

December 3, 2008



# Complying with the ITAR in an Invigorated Enforcement Environment

## Empowered Officials and Trade Compliance Professionals: Minimizing Exposure, Liability and Risk

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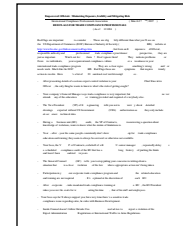
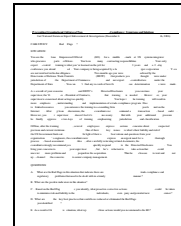
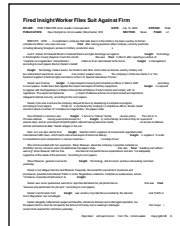
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# Minimizing Exposure, Liability and Risk

## Supplemental Material

- **Red Flags for Trade Compliance Professionals**
- **Case Study: Red Flags?**
- **Sanitized Newspaper Article, “Fired Empowered Official Files Suit Against Previous Employer”**



# Minimizing Exposure, Liability and Risk

## Laying the Foundation - Regulatory Requirements

The International Traffic in Arms Regulations (ITAR), Part 120.25, Purpose and Definitions, spells out Empowered Official (EO) criteria.

(a) An EO means a US person who:

- (1) Is directly employed by the applicant or a subsidiary in a position having authority for policy and management within the applicant organization; and
- (2) Is legally empowered in writing by the applicant to sign license applications or other requests for approval on behalf of the applicant; and

# Minimizing Exposure, Liability and Risk

## Laying the Foundation - Regulatory Requirements

- (3) **Understands the provisions and requirements of the various export control statutes and regulations, and the criminal liability, civil liability and administrative penalties for violating the Arms Export Control Act and the ITAR; and**
- (4) **Has the independent authority to:**
  - (i) **Enquire into any aspect of a proposed export or temporary import by the applicant, and**
  - (ii) **Verify the legality of the transaction and the accuracy of the information to be submitted; and**
  - (iii) **Refuse to sign any license application or other request without prejudice or other adverse recourse.**
- (b) **[Reserved]**

# Minimizing Exposure, Liability and Risk

## What's not in the Regulation?

**WARNING**

**Being an EO can be hazardous to your health and welfare.**

### Some of what the ITAR doesn't tell you:

- You'll be held personally accountable and responsible for your actions and those of others.
- You're caught in the middle from above and below.
- There's much at stake and you can lose your job.
- What are an EO's desired characteristics?

# Minimizing Exposure, Liability and Risk

## Laying the Foundation - Character Considerations

### What kind of person best fits the EO position?

- a) Arrogant
- b) Bends the rules
- c) Can't multi-task
- d) Dependable
- e) Easily influenced
- f) Empowered
- g) Enthusiastic
- h) Ethical & law abiding
- i) Hard working
- j) Knowledgeable
- k) Micromanager
- l) Organized
- m) Poor communicator
- n) Power crazed
- o) Self sufficient
- p) Selfish
- q) Task saturated
- r) Team player

**EO traits make a BIG difference in job performance.**

# Minimizing Exposure, Liability and Risk

## Laying the Foundation - Character Considerations

What kind of person best fits the position?

- a) ~~Arrogant~~
- b) ~~Bends the rules~~
- c) ~~Can't multi-task~~
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- i) Hard working
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- k) ~~Micromanager~~
- l) Organized
- m) ~~Poor communicator~~
- n) ~~Power crazed~~
- o) Self sufficient
- p) ~~Selfish~~
- q) ~~Task saturated~~
- r) Team player

**An EO without the requisite attributes is problematic.**

# **Minimizing Exposure, Liability and Risk**

## **Laying the Foundation - Profile of an EO**

**He's the Vice President of Contracts and has numerous responsibilities including export controls. He didn't volunteer to be an EO. He has an Export Administrator (EA) who works for him. He relies on her to tell him what to sign and answer questions. He doesn't have time for education and training on any of the trade related issues relevant to the organization. He also generally sees trade administration and compliance as impediments to business development, sales, profits and his success.**

***What impact does someone like this have on those who work for him, with him and on the overall organization?***



# **Minimizing Exposure, Liability and Risk**

## **Laying the Foundation - Organizational Evolution**

- 1. Lone individual with multiple responsibilities reporting to Contracts or Business Development.**
- 2. Group of individuals with unique expertise (exports, imports, supply chain) reporting directly or indirectly to Legal.**
- 3. Dedicated organization of trade compliance professionals who report directly to the Chief Executive Officer or Board of Directors.**

