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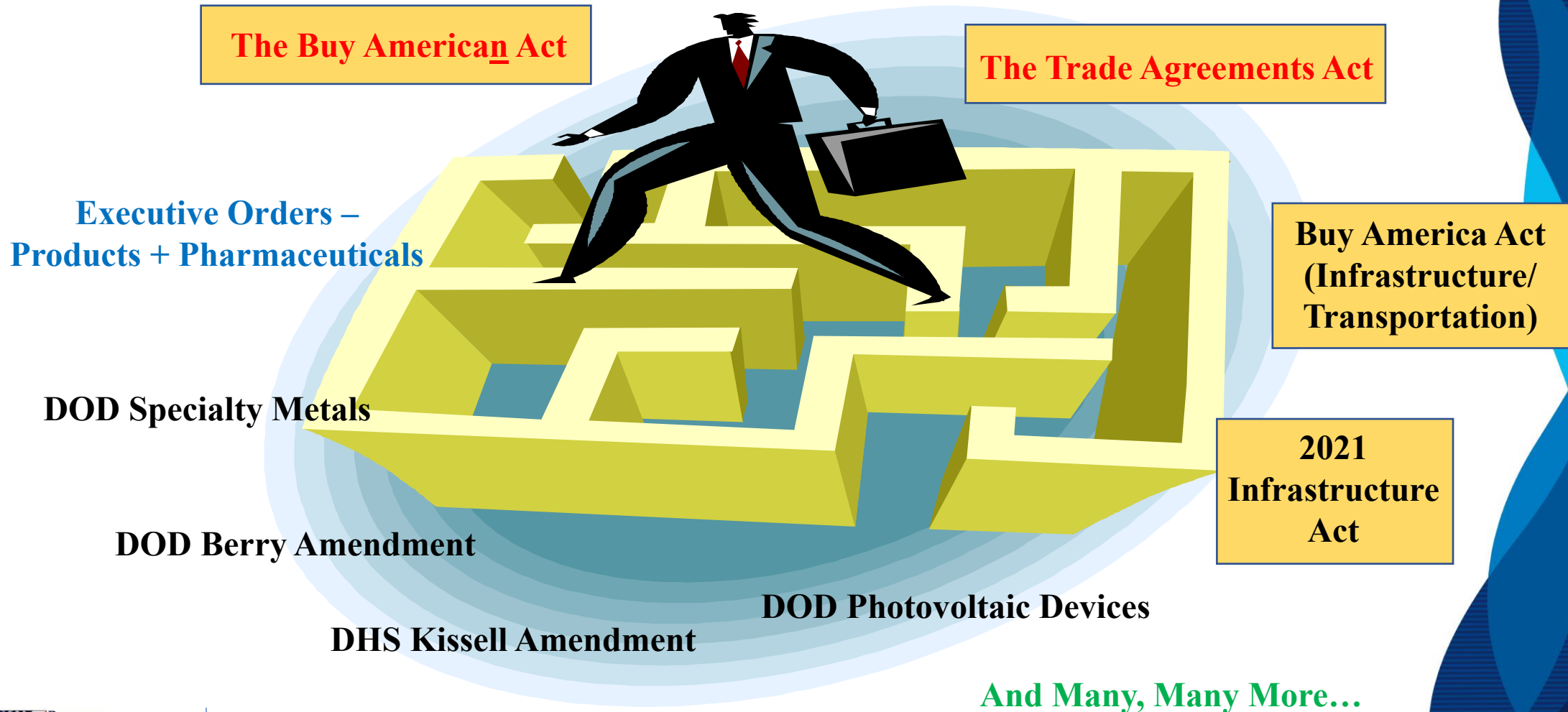
**SheppardMullin**

# Buy America, Buy American, the Trade Agreements Act, and other Domestic Preferences

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# The “Buy American” Maze



# Agenda

- Buy American Act
- Balance of Payments Program
- Trade Agreements Act
- Buy America Act
- Infrastructure Act

