

August 31, 2016

Chris Hladick  
Commissioner  
Department of Commerce, Community, and Economic Development  
P.O. Box 110800  
Juneau, AK 99811-0800

Re: Marijuana Social Clubs  
AGO No. AN2016101562

Dear Commissioner Hladick:

You have asked for a legal opinion about the consumption and distribution of marijuana at so-called “marijuana social clubs,” a generic term for physical venues where fee-paying patrons or members consume marijuana.

Your first question is about marijuana consumption at such venues. Alaska law prohibits consuming marijuana “in public.”<sup>1</sup> Regulations allow marijuana consumption at licensed retail marijuana stores that have state approval, but prohibit public consumption at all other “places of amusement or business” and places to which “the public or a substantial group of people has access.”<sup>2</sup> Thus, your question is whether people may lawfully consume marijuana at an unlicensed place that charges a fee for the privilege of entering and consuming marijuana on the premises.

The answer is no. If that place is not a licensed retail marijuana store, consuming marijuana there is unlawful. Charging people a fee to consume marijuana at a physical venue, if done regularly and for financial benefit, is to operate a business. The venue itself would therefore be a “place of business” where it is unlawful to consume marijuana, even if the venue’s proprietor expressly invites people to do so. And even if this operation did not rise to the level of a business, the venue would still count as “in

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<sup>1</sup> AS 17.38.040.

<sup>2</sup> 3 AAC 306.990(6).

public” if a “substantial number” of people had access to it, so that consuming marijuana there would be unlawful.

Your second question is about the distribution of marijuana samples at marijuana social clubs. Without a license from the Marijuana Control Board, a person may not possess more than one ounce of marijuana or transfer marijuana for remuneration.<sup>3</sup> You have asked whether a person without a Board-issued license acts unlawfully by charging people a fee to consume marijuana at a physical venue if he provides those people with marijuana samples.

If this person has “dominion or control” of the marijuana provided as samples—even if he does not own or have physical possession of the marijuana—he is acting unlawfully if the total amount of marijuana is more than one ounce or if he receives payment for transferring that marijuana to patrons.

## LEGAL BACKGROUND

### I. Alaska’s marijuana laws and regulations.

Alaskans voted in 2014 to liberalize personal use of marijuana and to authorize a commercial marijuana industry regulated by a Marijuana Control Board.<sup>4</sup> The resulting laws strictly control the sale of marijuana and establish limits for personal possession, use, and distribution of marijuana.<sup>5</sup>

Lawful personal use of marijuana entails the right to use, possess, and purchase one ounce or less of marijuana as well as the right to transfer one ounce or less of marijuana (and up to six immature plants) to another person “without remuneration.”<sup>6</sup> A person may lawfully assist another in personal use activities.<sup>7</sup> However, it is unlawful to consume marijuana in public, with violations punishable by a fine of up to \$100.<sup>8</sup>

Commercial marijuana cultivation, processing, testing, and sale are permitted only by four types of licensed “marijuana establishments” : retail marijuana stores, marijuana cultivation facilities, marijuana product manufacturing facilities, and marijuana testing

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<sup>3</sup> AS 11.71.050(a); AS 17.38.020(3); AS 17.38.070(a).

<sup>4</sup> 2014 Ballot Measure No. 2, “An Act to Tax and Regulate the Production, Sale, and Use of Marijuana”; AS 17.38.020; AS 17.38.080; AS 17.38.121.

<sup>5</sup> AS 17.38.020; AS 17.38.070.

<sup>6</sup> AS 17.38.020(3).

<sup>7</sup> AS 17.38.020(5).

