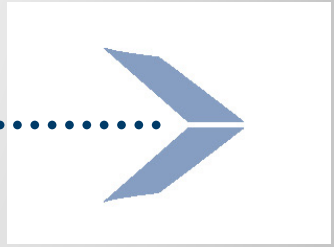


TOXIC SUBSTANCES CONTROL ACT IMPORTING CHEMICAL SUBSTANCES

Ethan R. Ware, Esquire
eware@williamsmullen.com

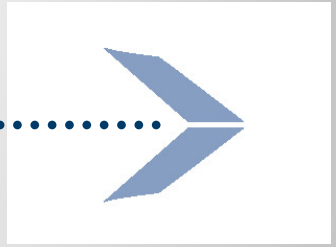
WILLIAMS MULLEN



Toxic Substances Control Act

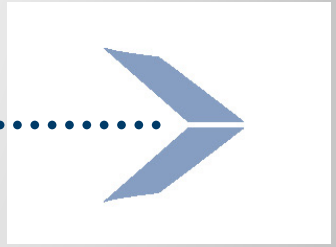
“TSCA”

15 USC 2601 to 2697



We will Review...

- **Import Requirements**
- **Applicability**
- **Stumbling Blocks**



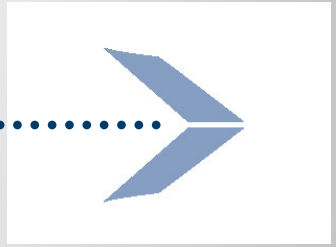
The Rule:

Import Chemical Substances

Must Provide

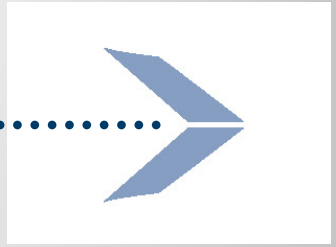
Positive or Negative Certification

[40 CFR 707]



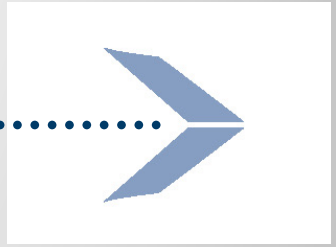
Chemical Substance means...

“any organic or inorganic substance
of a particular **molecular identity**”



Including...

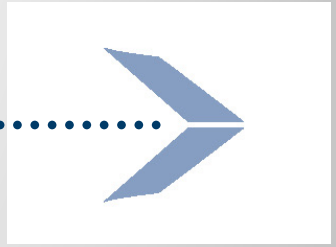
- Any **combination**
- Resulting from a **reaction**
- Occurring in **nature**



Types Chemical Substances...

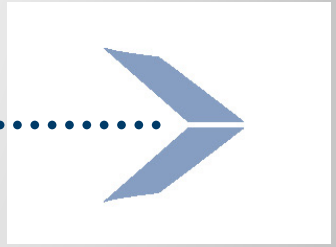
“Existing”: On the TSCA Inventory

“New”: Not on the TSCA Inventory



“Existing Chemicals” Flags...

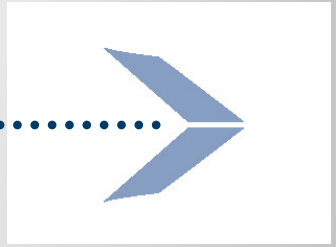
Check the Restrictions



5E -TSCA 5(e) order governs use

5F - TSCA section 5(f) rule limitations

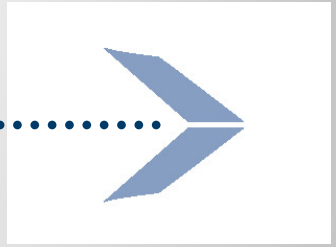
PE1 to PE3 – polymer exemptions
may apply



PMN - commenced PMN substance

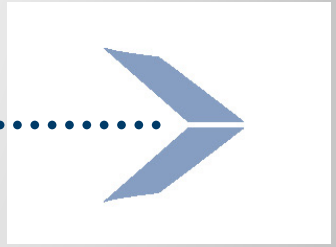
R - TSCA section 6 risk management rule

S - Significant New Use Rule (SNUR)

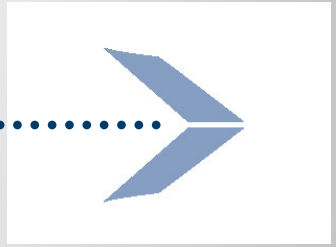


Flagged Chemical Substances...