***Progression natural or a result of enforcement action.***

# Minimizing Exposure, Liability and Risk

## Laying the Foundation - “Reporting to” Options

### Some recommended, some not:

- |                            |                           |
|----------------------------|---------------------------|
| a) Audit Committee         | j) Information Technology |
| b) Board of Directors      | k) Legal                  |
| c) Business Development    | l) Logistics              |
| d) Chief Executive Officer | m) Marketing              |
| e) Chief Financial Officer | n) Operations             |
| f) Contracts               | o) Procurement            |
| g) Engineering             | p) Program Management     |
| h) Government Relations    | q) Public Affairs         |
| i) Human Resources         | r) Security               |

***Direct and dotted lines are also important!***

# Minimizing Exposure, Liability and Risk

## Laying the Foundation - “Reporting to” Options

Some recommended, some not:

- |                                    |                                      |
|------------------------------------|--------------------------------------|
| a) Audit Committee                 | j) <del>Information Technology</del> |
| b) Board of Directors              | k) Legal                             |
| c) <del>Business Development</del> | l) <del>Logistics</del>              |
| d) Chief Executive Officer         | m) <del>Marketing</del>              |
| e) Chief Financial Officer         | n) <del>Operations</del>             |
| f) Contracts                       | o) <del>Procurement</del>            |
| g) <del>Engineering</del>          | p) <del>Program Management</del>     |
| h) Government Relations            | q) <del>Public Affairs</del>         |
| i) <del>Human Resources</del>      | r) Security                          |

***What about separate reporting channels?***

# Minimizing Exposure, Liability and Risk

## Laying the Foundation - Title and Salary Evolution

1. Administrator, Analyst or Specialist (0-6 years)	\$40-75K
2. Manager (5-10 years)	\$70-105K
3. Director (9-14 years)	\$100-135K
4. Vice President (15+ years)	\$130-165K

### What else goes with it:

Administration, Control,  
Compliance, Corporate,  
Export, Global, Import,  
International, Licensing,  
Management, Programs,  
Regulation, Trade, Training...

### Other factors impacting salary:

Certification, compliance  
program evolution, corporate  
headquarters, Law Degree,  
location, organization size,  
responsibilities, unique  
industry/government expertise  
and experience...

# Minimizing Exposure, Liability and Risk

## Laying the Foundation - Infinite Title Variations...

- Export Administrator
- Export Control Analyst
- Imports Training Specialist
- Manager, Export Administration
- Manager, International Exports/Imports
- Senior Manager, Licensing
- Director, Corporate Customs Compliance
- Director, Global Integrated Supply Chain
- Executive Director, Regulatory Requirements
- Vice President, Compliance
- Vice President, Technology Transfer Programs
- Vice President & Counsel, Trade Controls

*There's little  
consistency across  
our industry*

# **Minimizing Exposure, Liability and Risk**

## **Laying the Foundation - Empowering in Writing**

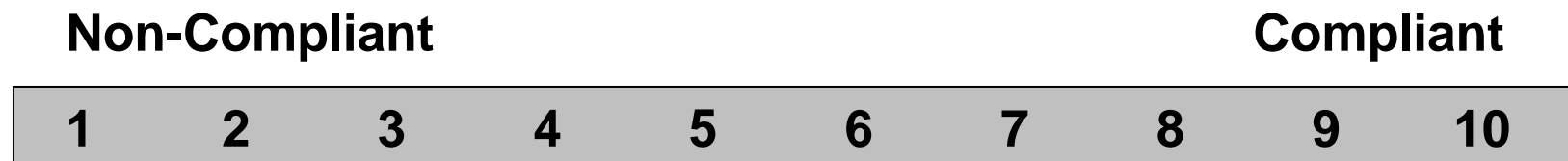
- **Concise and thorough one page Appointment Letter (to individuals) and Designation Letters (to the State Department) signed by most senior leadership**
- **Clearly delineates full-range of responsibilities, required knowledge, education and training; and direct line of authority acting on behalf of the above**
- **Unequivocal mandate to always abide by the letter and spirit of the law and your organization's Code of Conduct to stop any suspect transactions**
- **Affirms such EO actions are not subject to any adverse consequences, inappropriate influence or repercussions**

# Minimizing Exposure, Liability and Risk

## The Trade Compliance Attitude Spectrum

When it comes to trade compliance culture how would you grade yourself and your organization?