<sup>8</sup> AS 17.38.020(4); AS 17.38.040.

facilities.<sup>9</sup> Each type of establishment plays a distinct role in the marijuana industry, must be licensed by the Marijuana Control Board, and is subject to the Board's regulations.<sup>10</sup> The Board's regulations establish a licensing process, health and safety measures, employee training requirements, and other requirements for each type of establishment.<sup>11</sup> They also create rules for enforcement and local government control.<sup>12</sup> The regulations prohibit consuming marijuana on the premises of any licensed establishment except for permitted areas of licensed retail marijuana stores.<sup>13</sup>

Despite the 2014 changes to Alaska's marijuana laws, it remains unlawful to possess more than one ounce of marijuana without a license and to sell marijuana without a license. Possessing more than one ounce of marijuana remains unlawful under Alaska's Controlled Substances Act;<sup>14</sup> only licensed marijuana establishments are exempted.<sup>15</sup> The Controlled Substances Act also criminalizes possessing any quantity of marijuana "with the intent to manufacture or deliver."<sup>16</sup> This prohibition is partially supplanted by the 2014 amendments, which allow possessing or transferring up to one ounce of marijuana "without remuneration"<sup>17</sup> and permit licensed marijuana establishments to sell marijuana to consumers.<sup>18</sup> But for those without a Board-issued license, transferring marijuana for remuneration remains illegal.<sup>19</sup>

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<sup>9</sup> AS 17.38.070; AS 17.38.990(10) (defining "marijuana establishments").

<sup>10</sup> See AS 17.38.070; AS 17.38.190.

<sup>11</sup> 3 AAC 306.300 – 306.360 (retail marijuana stores); 3 AAC 306.400 – 306.480 (cultivation facilities); 3 AAC 306.500 – 570 (marijuana product manufacturing facilities); 3 AAC 306.600 – 306.675 (marijuana testing facilities); 3 AAC 306.700 – 306.775 (rules for all establishments).

<sup>12</sup> 3 AAC 306.200 – 306.260 (local control); 3 AAC 306.800 – 306.850 (enforcement).

<sup>13</sup> See 3 AAC 306.305(a)(4); 3 AAC 306.310(b)(2); 3 AAC 306.405(c)(2); 3 AAC 306.510(a)(3); 3 AAC 306.310(b)(3).

<sup>14</sup> AS 11.71.050(a)(2)(E).

<sup>15</sup> AS 17.38.070.

<sup>16</sup> AS 11.71.050(a)(1).

<sup>17</sup> AS 17.38.020(3)

<sup>18</sup> AS 17.38.070(a).

<sup>19</sup> Although Alaskans have a constitutional right to privacy that protects their right to possession of small amounts of marijuana even prior to the enactment of marijuana legalization, this right to privacy does not protect the sale or purchase of marijuana. See *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975) ("[N]either the federal or Alaska

## **II. Federal marijuana laws.**

The federal Controlled Substances Act prohibits possessing and selling marijuana.<sup>20</sup> The U.S. Department of Justice has advised that federal officials are less likely to enforce the prohibitions on marijuana in states that have legalized marijuana possession and sale if these states' regulations support the federal government's enforcement priorities: preventing distribution to minors; preventing revenue from marijuana sales going to criminal enterprises; preventing drugged driving and other adverse public health consequences tied to marijuana use; and preventing violence and the use of firearms in the cultivation and distribution of marijuana.<sup>21</sup> Yet the Department of Justice's current enforcement policy is no guarantee against federal prosecution. The Department of Justice cautioned that "[i]f state enforcement efforts are not sufficiently robust to protect against [those harms,] the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms."<sup>22</sup> The Department of Justice could also choose to resume enforcing federal laws against marijuana possession and transfer at any time.

### **ANALYSIS**

#### **I. Alaska law prohibits the consumption of marijuana at a place where a fee is charged for that privilege unless that place is licensed as a retail marijuana store.**

Soon after the 2014 changes to Alaska's marijuana laws, people began to operate physical venues where guests are invited to consume marijuana and marijuana products in a physical setting resembling a café, lounge, or nightclub. These venues, generically termed "marijuana social clubs," typically charge an entry or membership fee or demand

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constitution affords protection for the buying or selling of marijuana, nor absolute protection for its use or possession in public. Possession at home of amounts of marijuana indicative of intent to sell rather than possession for personal use is likewise unprotected.").