- **No prohibited use**
- **Labeling and MSDS**



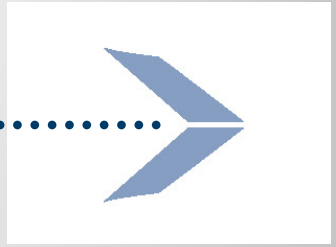
- **Not for SNUR uses**
- **Specified import volume**



How to Check the Inventory

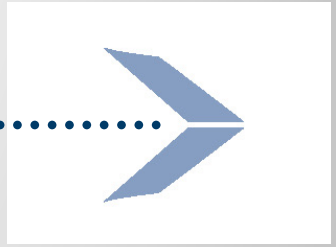
- **“Valid Commercial Need”**
- **“Bona Fide Notice”**
- **Request a “determination”**

[40 CFR 720.5]



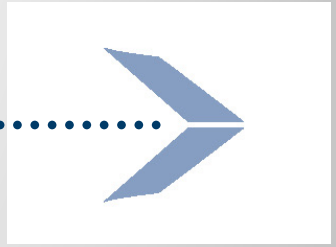
New Chemicals...

File the PMN prior to Import



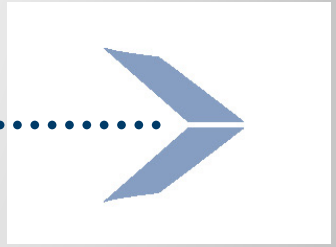
New or Existing Chemicals...

Positive or Negative Certification



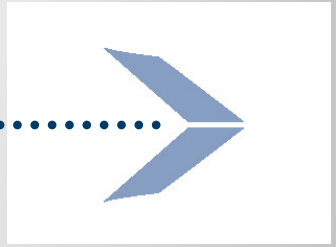
No Certification required...

- **Articles**
- **Imported as part of an Article**
- **Tobacco or Tobacco products**



“Article” means...

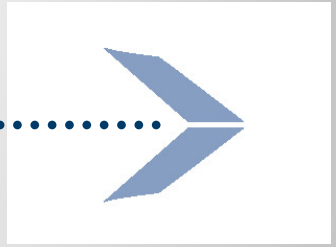
- **Specific shape or design**
- **End use dependent, and**
- **No changes during end use, unless “near final form”.**



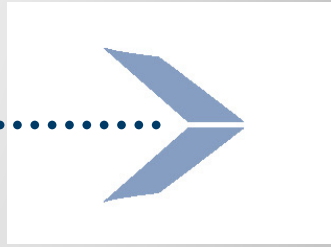
“As Part of an Article”:

- **Imported as Part of an article**
- **Does not come out of the article**

[40 CFR 711.10(b)]



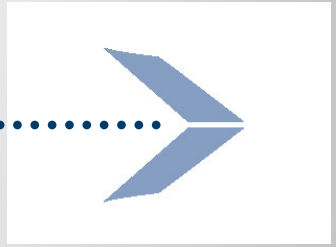
NOTE: Fluids and particles are not considered articles “regardless of shape or design.”



Examples:

- **Ball point pen:** Ink is not exempt, plastic form is.
- **Metal ignots:** Not exempt
- **Machining metal disk:** Exempt

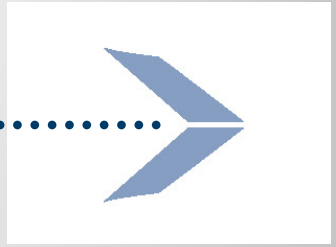
NOTE: “near final form” rule



Positive Certification: Chemicals

“I certify all chemical substances in this shipment comply with...rules or orders under TSCA”

[19 CFR 12.121 (a)(1)]



This includes...

PMN/Flags

5(e) Risks

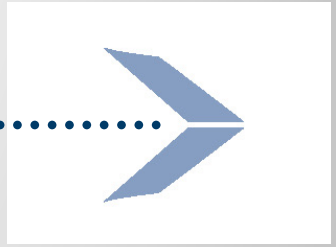
6 PCBs, As, Cr

Title IV Formaldehyde

SNUR Notice

5(f) Injunction

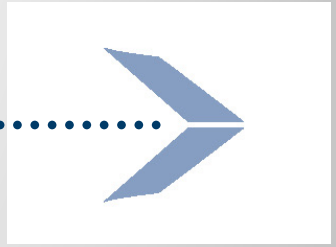
7 Judicial



Negative Certification: Exemptions

"I certify that all chemicals in this shipment are not subject to TSCA."

