur for consumers.

Third, the City suggests an additional license category for purposes of industry events, especially trade shows and conferences, as California has done.<sup>247</sup> Special restrictions should be placed on this license type to limit the potential for an event to become a massive consumption vehicle, rather than a place to conduct business, which was the impetus behind California’s temporary event license.<sup>248</sup>

## **11. Allow Only Sole-Purpose Cannabis Businesses**

The City supports a model where all cannabis retail businesses are sole-purpose cannabis businesses, so that only businesses with a cannabis license could sell cannabis, and those businesses would be restricted in their ability to sell other products. Thus, restaurants and stores would not be able to acquire an additional license to begin selling or serving cannabis as one of their products. Similarly, processors and distributors would not be able to acquire a cannabis license as an additional license. This would mean that no existing food processor or food or convenience store could sell cannabis products (smokable or consumable).

Many City establishments already sell CBD products, which are legal in New York State, as CBD is minimally psychoactive and believed not to carry significant health risks.<sup>249</sup> However, consumable cannabis products that contain both CBD and THC (the psychoactive component in cannabis) pose more significant public health concerns.<sup>250</sup>

Given the presence of the psychoactive compound THC in cannabis products, it is important to limit, to the greatest extent possible, any mixing of cannabis and products that contain other intoxicants, especially alcohol. Thus, establishments that sell alcohol should not be permitted to sell cannabis products. Cannabis establishments may be permitted to sell food and non-alcoholic beverages, with proper regulations. It is important to note, however, that these restrictions need not apply to businesses selling CBD-only products (though, of course, there should be basic regulations of CBD-only products in keeping with any food or drug).

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<sup>247</sup> See Cal. Bureau of Cannabis Control, *Cannabis Event Fact Sheet*, [https://www.bcc.ca.gov/about\\_us/documents/18-003\\_cannabis\\_factsheet.pdf](https://www.bcc.ca.gov/about_us/documents/18-003_cannabis_factsheet.pdf).

<sup>248</sup> See *id.*

<sup>249</sup> World Health Org., Expert Comm. on Drug Dependence, Cannabidiol (CBD) Pre-Review Report, Agenda Item 5.2 5, 7 (Nov. 2017), [http://www.who.int/medicines/access/controlled-substances/5.2\\_CBD.pdf](http://www.who.int/medicines/access/controlled-substances/5.2_CBD.pdf) (noting that CBD “is generally well tolerated with a good safety profile” and “exhibits no effects indicative of any abuse or dependence potential,” and that there is no substantive evidence that CBD is likely to cause THC-like psychoactive effects).

<sup>250</sup> THC, unlike CBD, is psychoactive, and the onset of its effects are delayed when it is ingested compared to when it is inhaled, which can lead to over-consumption. Daniel G. Barrus et al., *Tasty THC: Promises and Challenges of Cannabis Edibles*, *Methods Rep.* RTI Press 3, 7-8 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5260817> (noting that the delayed onset of effects from consuming edible cannabis products containing THC can cause both experienced and inexperienced users to over-consume or overdose).

Washington and Colorado have adopted restricted cannabis sale models.<sup>251</sup> Given the need for consumer education around cannabis products and the intoxicating nature of the product, there is a strong public health rationale to maintain a single-purpose cannabis business structure in New York as well. Indeed, this policy is particularly important in New York City’s environment, where a highly competitive real estate market creates a risk that uneven concentrations of cannabis activity will occur in the retail context. Allowing non-sole-purpose cannabis businesses may also indirectly incentivize the growth of unregulated non-traditional services or sustain demand for the illegal market.

It is important that localities be given the authority to regulate the goods that cannabis businesses may sell as well as the businesses that may hold cannabis licenses.

## **12. Give No Preferential Treatment to Existing Registered Organizations for Medical Cannabis**

Legislation should not give preferential treatment to existing medical cannabis registered organizations in the new licensing scheme. Additionally, existing registered organizations should be independently regulated. Requirements for adult-use and medical cannabis businesses should align so as to prevent business owners from seeking a license with lower barriers or costs.<sup>252</sup>

Decades of legalized medical cannabis has led to a well-developed and well-capitalized medical market populated by very large entities.<sup>253</sup> Of course, this existing structure could be a market force behind ancillary businesses (i.e., legal and manufacturing assistance) that will need to transition to supporting both medical and adult-use cannabis industries.

On the other hand, it is important to mitigate the advantages that existing registered organizations hold so that they do not dominate the nascent adult-use cannabis industry. Given the capital required to launch and operate cultivation, processing, and manufacturing businesses,<sup>254</sup> existing medical cannabis companies will be the most likely source of available cannabis products in the early period of legalization. For example, in Massachusetts, all thirty of

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<sup>251</sup> See Wash. Admin. Code § 314-55-079 (“A marijuana retailer license allows the licensee to sell only usable marijuana, marijuana concentrates, marijuana-infused products, and marijuana paraphernalia at retail in retail outlets to persons twenty-one years of age and older.”); see also Wash. State Liquor & Cannabis Bd., *Frequently Asked Questions on Marijuana*, <https://cb.wa.gov/mjlicense/marijuana-licensing>; Colo. Rev. Stat. § 44-12-402 (“A licensed retail marijuana store may only sell retail marijuana, retail marijuana products, marijuana accessories, non-consumable products such as apparel, and marijuana related products such as childproof packaging containers . . .”).

<sup>252</sup> Discussion with Jim Burack, Marijuana Enft Div., Denver, Colo. (Oct. 2018).

<sup>253</sup> See, e.g., Nick Meyers, *Sowing Success: Harvest of Arizona Aims to Be the Largest U.S. Cannabis Company*, Phx. New Times (Sept. 14, 2018), <https://www.phoenixnewtimes.com/news/harvest-of-arizona-cannabismedical-marijuana-dispensary-10823477> (discussing the scale and experience advantages of early-adopting medical cannabis companies); Marcia Heroux Pounds, *Pot Business: Toronto Medical Marijuana Company to Open U.S. Headquarters in Fort Lauderdale*, Sun Sentinel (Sept. 10, 2018) (discussing the “deep pockets” and technical, capital, and branding expertise of the “emerging corporate cannabis industry,” which has its roots in the medical cannabis market).

<sup>254</sup> See Jack Kaskey, *As Pot Prices Plunge, Growers Scramble to Cut Their Costs*, Bloomberg (Jan. 17, 2017), <https://www.bloomberg.com/news/articles/2017-01-17/as-pot-prices-plunge-growers-scramble-to-cut-productioncosts>; Lester Black, *Legal Weed Isn't the Boon Small Businesses Thought It Would Be*, FiveThirtyEight (Dec. 29, 2017), <https://fivethirtyeight.com/features/legal-weed-isnt-the-boon-small-businesses-thought-it-would-be>.

the state’s initial “provisional” licenses went to medical businesses, which were already positioned to apply. They had the capital, were familiar with the application process, and were already in compliance with medical cannabis regulations.<sup>255</sup>

Means to prevent market dominance by medical cannabis companies include a tiered license system that allocates a number of licenses to small businesses. Another measure may be to permit targeted business support and assistance to licensees operating on smaller tiers. Moreover, the transition from medical to adult-use cannabis production will require major changes to a medical cannabis company’s business model. This adaptation may naturally reduce the advantages that existing medical cannabis businesses hold for entry into the adult-use cannabis industry, particularly in New York State, which has a restricted medical cannabis industry.<sup>256</sup>

### **13. Applicants with Prior Drug-Related Convictions Should Be Eligible for Licenses**

Legalization should provide that individuals with prior drug-related convictions will not be barred from obtaining a cannabis license solely on that basis. Furthermore, previously illegal businesses—whether or not formally convicted—should not be penalized when applying for support services and technical assistance.

California legislation provides that applicants cannot be denied a license solely on the basis of a prior conviction related to a controlled substance, and such a conviction may not be considered substantially related to grounds for denial of a license.<sup>257</sup> This type of provision in State legislation would signify an enormous step forward in correcting the negative impact of drug-related offenses, as well as a recognition of the often inequitable conditions under which such offenses occur and are enforced. With respect to prior convictions not related to controlled substances, licenses may be denied on the basis of such convictions when related to owning and operating a business, such as for fraud or tax evasion.