What's said:



What's actually done:



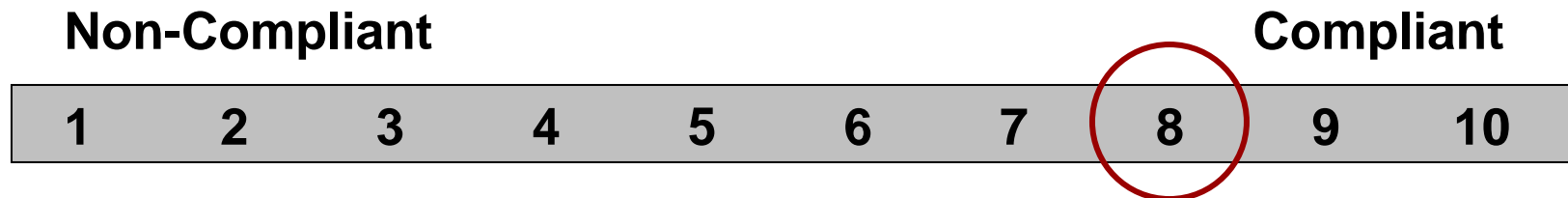
*Overall, do the words and pictures match?*

# Minimizing Exposure, Liability and Risk

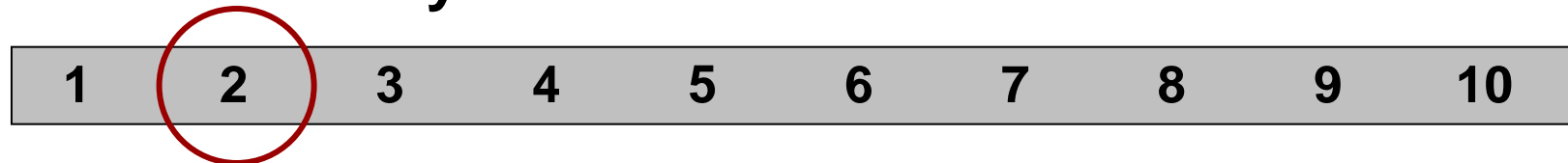
## The Trade Compliance Attitude Spectrum

When it comes to trade compliance culture how would you grade yourself and your organization?

What's said:



What's actually done:



*What happens if the words and pictures don't match?*



# Minimizing Exposure, Liability and Risk



## Red Flags



- From an Empowered Official, responsible authority and professional trade compliance practitioner perspective, Red Flags are important to consider.
  - **Watch out for them! - Don't ignore them! -**
- Red Flags indicate problems or flaws in individuals, your organizational compliance culture or a weakness in your international trade compliance program.
- They're a clear sign something's wrong or needs work.
- These are symptoms that require timely resolution.

# Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions



## Red Flags - Top Ten

- 10. Your job in trade compliance is suddenly eliminated in the midst of a vigorous debate over reporting national security related violations where you wouldn't waiver.**

# **Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions**



## **Red Flags - Top Ten**

- 9. Following a difficult audit at one of your Business Units (BUs), senior management pressures the Auditor to change the Final Report to paint the BU in a better light.**

# Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions



## Red Flags - Top Ten

8. During a BU audit, the Vice President of Contracts, in answering a question about knowledge of violations, wants to know what the statute of limitations is.

# **Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions**



## **Red Flags - Top Ten**

- 7. Your company's General Manager says trade compliance is very important but never attends any of the education or training provided and required of everybody else.**

# Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions



## Red Flags - Top Ten

6. **Inside Counsel doesn't follow Outside Counsel advice to report a violation of the Export Administration Regulations or International Traffic in Arms Regulations.**

# Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions



## Red Flags - Top Ten

- 5. Your General Counsel (GC) doesn't want trade and compliance policies, processes and procedures in writing. He's satisfied with allowing BUs to do things any way they want to.**

# Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions



## Red Flags - Top Ten

4. **The GC tells you to stop putting your concerns in writing about a situation that is a clear violation of the law where appropriate action isn't being taken.**



# **Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions**



## **Red Flags - Top Ten**

- 3. During acquisition due diligence, the seller's Chief Financial Officer decides not to pursue submission of a Voluntary Disclosure as it may adversely impact the sale.**

