



COMMONWEALTH of VIRGINIA

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The Honorable J. Chris Plaster
Commonwealth's Attorney for Tazewell County
Post Office Box 946
Tazewell, Virginia 24651

Dear Mr. Plaster:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a business practice of giving away marijuana, free of charge, to customers who purchase other merchandise constitutes the illegal distribution of marijuana.

Background

You inquire regarding certain practices of businesses operating CBD stores and smoke shops (collectively, "shops"). You relate that, throughout the Commonwealth, some of these shops engage in the following business practices, or practices that are substantially similar. In addition to offering certain merchandise, such as grow supplies, CBD, or hemp products, for sale, the shops claim to be private, "members only" businesses that facilitate the adult sharing of marijuana among their member customers. Although the shops technically do not offer any marijuana for direct sale, customers who purchase shop merchandise receive marijuana as a complimentary "gift." The amount of marijuana "gifted" reflects the dollar amount of the goods purchased. I assume from your description that no gift of marijuana is provided to individuals who do not make a purchase. You further relate that the gifted marijuana is sourced from a "community of growers" who "gift" it to the shop; the shop owners engage in profit sharing with the growers using the proceeds of the merchandise sales.

Applicable Law and Discussion

The General Assembly enacted the Virginia Cannabis Control Act (the "Act") in 2021.¹ Pursuant to the Act, personal possession of certain amounts of marijuana by individuals 21 years of age or older is now legal in the Commonwealth.² The distribution of marijuana for recreational use, nevertheless, remains

¹ 2021 Va. Acts Spec. Sess. I, chs. 550, 551 (amending Title 4.1 to add Subtitle II, entitled "Cannabis Control Act," consisting of Code §§ 4.1-600 to -628; 4.1-1100 to -1121; 4.1-1302; and 4.1-1500 to -1503).

² See VA. CODE ANN. § 4.1-1100 (2021).

illegal under Code § 18.2-248.1.³

As now codified in § 4.1-1101.1, however, the Act further provides that “[n]otwithstanding the provisions of § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or of an equivalent amount of marijuana products.”⁴ For purposes of the Act, “‘adult sharing’ means transferring marijuana between persons who are 21 years of age or older without remuneration.”⁵ Section 4.1-1101.1 explicitly excludes from permissible “adult sharing” any

instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services.⁶

Accordingly, under certain circumstances, “sharing” of marijuana between adults is legal and adults “sharing” marijuana as allowed under § 4.1-1101.1 does not constitute unlawful distribution. You ask whether the conduct you describe falls within the ambit of legal adult sharing.

“When construing a statute, our primary objective is to ‘ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.”⁷ In interpreting legislative intent as expressed by “the plain meaning of the statutory language,”⁸ courts “presume that ‘the legislature chose, with care, the words it used when it enacted the relevant statute.’”⁹

Section 4.1-1101.1 clearly establishes that “[a]dult sharing’ *does not include* instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties . . . or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services.”¹⁰ Because the Act otherwise permits certain exchanges of marijuana when there is no “remuneration,” this language serves to foreclose potential loopholes for schemes where there are transactions comprising direct or indirect exchanges that involve items of value in an attempt to circumvent the law.

In the scenario you present, shop customers who buy merchandise are “gifted” with an amount of marijuana that reflects the dollar value of the items purchased. Accordingly, the customers and the shop are engaged in a “reciprocal transaction”¹¹ for the sale of goods. Should the “gifting” occur upon sale, then it

³ See VA. CODE ANN. § 18.2-248.1 (2021) (“Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it is unlawful for any person to sell, give, distribute or possess with intent to sell, give, or distribute marijuana.”). The Drug Control Act, which separately addresses the possession, use, and distribution of specific forms of medical marijuana, does not apply here.

⁴ Section 4.1-1101.1(B) (2021).

⁵ Section 4.1-1101.1(A).

⁶ *Id.*

⁷ *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012) (internal quotation marks omitted) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418 (2011)).

⁸ *Addison v. Jurgelsky*, 281 Va. 205, 208 (2011).

⁹ *Id.* (internal quotation marks omitted) (quoting *City of Va. Beach v. ESG Enters.*, 243 Va. 149, 153 (1992)).

¹⁰ Section 4.1-1101.1 (emphasis added). Section 4.1-1101.1(A)(ii) does not apply here as your request does not expressly implicate any offer or advertisement of marijuana.

¹¹ A “transaction” is “[t]he act or an instance of conducting business or other dealings,” “[s]omething performed

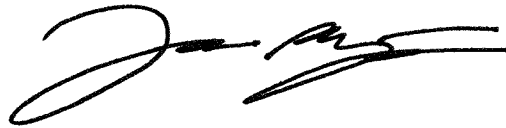
will have occurred “contemporaneously with” that transaction, and if a “gift” is available only with a purchase of other goods, then it is “contingent” upon that purchase.¹² Neither an establishment’s status as a private club nor the source of its marijuana is material to whether the establishment or its customer members are distributing marijuana unlawfully; the provisions of § 4.1-1101.1 do not include either “private” or “public” or distinguish between private or public sharing.¹³ Thus, to the extent a customer is “gifted” an amount of marijuana either at the same time as, or dependent upon, the sale of legal, non-marijuana merchandise, such a transaction is not “adult sharing” and constitutes the unlawful distribution of marijuana.

Conclusion

Accordingly, based on the facts provided, it is my opinion that a CBD store or smoke shop engages in the illegal distribution of marijuana, in violation of Code § 18.2-248.1, when the shop “gifts” marijuana to customers contemporaneously with, or contingent upon, the sale of merchandise as described in the scenario presented.¹⁴

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

or carried out,” or “[a]ny activity involving two or more persons[,]” *Transaction*, BLACK’S LAW DICTIONARY (11th ed. 2019); it is “reciprocal” when “[d]irected by each toward the other or others,” *Reciprocal*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹² See BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “contemporaneous” as “[l]iving, occurring, or existing at the same time”; and defining “contingent” in relevant part as “[d]ependent on something that might or might not happen in the future; conditional”).

¹³ Compare § 4.1-1101.1 with § 4.1-1108 (2021) (specifically prohibiting consuming or offering marijuana in a “public place”). This Opinion is limited to the application of § 4.1-1101.1.

¹⁴ This conclusion, while reflecting my analysis of current law as it relates to the scenario you present, does not alter the fact that it is the province of the prosecutor to determine whether to bring a criminal charge in the first instance. See 2012 Op. Va. Att’y Gen. 93, 95 (“The institution of criminal charges . . . [is a] matter[] of prosecutorial discretion.”). Indeed, “the application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth’s Attorney, the grand jury, and the trier of fact.” 2010 Op. Va. Att’y Gen. 96, 98. This Opinion therefore is not intended to foreclose the judicial process with respect to any specific set of facts.