Additionally, NYC would benefit from the flexibility to provide agency and nonprofit support towards the unique needs of individuals affected by prior cannabis-related arrests and convictions.<sup>258</sup>

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<sup>255</sup> Discussion with Mass. Cannabis Control Comm’n (Oct. 2018).

<sup>256</sup> Medical cannabis is distributed in New York State through five “Registered Organizations,” designated by the State Department of Health, that are permitted to be involved in all phases of production and distribution, from cultivation to retail sales. Additionally, medical cannabis can only be sold in capsule, liquid, or oil form. See Geoffrey A. Mort & Desiree Gustafson, *New York’s Medical Marijuana Law Comes of Age*, N.Y. L. J. (Apr. 3, 2018), <https://www.law.com/newyorklawjournal/2018/04/03/new-yorks-medical-marijuana-law-comes-of-age>. Because of the differences between the existing medical regime and the proposed adult-use regime—which would limit vertical integration and allows a much broader range of products—existing medical cannabis businesses may struggle to easily adapt to the adult-use market.

<sup>257</sup> See Adult Use of Marijuana Act, 2016 Cal. Legis. Serv. Prop. 64, sec. 6, § 26057(b)(5).

<sup>258</sup> For example, the Los Angeles County Working Group recommended requiring that cannabis businesses adopt CBAs and elements including percentage contribution to community organizations, serving as an incubator to an equity applicant, community clean-ups, and other support options. See L.A. Cty. Advisory Working Grp. on Cannabis Regulation, *Recommendations Report*, 13, 48, 214-216 (Oct. 2017), <http://>

## 14. Provide Targeted Workforce Development

The City will seek authorization and funding necessary for the recruitment and training needed to sustain the new industry and support the City's equity goals for creating employment opportunities for those disparately impacted by cannabis criminalization.

The City needs to be prepared to help with the challenges of supporting new jobs that come with any new industry—for owners and employees alike—as well as the more novel challenges unique to the cannabis industry, such as protecting workers within a federally prohibited industry and training them for the new and unique skills required when working with cannabis. Jobs directly created by the new industry will include cultivation, distribution, and retail operations. Further, workers at all levels in existing related professions will require supplemental training to transition to the cannabis industry.

In addition to compliance training, workers will require industry-specific safety training given the biological and chemical hazards of the industry. For example, Colorado provided training on federal OSHA requirements, state regulations, and a best practice guide to ensure worker safety.<sup>259</sup> Workers may also require de-escalation training for defusing conflict situations (as a result of increased security and possible burglary risks).

Further, certain existing industries may move into the cannabis space for indirect employment opportunities.<sup>260</sup> Scientists and chemists will be needed to conduct product safety tests. Attorneys will be needed for questions of compliance. Public relations professionals and advertisers will be needed to assist the public face of the industry. Other industries affected include manufacturing, construction and design, distribution, and trucking and delivery. All of these industries will need accurate information to assist them in compliance in a new regulatory environment. Health care workers and substance use counselors may also need training to better understand new challenges.<sup>261</sup>

In order to promote equity, the City will seek State support to incentivize owners to hire a certain percentage of employees from target populations. The program could provide incentives for business applicants who provide hiring plans for hiring, training, and advancing minority and

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cannabis.lacounty.gov/wp-content/uploads/2017/10/2017-10-24-FINAL-AWG-Recommendations-Report.pdf. Great Barrington, Massachusetts also levied a 3% tax and required cannabis shop owners to make a \$10,000 donation to a local nonprofit dedicated to educating the population on cannabis. See Zoe Chevalier, *Recreational Marijuana: A Business Boon for States?*, U.S. News & World Rep. (Aug. 1, 2018), <https://www.usnews.com/news/best-states/articles/2018-08-01/the-legalization-of-recreational-marijuana-an-economic-opportunity-for-states>. In Maryland, stakeholders proposed that businesses make a financial contribution to programs for individuals with prior criminal justice system involvement for cannabis-related offenses. See Rushern Baker, *Let's Talk About Economic Justice Before We Legalize Marijuana*, Phila. Trib. (June 26, 2018), [http://www.phillytrib.com/commentary/columns/let-s-talk-about-economic-justice-before-we-legalize-marijuana/article\\_96127b7a-1e11-5e04-9347-79ec6d90caf9.html](http://www.phillytrib.com/commentary/columns/let-s-talk-about-economic-justice-before-we-legalize-marijuana/article_96127b7a-1e11-5e04-9347-79ec6d90caf9.html).

<sup>259</sup> See N.Y. Dep't of Health, *Assessment of the Potential Impact of Regulated Marijuana in New York State*, at 25.

<sup>260</sup> See Christopher Gavin, *Want a Job in Massachusetts's Marijuana Industry? Here's What to Know*, Bos. Globe (July 17, 2018), <https://www.boston.com/news/local-news/2018/07/17/marijuana-jobs-massachusetts>.

<sup>261</sup> See N.Y. Dep't of Health, *Assessment of the Potential Impact of Regulated Marijuana in New York State*, at 22.

women applicants as well as incentives for businesses to provide living wages above the minimum wage.

Other municipalities have explored similar models. For example, in Long Beach, California, all cannabis businesses, regardless of application type, must ensure that 40% of employees are either low-income or have had convictions for cannabis-related crime.<sup>262</sup> The Los Angeles advisory working group recommended 30% local hiring for cannabis businesses.<sup>263</sup>

## **V. Recommendations to Afford Local Governments Authority over Land Use Determinations**

### **1. Localities Should Have Authority to Determine Cannabis Use and Area Restrictions**

Legislation should allow localities to adopt the same basic restrictions for cannabis businesses that already exist for alcohol and tobacco businesses, including distances from schools, playgrounds, and places of worship. Localities would benefit from maximum authority to set their own goals with regard to where licensees may locate. New York City will need the ability to regulate these various restrictions through local legislative and land use processes, especially given the City's density.

Other states explicitly vest the ability to decide these issues with local legislative bodies. Nevada specifies that a locality may adopt and enforce its own cannabis control measures pertaining to zoning and land use for cannabis establishments.<sup>264</sup> Similarly, Washington allows municipalities to adopt laws and regulations, including zoning legislation, to govern location of cannabis operations in their cities, so long as the limits imposed are consistent with the overarching legislative scheme and the State Liquor Control Board's cannabis-specific regulations.<sup>265</sup> Massachusetts and Oregon also require prospective licensees to demonstrate to the state licensing authority compliance with local zoning rules.<sup>266</sup>

The activities associated with the legal cannabis industry generally fit within the existing zoning use groups; major structural changes to the basic zoning system are unnecessary to accommodate most cannabis-related activities.<sup>267</sup> Such activities as retailing, warehousing and

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<sup>262</sup> See Chris Haire, *Long Beach's pioneering marijuana social-equity program aims to tackle racial, economic injustice*, Press Telegram (June 22, 2018), <https://www.presstelegram.com/2018/06/22/long-beachs-pioneering-marijuana-social-equity-program-aims-to-tackle-racial-economic-injustice/>.

<sup>263</sup> See L.A. Cty. Advisory Working Grp. on Cannabis Regulation, *Recommendations Report 4* (Oct. 2017), <http://cannabis.lacounty.gov/wp-content/uploads/2017/10/2017-10-24-FINAL-AWG-Recommendations-Report.pdf>.

<sup>264</sup> See Nev. Rev. Stat. § 453D.400.

<sup>265</sup> See Wash. Initiative I-502, sec. 6.

<sup>266</sup> See Medicinal and Adult-Use Cannabis Regulation and Safety Act, S. 94-B, sec. 61, § 26070.5 (Cal. 2017); 935 Mass. Code Regs. 500.101(1); Or. Rev. Stat. § 475B.063.

<sup>267</sup> See New York City Planning, *The Zoning Resolution*, <https://www1.nyc.gov/site/planning/zoning/access-text.page>.

distribution, testing, and cultivation are allowed broadly in areas where such activities are considered appropriate for other agricultural products.<sup>268</sup>

To the extent that limitations on the location or number of establishments conducting these activities must be designated, this should occur through regulation of licenses to conduct these business activities. Land use limitations, including distance from schools, parks, or places of worship, as well as limits on presence in multi-use buildings or proximity to residential populations, would be best addressed by local governmental bodies.

