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# OFAC ENFORCEMENT AND COMPLIANCE

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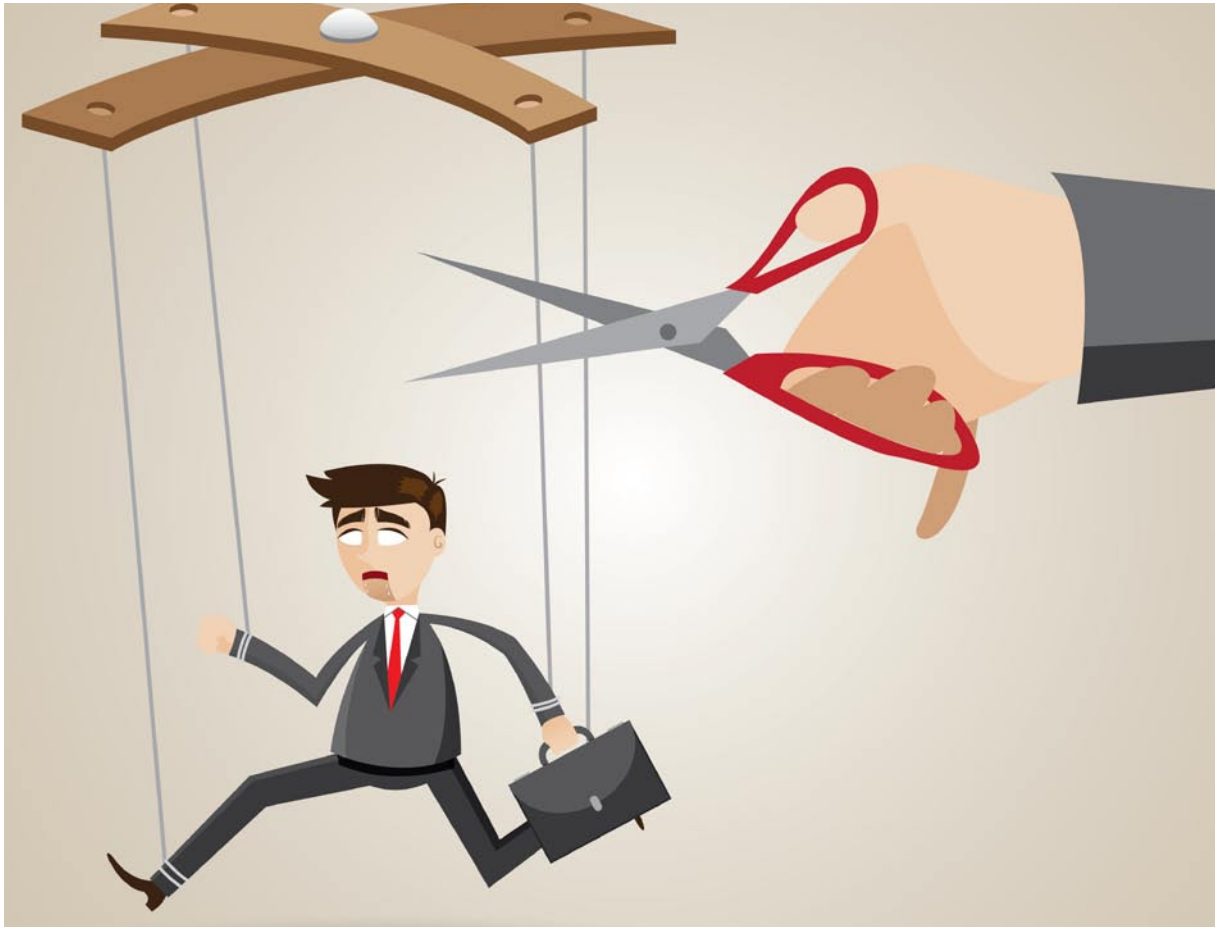


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MINI-ROUNDTABLE

# OFAC ENFORCEMENT AND COMPLIANCE



## PANEL EXPERTS

**Adriaen M. Morse Jr.**

Director  
 Computer Sciences Corporation  
 T: +1 (703) 641 3133  
 E: amorse4@csc.com

**Adriaen Morse Jr** has 19 years experience as a practicing attorney. His background includes experience as in-house counsel with a public company, as outside counsel representing companies and their officers and directors, as government counsel with the Division of Enforcement at the US Securities and Exchange Commission, and as trial counsel in the military.