# **Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions**



## **Red Flags - Top Ten**

- 2. Your organization has a comprehensive Ethics and Trade Compliance Program, Code of Conduct and Business Practices in writing and widely distributed, but they aren't followed.**

# **Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions**



## **Red Flags - Top Ten**

- 1. After presenting details of a serious export control violation to your Chief Executive Officer, the only thing he wants to know is what's the risk of getting caught?**

# Minimizing Exposure, Liability and Risk



## Red Flags - Case Studies



**Sanitized real word circumstances as examples help translate regulatory requirements to reality and:**

- **Allow you to deal with demanding challenges in a more benign, non-threatening environment.**
- **Are a great way to unemotionally and methodically think through the facts, thoroughly assess all the possibilities and consider potential alternatives.**
- **You can then make sound recommendations without the inherent demands and pressures of an actual situation where a great deal more is at stake.**

# **Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions**



## **Red Flags - Case Study**

**You are the lone Empowered Official (EO) for a middle-market US systems integrator who procures parts offshore. You have many contracting responsibilities. Your only export-control training is what you've learned on the job for 3 years and a 2-day conference you attended. Your company is being acquired by a larger corporation. You are not involved in the due diligence. Two months ago you were advised by the Directorate of Defense Trade Controls (DDTC) that products you thought were under jurisdiction of the Department of Commerce and not export-controlled are under the Department of State. You can't find any records of how those determinations were made.**

# Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions

## Red Flags - Case Study



You are the lone Empowered Official (EO) for a middle-market US systems integrator who procures parts offshore.

# Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions


## Red Flags - Case Study



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# Minimizing Exposure, Liability and Risk Non-Compliance: Symptoms and Solutions

**What do you do when things get ugly?**

**The best advice when you see or hear things around you that don't look right, smell right and aren't meeting the letter and spirit of the law and your organization's Code of Conduct, then what?**

**Follow the appropriate internal policies, processes and procedures and your personal and organizational Code of Conduct and**

**Document!   Document!   Document!**

***If you don't have proof in writing you and your organization are hanging it out!***

# Minimizing Exposure, Liability and Risk

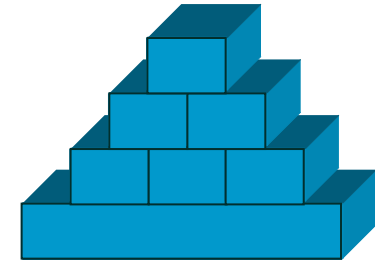
## What happens when you ignore the Red Flags?

- The consequences of not taking the appropriate corrective action are detrimental, numerous and can be disastrous.
- The long list of possible unpleasant outcomes include: federal prosecution; debarment from USG contracts; loss of export privileges, award fees and jobs; damaged credibility; adverse publicity, significant legal fees; huge fines; negative impact on shareholder value and shareholder confidence; imprisonment for individuals, negative impact on future business/contracts and a wide-range of other USG mandated remedial compliance measures.