## **2. Local Authority to Set Restrictions on Cannabis Business Density**

New York City should have the authority to impose other location restrictions as appropriate, including placing density limits within defined geographic areas (i.e., community districts), and restrictions on the number of stores per City block (“blockface” restrictions).

Such restrictions are important as they relate to consumer-facing cannabis businesses, namely retail and on-site consumption licensees, and also to production businesses bordering residential areas. The Task Force seeks to prevent over-concentrations of cannabis outlets in the City and ensure that the location of these businesses takes into account broader commercial storefront activity on City streetscapes, for reasons related to public health and local economic competition. Given the competitive and scarce nature of the New York City real estate market, concentrations of cannabis businesses would likely develop without proactive and intentional density restrictions.

The New York State Liquor Authority includes some of these restrictions in its regulations for liquor license applicants, but because of general waiver provisions, concentrations of either on-site or retail licenses are at levels that would likely be problematic for legal cannabis, particularly given public health concerns.<sup>269</sup>

In New York City, community board review can offer a meaningful process to solicit input from the local community on decisions about the location and operation of such facilities, with decision-making authority vested in the City to determine density criteria for licensee locations and approve on-site consumption licenses.

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<sup>268</sup> *See id.*

<sup>269</sup> *See N.Y. Alco. Bev. Cont. Law.*

## **VI. Recommendations to Support Access to Financial Resources and Services**

### **1. To Reduce Barriers to Entry for Small Business Owners, Legislation Should Expressly Provide that Banking and Professional Services for Cannabis-Related Businesses Do Not Violate State Law**

Providing financial services to cannabis businesses is complex and uncertain due to current federal restrictions, reducing the willingness of financial institutions to provide critically needed banking services to cannabis-related businesses.<sup>270</sup> This has, in turn, resulted in cannabis-related businesses having to operate mostly in cash,<sup>271</sup> thereby becoming more vulnerable to criminality—both as targets and as actors—in areas including tax and regulatory evasion<sup>272</sup> and robbery.<sup>273</sup> Additionally, the lack of traditional banking services exacerbates the racial and socioeconomic disparities in accessing reliable forms of financing and capital.<sup>274</sup>

For these reasons, it is imperative that the City and State work with financial institutions and cannabis-related businesses to provide access to banking and other financial services. New York City, the world leader in capital for banking and financial services, has the opportunity to provide leadership in cannabis-related business banking as well.

Federal and state regulators maintain overlapping oversight and legal authority over banks.<sup>275</sup> The federal Controlled Substances Act makes it a crime to conspire to manufacture, distribute, or dispense cannabis, including offering aid as an accessory after the fact.<sup>276</sup> The Money Laundering Control Act makes it a crime to conduct a financial transaction involving the proceeds of certain specified illegal activity (including cannabis production and sales), knowing that the transaction intends to conceal the illegal activity from reporting under state or federal law.<sup>277</sup>

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<sup>270</sup> See The Economist, *Most Banks Won't Touch America's Legal Pot Industry* (Apr. 20, 2018), <https://www.economist.com/graphic-detail/2018/04/20/most-banks-wont-touch-americas-legal-pot-industry>.

<sup>271</sup> See, e.g., Jeremy Berke, *Marijuana Startups Handling Millions of Dollars Are Forced to Hide Cash and Use Secure Vaults Because They're Shut Out of the Banking System*, Business Insider (Sept. 4, 2018), <https://www.businessinsider.com/marijuana-startups-shut-out-banking-system-2018-8>.

<sup>272</sup> See, e.g., Press Release, U.S. Attorney's Office for the N. Dist. of Cal., North Bay Marijuana Distributor Pleads Guilty to Tax Fraud (May 25, 2018), <https://www.justice.gov/usao-ndca/pr/north-bay-marijuana-distributor-pleads-guilty-tax-fraud> (“Woods deposited more than \$1 million into numerous bank accounts under his control in amounts less than \$10,000. Combined, Woods failed to report more than \$1.1 million in gross receipts from his marijuana distribution business, which resulted in a tax loss of \$466,707 to the United States”).

<sup>273</sup> See, e.g., Chris Kudailis, *Las Vegas Marijuana Dispensary Shuttters After Robbery*, Las Vegas Sun (June 30, 2018), <https://lasvegassun.com/news/2018/jun/30/las-vegas-marijuana-dispensary-shuttters-after-robbery/> (noting seven dispensary robberies in the Las Vegas area over 18 months).

<sup>274</sup> See Tracy Jarrett, *Six Reasons African Americans Aren't Breaking Into Cannabis Industry*, NBC News (Apr. 19, 2015), <https://www.nbcnews.com/news/nbcblk/6-reasons-african-americans-cant-break-cannabis-industry-n344486>; see also Tracy Jan & Fenit Nirrapil, *Battling the Racial Roadblocks to Joining the Legalized Marijuana Trade*, Wash. Post (June 2, 2017), [https://www.washingtonpost.com/business/economy/battling-the-racial-roadblocks-to-joining-the-legalized-marijuana-trade/2017/06/02/7321de02-416f-11e7-9869-bac8b446820a\\_story.html?noredirect=on&utm\\_term=.7d54e243c52f](https://www.washingtonpost.com/business/economy/battling-the-racial-roadblocks-to-joining-the-legalized-marijuana-trade/2017/06/02/7321de02-416f-11e7-9869-bac8b446820a_story.html?noredirect=on&utm_term=.7d54e243c52f).

<sup>275</sup> See Julie Anderson Hill, *Banks, Marijuana and Federalism*, 65 Case Western Reserve L. Rev. 597, 605-07 (2015).

<sup>276</sup> See 21 U.S.C. § 801 *et seq.*

<sup>277</sup> See 18 U.S.C. §§ 1956, 1957.

Other laws, including the Bank Secrecy Act,<sup>278</sup> require banks to implement compliance programs to prevent money laundering and require filing of Suspicious Activity Reports (“SARs”) with the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) for, very generally,<sup>279</sup> any transaction that involves more than \$10,000 in cash or is more than \$5,000 and appears to derive from illegal activities or evade federal law.<sup>280</sup>

Even though former Attorney General Sessions directed local U.S. Attorneys to follow general Department of Justice guidance regarding the decision to prosecute cannabis-related crimes,<sup>281</sup> the guidance from the Treasury’s Financial Crimes Enforcement Network (“FinCEN Guidance”) still remains in effect. The FinCEN Guidance<sup>282</sup> provides that a bank may give services to cannabis-related businesses, consistent with the bank’s obligations under the Bank Secrecy Act.<sup>283</sup> To do so, a bank must conduct due diligence on the cannabis-related customer, and file one of three new types of SARs with FinCEN as well as issue currency transaction reports (“CTRs”) consistent with the law.<sup>284</sup> A “Marijuana Limited SAR” indicates the customer does not violate state law or the priorities of the Cole Memo.<sup>285</sup> A “Marijuana Priority SAR” indicates a violation of state law or the Cole Memo.<sup>286</sup> And a “Marijuana Termination SAR” indicates the bank needed to terminate the banking relationship with a cannabis-related business in order to maintain an effective anti-money laundering compliance program.<sup>287</sup> The FinCEN Guidance offers a list of “red-flags” which could trigger a “Priority” or “Termination” SAR.<sup>288</sup>

The impact of rescission of the Cole Memo on the FinCEN Guidance has created uncertainty.<sup>289</sup> The FinCEN Guidance explicitly references the Cole Memo,<sup>290</sup> making it difficult to know for certain if continuing to follow the FinCEN Guidance has any effect, and if following the guidance would (at least in practice) immunize a bank from federal investigation or prosecution for

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<sup>278</sup> See 31 U.S.C. § 5311 *et seq.*

<sup>279</sup> The specific requirements can be found in 31 C.F.R. § 1020.320.

<sup>280</sup> See Julie Anderson Hill, *Banks, Marijuana and Federalism*, 65 Case Western Reserve L. Rev. 597, 613-17 (2015).

<sup>281</sup> See Jefferson B. Sessions, III, Attorney Gen., Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>282</sup> See U.S. Dep’t of the Treasury, Fin. Crimes Enf’t Network, *Guidance: BSA Expectations Regarding Marijuana Related Businesses* (Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.