# 1. The Buy American Act

# Buy American Act (BAA)

Purchasing Agency?	U.S. Government-wide, but especially DOD (particularly products for national defense)
Contract Value?	Typically, \$10,000 – \$182,999 (supplies) or < \$10,000 – \$7,031,999 (construction materials)
Types of Products/Services?	Products only (supplies + construction materials); domestic purchases (not overseas)
Exceptions/Waivers?	Partial COTS waiver; other waivers available
Legal Requirement?	<ul style="list-style-type: none"><li>✓ End product = manufactured in the U.S.</li><li>✓ <math>\geq</math> 55% U.S.-origin content (<math>\geq</math> 95% for items made predominantly from iron &amp; steel)</li></ul>

# Key Concepts Under the BAA

- “Domestic End Product”
- “Manufactured”
- “Cost of Components” & Domestic Content
- Domestic Iron and Steel
  - Made “predominantly from iron or steel or a combination of both”
- “Commercially available off-the-shelf” (COTS)
- Preference vs. Requirement



# “Domestic End Product”

- For non-manufactured products, the item must be **mined or produced** in the U.S.
- Two-part test for manufactured products:
  1. **Manufactured** in the U.S.; and
  2. Majority **domestic content**
    - ✓ Products made predominantly from iron and steel =  $\geq 95\%$  domestic content
    - ✓ Other manufactured products =  $\geq 55\%$  domestic content
      - *Partial* exception for commercially available off-the-shelf (COTS) products to domestic content test for other manufactured products
- If it's not “domestic”... it is **foreign**

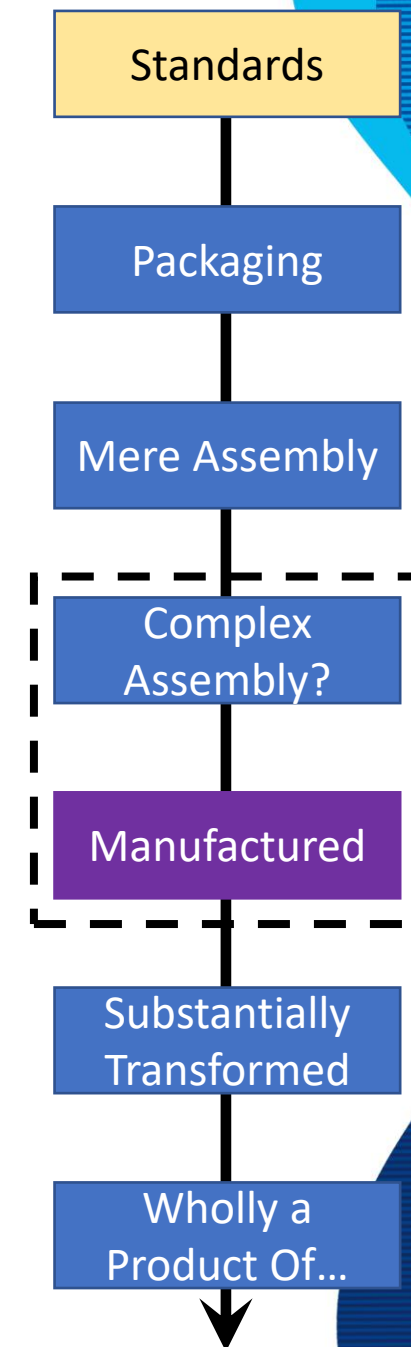
# “Domestic End Product” (cont’d)

- Definition of “**End Product**”
  - “Articles, materials and supplies to be acquired for public use”
  - Can be anything from an entire product/system to an individual spare part, and everything in between
  - How the contractor and Government interpret the delivered “end product” under a contract often determines whether you are BAA compliant
  - Typically defined by what is delivered under a particular contract line item



# “Manufactured”

- The BAA does not define “manufactured”
- Inconsistent interpretations by Courts/Boards
- Key takeaways
  - “Manufacturing” requires more than mere U.S. packaging, but assembly of discrete items into a final form **may** be sufficient
    - ✓ Highly fact-dependent
    - ✓ Reassembly in the U.S. of a disassembled product is not enough
  - Considers whether the item being purchased by the government “is made **suitable for its intended use** and its identity established” in the U.S.
  - Does not necessarily require “substantial transformation” (which must be established under the TAA)