<sup>20</sup> 21 U.S.C. § 812; 21 U.S.C. § 841(a); 21 U.S.C. § 844(a).

<sup>21</sup> James M. Cole, Deputy Attorney General, U.S. Dept. of Justice, "Memorandum for all United States Attorneys: Guidance Regarding Marijuana Enforcement" at 1-2 (Aug. 29, 2013).

<sup>22</sup> *Id.* at 3.

a “donation”. These venues do not purport to operate as retail marijuana stores authorized by Alaska’s marijuana statutes<sup>23</sup> and are not licensed by the Marijuana Control Board.

Because Alaska law prohibits consuming marijuana in public,<sup>24</sup> consuming marijuana at these venues is legal only if they are not operating “in public.” The Alaska Statutes do not define what places are “public” for purposes of the ban on public consumption, but the Marijuana Control Board has defined the term in a way that appears to prohibit consumption at these “marijuana social clubs”:

“in public” (A) means in a place to which the public or a substantial group of people has access; (B) except as provided in (C) of this paragraph, includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartment designed for actual residence; [and] (C) does not include an area on the premises of a licensed retail marijuana store designated for onsite consumption under 3 AAC 306.305.<sup>[25]</sup>

Depending on the particular facts, an unlicensed physical venue where people are invited to pay a fee for the privilege of consuming marijuana on the premises would be a “place[] of amusement or business” or a “place to which the public or a substantial number of people has access.”

**A. “Place of amusement or business”**

The prohibition against public consumption of marijuana applies to any “place of amusement or business” other than a licensed retail marijuana store with permission from the Marijuana Control Board to allow on-site consumption. The regulation does not further define the terms “amusement or business,” but their meaning can be gleaned from both dictionaries and other legal authorities.

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<sup>23</sup> A retail marijuana store is an “entity registered [with the Marijuana Control Board] to purchase marijuana from marijuana cultivation facilities, to purchase marijuana and marijuana products from marijuana product manufacturing facilities, and to sell marijuana and marijuana products to consumers.” AS 37.18.900(15); *see also* AS 37.18.070(a) (authorizing retail marijuana stores).

<sup>24</sup> AS 17.38.040.

<sup>25</sup> 3 AAC 306.990(6).

A “place of business” is, straightforwardly, a “location at which one carries on a business.”<sup>26</sup> Dictionaries and various legal authorities generally define “business” as the activity of regularly furnishing goods or services with the goal of receiving a financial benefit.<sup>27</sup>

For example, the State of Alaska requires all businesses to be licensed. For this purpose, “business” is defined as “a for profit or nonprofit entity engaging or offering to engage in a trade, a service, a profession, or an activity with the goal of receiving a financial benefit in exchange for the provision of services, or goods or other property.”<sup>28</sup> Only a person who “does not represent to be regularly engaged in furnishing goods or services” is exempt from the business license requirement.<sup>29</sup> Under federal tax law, the criterion for determining whether an activity is a business is whether it is “engaged in for profit” or is “carried on for the production of income from the sale of goods or the performance of services.”<sup>30</sup> Relevant considerations include the amount of time spent on

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<sup>26</sup> Black’s Law Dictionary (10th ed. 2014).

<sup>27</sup> See Black’s Law Dictionary (10th ed. 2014) (“a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain”); [www.merriam-webster.com/dictionary/business](http://www.merriam-webster.com/dictionary/business) (“the activity of making, buying, or selling goods or providing services in exchange for money”); [dictionary.cambridge.org/us/dictionary/english/business](http://dictionary.cambridge.org/us/dictionary/english/business) (“the activity of buying and selling goods and services, or a particular company that does this”); [www.macmillandictionary.com/us/dictionary/american/business](http://www.macmillandictionary.com/us/dictionary/american/business) “the work of buying or selling products or services for money”).

<sup>28</sup> AS 43.70.110(a).

<sup>29</sup> AS 43.70.105(a)(6).