<sup>283</sup> See *id.* at 2-3.

<sup>284</sup> See *id.* at 6.

<sup>285</sup> *Id.* at 3-4.

<sup>286</sup> *Id.* at 4.

<sup>287</sup> *Id.* at 4-5.

<sup>288</sup> *Id.* at 5-7.

<sup>289</sup> A letter from the Department of the Treasury in response to congressional inquiries on the impact of the Cole Memo rescission stated only “. . . we will notify the financial sector and supervisory authorities of any changes [to come as a result of the rescission]”, deferring the issue to a later date. Letter from Drew Maloney, Assistant Sec’y for Legislative Affairs, U.S. Dep’t of the Treasury, to U.S. Rep. Denny Heck (Jan. 31, 2018), [https://dennyheck.house.gov/sites/dennyheck.house.gov/files/documents/Treasury%20Response%201.31.18\\_Heck.pdf](https://dennyheck.house.gov/sites/dennyheck.house.gov/files/documents/Treasury%20Response%201.31.18_Heck.pdf).

<sup>290</sup> See, e.g., “As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law.” U.S. Dep’t of the Treasury, Fin. Crimes Enf’t Network, *Guidance: BSA Expectations Regarding Marijuana Related Businesses* 3 (Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.

cannabis banking.<sup>291</sup> However, testimony from Department of the Treasury officials, including Treasury Secretary Mnuchin, indicates the FinCEN guidance remains in effect.<sup>292</sup>

As a result of the federal laws and shifting enforcement landscape, banks are extremely cautious in doing business with cannabis-related businesses, in many cases refusing entirely.<sup>293</sup> Still, according to FinCEN statistics, as of June 2018, some 441 depository institutions were actively banking cannabis-related businesses in the United States.<sup>294</sup> While one front for reform and increased certainty has been a push on the federal level to legalize banking for cannabis-related businesses,<sup>295</sup> another front has been efforts by some states to ease their own regulatory burdens on banks to further facilitate cannabis-related business banking.<sup>296</sup>

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<sup>291</sup> Complying with the FinCEN guidance should avoid complications with the Department of the Treasury, as FinCEN is a component of that department.

<sup>292</sup> At a February 6, 2018 meeting of the U.S. House of Representatives Financial Services Committee, Secretary Mnuchin stated “[t]he intent is not to take [the FinCEN Guidance] down without a replacement that can deal with the current situation.” Tom Angell, *Trump Treasury Secretary Wants Marijuana Money in Banks*, *Forbes* (Feb. 6, 2018), <https://www.forbes.com/sites/tomangell/2018/02/06/trump-treasury-secretary-wants-marijuana-money-in-banks/#6163a2753a53>.

<sup>293</sup> See, e.g., Nick Lindsey, *Cannabis Testing Lab in Alaska Shut Down Due to Banking Regulations*, *High Times* (Apr. 2, 2018), <https://hightimes.com/news/cannabis-testing-lab-alaska-shut-down-banking-regulations/> (recounting Wells Fargo threatening a landlord’s mortgage until the landlord agreed to evict a state-legal cannabis testing laboratory). Nonetheless, there is evidence—at least prior to Sessions’s action in January 2018—that major banks are actually doing some business with cannabis-related enterprises, despite their denials and occasional shutdowns: “[t]he analysis found that out of 84 applicants to operate medical marijuana dispensaries in Massachusetts, 29 reported having access to funds in at least one account at [a major bank].” Kevin Wack, *Big Banks Worked with Pot Industry, Despite Denials, Records Show*, *Am. Banker* (Jan. 11, 2017), <https://www.americanbanker.com/news/big-banks-worked-with-pot-industry-despite-denials-records-show>.

<sup>294</sup> See FinCEN, *Marijuana Banking Update 2* (June 2018), <https://www.fincen.gov/sites/default/files/shared/3rd%20Q%20MJ%20Stats.pdf>.

<sup>295</sup> The most recent attempt was the SAFE Act of 2017, H.R. 2215, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1152>, which failed to pass out of the House Appropriations Committee in January 2018. As summarized by the Congressional Research Service, the law would have: “prohibit[ed] a federal banking regulator from (1) terminating or limiting the deposit insurance or share insurance of a depository institution solely because the institution provides financial services to a legitimate marijuana-related business; (2) prohibiting or otherwise discouraging a depository institution from offering financial services to such a business; (3) recommending, incentivizing, or encouraging a depository institution not to offer financial services to an account holder solely because the account holder is affiliated with such a business; or (4) taking any adverse or corrective supervisory action on a loan made to a person solely because the person either owns such a business or owns real estate or equipment leased or sold to such a business.” As specified by the bill, a depository institution shall not, under federal law, be liable or subject to forfeiture for “providing a loan or other financial services” to a legitimate marijuana-related business. *Id.* A letter from nineteen state Attorneys General to Congressional leadership, urging passage of the bill, described the “need for Congressional Action to get the cash generated by [the cannabis] industry into the regulated banking sector even more urgent” following rescission of the Cole memo. Letter from Nineteen State Attorneys General to Congressional Leadership at 2 (Jan. 16, 2018), [https://oag.ca.gov/system/files/attachments/press\\_releases/Final%20Banking%20Letter%20to%20Congress.pdf](https://oag.ca.gov/system/files/attachments/press_releases/Final%20Banking%20Letter%20to%20Congress.pdf).

<sup>296</sup> For example, Oregon law provides that a financial institution providing customary financial services to a state-licensed cannabis-related business is “exempt from any criminal law of this state an element of which may be proven by substantiating that a person provides financial services customarily provided by financial institutions . . . to a person who possesses, delivers or manufactures marijuana or marijuana derived products,” decriminalizing banking for cannabis-related businesses. H.R. 4094-B, 78th Leg. Assemb., 2016 Reg. Sess., § 2 (Or. 2016).

A few states have gone the other way. See, e.g., Anthony C. Kaye, *Banking and Marijuana, Redux: Utah Department of Financial Institutions Commissioner Declares Opposite Position to New York’s Encouragement of Banking Services for Marijuana Businesses Licensed Under State Law*, *Ballard Spahr LLP Money Laundering Watch Blog* (Aug. 21, 2018), <https://www.moneylaunderingwatchblog.com/2018/08/banking-and-marijuana-redux-utah-department-of-financial-institutions-commissioner-declares-opposite-position-to-new-yorks-encouragement-of-banking-services-for-marijuana-businesses-license/> (noting that Utah’s Commissioner of the Division of Financial Services indicated that “if any examination conducted by UDFI identifies evidence of cannabis-related banking activities, UDFI will cite the conduct as an apparent violation of federal law”).

Adopting explicit protections for banking institutions and professional service providers would help alleviate concerns arising from uncertainty at the federal level about provision of services to cannabis-related businesses.<sup>297</sup>

In a manner similar to Washington’s law,<sup>298</sup> legislation should provide that offering banking services to cannabis-related businesses is not a state-level crime.

Legislation should similarly include provisions giving comfort to accountants, lawyers, and other professional service providers that rendering services to cannabis-related businesses does not violate applicable licensing or professional requirements.<sup>299</sup>

## **2. The State Department of Finance Should Expand Guidance on Banking Services for Cannabis-Related Businesses**

States have issued guidance to enable and encourage financial institutions to provide financial services to cannabis-related businesses.<sup>300</sup> Similarly, the State Department of Financial Services should build on guidance encouraging banking institutions to provide financial services to medical cannabis businesses issued in 2018.<sup>301</sup> The guidance declared that the Department of Financial Services would not impose regulatory actions on any bank “solely for establishing a banking relationship with a medical [cannabis]-related business that operates a compliant business in New York,”<sup>302</sup> if the institution (i) complies with the 2014 FinCEN Guidance for financial institutions providing financial services to cannabis-related businesses, (ii) complies with guidance and priorities set forth in the Cole Memo (despite the Memo’s rescission), and (iii) evaluates the risks associated with offering products and services and its ability to effectively manage those risks. The Department of Financial Services should expand this guidance to adult-use cannabis-related businesses simultaneously with State legislation legalizing cannabis,

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<sup>297</sup> A model provision can be found in Oregon’s House Bill 4094. See H.R. 4094-B, 78th Leg. Assemb., 2016 Reg. Sess., § 2 (Or. 2016) (providing that a financial institution providing customary financial services to a State-licensed cannabis-related business is “exempt from any criminal law of this state an element of which may be proven by substantiating that a person provides financial services customarily provided by financial institutions . . . to a person who possesses, delivers or manufactures marijuana or marijuana derived products,” decriminalizing banking for cannabis-related businesses).

