

# How do you work in highly regulated markets? A Compliance Q&A with MadisonJay Solutions



Is compliance and regulation just one big headache? The headache is why MJS was formed - to start helping folks understand how to work in a hyper-regulated market.

From the alcohol space to now working in cannabis and hemp, Michael Cooper & Eric Becker are working across the US with retailers, brands, and cultivators to answer some of the most contentious questions. The team sat with us to talk through a bit of the hurdles along the way.

MC - Michael Cooper

EB - Eric Becker

**Greater: Michael, Eric, thanks for spending the time, first question, how did you get into the cannabis industry?**

MC – For me, it was actually existing clients pushing us to help them navigate this new industry who led us to cannabis. At the time, I was the General Counsel of MHW, which is the leading provider of compliance services to independent producers of alcohol (among other services) and

one of the first calls emerging brands make when they are looking to scale up. As state cannabis reform gained momentum, many of our alcohol clients were interested in exploring adult-use, but they wanted our help. My career was fairly common for a role like GC of MHW (Harvard College, Harvard Law, a clerkship with a judge on one of the U.S. Courts of Appeals, and many years litigating at Cravath, one of the nation's best law firms), but fairly atypical for cannabis at that point.

Essentially, we saw real value in the experiences our team had, both in working with entrepreneurs to launch countless emerging brands in the highly-regulated alcohol space and in advising Fortune 500s on their compliance programs and regulatory risks in my prior life at Cravath. We created this company to meet the clear need we were seeing for proactive, strategic regulatory advice to help shape brands that can succeed in the short-term and build for the long-term in this fast evolving regulatory environment.

**EB** – For me, cannabis was something I've wanted to be involved in professionally for a long time and was lucky enough to re-connect w/Michael (we worked together in NYC in the late 2000's). I am passionate about cannabinoids and their multitude of uses and I am lucky to help pioneers in the space create the next generational brands that set the standards for a responsible industry. It's an industry that leverages much of what I loved about my time as a deal lawyer in NYC, but also draws heavily on my work as a prosecutor in helping brands meaningfully evaluate relative risk. (And, to answer a common question, no, I WASN'T a drug prosecutor—I focused on consumer protection and fraud.)

**Greater: What excites you the most about where the industry is at and headed in the next 1-2 years?**

**MC** - This is a rare opportunity to help grow and shape an industry from the ground floor—there's not currently a single, established model of regulation for these products and that's an opportunity to get this right by drawing on a broad range of experiences and skill sets in the process. There are so many impactful, crucial regulatory decisions being made every day in this industry.

For example, this week alone I've participated in a working group with state regulators and key stakeholders on new rules that are being developed, I've had multiple substantive discussions on current initiatives in my role as Co-Chair of the NCIA Policy Council (the think tank for the

nation's largest non-profit trade association), and I've worked on setting the table for the 2020-21 term of the NCIA State Regulations Committee, which I currently chair.

Getting to help get these issues right at a policy level, and also helping our clients navigate these questions that impact the core of their business plans, is incredibly rewarding.

**EB** – In the next 1-2 years, I'm particularly excited about the rapid pace of development in existing markets such as California and newly open adult-use states like Michigan and Illinois that already afford so many opportunities, let alone layering on potential markets like Arizona and New Jersey. I know Michael spoke recently at a New Jersey industry event and was very impressed with the level of excitement for the adult-use voter initiative this November.

And let's not kid ourselves, New Jersey would open a huge new regional market and strongly increase the pressure on its densely populated neighbors like New York and Pennsylvania to speed up their own reforms once an adult-use market is a commuter rail stop away. On that note, growing up in and remaining closely tied to the Philadelphia area, I've been watching Lt. Gov. John Fetterman advocate passionately for adult-use cannabis in the Keystone State. His [Twitter](#) is worth a follow.

The hope for real progress at the federal level is constantly growing and I'm excited to see how cannabis factors into election season—it's pretty clear that cannabis can have significant job creation and economic development benefits and that's something that hopefully is resonating with a broader swath of elected officials and voters, in addition to critical social justice issues that must be addressed.

**Greater: Elections are a headache and legislative change brings on a whole lot of uncertainty for regulated markets. What exactly does a compliance team do for cannabis brands?**

**MC** - Any entrepreneur who has succeeded in a highly regulated industry will tell you that compliance takes on different meanings in different contexts.

No matter the product category or market, every brand in this industry is operating off of a business model that centers around the sale of cannabis products in some form. It's how they'll turn a profit, it's how they raised money in the past, how they'll raise it in the future, and how they build value in their equity. But that means the business model needs to fit the regulatory structure both today and long-term.

Put another way, in cannabis being compliant is a mission critical function because regulations are the key to the very survival of a brand. And that really requires being compliant both today and in the future.

We think it is critical for operators to anticipate and understand regulatory risk and a key element of that is addressing these issues proactively—we want to give them the tools to make business decisions that align with their goals.

Of course, many are familiar with operating under various SOPs or ensuring that their facility operates in compliance with manufacturing protocols. That's a necessary part of success in this industry, and it gets overlooked too often. To build a successful operation, you'll need security expertise and you may need a CGMP resource. But you'll definitely need regulatory compliance expertise if you're going to thrive with the fast-evolving rules in this industry.