***Best advice when you discover a Red Flag: Always heed the danger sign and take timely corrective action!***

# Trade Compliance Core Best Practices Top Ten Essentials

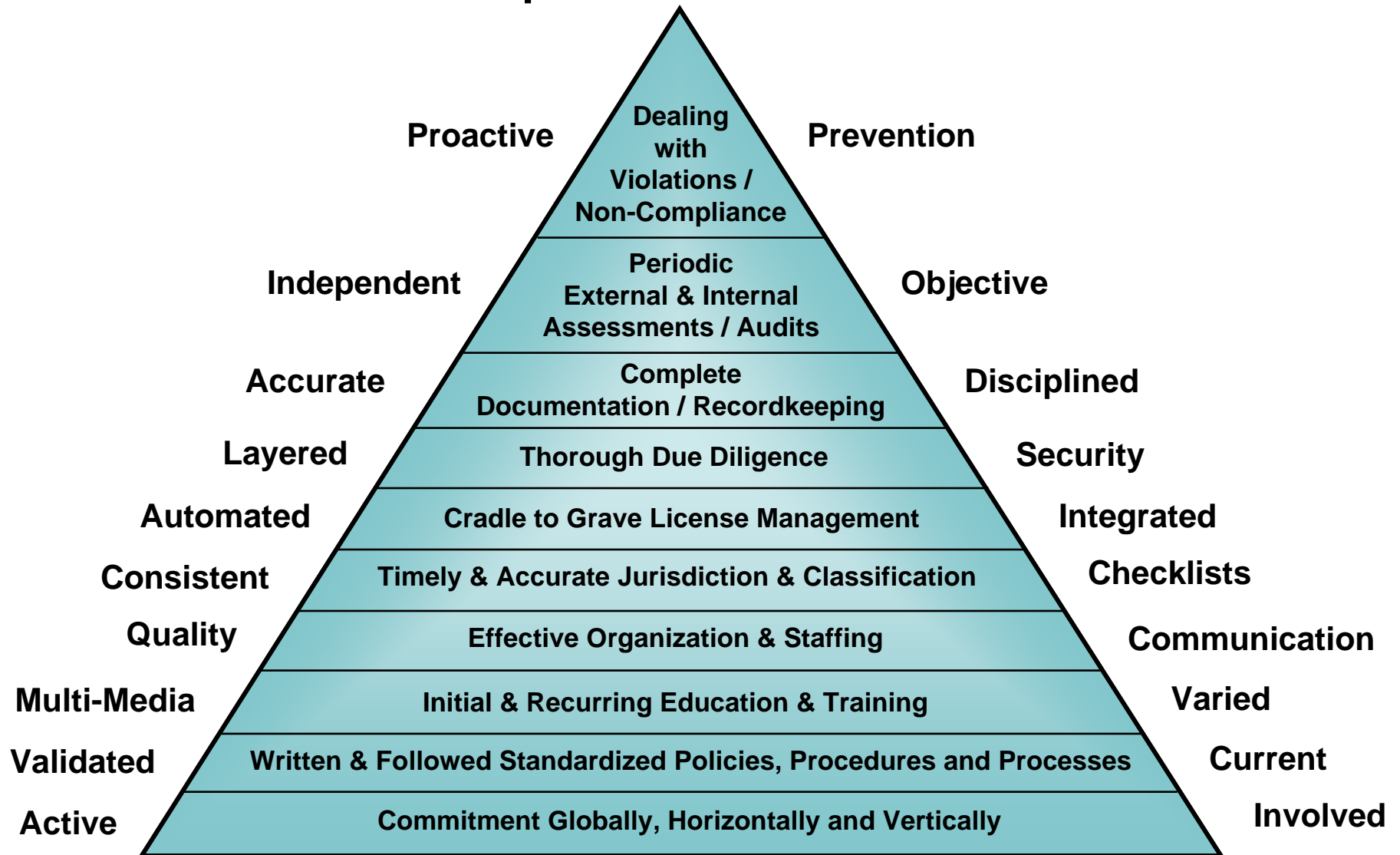


1. **Commitment Globally, Horizontally and Vertically**
2. **Written & Followed Standardized Policies, Procedures and Processes**
3. **Initial & Recurring Education & Training**
4. **Effective Organization & Staffing**
5. **Timely & Accurate Jurisdiction & Classification**
6. **Cradle to Grave License Management**
7. **Thorough Due Diligence**
8. **Complete Documentation / Recordkeeping**
9. **Periodic External & Internal Assessments / Audits**
10. **Dealing with Violations / Non-Compliance**

***Without these you don't have an "effective" and comprehensive "World Class" program.***



# Trade Compliance Core Best Practices Top Ten Essentials



**CAUTION**



**WARNING**



## **Empowered Officials and Trade Compliance Professionals: Minimizing Exposure, Liability and Risk**

**In Conclusion:**

*“At a minimum, to be truly empowered, Empowered Officials and trade compliance professionals must meet the letter and spirit of the regulatory requirements and comply with your organization’s Code of Conduct.”*



**J.P.Morgan**

# Minimizing Exposure, Liability and Risk

## Parting Comments - Food for thought

### Some Other Important Questions to Consider:

- When do you start your own documentation?
- Who do you go to inside your organization on a sensitive trade compliance issue that's gone South?
- How far do you go internally?
- At what point do you go outside your organization?
- When do you hire your own outside counsel?
- How far do you go externally?
- What do you do when the Grand Jury knocks?
- Can you as a lone individual change a culture?
- What does it take to change a non-compliant culture?

# Empowered Officials and Trade Compliance Professionals: Minimizing Exposure, Liability and Risk



## Questions, Comments, Other ...

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