<sup>298</sup> See S. 5928, 65th Leg., 2018 Reg. Sess. (Wash. 2018) (providing that a financial institution “does not commit a crime [under any Washington law] solely by virtue of receiving deposits, extending credit, conducting funds transfers, transporting cash or other financial instruments, or providing other financial services for” a cannabis-related business authorized under Washington Law).

<sup>299</sup> See S. 5928, 65th Leg., 2018 Reg. Sess. (Wash. 2018) (decriminalizing the provision of accounting services to cannabis-related businesses for certified public accountants and their firms); David C. Spellman, *2018 Washington State Comfort Legislation for the Financial Industry and Accountants Dealing with Licensed Marijuana Businesses*, The Pipeline, Lane Powell PC Cannabis Law Blog (Apr. 12, 2018), [https://www.cannabislawadvisor.com/2018/04/12/2018-washington-state-comfort-legislation-financial-industry-accountants-dealing-licensed-marijuana-businesses/#\\_ftnref2](https://www.cannabislawadvisor.com/2018/04/12/2018-washington-state-comfort-legislation-financial-industry-accountants-dealing-licensed-marijuana-businesses/#_ftnref2).

<sup>300</sup> For example, the Massachusetts Department of Banking has stated that “adherence to [FinCEN] guidelines and recommendations will satisfy the requirements of the Division of Banks for institutions under its supervisory jurisdiction.” Mass. Div. of Banks, *Banking for Marijuana Related Businesses in Massachusetts* (Mar. 27, 2018), <https://www.mass.gov/news/banking-for-marijuana-related-businesses-in-massachusetts>.

<sup>301</sup> See Maria T. Vullo, N.Y. State Superintendent of Fin. Serv., *Guidance on Provision of Financial Service to Medical Marijuana and Industrial Hemp-Related Business in New York State* (July 3, 2018) [Maria T. Vullo, *Guidance on Provision of Financial Service to Medical Marijuana and Industrial Hemp-Related Business in New York State*], [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/New\\_York\\_Online\\_Lending\\_Survey\\_Report.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/New_York_Online_Lending_Survey_Report.pdf).

<sup>302</sup> *Id.* at 9.

including the development of robust exam procedures<sup>303</sup> and other guidance and technical assistance for banks entering the cannabis space.

### **3. The State Should Provide, and Permit Localities to Provide, Technical Assistance with Banking Services and Access to Capital Services, Including a Loan Fund, to Promote Economic Opportunity**

Regulations should provide for and permit localities to provide technical assistance and access to capital services for easing compliance with federal and State guidelines, with a focus on small-sized cannabis-related businesses and businesses owned by equity applicants, such as Minority and Women-Owned Businesses and cannabis-related businesses affiliated with those previously arrested, convicted, or incarcerated for use, possession, or sale of cannabis. Locally-administered equity initiatives in partnership with community nonprofits will most effectively allow local jurisdictions to reach communities most in need of historical redress.

Given that new businesses will need assistance navigating the regulatory regime, localities will benefit from the flexibility to provide other programs that promote equity by enabling small businesses to open. For examples, localities could consider instituting programs that provide technical assistance to cannabis-related businesses seeking banking and other financial services, as well as programs that allow City agencies and community nonprofits to provide legal and technical support for small businesses, including guidance related to issues of federal illegality (such as access to capital and tax consequences), safety standards, compliance, quality control, inspections, meeting licensing requirements, and pathways from the illicit market to the legal market for previously illegal businesses.

To promote racial, ethnic, and gender diversity in the cannabis industry, State supported loans will be important. In addition, localities should be allowed to leverage a revolving loan fund through public-private partnerships or by partnering with credit unions to implement a co-op model to fill the need for banking services. A fund of at least \$10 million will be needed to make real the promise of equitable access to the burgeoning industry. Such a loan fund would support equity entrants to the field.

### **4. Foster City-State Regulatory Information Sharing**

It is imperative that the City and State engage in information sharing and utilization of standardized forms by cannabis control authorities on the State and local levels, including by the New York State Department of Financial Services and any other applicable State regulators, to facilitate streamlined compliance requirements and enforcement.

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<sup>303</sup> See Wash. Dep't of Fin. Inst., *Providing Banking Services to Marijuana Related Businesses under I-502* (June 23, 2014), <http://www.dfi.wa.gov/documents/banks/marijuana-faqs.pdf>.

## 5. Conduct a Feasibility Study with Respect to Financial Services for Cannabis Businesses

A feasibility study should be conducted on whether to establish a State-chartered financial institution that provides financial services to cannabis-related business. The study should also evaluate how the State can ease the process for incorporation of private banks or credit unions with a cannabis-related business focus.

While some states have considered licensing or establishing state-chartered banking institutions for the provision of banking services to cannabis-related businesses,<sup>304</sup> others have been deterred by significant obstacles, including lack of protection for state banks from federal law enforcement.<sup>305</sup> Still others have attempted to establish close-looped systems, which would allow for cannabis-related businesses to transact business within the state and for financial institutions to provide financial services in a contained banking system.<sup>306</sup> Similarly, Colorado permits the establishment of cannabis financial services cooperatives, known as “cannabis credit co-ops,” which restrict membership to licensed cannabis-related businesses that can interact only with other co-ops and their members.<sup>307</sup> However, as exemplified by Fourth Corner Credit Union, a state-chartered credit union based in Colorado,<sup>308</sup> due to uncertainty at the federal level regarding enforcement and problems with administration and funding, states have recognized the significant limitations to these plans and continue to evaluate their feasibility.<sup>309</sup>

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<sup>304</sup> See, e.g., H.R. 376, 30th Leg., Reg. Sess. (Al. 2017); Cal. Senate Comm. on Banking and Fin. Inst., *Analysis of Financial Institutions: Cannabis S.B. 930, 2017-2018 Reg. Sess.* (2018) (proposing the creation of a state-chartered banks to provide services to cannabis-related businesses).

<sup>305</sup> See, e.g., *California Decides Against State-Chartered Banking for Marijuana Industry*, Marijuana Bus. Daily (Aug. 17, 2018), <https://mjbizdaily.com/california-decides-against-state-chartered-banks-to-help-marijuana-industry> (noting that California decided not to pursue its plan to establish a State-chartered banking institution for cannabis-related businesses).

<sup>306</sup> See H.R. 376, 30th Leg., Reg. Sess. (Al. 2017); see also Cal. Senate Comm. on Banking and Fin. Inst., *Analysis of Financial Institutions: Cannabis S.B. 930, 2017-2018 Reg. Sess.* (04/16/18—Senate Banking And Financial Institutions), [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180SB930#](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB930#).

<sup>307</sup> See H.R. 14-1398, 69th Gen. Assemb., Reg. Sess. (Colo. 2014) (enacting the Marijuana Financial Services Cooperatives Act). A co-op is empowered to behave like an ordinary credit union, but membership is restricted to licensed cannabis-related businesses, and a co-op can only interact with other co-ops and their own members. The co-ops are exempted under Colorado law from compliance with certain federal laws, allowing them to operate legally under Colorado law regardless of their federal status. See Colo. Legislative Council Staff, *Marijuana Legislation 2014*, [https://leg.colorado.gov/sites/default/files/14\\_marijuanalegis.pdf](https://leg.colorado.gov/sites/default/files/14_marijuanalegis.pdf).