[19 CFR 12.121(a)(2)]



Required if Not “Clearly Identified” ...

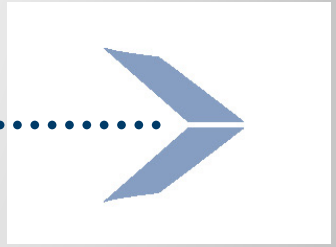
Pesticide

Food/food additive

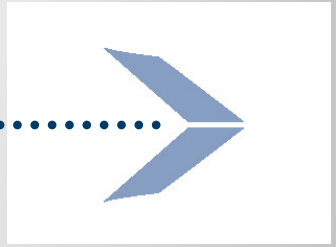
Drug/Cosmetic or device

Firearms/ammunitions...

And certain **Nuclear** source/byproducts



NOTE: Most are “Clearly Identified” under other entry documentation or electronic entry filing requirements.

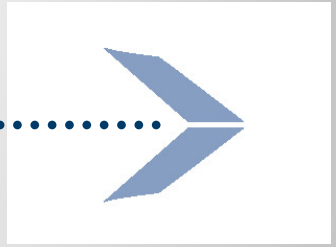


Just remember...**Before Import**

PMN = 90 Days Notice

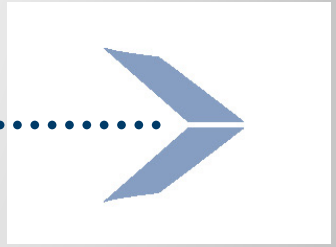
SNUR = 90 Days Notice

Micro = 90 Days Notice



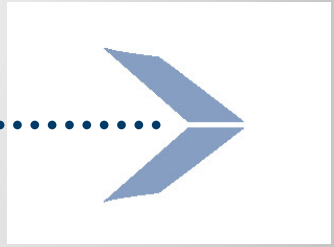
“The appropriate certification...must be filed with the...port of entry in writing or **electronically to [ACE] system** or...CBP-authorized EDI system **prior to release** of the shipment.”

[19 CFR 12.121(a)(3)]



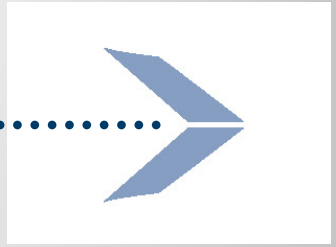
[https://www.cbp.gov/trade/automated/
how-to-use-ace](https://www.cbp.gov/trade/automated/how-to-use-ace)

NOTE: Fax Signature allowed....

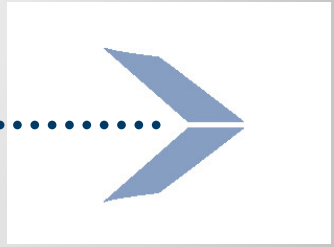


NOTE: Certification is still required...

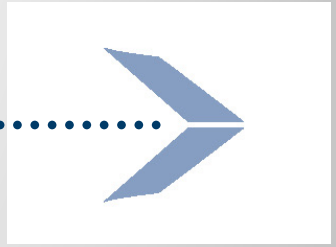
- **R&D [720.36]**
- **Test Marketing [720.38]**
- **Low volume/LOREX [723.50]**
- **Polymers [723.250]**



If you're the “**Importer**”,
you must **Certify**.

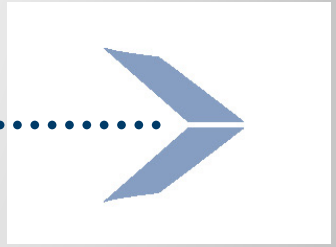


**“Thank goodness we are not
the ‘Importer.’”**



The Rule:

“A **certification** must be signed and filed electronically or in writing with CBP by the **[I]mporter** or an **authorized agent** of the **[I]mporter.**”



“Import means to import for commercial purposes.”