**Fahad A. Habib**

Partner  
 Jones Day  
 T: +1 (415) 875 5761  
 E: fahabib@jonesday.com

**Fahad Habib** is a partner in Jones Day's San Francisco office. Mr Habib counsels clients regarding economic sanctions regulations administered by the US Treasury Department's Office of Foreign Assets Control (OFAC), export control laws, and other related statutes. His practice also includes international arbitration and litigation and anti-corruption counselling and defence.

**Kara M. Bombach**

Shareholder  
 Greenberg Traurig, LLP  
 T: +1 (202) 533 2334  
 E: bombachk@gtlaw.com

**Kara Bombach** assists companies in lawfully exporting goods, technology and services around the globe. Her practice focuses on anti-corruption and anti-bribery compliance (US Foreign Corrupt Practices Act (FCPA) and OECD Convention), export control laws (EAR and ITAR), foreign investment (CFIUS), anti-boycott laws, and special sanctions (embargoes) maintained by the US government (OFAC and other agencies) against various entities, individuals and countries.

**Michelle Fisser**

Compliance Officer  
 Rabobank International  
 T: +31 6 1311 2937  
 E: michelle.fisser@rabobank.com

**Michelle Fisser** joined Rabobank International in October 2008 as a Senior Compliance Officer. As a Global Business line Compliance Officer at Rabobank she is responsible for Corporate Finance, Global Trade & Commodity Finance and Private Equity. She started her Compliance career in 2003 at Fortis Bank Merchant Banking after a couple of years working in the business. She joined Fortis Bank (former MeesPierson) in 2000 after a two year period as a tax consultant at PricewaterhouseCoopers. After a few years she joined the Swiss Asset Manager Lombard Odier (former LODH) in Amsterdam as a Compliance officer and participated in the MiFID project team for the European branches.

**RC: What do you believe are the key trends and issues that have arisen in connection with Office of Foreign Assets Control (OFAC) enforcement and compliance over the last 12 months or so?**

**Bombach:** The Russia/Ukraine related sanctions have had a significant impact because so many companies are engaged in business – direct and indirect – in Russia, and the rapid escalation of the sanctions has challenged even the most proactive OFAC compliance programs. The Russian sanctions have targeted the primary financial institutions in Russia, so even incidental transactions involving payments or financing by or through sanctioned banks create compliance challenges. The Sectoral List Sanctions complicate matters by listing a number of Russian entities with which US persons are prohibited from engaging in certain dealings in debt and equity. Additionally, in August 2014, OFAC issued updated guidance that applies to all of its sanctions programs, not just Russia/Ukraine. That guidance served to widen the prohibition against US persons dealing with any firm owned 50 percent or more by any combination of Specially Designated Nationals and Blocked Persons (SDN) in the aggregate. Previous guidance stipulated that companies owned 50 percent or more by any single SDN, are considered themselves to be SDNs. The

updated guidance complicates compliance, because US firms must now try to ascertain and calculate aggregate SDN ownership.

**Morse:** Over the past 12 months, we've seen the continuation of a decade-long trend in OFAC enforcement of bringing fewer cases but with much higher penalties and fines per case. In 2014, there were around 23 enforcement actions in total which saw penalties and settlements of \$1.2bn collected via OFAC enforcement actions. The average amount paid per case in the first 11 months of the year was approximately \$52.6m. The figure was skewed by larger cases, of course, but 10 cases resulted in more than \$1m in payments to OFAC. This stands in stark contrast to OFAC actions seen a decade ago. In 2004, there were 513 enforcement actions, but the total amount levied in penalties and settlements was just \$ 4.2m, these actions were worth an average of \$8232 per case. In addition to the stiff penalties imposed in enforcement actions, OFAC cases continue to demonstrate the need for company compliance programs to properly address screening customers, suppliers and business partners for individuals and entities on the Specially Designated Nationals and Blocked Persons (SDN) List and for business with countries subject to OFAC sanctions. Importantly, enforcement actions demonstrate that OFAC expects US businesses to be aware of their OFAC obligations and failure in this regard is becoming increasingly expensive. Finally, it is clear

that OFAC violations done with the knowledge of senior management will attract the harshest of penalties.