<sup>308</sup> Fourth Corner Credit Union (“FCCU”) was formed in 2014 under Colorado’s co-op law, and applied for two key federal programs: a Federal Reserve Master Account (essentially a bank account for banks, allowing FCCU to make transfers to other banks within the Fed’s system) and deposit insurance under the federal National Credit Union Administration. See Nathaniel Popper, *Banking for Pot Industry Hits a Roadblock*, N.Y. Times (July 30, 2015), <https://www.nytimes.com/2015/07/31/business/dealbook/federal-reserve-denies-credit-union-for-cannabis.html>. Initially denied access to both federal programs, FCCU brought suit, including an appeal (and reversal) on the Master Account issue before the Tenth Circuit. See Board of Governors of the Federal Reserve System Amicus Br. in Supp. of Def.-Appellants, *Fourth Corner Credit Union v. Fed. Res. Bank of Kansas City*, No. 16-1016 (10th Cir. June 27, 2016). FCCU recently was granted a conditional approval by the Federal Reserve Bank of Kansas City, which required the credit union to not service dispensaries, but to provide banking services for cannabis-linked businesses, such as accountants, landlords, and lawyers. However, litigation regarding the deposit insurance continues. Lalita Clozel, *Fed Banks Marijuana-Focused Credit Union*, Wall St. J. (Feb. 5, 2018), <https://www.wsj.com/articles/fed-backs-marijuana-focused-credit-union-1517870188>.

<sup>309</sup> See John Chiang, Cal. State Treasurer, *Banking Access Strategies for Cannabis-Related Businesses: A Report from the State Treasurer’s Cannabis Banking Working Group* 18-19 (2017), <https://www.treasurer.ca.gov/cbwg/resources/reports/110717-cannabis-report.pdf>.

A feasibility study can evaluate the issue as well as other possible approaches to New York State involvement with facilitating banking services for cannabis businesses.<sup>310</sup>

## 6. Eliminate a Surety Bond Requirement

The legislation should eliminate any surety bond requirement. A surety bond is costly to maintain and a particularly challenging requirement in the cannabis industry because insurers are less willing to issue bonds given the federal cannabis ban. Other jurisdictions have faced similar challenges and have either removed the requirement altogether or created a flat bond. For example, Colorado removed its initial requirement to obtain a surety bond<sup>311</sup> after many surety bond companies decided not to issue bonds out of concern with being charged with federal racketeering laws under the RICO Act.<sup>312</sup> On the other hand, California requires a flat bond of \$5,000 payable to the State.<sup>313</sup> In February 2018, Continental Heritage Insurance Company became California's first approved insurer to offer surety bonds to legal cannabis businesses.<sup>314</sup> Likewise, Oklahoma is considering a flat \$50,000 bond for medical cultivation operations.<sup>315</sup>

Surety bonds also create practical challenges, even if an insurer is willing to issue them. A retail licensee could not reasonably know the anticipated tax obligation of the cultivator. Indeed, a retailer and a cultivator may not even be in direct contact if there is a long supply chain. It is also unclear what the surety bond will be used to insure and whether, should there be a violation, the State regulators will file against the retailer or the cultivator. These factors pose a significant challenge for a retailer who would be tasked with determining the proper amount to bond. This uncertainty makes it difficult for a retailer to adequately plan for permitting and licensing costs. It also makes it difficult for a retailer to ensure its compliance with law.

Therefore, surety bond requirements should be eliminated to minimize unforeseen costs for small businesses and not exacerbate the obstacles to creating new businesses.

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<sup>310</sup> For example, Hawaii has partnered with private sector actors, CanPay for transactions and Safe Harbor Private Banking, to set up accounts, to provide certain banking services to cannabis-related businesses. See PRNewswire, *Safe Harbor and CanPay Launch Statewide Cannabis Banking in Hawaii* (Sept. 13, 2017), <https://www.prnewswire.com/news-releases/safe-harbor-and-canpay-launch-statewide-cannabis-banking-in-hawaii-300518656.html>.

<sup>311</sup> See Act Repealing Bonding Requirement Marijuana Businesses, H.R. 16-1041, 71st Gen. Assemb., Reg. Sess. (Colo. 2016).

<sup>312</sup> See Lucinda Honeycutt, *Changes to the Colorado Marijuana Business Make it Easier to Participate*, Huffington Post (Apr. 17, 2017), [https://www.huffingtonpost.com/lucinda-watrous/changes-to-the-colorado-m\\_b\\_9711040.html](https://www.huffingtonpost.com/lucinda-watrous/changes-to-the-colorado-m_b_9711040.html).

<sup>313</sup> See Cal. Bureau of Cannabis Control, *Commercial Cannabis Licensee Bond Form* (Apr. 2018), <https://cannabis.ca.gov/2018/04/16/bureau-of-cannabis-control-commercial-cannabis-licensee-bond-form>; Cal. Bureau of Cannabis Control, *Commercial Cannabis Licensee Bond* (Apr. 2018), [https://www.bcc.ca.gov/clear/licensee\\_bond.pdf](https://www.bcc.ca.gov/clear/licensee_bond.pdf).

<sup>314</sup> See Press Release, Cont'l Heritage, California Approves Continental Heritage Cannabis Surety Program (Feb. 21, 2018), <https://continentalheritage.com/california-department-of-insurance-approves-continental-heritage-insurance-company-cannabis-surety-program/>.

<sup>315</sup> See Title 310 Oklahoma State Department of Health, Chapter 681 Medical Marijuana Control Program § 310:681-5-3(e)(9) (June 26, 2018) (Working Draft version 1.5), <http://omma.ok.gov/Websites/ddeer/images/REVISED.MMR.WorkingDraft.JE06262018.pdf>.

## VII. Recommendations for Tax-Related Policy and Revenue Use

### 1. Local Authorities Should Have Authority to Impose a Sales Tax on Adult-Use Cannabis

The tax framework for legal cannabis-related activity should focus on key goals of legalization: creating a viable legal market that supplants the illicit market, promoting only safe cannabis use among of-age individuals, and building economic opportunities for disadvantaged communities.

Towards these ends, the City would seek authority to establish an option for an add-on local sales tax on retail sales of adult-use cannabis appropriate relative to State tax levels. New York needs to be sensitive that the total tax burden imposed on cannabis activity not raise legal cannabis prices to a level that incentivizes illicit market or illegal cross-border sales. These tax rates should be competitive with surrounding jurisdictions in order to discourage trafficking or reduce market opportunities for New York City businesses. But the total tax levy adopted should establish balance between New York State and New York City taxes to ensure fair distribution of revenues and that revenue streams are available for needed cannabis-related programs at the local level.

The enforcement needs of the City, with its high population density and proximity to New Jersey and Connecticut, which are considering legalization,<sup>316</sup> are likely to be significant, as will be the resources required for locally funded cannabis-related health, economic opportunity, and other public services in New York City.

No additional local excise tax on cannabis transactions should be added as a funding source, however, even though City excise taxes are currently imposed on cigarette and alcohol sales in the City.<sup>317</sup> A sales tax is preferred to an excise tax because of the relative simplicity of administration, enforcement, and collection, although the possible high percentage of taxes that will be paid in cash due to the limited financial services available to cannabis vendors will create challenges. The sales tax infrastructure is already in place.<sup>318</sup> All retail vendors are required to file sales tax returns under existing law,<sup>319</sup> and therefore the additional burden on the vendor and the State will be modest. The sales tax would be administered and enforced by New York

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<sup>316</sup> See Sandra Gomez-Aceves, *Connecticut Legislative Committee Passes Recreational Marijuana Bill*, Hartford Courant (Apr. 5, 2018), <http://www.courant.com/politics/hc-pol-marijuana-legislation-hits-committee-deadline-20180405-story.html>.

New Jersey has recently introduced a revised bill to legalize adult use of cannabis. See New Jersey Cannabis Regulatory and Expungement Aid Modernization Act, S. 2703, 218th Leg. (N.J. 2018). The New Jersey bill provides for a tax “at the rate of 5.375 percent upon the receipts from the retail sale of cannabis items by a cannabis retailer to retail customers who are 21 years of age or older.” *Id.* § 18(a). Under the bill, the tax will escalate over time: “To encourage early participation in and development of marijuana establishments and to undermine the illegal marketplace, the tax shall escalate as follows: in year one following the enactment [this bill], the excise tax shall be 10 percent; in year two, the tax shall be 15 percent; in year three, the tax rate shall be 20 percent; and in year four and beyond, the tax shall be 25 percent.” *Id.*

<sup>317</sup> Large localities are regularly granted different status and authorities. See, e.g., N.Y. Tax. Law § 1301 (authority to impose local income taxes).