# Domestic Content & “Cost of Components”

- Cost of components =

Components Purchased by Contractor	Acquisition Cost (incl. transportation + duties)
Components Manufactured by Contractor	All costs associated with manufacturing components, but NOT the end product

- Does not consider the source of **subcomponents**
- Looks only at material costs – not manufacturing labor for the end-item
  - *But should this change when focusing on “domestic content”?*
- If a component is not “domestic” (*i.e.*, manufactured in the U.S.), then it should be treated as “foreign”

# Domestic Iron and Steel

- “Foreign iron and steel”
  - “Iron or steel products not produced in the United States.”
- “Produced in the United States”
  - “All manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.”
- Made “predominantly from iron or steel or a combination of both”
  - Cost of iron and steel content > 50% of the total cost of all its components.
  - Example:
    - Iron safe = \$1,000 (retail)
    - Cost of components = \$500
    - If > \$250 = iron or steel, then the safe is made “predominantly from iron or steel”
      - And thus at least \$475 (95%) of cost of components must be domestic/produced in the U.S.
      - Non-iron or steel components can be based on a good faith estimate of domestic vs. foreign
    - If < \$250 = iron or steel, then the safe is not made “predominantly from iron or steel”
      - And thus at least \$275 (55%) of cost of components must be domestic
      - (Unless this is a COTS product)



# “Commercially available off-the-shelf” (COTS)

1. Commercial item
  2. Sold in substantial quantities in the commercial/non-government market
  3. Sold without modification
- *Partial* COTS exception for “domestic content” requirement:
    - ✓ Manufactured products not made predominantly from iron or steel
    - ✓ Fasteners
    - ❖ The end item **must still be manufactured** in the U.S. to qualify as “domestic”

# Preference vs. Requirement

- Waivers available
  - Public interest
  - Nonavailability (FAR 25.104 + other determinations)
  - **Unreasonable cost**
  - Commercial IT products (under review?)
  - Commissary/resale
- If the foreign product is **substantially cheaper** than the domestic one, then the BAA may be waived
  - **20%** for most acquisitions
  - **30%** if the lowest domestic offer is from a small business
  - **50%** for *Department of Defense acquisitions*



# Summary of 2021 BAA Changes

	U.S. Origin Parts or Materials (Supplies)	U.S. Origin Parts or Materials (Construction)	COTS Items
<b>End Products Made Wholly or Predominantly of Iron or Steel (or Both)</b>	Increased from $\geq 50\%$ to $\geq 95\%$	Increased from $\geq 50\%$ to $\geq 95\%$	Domestic content requirements not waived for iron and steel end products, except for fasteners
<b>Other End Products</b>	Increased from $\geq 50\%$ to $\geq 55\%$	Increased from $\geq 50\%$ to $\geq 55\%$	Domestic content requirements waived for COTS items.
<b>Domestic Item Price Preference</b>	Increased from 6% to 20% (large businesses) and 12% to 30% (small businesses)	Increased from 6% to 20%	Increased from 6% to 20% (large businesses) and 12% to 30% (small businesses)