**Fisser:** The key trend to emerge over the last year, of course, has been the new targeted sanctions of OFAC, which have been issued with clear guidance. For a European licensed international organisation, the challenge in complying with the different EU and OFAC sanctions in this respect has related to Russia. Other US sanctions, such as those applied to Cuba, can often be difficult to manage properly as we do not want to contravene any existing sanctions. Furthermore, throughout 2014, OFAC offered dramatically improved support in relation to sanctions and sanction. The ongoing guidance offered and OFAC hotline are just two of the means of support on offer.

**Habib:** The key trend in 2014 was the continued use of targeted sanctions. This initially occurred with respect to the Central African Republic and South Sudan sanctions, and then took its most severe and complicated form following the onset of the Ukrainian crisis. The Ukraine-related sanctions required companies to refer to three Executive Orders, published regulations, four Directives and nearly 50 FAQs, and even then a number of critical

issues remained unclear. And, notwithstanding the effort to keep the sanctions narrow, broad terms and uncertain interpretations drastically increased their impact on compliance. On enforcement, the focus remained on sanctions on financial institutions,

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*Adriaen M. Morse Jr.,  
Computer Sciences Corporation*

with substantial penalties being paid by a number of US and non-US banks, including a record OFAC settlement of \$963m. However, a number of other industries and areas also saw enforcement actions last year, reflecting that no one can let their guard down.

**RC: In your experience, how would you characterise the quality of OFAC compliance programs among companies? For example, how closely aligned are internal audit departments with OFAC’s**

## constantly changing Specially Designated Nationals and Blocked Persons (SDN) list?

**Morse:** Company compliance programs have improved over the last few years, although it could be argued that financial firms are, perhaps understandably, far ahead of US companies in other industries in terms of having effective OFAC compliance programs. Internal audit departments should be checking to ensure, for example, that a company's suppliers and vendors are vetted against the SDN List as a matter of course. Internal auditors have become more attuned to this issue, particularly among US companies with a global presence. In this regard, compliance and internal audit teams must work closely together to ensure that awareness among employees is enhanced and that the insights and lessons learned through internal audits are used to enhance the various programs addressing OFAC compliance.

**Habib:** Compliance programs are all over the map, and the pace of developments has challenged even the best ones. Even as companies have adapted to checking the SDN List, other lists have been implemented, including the Foreign Sanctions Evaders (FSE) List, the Sectoral Sanctions

Identification (SSI) List, the Palestinian Legislative Council (NS-PLC) List, the List of Foreign Financial Institutions Subject to Part 561, and the Non-SDN Iranian Sanctions Act (NS-ISA) List. While these are now in a single searchable database on the OFAC website, the specific restrictions applicable

*"The overall quality of corporate OFAC compliance programs appears to have come a long way in recent years. That said, there is still wide variation in quality from company to company."*

*Kara M. Bombach,  
Greenberg Traurig, LLP*

vary by list, meaning each transaction must often be evaluated individually. Furthermore, many compliance programs have not fully absorbed the issue of restrictions on dealings with entities that are owned 50 percent or more by designated individuals and entities. The issue itself became much more complicated in August, when OFAC changed its interpretation of the restrictions to include entities majority-owned in the aggregate by designated persons.

**Bombach:** The overall quality of corporate OFAC compliance programs appears to have come a long way in recent years. That said, there is still wide variation in quality from company to company. Some firms have adopted risk-based programs that not only address specific OFAC risks, but also satisfy the elements of an effective compliance program. These compliance programs also incorporate, among other things, a level of proactive monitoring or auditing that would satisfy the US Department of Justice (DOJ) under its Federal Sentencing Guidelines. A number of companies still operate under a reactive compliance model and, quite frankly, that is not going to satisfy enforcement agencies that a company has an effective compliance program. The objective in developing an effective compliance program is to properly tailor it to the risks the company faces, devoting adequate resources, and at the same time allowing business to continue without unreasonable operational or administrative burdens. Compliance should not be the tail that wags the dog. The key is finding that balance, being able to adequately address risks and satisfy regulators, but in a way that is both reasonable and workable for the business.

**RC: How can companies make their due diligence measures robust enough, given that OFAC can alter its interpretations without public notice? What are the implications for in-house counsel and compliance officers?**

**Fisser:** Using the most sophisticated systems and information providers, who manage the sanction lists on a daily basis, should provide some support to companies as they attempt to manage their payments. With regard to due diligence, there is a greater need for the screening and checking of all parties involved, including counterparties or other relevant third parties. The activities of some companies may give reason to carry out further due diligence procedures. The adverse news checks performed when on-boarding, regular reviews and monthly client screening are good information sources with which compliance teams can begin event-driven reviews. For large corporates which employ a complex UBO structure, a number of risks remain. A lot of effort must be put into identifying the UBOs and related parties must be careful to ensure that sanctions risk is mitigated. The impact for in-house, and external counsel, as well as compliance officers, is large. Although every day is different, new and changing sanctions, especially under pressure, require a lot of time and effort from staff in order to ensure compliance. Furthermore, planned transactions, as well as ongoing transactions, must be reviewed on a case by case basis if a sanctions element may appear.