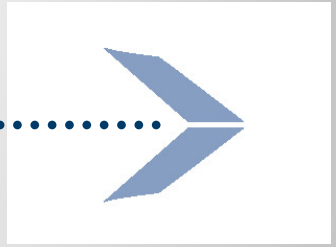
[40 CFR 704.3]



**“Import for commercial purposes
means...**

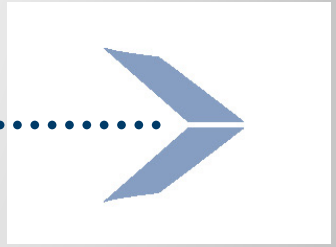
- **Commercial advantage**
- **Any amount**
- **Impurities possibly”**

[40 CFR 704.3]



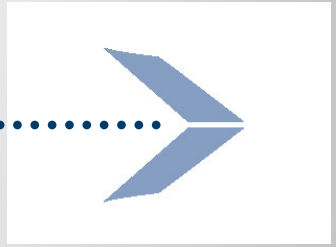
“Importer”

“any person...who imports [a] chemical substance [and] includes...”

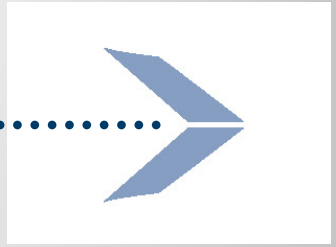


...And Includes:

- Person/Agent **“liable for duties”**
- **Consignee**
- **Importer of record...**

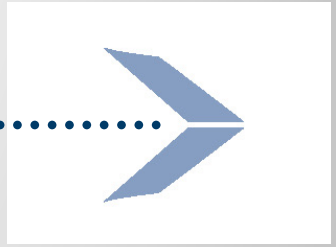


- **Actual owner--declaration and superseding bond filed**
- **Transferee, if the right to draw merchandise in a bonded warehouse has been transferred**



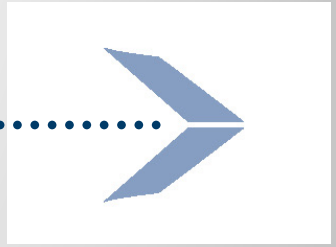
“When two or more persons...”

Make arrangements, but **both are liable** for failure to certify.



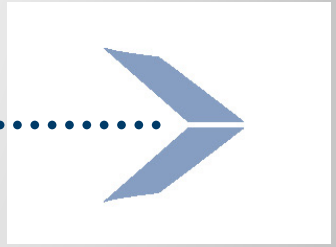
Helpful Guidance...

- Chemical substance imported in a drum, barrel, or other container for **intentional release not exempt**



Pop Quiz

Import/intend to later incorporate into an article. Exempt article?

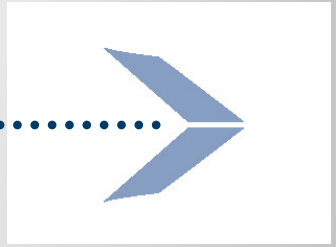


Answer: No

Must be...

(1) **Part** of an Article (e.g. chair varnish); or

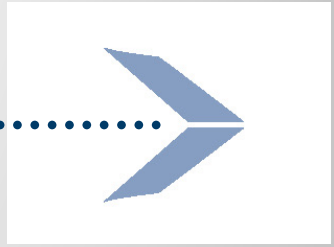
(2) **Article** itself (car door).



Pop Quiz

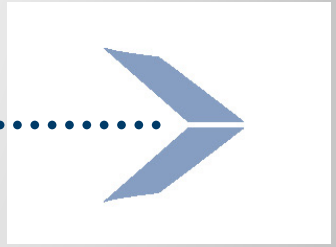
- Company A **imports scrap printed circuit boards**
- Sorts and **recovers Cu, Au, Ag**
- **Resales** metals

Question: Exempt “article” at import?



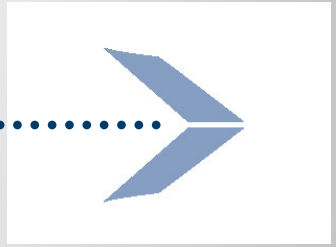
Answer: No.

Final use must be dependent on the design and shape at import

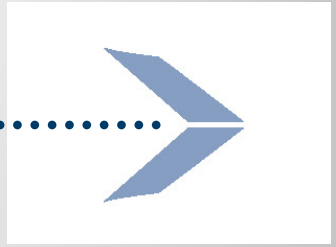


Pop Quiz

- Company F imports High Density Polyethylene (HDPE) **chips and scrap HDPE.**
- Company E melts HDPE/**fabricates HDPE sheets.**

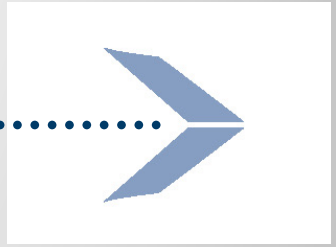


Are the chips and scrap HDPE pieces considered imported articles?