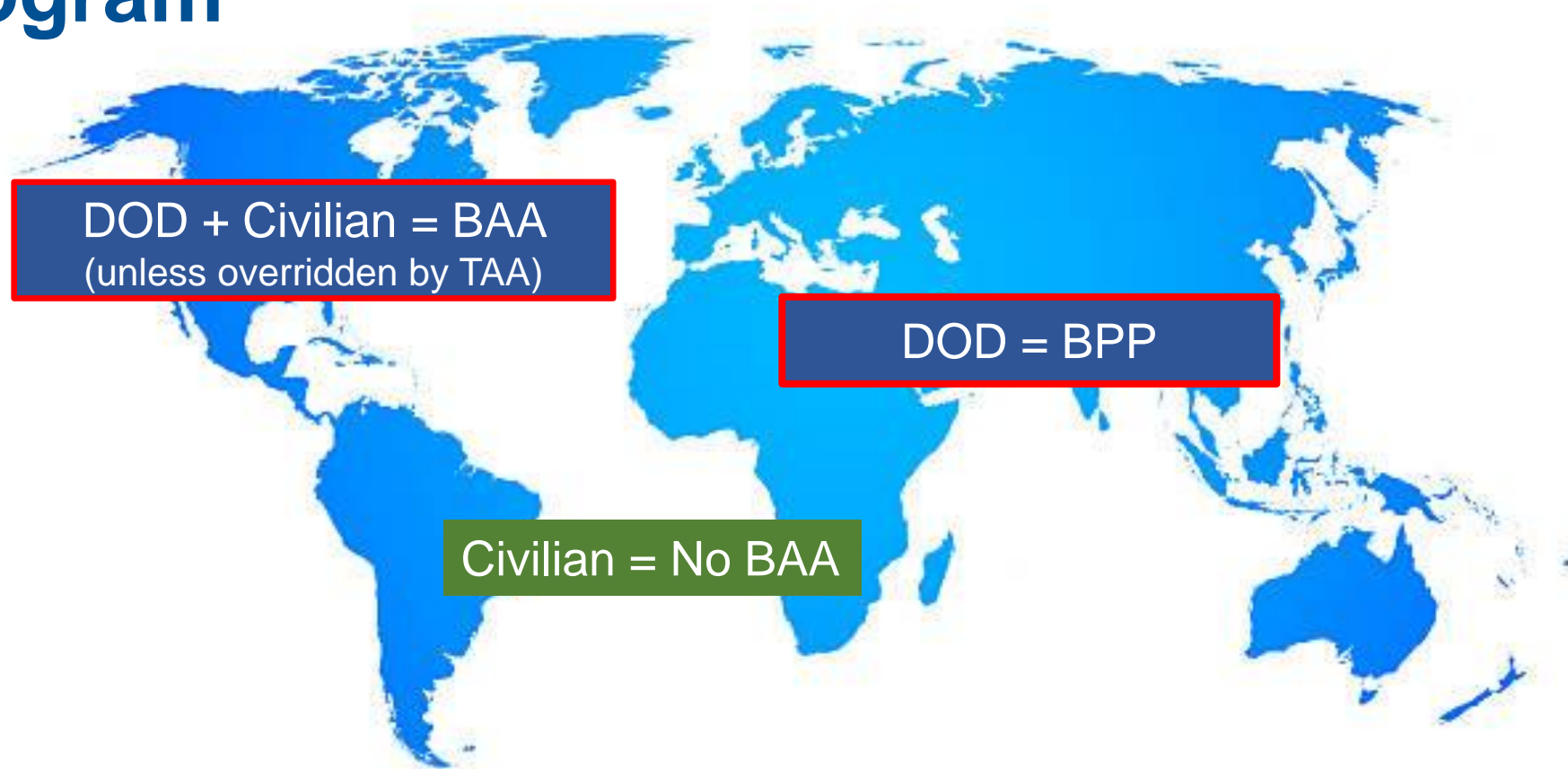


## 2. Balance of Payments Program

# Balance of Payments Program (BPP)

Purchasing Agency?	Department of Defense only (not civilian agencies)
Contract Value?	Any contract where BAA applies
Types of Products/Services?	Products only (supplies + construction materials); applies overseas
Exceptions/Waivers?	Partial COTS waiver; “Qualifying Country;” other waivers available
Legal Requirement?	<ul style="list-style-type: none"><li>✓ End product = manufactured in the U.S.</li><li>✓ <math>\geq</math> 55% U.S.-origin content</li></ul>

# Applicability of the Balance of Payments Program



# “Qualifying Country”

- For DOD, “Qualifying Country” exception also applies:
  - Australia
  - Austria
  - Belgium
  - Canada
  - Czech Republic
  - Denmark
  - Egypt
  - Estonia
  - Finland
  - France
  - Germany
  - Greece
  - Israel
  - Italy
  - Japan
  - Latvia
  - Luxembourg
  - Netherlands
  - Norway
  - Poland
  - Portugal
  - Slovenia
  - Spain
  - Sweden
  - Switzerland
  - Turkey
  - United Kingdom