**Habib:** Good compliance programs are based on an appraisal of the degree of risk faced by the company. Companies facing significant exposure should consider taking aggressive compliance

measures, including real-time awareness of OFAC interpretations, and engaging with OFAC wherever necessary. It is also important to re-evaluate risk on a regular basis and ensure the relevant stakeholders have visibility in compliance considerations. Early evaluation of these issues is also critical as they can have a significant impact on the timing, terms and indeed viability of any transaction. Given that due diligence up the chain of parties in a transaction is now usually essential, obtaining complete information early in the process should become an integrated part of the compliance process.

**Bombach:** OFAC recognises that sanctions by their very nature and design are imposed with little to no warning. The objective then is to have a compliance program that not only prevents violations, but detects them. If you are in a position to detect violations within a reasonable amount of time, and take measures to address them and prevent them in the future, that goes a long way to mitigating potential enforcement action. Depending upon the size and nature of a business, automated systems-based support for the compliance program can be critical. No automated system, however, is a substitute for well-trained business operations staff and engaged compliance staff. Ideally, the human element and automated systems work together in a compliance program as an effective way to prevent and detect violations. For in-house counsel and compliance officers, the stakes are high, with

potential personal liability for violations and overall accountability, in addition to the C-suite, for the compliance program. Furthermore, operational staff who violate sanctions may also face personal liability, including prison. For that reason, a risk-based compliance program is critical to the company as well as the individuals.

**Morse:** Every enforcement agency is susceptible to the accusation that it engages in 'regulation through enforcement'. OFAC is no different in this regard. As an initial matter, it should be noted that regulatory changes may not be accomplished through enforcement fiat. It is a basic tenet of administrative law that new regulations require prior public notice and comment before they can be enforced. On the other hand, interpretations of existing regulations by an administrative agency are generally given significant weight. When involved in an enforcement investigation, companies must weigh their interest in moving beyond the investigation and its associated expense and inconvenience against the potential ramifications of accepting a settlement that in essence creates new law. In-house counsel and compliance officers need to keep a watchful eye on those OFAC enforcement actions that become public, and remain vigilant for trends or changes in OFAC's interpretations of its regulations and requirements. Periodic reviews of a company's OFAC compliance program by attorneys and other professionals who specialise in this field



can help firms to keep up to speed with evolving requirements.

**RC: What do you consider to be the ‘best practices’ that companies should be following when working with OFAC to receive licence approvals?**

**Habib:** Those who have been through OFAC’s licensing process know that the challenge is as much the timeliness of the approval as the approval itself. Probably the most important factor in seeking a licence approval is ensuring that your application is complete and clear. In addition, applications should be submitted as early as possible. But where early application is not possible and time is short, be explicit about the time-sensitive nature of the request. OFAC has proven responsive to legitimate urgent requests, as it is able, but the approval will still require completion of the deliberative process. Finally, for those receiving licences, it is important to ensure compliance with their terms and conditions.

**Morse:** As an initial matter, companies should ensure that the activities they intend to engage in actually require an OFAC licence. One reason for this is that, should OFAC deny a licence application, the company will face significant hurdles in getting the decision reversed. Companies need to understand that whatever undertakings are agreed to in order to obtain the licence will need to be followed

to the letter and may include requirements for enhanced due diligence or reporting requirements that are in addition to the company's normal compliance processes. Companies need to set up appropriate measures to ensure compliance with such requirements. Companies should ensure that their applications adhere to OFAC guidance regarding the specific sanctions program to which the licence pertains. Finally, although this may sound somewhat simplistic, companies need to ensure their applications are complete and accurate before submission to OFAC. Requiring follow-up submissions or additional information can prolong the licence process or lead to denial of the application.