<sup>30</sup> The two different standards for determining whether an activity is a business stem from two different sets of potential taxpayers. Individual taxpayers and non-exempt corporations may deduct ordinary and necessary expenses paid or incurred in carrying on a “trade or business.” I.R.C. § 162(a). Only those activities engaged in for profit qualify for deductions. § 183(a). Treasury regulations contrast expenses incurred in carrying on a trade or business, which are deductible, with expenses incurred in “activities . . . carried on primarily as a sport, hobby, or for recreation,” which are not deductible. See Treas. Reg. § 1.183-2(a). The key determinant of a business is whether the taxpayer entered the activity “with the objective of making a profit.” *Id.* The I.R.S. employs nine factors to determine whether an activity is a truly a business whose expenses can be deducted. Treas. Reg. § 1.183-2(b).

A tax-exempt organization like a charity generally does not pay income taxes, but it must pay taxes on income it derives from any “unrelated trade or business.” I.R.C. § 511(a)(1); § 512(a)(1). For purposes of this provision, “trade or business” includes “any

the activity and its history of producing income or losses.<sup>31</sup> And in insurance law, when homeowners' insurance policies exclude coverage of losses arising out of "business pursuits," an activity is a "business" if it is engaged in "continuously" and with a "profit motive."<sup>32</sup>

Taken together, these authorities suggest that a "business" is the activity of regularly providing goods or services in order to receive a financial benefit. Operating a physical venue where people may consume marijuana provides a service. Providing this service would thus be a business if it were undertaken regularly and with the goal of receiving financial benefit.

An activity need not be constant or even frequent to be considered "regular." Part-time or supplemental activities can be sufficiently regular to qualify as businesses.<sup>33</sup> A venue that opens its doors only sporadically to marijuana consumption might still be the site of a business if the efforts necessary to realize these openings—such as leasing property for the purpose, advertising, seeking entertainment, or preparing for openings—are sufficiently regular or extensive.<sup>34</sup>

As for the issue of financial benefit, charging people money for the privilege of consuming marijuana on the premises is certainly evidence of intent to receive a financial benefit from the activity. Whether the payment is styled as a cover charge, membership fee, or donation makes no difference; receiving money, however denominated, is a financial benefit. Nor does it matter whether people can consume marijuana at the venue only if they are members of a "club." Costco and Sam's Club are undeniably businesses even though only fee-paying members can shop there. The level of professionalism with which the activity is undertaken and its financial results may also be relevant evidence of

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activity which is carried on for the production of income from the sale of goods or the performance of services." § 513(c).

<sup>31</sup> Treas. Reg. 1.183-2(b)(3), (6).

<sup>32</sup> See *Safeco Ins. Co. of Am. v. Hilderbrand*, 602 F.3d 1159, 1163 (10th Cir. 2010) (describing test "overwhelmingly favored" by state courts for identifying business pursuits that are excluded from homeowners' insurance coverage).

<sup>33</sup> *National Farmers Union Property and Cas. Co. v. Garfinkel*, 277 P.3d 905, 910 (Colo. Ct. App. 2015) (collecting cases).

<sup>34</sup> See *Hilderbrand*, 602 F.3d at 1164 (holding that although certain aspects of exotic animal business, such as magic shows or photo shoots, occurred only sporadically, business met continuity requirement for purposes of business pursuit exclusion when operator owned and supported exotic animals for the entire duration and continually attempted to arrange animal performances).

whether it is a business or not.<sup>35</sup> Notably, an activity need not actually be profitable to be undertaken for the goal of receiving financial benefit.<sup>36</sup> Activities that seek to raise money for altruistic causes, rather than personal enrichment, can also be considered businesses.<sup>37</sup>

If a person who regularly invites others to pay a fee in exchange for the permission to consume marijuana at a physical venue were found to undertake this activity for financial benefit, then the activity would be considered a business and the venue itself would be a “place a business.” Marijuana consumption would therefore be prohibited at that venue, even though the person specifically intended to permit it.