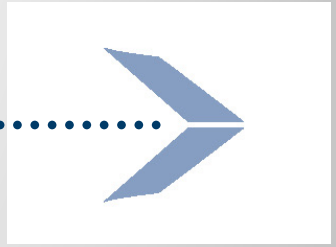
Answer: No

The end use function is to be **further melted and/or molded to fabricate another product.**



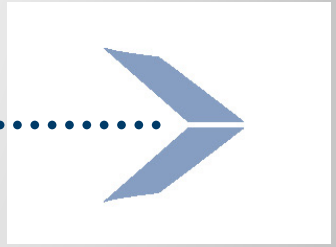
Pop Quiz

Can “**the sole customer**” of an importer be considered the principal importer and submit a PMN?



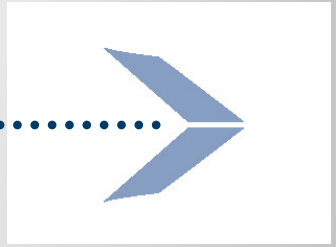
Answer: Yes

Where the customer specifies chemical substance/amount/composition to be imported.

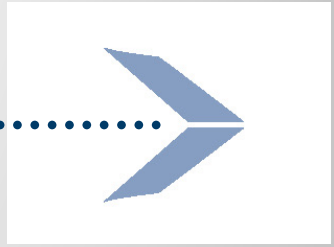


Importer is **broadly defined**:

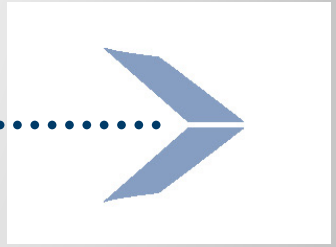
...and so is the Certification requirement.



There can be **Stumbling Blocks...**

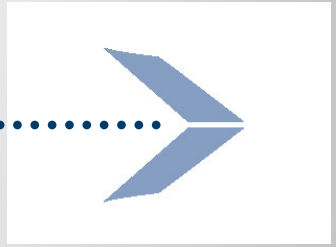


Block No. 1: TSCA Inventory



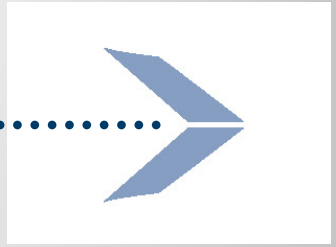
“It is the responsibility of the manufacturer or importer of the reactant to determine the Inventory status of the reactant.”

[TSCA Q/A, Q 102-6]

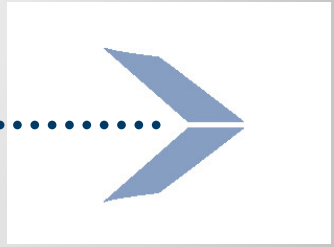


Consider:

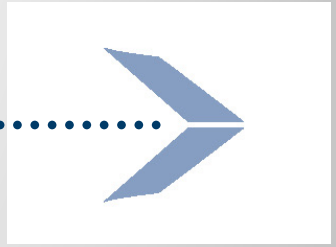
- Polymer? **> 2% Monomers**
- **SNUR?** > 90 days Notice
- Direct shipments for **R&D**



- Notice of **Bona Fide Intent**
 - CAS No. including **Precursors**
 - Molecular **Formula/Structure**
 - Letter of Support** (Supplier)?
 - Presence of **Salts**



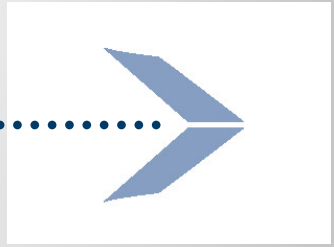
Block No. 2: Chemical Identity?