**Bombach:** Companies should provide as much detail as possible. They should clearly set out the 'who, what, why, when and how' of the proposed activities, a well-organised complete licence application, and a clear point of contact, either within the company or outside counsel, who is knowledgeable about the facts as well as the legal provisions, whom OFAC can reach for follow-up. Finally, if you are able to submit your licence application electronically, do so. OFAC's electronic licensing system helps OFAC to track and process the licences more quickly. Apply as early as possible. OFAC licence processing times can be considerable.

Manage expectations of your internal clients so they understand that licences are typically not issued quickly, and that licences are reviewed on a case by case basis, that they do not undergo a 'rubber stamp' process, and that they are subject to interagency review. Other external bodies such as State and Commerce departments and intelligence agencies may review OFAC licence applications, which are not always granted.

**"Companies can have higher risk tolerance but those facing significant risks need to ensure they are devoting adequate resources and attention to sanctions compliance."**

*Fahad A. Habib,  
Jones Day*

**RC: To what extent do companies and their stakeholders need to change their risk tolerance policies due to stringent OFAC compliance requirements?**

**Bombach:** Decision makers need to be aware of the risks presented by OFAC regulations and enforcement activities in order to adequately

prioritise the use of company resources for OFAC compliance, and to minimise liability, disruption to business, and surprises. Companies operating internationally face dozens, if not hundreds, of compliance risks. Figuring out where the OFAC risks fit into the business operations and enterprise risks is key. Keep in mind that OFAC violations are based essentially on a strict liability standard – there need not be any intent to violate the law, there is no *de minimis* dollar value of a transaction, and no materiality standard for what constitutes a violation.

**Fisser:** Large traders and corporates executing international transactions on a daily basis seem quite knowledgeable about sanctions and consequences. The main concern should lie with the mid-sized companies and individuals who are not very familiar with sanctions compliance and consequences of breaching sanctions.

**Morse:** One good thing about OFAC compliance requirements is that they remain relatively stable and consistent. The requirements generally change based upon additions or deletions to the SDN List or updates to sanctions programs. Accordingly, although updates are frequent, it is not complicated to comply with OFAC requirements and there are commercially available programs to assist in keeping up to date with the various changes. In terms of risk tolerance, companies should raise the importance of OFAC compliance relative to other enterprise risks

due to the zero tolerance for noncompliance and the risk of significant sanctions for violations.

**Habib:** Even as sanctions and regulations have become more complex and expansive, compliance requirements themselves have not really changed. Rather, they have just become or should become a more pervasive consideration. Companies do sometimes walk away from activities with some connection to sanctioned countries or persons that might be permissible but raise too high a compliance risk. It does not have to be that way but the challenging nature of sanctions compliance may justify the call. Companies can have higher risk tolerance but those facing significant risks need to ensure they are devoting adequate resources and attention to sanctions compliance.

**RC: With the sanctions imposed on Russia and Iran by OFAC, and the DOJ and SEC raising the regulation and compliance stakes to even greater levels, are companies under more pressure to get their house in order?**

**Morse:** I believe that companies are under increased pressure to work to get up to speed on OFAC compliance. The sanctions imposed upon both Russia and Iran entail increased risk to US companies and companies with a significant US nexus. The Iran sanctions regime, particularly, has

imposed additional obligations on US companies to certify compliance with its requirements. If companies have not yet adopted processes to check against potential violations, they are at increased risk of significant sanctions in case of violation. Companies that previously did business with Iran or Russia through non US subsidiaries, in particular, have a need to address this business and enforce organisational changes in order to safeguard against sanctions violations.

**Habib:** The expansion of sanctions programs and the vigorousness of enforcement mean that there is more pressure to ensure compliance. Another notable aspect is the increasing globalisation of sanctions laws. US enforcement agencies demonstrate a continued willingness to pursue foreign parties, and the laws themselves are increasingly of extraterritorial effect. In the commercial context, banks, underwriters and other parties are seeking assurances on compliance with US sanctions even from non-US persons. In addition, EU, Canadian, Japanese and Australian agencies, among others, are increasingly entering the fray. Finally, it may also be important to look backward for inadvertent, or worse, violations, and deal with any identified appropriately. Beyond obvious governance reasons for this, companies also often have to be in a position to certify compliance under state and federal contracting laws, under disclosure rules, in corporate and financing transactions, and to be able

to apply for licences without material omissions related to potential past activities.