The prohibition against public consumption of marijuana applies also to “places of amusement.”<sup>38</sup> Dictionaries define an “amusement” as an activity that entertains.<sup>39</sup> Courts

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<sup>35</sup> The IRS considers whether books and records are kept, whether the operator has studied business practices or sought expert advice, the amount of time spent carrying on the activity, and the history of income or losses (among other things) in determining whether an activity is a business the expenses of which are tax-deductible. Treas. Reg. § 1.183-2(b).

<sup>36</sup> *Garfinkel*, 277 P.3d at 911 (“[T]he cases recognize that actual profit is not required as long as the activity in question is one that constitutes a means of procuring subsistence or profit and there is a motive to make a profit or, at a minimum, to cover costs and expenses.”).

<sup>37</sup> See AS 47.30.110(a) (including non-profit organizations in definition of “business”); I.R.C. § 511 (recognizing that tax-exempt charitable organizations may have business income); *Hilderbrand*, 602 F.3d at 1164 (exotic animal business had profit motive because intent in creating company was to generate enough income to sustain sanctuary for exotic animals); *Fraternal Order of Eagles v. City and Borough of Juneau*, 254 P.3d 348, 357-58 (Alaska 2011) (“The fact that [a non-profit private social club] uses its revenue to support charitable causes does not change the commercial nature of its . . . facility”).

<sup>38</sup> The term “place of amusement” is not defined anywhere in Alaska’s statutes, regulations, or case law. Alaska’s law against discrimination in places of public accommodation defines “public accommodation” to include “public amusement and business establishments” and offers a broad list of examples of places that fall into one or both of those categories. See AS 18.80.300 (“ ‘public accommodation’ means a place that offers its services, goods, or facilities to the general public and includes a public inn, restaurant, eating house, hotel, motel, soda fountain, soft drink parlor, tavern, night club, roadhouse, place where food or spiritous or malt liquors are sold for consumption, trailer park, resort, campground, barber shop, beauty parlor, bathroom, resthouse, theater,

in other states have focused the provision of entertainment in deciding that places as diverse as bingo halls,<sup>40</sup> dance studios,<sup>41</sup> and nightclubs that stage musical acts are all “places of amusement.”<sup>42</sup>

There is substantial overlap between “places of amusement” and “places of business” because many places offering entertainment do so regularly for financial benefit. For example, a bowling alley provides a service—facilities for bowling—with the goal of benefitting financially from the money people pay to bowl there. However, the term “place of amusement” is not so broad as to include private residences where people watch movies or stage musical performances in a non-business manner because the definition must be consistent with the overall statutory purpose of allowing the personal use of marijuana.<sup>43</sup> Thus the regulatory definition of “in public” prohibits marijuana consumption at places of business (other than licensed retail marijuana stores) and at non-business venues where entertainment is provided.

It is unclear whether a marijuana social club that provided only a venue for marijuana consumption—without any other amenity—would qualify as a “place[] of amusement” (although it might still be a place of business). But if the club’s venue featured musical performances, games, or other forms of diversion in addition to a

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swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, and *all other public amusement and business establishments . . .*” (emphasis added)).

<sup>39</sup> See [www.merriam-webster.com/dictionary/amusement](http://www.merriam-webster.com/dictionary/amusement) (“something (such as an activity) that amuses or entertains someone”); [www.macmillandictionary.com/us/dictionary/american/amusement](http://www.macmillandictionary.com/us/dictionary/american/amusement) (“an activity that is provided for entertainment”); [dictionary.cambridge.org/us/dictionary/english/amusement](http://dictionary.cambridge.org/us/dictionary/english/amusement) (“something that entertains you”).

<sup>40</sup> *State v. Crayton*, 344 So. 2d 711, 775 (Ala. 1977) (ruling that bingo hall is a “place of amusement,” statutorily defined as “any place where any facilities for entertainment, amusement, or sports are provided”).

<sup>41</sup> *Miss Diana’s School of Dance, Inc. v. Dir. of Revenue*, 478 S.W.3d 405, 409 (Mo. 2016) (dance studio is subject to tax applied to “place[s] of amusement, entertainment or recreation”).