In our view, however, an effective regulatory strategy in this space requires prioritization that goes beyond simple "compliance." It requires a thorough evaluation of brands' short and long-term strategies, product mixes, and, yes, SOPs, to help them tackle the thorny issues presented by ambiguities in regulations and capitalize on opportunities presented by proactively managing regulatory risk. That can mean new or revised SOPs, but also tweaks to marketing plans or product formulations if that's the best vehicle to reduce regulatory risk.

In other words, this just isn't an area where a "check the box" approach delivers real value.

The best part of it—we get to work with extremely talented and visionary people who are as passionate about the future of cannabis as we are. And we get to see the real competitive advantage and value premium that our clients have been able to achieve by thriving in a highly-regulated area while mitigating key risks that would cause potential investors to demand discounts.

**Greater: What are the top 3 categories (sales, marketing, packaging, etc?) of regulatory strategy that a cannabis brand should prepare for?**

**MC** - The “Top 3” areas of regulatory risk are going to vary dramatically depending on the brand’s strategy and markets.

Now, the three examples you mentioned are all key areas of regulatory risk that need to be evaluated, and they are definitely three areas that are always near the top of our list for a new client or potential investment due diligence.

Why? They are all ways that brands communicate to potential consumers, and they are all public. For example, a more aggressive marketing campaign that is on a billboard is going to speak to your potential customers, but it’s also going to speak to your regulators who drive by it and those less friendly to cannabis or your messaging (including your competitors) who may be inclined to send a picture to the regulators.

Now, there are a ton of other areas of potential risk that could be at the top of a brand’s risk profile and that need to be evaluated. One good example, we frequently see significant risk from those you do business with and how you set those relationships. Another very common priority area is social media risk (a subset of marketing, but such a fertile area of regulatory risk that it warrants a breakout of its own).

There’s also what we like to call multi-state expansion risk, where a potential client comes to us with a model they want to expand to a given market but their brand doesn’t translate because they developed their products or branding in Market A in a manner that is not permitted in Market B.

**Greater: Can you give us an example of what a marketing compliance guidebook is and why it’s important?**

**EB** - One thing we like to do is not only help our clients understand how to evaluate their marketing efforts for compliance with cannabis regulations, but also help them put procedures

into place to guide their processes. We do this by crafting industry leading, credible guidance for the marketing team that reflects the goals and strategy of the business.

Given the number of subjective questions, and questions that have never been addressed by regulators in any jurisdiction let alone the home jurisdiction, we believe that this type of credible guidance gives comfort to regulators and potential investors who may have questions about some of these novel issues. Of course, the emphasis is on credibility there.

We want to help marketers find ways to be creative without taking on unnecessary risk, working with them collaboratively to do so.

**Greater: Cannabis compliance is constantly changing, what is the best way to stay ahead of the curve and updated?**

**EB** - I'd start with working with the trade organizations in your region, get involved in the overall community. Trade organizations are knowledge bases, we sit on committees in regions across the US and see the impact it makes.

We actively keep all of our clients updated with the ever-changing regulatory landscape focused on what's important to them. You can always hire us to do the dirty work for you.

**Greater: What are the biggest compliance failures that you see time and time again that put a company at high risk of breaching regulations?**

**MC** - One failure that we have seen time and time again (and not just in cannabis) are poor cross-functional communications due to lack of internal controls. These failures have led to significant fines and also costly consumer litigation in the still young cannabis industry.

We live and breathe these questions every day, and draw on best practices and lessons learned from across the country. A core goal for us is helping companies avoid these types of unforced

errors that could easily be prevented by having better systems in place. And, in the worst case scenario where someone at a brand makes a mistake, we want to have helped them develop credible infrastructure that makes clear to a regulator that it was an honest mistake.

### **Greater: What are some of the challenges of being a compliant multi-state brand?**

**MC** - Good thing that you left this question for last because these issues keep us busy day in and day out and that have helped us become leaders in this space. First, while obvious to those working in cannabis, you need to recreate your product in each market. Since you cannot transport cannabis across state lines, finding consistency in cultivation and manufacturing is tricky. Layer on top different labeling and advertising rules that are key to understanding early in the creative process when branding (or re-branding) a SKU.

But it's crucial to get these right, both from a regulatory perspective and from a brand-building perspective. The value in your brand is in meeting customer expectations. That means having a credible regulatory strategy to set and meet those expectations is essential to brand growth.

None of this is easy for operators, and it means that savvy operators are thinking of these questions early in the process. For example, it's not just the rules of the road but also the state-specific nomenclature and how seemingly similar considerations are dealt with by various regulators.

In fact, one issue that we see frequently is a desire by team members who have thrived in one market to operate identically in a new market, notwithstanding the rules differing between the states. We definitely understand why—these are exceptionally talented folks who know exactly how to reach cannabis consumers, demonstrate value to retail licensees in a brand, or formulate an edible product for example. But the rules in Market B may forbid the precise practice that they had used in Market A, and it's essential that they follow the rules of the road in their new market.

The great news is that those who do this are able to differentiate themselves and create real long-term value. That's the most rewarding part of our work.