**Bombach:** It's undeniable that enforcement actions related to violations of US sanctions are on the rise, both in terms of frequency and penalties assessed. We are also witnessing a trend in enforcement against non-US entities engaging in transactions subject to US law, such as US dollar clearing transactions, or that otherwise use US commerce in connection with activities that violate US sanctions. In this sense, US and non-US businesses alike should ascertain where their sanctions compliance risks lie and develop compliance programs to address those risks.

**Fisser:** The pressure is unreasonably high, especially since financial institutions are expected to manage all sanction risks. In certain circumstances, it is hard to identify a Russian or Iranian aspect when executing an enhanced due diligence procedure. Financial institutions must be very careful when dealing with sanctions and often take no risks wherever possible.

**RC: What developments do you expect to see in the coming months in relation to OFAC enforcement? What key piece of advice would you offer to companies on maintaining OFAC compliance?**

**Fisser:** I expect to see further clear guidance and support. It would be good and reasonable that when issuing and preparing new sanctions the financial market should be consulted to analyse whether the sanctions are reasonable and do not put companies at enormous risk or, in a worst case scenario, lead to financial damages which could not have been foreseen. Sanctions can often work both ways – for example, we have recently seen sanctions issued by Russia on European fruit and vegetables. A large number of Dutch clients are currently experiencing solvency problems due to the sanctions imposed on Russia and vice versa. Another suggestion in relation to market consultation is to mitigate the risk of interpretation issues by the various companies and financial institutions involved. A lack of clarity in this space may lead to unnecessary blockings or financial damages for the parties involved.

**Habib:** There is no basis to expect enforcement to slow down or to see OFAC's focus shift from the financial sector. While it will be interesting to see if any significant change comes off the continuing negotiations between the P5+1 nations and Iran, there has been no specific reason to be optimistic. The same is true of the Ukraine-related sanctions. With the political situation there remaining fluid, the EU getting into the mix, and given that many of the

designated individuals and entities are so widely and deeply integrated in the international markets, we will likely be focusing on Ukraine for a while. In that light, the key advice to companies is to pay attention – know your risks, know the law as best as you can, and devote the resources necessary to ensure compliance.

**“Financial institutions must be very careful when dealing with sanctions and often take no risks wherever possible.”**

*Michelle Fisser,  
Rabobank International*

**Morse:** I believe there will be continued additions of Russian individuals and entities on the SDN List as the crisis in Ukraine continues. The same will be true for those involved in funding the Islamic State (ISIL) and others in the volatile conflicts in Syria and Iraq. I suspect that OFAC will be bringing enforcement actions during the coming year against US companies who have done business with companies on the Russian Sectoral Sanctions Identification (SSI) List or the SDN List. The SSI List presents a

less straightforward risk that companies will have to figure out how to avoid, and this will require enhanced vigilance by companies. One reason for this is that some Russian companies on the SSI List are subject to sanctions under certain directives but not under others. For the time being, US companies, and companies who do business in the US, should be reluctant to do business with companies on the SSI List at least until the parameters of the requirements are further clarified by OFAC, which may come in the context of enforcement actions as OFAC demonstrates that the new sanctions regime has teeth.

**Bombach:** We will likely begin to see more enforcement actions related to the Russia/Ukraine related sanctions. I suspect we will continue to see multinational financial institutions under the microscope for activities that have some nexus to

the US financial system, such as US dollar clearing transactions. Companies, boards of directors and compliance officers should keep in mind that a compliance program does not have to be perfect to be effective. Companies can often overwhelm themselves thinking compliance standards require a 100 percent success rate, but the company can't afford to implement a perfect compliance program. This all-or-nothing approach can lead to paralysis. An effective compliance program doesn't mean zero violations, it doesn't mean there is not room for improvement, and it certainly doesn't mean once it is implemented your work is done. Compliance programs should constantly evolve to address the risks a company faces. While adequate resources should be devoted, there are also a number of creative ways to leverage existing processes, personnel and other resources in order to implement an effective compliance program. **RC**



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KEY CONTACTS



**Kara M. Bombach**  
Shareholder  
Washington, DC, US  
T: +1 (202) 533 2334  
E: [bombachk@gtlaw.com](mailto:bombachk@gtlaw.com)



**Michael X. Marinelli**  
Shareholder  
Washington, DC, US  
T: +1 (512) 320 7236  
E: [marinellimx@gtlaw.com](mailto:marinellimx@gtlaw.com)



**Renee Latour**  
Shareholder  
Washington, DC, US  
T: +1 (202) 533 2358  
E: [latourr@gtlaw.com](mailto:latourr@gtlaw.com)