<sup>42</sup> *Morascini v. Commissioner of Public Safety*, 675 A.2d 1340, 1345-46 (Conn. 1996) (“We conclude that a nightclub that stages performances for the entertainment of its patrons is a “place of public amusement” as that phrase is commonly understood.”).

<sup>43</sup> See AS 17.38.010(a) (“In the interest of allowing law enforcement to focus on violent and property crimes, and to enhance individual freedom, the people of the State of Alaska find and declare that the use of marijuana should be legal for persons 21 years of age or older.”).

physical space to consume marijuana, it would probably qualify as a “place of amusement”<sup>44</sup>—and marijuana consumption would be illegal there.

**B. “Place to which the public or a substantial number of people has access.”**

The prohibition on public consumption of marijuana also applies to any place “to which the public or a substantial group of people has access.”<sup>45</sup> “Access” is defined as “permission, liberty, or ability to enter” and “freedom or ability to obtain or make use of something.”<sup>46</sup> Whether consumption in a particular venue takes place “in public” thus turns on the scope of restrictions that limit some people’s ability to enter the club.

A venue is considered open to the public even if it charges an admission fee and places age restrictions on admission.<sup>47</sup> For example, establishments like movie theaters, nightclubs, golf courses, and swimming pools—which routinely charge admission fees—are generally considered to be places that offer their facilities to the general public.<sup>48</sup> A venue that charges a cover or membership fee without otherwise restricting admission (except to those over 21) is thus likely accessible to the public.

Even a venue where access is more restrictive will be considered “in public” if it is open to a “substantial group of people.” But as with the term “places of amusement,” this provision does not extend to private residences that are not places of business so as not to conflict with the overall statutory purpose of permitting personal use of marijuana. Thus it is not unlawful to consume marijuana at a house party even if many people are invited.

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<sup>44</sup> See, e.g., *J. Sutter’s Mill v. Revenue Cabinet, Commonwealth of Ky.*, 793 S.W.2d 838, 839-40 (Ky. 1990) (holding that substantial evidence supported trial court’s finding that tavern which charged \$1 admission fee and had music played on loudspeakers, dance floor, foosball games and television sets was “place of amusement” for purposes of tax on retail sales including admission to “places of amusement or entertainment”).

<sup>45</sup> 3 AAC 306.990(a)(6).

<sup>46</sup> See [www.merriam-webster.com/dictionary/access](http://www.merriam-webster.com/dictionary/access).

<sup>47</sup> See *Isbister v. Boys’ Club of Santa Cruz, Inc.*, 707 P.2d 212, 217-19 (Cal. 1985) (ruling that charitable organization’s swimming pool, open to town’s boys under 18 years of age whose families paid an annual membership fee, was a place of public accommodation subject to California’s nondiscrimination laws).

<sup>48</sup> See, e.g., AS 18.80.300(16) (defining “public accommodations” for purposes of Alaska’s Human Rights Act as a “place that caters or offers its services, goods, or facilities to the general public and includes” nightclubs, theaters, swimming pools, and golf courses).

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In sum, a physical venue where a business is operated, where entertainment is provided, or to which a substantial number of people has access qualifies as “in public” for purposes of the prohibition against consuming marijuana in public. That means that consuming marijuana at any of these venues is unlawful—even if the proprietor of the venue invites people to do so. And because Alaska law provides that any person who solicits or aids another in committing an offense—including the offense of consuming marijuana in public—is also guilty of that offense, the proprietor of such a venue could also be criminally liable.<sup>49</sup>

**II. A person who charges an entrance fee to a venue where samples of marijuana are distributed may be unlawfully selling marijuana.**

Some marijuana social clubs advertise “free samples” of marijuana and marijuana products to patrons who pay an admission or membership fee. This practice likely violates the limits on marijuana possession and the laws against unlawful delivery of marijuana.