<sup>318</sup> See, e.g., N.Y. Tax Law §§ 1250; 1105, 1111. The 2018 Proposed Bill contemplates using this infrastructure. See S. 3040-C, sec. 33 §§ 447-A, 449.

<sup>319</sup> See generally N.Y. Tax Law §§ 1105-1107.

State (as is the currently imposed 8.875% aggregate New York State/New York City sales tax),<sup>320</sup> although the City should have a role in New York tax-related and licensing enforcement, which should be bolstered in the cannabis context with access for local agencies to relevant seed-to-sale system data.

An excise tax could be “upstreamed” to distributors, potentially decreasing the number of business entities the tax authorities would have to monitor. However, a local excise in addition to a local sales tax would be more complex to administer and enforce and could have unwanted tax cascading effects—the excise tax could become part of the sales tax base. Distributors could be located outside the taxing locality, making enforcement (even with seed-to-sale system access) more difficult for local regulators. Given the large agricultural land or grow house spaces required for cannabis cultivation, in the medium- and long-term, cannabis production and processing will likely take place primarily outside of New York City. There are administrative advantages to focusing on taxing at the retail level where vendors are located, or for delivered cannabis where the consumer is located.

For either a sales or excise tax, an ad valorem tax on consumption is preferred, and would be in addition to the current City sales and use tax imposed on most retail sales of tangible goods to consumers within New York City. This transaction value-based approach follows that adopted in several other states and major cities. A consumption tax based on potency or other unit of measure would require monitoring and enforcement of an additional testing regime.<sup>321</sup>

## **2. Establish Mechanisms to Study and Set Tax Rates**

Mechanisms, such as a State-local advisory body, will be necessary to allow for biennial reviews, reports, and possible adjustment of tax rates on the basis of shifting market conditions, demand elasticity, and changing cross-border legalization and taxation regimes.

The most efficient tax rate is presently unknown. Demand for alcohol and tobacco have been shown to be moderately elastic to price—and therefore tax rates.<sup>322</sup> In Washington and Colorado, the states with the most mature adult-use markets, tax revenues began relatively low as the market developed. This may have been driven by the initial need to resolve regulatory and enforcement issues, and the transition of cannabis business out of the illicit markets with

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<sup>320</sup> See generally *id.*

<sup>321</sup> See Richard Phillips, Inst. on Taxation and Econ. Policy, *Issues with Taxing Marijuana at the State Level* 3 (2015), <https://itep.org/wp-content/uploads/marijuanaissuesreport.pdf>.

However, at cultivation it is appropriate to assess a unit tax per plant, or by weight of raw plant material. For example, Alaska currently charges a \$50 per ounce tax, see *id.*, and California has a \$9.25 per ounce tax on flower and a \$2.75 per ounce tax on leaves, see Cal. Dep’t of Tax and Fee Admin., *Tax Guide for Cannabis Business: Cannabis Cultivation Tax*, <http://www.cdtfa.ca.gov/industry/cannabis.htm#Cultivators>.

<sup>322</sup> See Matthew C. Farrelly, et. al., *The Consequences of High Cigarette Excise Taxes for Low-Income Smoker*, 7 PLOS ONE E43838 (2012); Scott Drenkard, Tax Found., *Fiscal Fact Sheet No. 565: Cigarette Taxes and Smuggling by State, 2015* (Nov. 2017), <https://taxfoundation.org/cigarette-tax-cigarette-smuggling-2015/>.

adjustment of tax rates.<sup>323</sup> However, New York should be aware that, as happened in Washington,<sup>324</sup> as the legal market develops, cannabis prices can decline, and there is no consensus on predictions of long-term cannabis consumption rates or how declining prices may affect consumption.<sup>325</sup>

### **3. Provide State and City-level Deductions of Business Expenses for Cannabis-related Businesses**

The City recommends that State and City-level deductions of business expenses for cannabis-related business be provided, notwithstanding the non-deductibility of those expenses for federal tax purposes.

Given that cannabis-related businesses are unable to deduct ordinary and necessary business expenses from their federal taxable income,<sup>326</sup> and federal taxable income is the starting point for determining taxable income for New York State and City business income tax purposes,<sup>327</sup> a considerable additional economic burden will be placed on cannabis-related businesses as compared to other legal businesses operating in New York. In line with legislation in several other states, especially for medical cannabis businesses,<sup>328</sup> the 2018 Proposed Bill permits the deduction of ordinary and necessary business expenses for State tax purposes.<sup>329</sup>

The Task Force endorses this provision, and recommends that legalization legislation permit cannabis-related businesses to deduct ordinary and necessary business expenses for New York City tax purposes as well.

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<sup>323</sup> See Joseph Henchman & Morgan Scarborough, Tax Found., *Special Report No. 231: Marijuana Legalization and Taxes: Lessons for Other States from Colorado and Washington* (May 2016), <https://taxfoundation.org/marijuana-taxes-lessons-colorado-washington/>.

<sup>324</sup> See BDS Analytics, *Marijuana Prices in Seattle and Washington: Fall 2017 Update* (Jan. 24, 2018), <https://potguide.com/pot-guide-marijuana-news/article/marijuana-prices-in-seattle-and-washington-fall-2017-update/> (reporting a 77% drop in the pre-tax price per gram of flower from July 2014 to October 2017).

<sup>325</sup> See Richard Phillips, Inst. on Taxation and Econ. Policy, *Issues with Taxing Marijuana at the State Level 3* (2015), <https://itep.org/wp-content/uploads/marijuanaissuesreport.pdf>.

<sup>326</sup> Section § 280E of the Internal Revenue Code, 26 U.S.C. § 280E, prohibits a business that engages in trafficking in any substance on the list, such as cannabis (21 U.S.C. § 812, Schedule I (c)(10)), from reducing gross income by any deductions or credits, including state and local taxes, normally available under the Internal Revenue Code.

<sup>327</sup> See N.Y. State Dep't of Tax. and Fin., *Definitions for Article 9-A Corporations* (last updated Mar. 14, 2018), [https://www.tax.ny.gov/bus/ct/def\\_art9a.htm#eni](https://www.tax.ny.gov/bus/ct/def_art9a.htm#eni).

<sup>328</sup> See, e.g., H.R. 13-1042, Gen. Assemb., Reg. Sess. (Colo. 2013) (enacted) (permitting medical cannabis business to deduct business expense from business income tax for State tax purposes). *But see* Mike Maharrey, *California Governor Vetoes Bill to Allow Marijuana Business Owners to Deduct Expenses from State Taxes*, Tenth Amendment Ctr. (Sept. 24, 2018), <https://blog.tenthamentendmentcenter.com/2018/09/california-governor-vetoes-bill-to-allow-marijuana-business-owners-to-deduct-expenses-from-state-taxes/> (California governor vetoed the bill to allow marijuana business owners to deduct business expenses from state taxes).

<sup>329</sup> See S. 3040-C, sec. 33 § 447-B.

#### 4. Maintain Current Tax Treatment of Medical Use Cannabis Under the Compassionate Care Act

The City proposes that the Compassionate Care Act,<sup>330</sup> which regulates medical cannabis in New York, including with respect to taxation, remain unchanged by adult-use legalization.

New York generally has not subjected prescription medicine to sales taxation.<sup>331</sup> In 2014, the Compassionate Care Act established a medical cannabis program, which includes an excise tax of 7% on the sale of medical cannabis by registered organizations to certified patients or caregivers<sup>332</sup> and exempts medical cannabis sales from sales tax.<sup>333</sup> The 2018 Proposed Bill proposes to exempt medical cannabis from the contemplated tax regime on adult-use cannabis and leave the medical excise tax in place.<sup>334</sup>

The medical cannabis market created by the Compassionate Care Act should not be modified, at least through the initial adult-use legalization period, consistent with other states that have legalized adult-use and medical cannabis programs.<sup>335</sup> The effects of the new adult-use market in concert with the existing medical use business are difficult to predict and should be studied as they unfold. The Compassionate Care Act expires in 2021 and can be renewed or revised, at that time, to adjust to market changes resulting from legalization of adult-use cannabis.