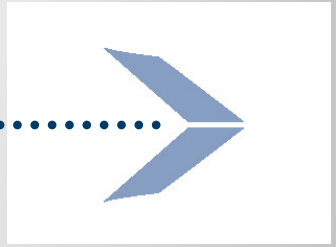
Contact the foreign manufacturer:

- **PMN directly to EPA**
- **Joint submission/Letter of support for CBI**

[TSCA Q/A, Q1-111-113]

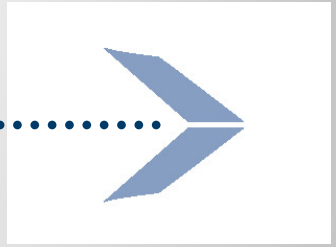


Block No. 3: Failure to Certify



Factual Background

- 1. Distributor:** polymers and rubber additives to chemical and polymer manufacturers;
- 2. 2017 -2018: Import 17 substances**
- 3. No Certifications** filed with CBP

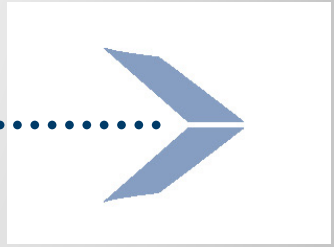


Outcome

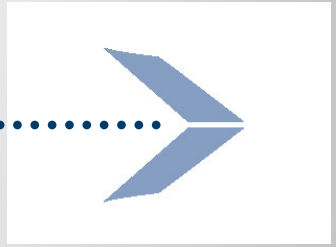
Penalty: **\$140,158**

\$8,245/Chemical

[Am. Int'l, EPA Region 5]

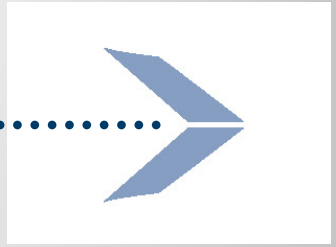


Block No. 4: Trusting the Broker



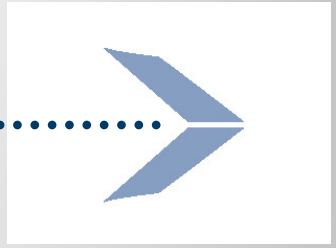
Factual Background

1. Resp. Imports, then resells
2. 80 drums—no Certifications
3. Resp.: “Prepared...certification... and sent to the broker.”
4. Broker: May prepare Certification



Heart of Respondents Case

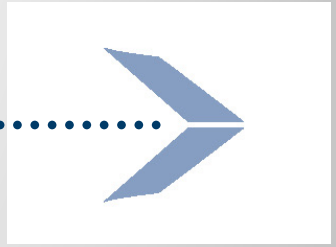
“[T]he certification was sent by [broker] and the document **disappeared** somewhere in customs.”



Outcome

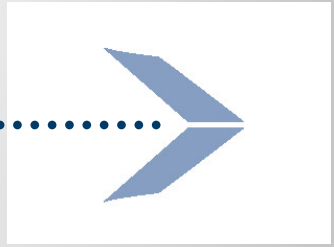
1. After Prima Facie Case, **burden** on Respondent to rebut evidence...
2. **“Preponderance of evidence”**

...And

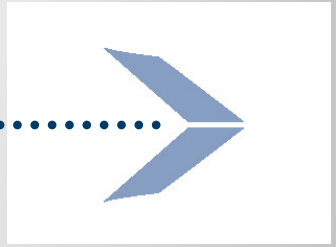


“It would set a questionable precedent to indulge in the presumption that government officials are careless with, or lose documents.”

[*Chematur, Inc.*, EPA Region 2]

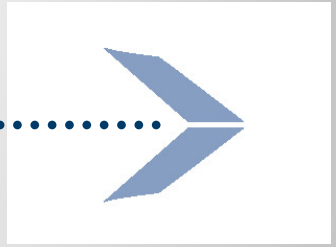


Block No. 5: Training Works



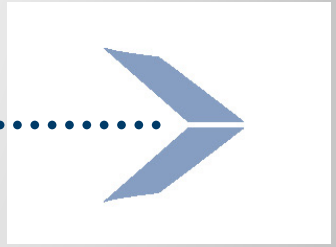
Factual Background

1. Reviewed 30,000-34,000 for PMN
2. “Proprietary mixtures” --thousands
3. 92 days import/no certifications
4. Two Chemicals-Disclosed



Outcome

1. “Inadvertent mistakes and erroneous but good faith assumptions”
2. (80%) adjustments = \$104,720.



Here is what we **learned...**

- **Certifications** required
- You may be an **Importer**
- **Costly Presumptions**