Only marijuana establishments licensed by the Marijuana Control Board can sell marijuana or possess more than an ounce of marijuana or marijuana products.<sup>50</sup> An unlicensed physical venue that charges patrons a fee to consume marijuana on the premises is subject to the personal use limits on marijuana possession and transfer.<sup>51</sup> The proprietor of such a venue may neither possess more than one ounce of marijuana nor transfer any amount of marijuana to patrons for remuneration.<sup>52</sup>

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<sup>49</sup> AS 11.16.110 (“A person is legally accountable for the conduct of another constituting an offense if . . . with intent to promote or facilitate the commission of the offense, the person (A) solicits the other to commit the offense; or (B) aids or abets the other in planning or committing the offense . . . .”); AS 11.81.900(40) (defining “offense” to mean “conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation”); AS 17.38.040 (“It is unlawful to consume marijuana in public. A person who violates this section is guilty of a violation punishable by a fine of up to \$100.”).

<sup>50</sup> See AS 17.38.070 (creating four types of licensed commercial marijuana establishments).

<sup>51</sup> See AS 17.38.020; AS 17.38.070.

<sup>52</sup> AS 17.38.020.

“Remuneration” generally means payment.<sup>53</sup> The key question is whether the proprietor of such a venue receives payment only for allowing a patron to consume marijuana on the premises or whether the payment is also for the marijuana samples made available inside. A jury considering that question could reasonably conclude that the fee is payment for both. For example, a proprietor’s advertisement of marijuana samples is evidence that he is offering marijuana to attract more patrons and thus to make more money. The logic of offering marijuana samples to patrons—that more people will be willing to pay the entrance fee if the proprietor makes marijuana available to them inside—strongly suggests that patrons are paying for marijuana as well as for the enjoyment of club facilities. Under these circumstances, the proprietor is unlawfully transferring marijuana for remuneration.

To avoid the prohibition against selling marijuana, proprietors of some marijuana social clubs that advertise free samples appear to solicit third parties to transfer their own marijuana or marijuana products to patrons.<sup>54</sup> Yet this practice will not insulate the proprietor from criminal liability if he exercises sufficient control over the marijuana samples to be held criminally liable for possessing or transferring them.<sup>55</sup> Liability does not require showing that the proprietor owns or has physical possession of the marijuana; both possession and transfer may be constructive.<sup>56</sup> Nor must the proprietor’s possession

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<sup>53</sup> See Black’s Law Dictionary (10th ed. 2014) (“Payment; compensation, esp. for a service that someone has performed”); [www.merriam-webster.com/dictionary/remunerates](http://www.merriam-webster.com/dictionary/remunerates). (“an amount of money paid to someone for work that person has done”); [www.dictionary.cambridge.org/us/dictionary/english/remuneration](http://www.dictionary.cambridge.org/us/dictionary/english/remuneration) (“pay for work or services”); [www.macmillandictionary.com/dictionary/american/remuneration](http://www.macmillandictionary.com/dictionary/american/remuneration) (“payment or other rewards that you get for your work”).

<sup>54</sup> Licensed growers and licensed product manufacturers are prohibited from transferring marijuana directly to consumers even if no compensation is received. 3 AAC 306.405(c)(1); 3 AAC 306.510(a)(1); *see also* AS 17.38.070(b)-(c) (activities that licensed marijuana cultivators and licensed marijuana product manufacturers may lawfully undertake do not include transferring marijuana or marijuana products to end users). Any license-holder distributing marijuana to patrons of an unlicensed marijuana social club could have his or her license suspended or revoked. 3 AAC 306.810(b)(3).

<sup>55</sup> The same principle would apply to the organizer of an exposition or trade show featuring marijuana industry participants where marijuana samples are provided.