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<sup>330</sup> See A. 6357-E, 2013-2014 Reg. Sess., Gen. Assemb. (N.Y. 2013); N.Y. Pub. Health Law § 3360 *et. seq.*

<sup>331</sup> See N.Y. State Dep't of Tax. & Fin., *Publication 840: A Guide to Sales Tax for Drugstores and Pharmacies* 7 (Aug. 1998), <https://www.tax.ny.gov/pdf/publications/sales/pub840.pdf>

("Sales of drugs and medicines are exempt from sales tax if the drug or medicine is intended for use, internally or externally, in the diagnosis, cure, mitigation, treatment, or prevention of illnesses or diseases in human beings.")

<sup>332</sup> See A. 6357-E § 4; N.Y. Tax Law § 490 *et. seq.*; see also N.Y. Dep't of Tax. & Fin., *Excise Tax On Medical Marijuana* (last updated July 18, 2018), [https://www.tax.ny.gov/pubs\\_and\\_bulls/tax\\_types/med\\_marijuana\\_tax.htm](https://www.tax.ny.gov/pubs_and_bulls/tax_types/med_marijuana_tax.htm). The excise tax is allocated to the "Medical Marihuana Trust Fund" held in joint custody by the State comptroller and the commissioner of taxation and finance. See A. 6357-E § 4. New York State then allocates 22.5% of the excise tax revenue to counties where the medical cannabis was manufactured and another 22.5% to counties where the medical cannabis was sold. See *id.* In addition, 5% of the revenue is transferred to the Office of Alcoholism and Substance Abuse and another 5% is transferred to the Division of Criminal Justice Services. See N.Y. State Fin. Law § 89-H. In FY 2018, New York State collected nearly \$2 million in medical cannabis excise taxes. See N.Y. State Div. of the Budget, *FY 2019 Enacted Budget Financial Plan 77* (May 2018), <https://www.budget.ny.gov/pubs/archive/fy19/enac/fy19enacFP.pdf>. New York City received approximately \$150,000 in FY 2018. See N.Y.C. Mayor's Office of Mgmt. & Budget, *The City of New York Executive Budget Fiscal Year 2019: Message of the Mayor* (Apr. 2018), <https://www1.nyc.gov/assets/omb/downloads/pdf/mm4-18.pdf>.

<sup>333</sup> See A. 6357-E § 4; N.Y. Tax Law § 490 *et. seq.*

<sup>334</sup> See S. 3040-C, sec. 33 § 446(1) (excluding "Medical Marihuana Activities provided for in Title Five-A of Article 33 of the Public Health Law").

<sup>335</sup> For example, in Colorado, medical cannabis is not subject to the State Retail Marijuana Excise Tax but is subject to the Colorado sales tax of 2.9%. Adult-use cannabis is subject only to the 15% State excise tax but not the regular sales tax of 2.9%. See Colo. Dep't of Revenue, *Sales 93: Sales Tax on Marijuana* (July 2017), <https://www.colorado.gov/pacific/sites/default/files/Sales93.pdf>. In Massachusetts, prescription cannabis sales are provided with an exemption from the excise tax and the sales tax. See 830 Mass. Code Regs. § 64N.1.1. Washington State exempts medical cannabis from the State sales tax but still charges the 37% excise tax. See Wash. State Dep't of Revenue, *Special Notice: Sales and Use Tax Exemptions for Marijuana Retailers with a Medical Endorsement* (May 2016), [https://dor.wa.gov/sites/default/files/legacy/Docs/Pubs/SpecialNotices/2016/sn\\_16\\_med\\_endorsement.pdf](https://dor.wa.gov/sites/default/files/legacy/Docs/Pubs/SpecialNotices/2016/sn_16_med_endorsement.pdf).

## **5. New York City Tax Revenues Should Be Deposited and Directed Through the City**

The City will pursue legislative authority to allocate cannabis tax revenues in the City's general fund to be used to properly regulate and provide necessary cannabis education, public health, technical assistance and access to capital services, other equity initiatives, and safety and enforcement programs.

## **6. State Tax Revenues Should Be Fairly Distributed to Local Governments, Which Can Promote Local Priorities**

The City recommends that tax revenues collected at the State level and allocated for spending in local communities be fairly distributed among local governments, and disbursed in line with local priorities. Therefore, should a fund similar to the New York State Community Grants Reinvestment Fund as suggested in the Proposed 2018 Bill be established,<sup>336</sup> New York City programs should receive a fair share of the funds and City authorities should have input into project-selection process for City programs.

The City requests that revenue generated from State adult-use cannabis taxes be allocated to assist localities in the array of expenditures that will be needed to administer legalization, ensure equity opportunities, and mitigate against risks. These will include, among others:

- developing licensing programs, regulations governing cannabis consumption in public places, and regulations for home and commercial cultivation;
- enhancing public safety and enforcement resources needed to respond to the demands of legalized cannabis;
- developing and implementing youth education campaigns focusing on the risks associated with cannabis use and abuse for adolescents, including potential adverse health consequences, limits on educational attainment, and exposure to the criminal justice system;
- developing and distributing guidance around best practices for the integration of cannabis in locally-funded primary care, psychiatric, pain management, and substance use treatment settings;

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<sup>336</sup> See S. 3040-C, sec. 32 § 99-HH. As currently drafted, the New York State Community Grants Reinvestment Fund will be awarded by an Executive Steering Committee to community-based nonprofits for the purpose of reinvesting in communities disproportionately affected by past federal and state drug policies. The grants are to be used to support job placement; job skills services; adult education; mental health treatment; substance use disorder treatment; system navigation services; legal services to address barriers to reentry; and linkages to medical care, women's health services, and other community-based supportive services. The Executive Steering Committee will consist of 13 members from the Office of Children and Family Services, with representatives from other executive departments, as well as appointees of the majority and minority leaders of the Senate and Assembly, the Comptroller, and representatives of local government and community-based organizations appointed by the Attorney General.

- disbursing targeted aid to licensees and potential employees operating on smaller tiers, including workforce development and technical assistance programs;
- other business supportive services, potentially including access to capital and compliance and application assistance;
- workforce development training and recruitment for disparately impacted communities, including those formerly involved with the criminal justice system;
- developing a cannabis dashboard similar to that provided by Washington State;<sup>337</sup> and
- reinvestment in communities disproportionately impacted by cannabis criminalization.

In general, the Task Force recommends that funding be made available to support cannabis business owners, including equity applicants and small business owners, and workers impacted by decriminalization, both those serving in newly created occupations and existing occupations impacted by decriminalization, as well as for other community reinvestment goals. These services should be prioritized for target populations and developed with community input. Some resources may be provided by non-equity applicants, potentially in the form of workforce development commitments, in-kind donations, and linkage fees, and used for the benefit of target populations.

Such a community reinvestment program would provide workforce development training, business support for equity applicants and small businesses, and cross-pollination of best practices between non-equity and equity applicants.

The New York City cannabis market will simultaneously provide new business and workforce opportunities, as well as a new industry with attendant regulatory, legal, financial, and resource challenges, particularly for new entrepreneurs. The City should therefore provide small business owners and jobseekers with capacity building and technical assistance, as well as regulatory, capital, and legal resources to meet these complex needs. These resources will ensure that the City has meaningfully and realistically supported our shared goal in creating opportunities for new entrepreneurs and workforce training for new occupational categories.

## **Conclusion**

Legalization of adult-use cannabis will place the State and the City at a crossroads, with challenges and opportunities ahead. We can best navigate a legalized environment through a

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<sup>337</sup> See Wash. State Liquor & Cannabis Bd., *Marijuana Dashboard*, <https://data.lcb.wa.gov/stories/s/WSLCB-Marijuana-Dashboard/hbnp-ia6v/>.

strong State regulatory infrastructure balanced with broad autonomy for local governments to meet the needs of their communities. The City envisions regulation trained on protecting public health and safety, particularly for the City's youth. Critically, legalization can relieve the burdens of past criminalization that have disproportionately impacted people of color. Going forward, legalization must seek to minimize, not perpetuate, those disparities. The advent of a new commercial industry also opens doors to economic opportunities for communities most impacted by criminalization. It will take coordinated planning and resources to seize this chance to build a safe and more equitable new industry in New York. New York City hopes this report will help build a sound framework that advances these goals.