<sup>56</sup> See AS 11.81.900(49) (“ ‘[P]ossess’ means having physical possession or the exercise of dominion or control over property . . . .”); AS 11.71.900(6) (“ ‘[D]eliver’ or ‘delivery’ means the actual, constructive, or attempted transfer from person to another of a controlled substance whether or not there is an agency relationship . . . .”).

be exclusive to create liability: “two or more persons may have joint possession of the drug.”<sup>57</sup>

Constructive possession means to “knowingly ha[ve] the power and intention at a given time to exercise dominion or control over” an item.<sup>58</sup> Although Alaska courts have not defined constructive transfer,<sup>59</sup> courts of other states with similar statutes define constructive transfer as “the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant.”<sup>60</sup> While merely connecting a buyer and seller of drugs generally does not show dominion and control over the drugs, controlling the physical location where the drugs are kept or setting the terms of exchange for the drugs may show sufficient “dominion or control” for constructive possession and transfer.<sup>61</sup>

Whether any particular person exercises “dominion or control” over marijuana is a fact-dependent question, so this opinion cannot determine as a general matter whether the

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<sup>57</sup> *Gordon v. State*, 533 P.2d 25, 30 (Alaska 1975).

<sup>58</sup> *Nelson v. State*, 628 P.2d 884, 889 (Alaska 1981) (defining constructive possession); *see also* AS 11.81.900(49).

<sup>59</sup> *But see Norman v. State*, Nos. A-3888, A-3889, 1993 WL 13156632 at \*6 (Alaska Ct. App. Mar. 3, 1993) (holding defendant failed to show why jury instruction on constructive transfer could not properly be applied to his case without expressly defining the concept).

<sup>60</sup> *State v. Campbell*, 795 P.2d 750, 752 (Wash. App. 1990) (quoting *Davila v. State*, 664 S.W.2d 722, 724 (Tex. Cr. Ct. App. 1984)). Alaska’s Controlled Substances Act is modeled on the Uniform Controlled Substances Act, *State v. Burden*, 948 P.2d 991, 993 (Alaska Ct. App. 1997), as are Washington’s and Texas’s. *State v. Bradshaw*, 98 P.3d 1190, 1993 (Wash. 2004); *Davila*, 664 S.W.2d at 724.

<sup>61</sup> *Compare United States v. Manzella*, 791 F.2d 1263 (7th Cir. 1986) (vacating finding of constructive possession of cocaine when evidence showed that defendant merely connected buyer and seller but did not have power to ensure drugs were delivered) and *Commonwealth of Pennsylvania v. Murphy*, 795 A.2d 1025, 1033 (Pa. Super. 2002) (vacating finding of constructive possession of heroin when defendant located seller but did not negotiate terms of sale, physically retrieve drugs, or collect money) *with State v. Shumaker*, 174 P.3d 1214 (Wash. App. 2007) (holding defendant’s control over premises is a non-dispositive factor to consider in establishing dominion and control over drugs) and *State v. Chisolm*, 92 Wash. App. 1062, 1998 SL 758872 at \*1-3 (Wash. Ct. App. 1998) (affirming jury’s verdict of constructive transfer when defendant did not handle drugs or cash during transaction but initiated transfer of drugs by soliciting undercover officer, negotiated purchase price, illuminated drugs for sale with cigarette lighter, and invited officer to return).

proprietor of a venue who makes marijuana samples available to fee-paying patrons is violating the laws on marijuana possession or transfer. Yet one could reasonably conclude that a proprietor has “dominion and control” over marijuana samples distributed to patrons if the proprietor advertises the samples, solicits others to transfer marijuana to patrons, and controls the physical space where marijuana is physically transferred or the terms of the transfer. If these samples totaled more than one ounce, the proprietor would be guilty of unlawful possession.<sup>62</sup> And if the proprietor received remuneration for these samples in *any* quantity, he or she would be guilty of unlawfully delivering marijuana.<sup>63</sup>

### CONCLUSION

Despite Alaska’s liberalization of the marijuana laws in 2014, the law requires regulation of the marijuana industry. Under Alaska law, a business cannot sell or provide marijuana or allow marijuana to be consumed on the premises unless it is licensed as a retail marijuana store by the Marijuana Control Board.

Sincerely,

Jahna Lindemuth  
Attorney General

cc: Cynthia Franklin, Director of the Alcohol & Marijuana Control Office

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<sup>62</sup> AS 11.71.050(a)(2)(E).

<sup>63</sup> AS 11.71.050(a)(1).