# 3. The Trade Agreements Act

# Trade Agreements Act (TAA)

Purchasing Agency?	U.S. Government-wide, but less commonly DOD (particularly products/services for national defense)
Contract Value?	Typically, $\geq$ \$183,000 (supplies) or $\geq$ \$7,032,000 (construction materials)
Types of Products/Services?	Products and services
Exceptions/Waivers?	Very limited
Legal Requirement?	<ul style="list-style-type: none"><li>✓ End product = substantially transformed in the U.S.</li><li>✓ <i>Origin of content is generally irrelevant</i></li></ul>



# Overview of the TAA



- Here's how it works...
  - The BAA generally applies to procurements > \$10,000
  - But **if**:
    - The product being purchased is covered by a Free Trade Agreement (FTA);
    - The agency conducting the procurement is covered by an FTA;
    - The procurement is at or above the FTA \$\$\$ threshold...
  - **Then...**



# Key Concepts Under the TAA

- “U.S.-Made End Product”
- “Substantially Transformed” / “Substantial Transformation”
- “Designated Country End Product”
- “Designated Country”

# “U.S.-Made End Product”

- An article that is:
  - “Mined, produced, or manufactured in the United States”; or
  - “Substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.”



# “Substantially Transformed”

## Services

- “The country in which the firm providing the services is established” (FAR 25.402(a)(2))

## Products

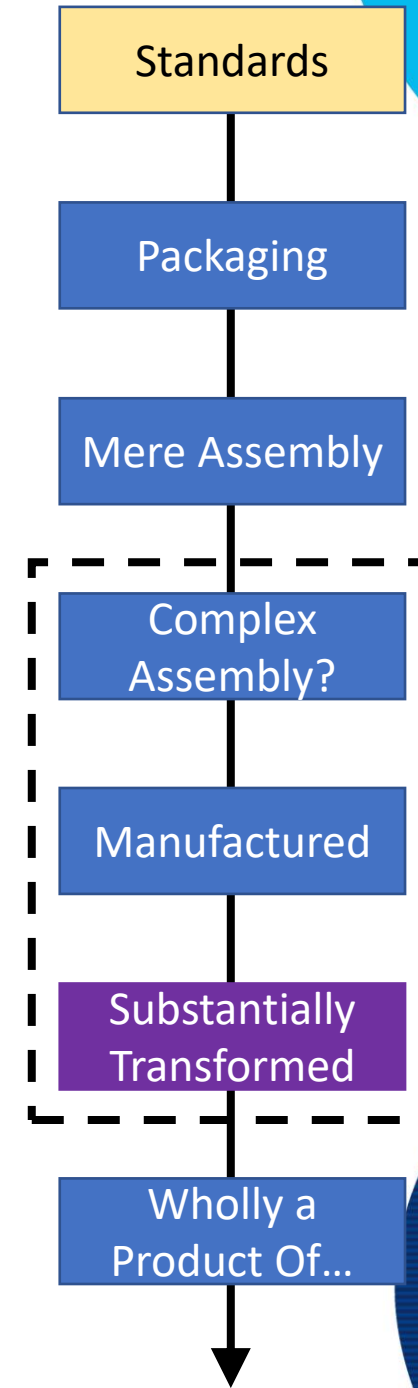
- Requires a **physical change** to the product and components
- **Origin of components is generally irrelevant** where there has been a substantial transformation
- **Very complicated and fact intensive analysis**
  - ✓ Different names?
  - ✓ Different characteristics?
  - ✓ Different uses?
  - ✓ Is the manufacturing process complex and meaningful?
  - ✓ What is the country of origin for the main components?



# “Substantially Transformed” (cont’d)

Typical questions in assessing “substantial transformation”:

- How has the “name, character or use” changed?
- What level of complexity is involved in assembly process?
  - How many components are there?
  - What technologies are involved?
  - How many operations are required?
  - What machinery or tooling is used?
  - How long does the process take?
- What types of technical skills must employees possess?
- What is the expense and value added of the assembly?





# “Substantially Transformed”: *Energizer Battery*

- *Energizer Battery v. United States*, 190 F.Supp.3d 1308 (Ct. Int’l Trade 2016)
- “Substantial transformation” applies to the **component parts, not just the end product**





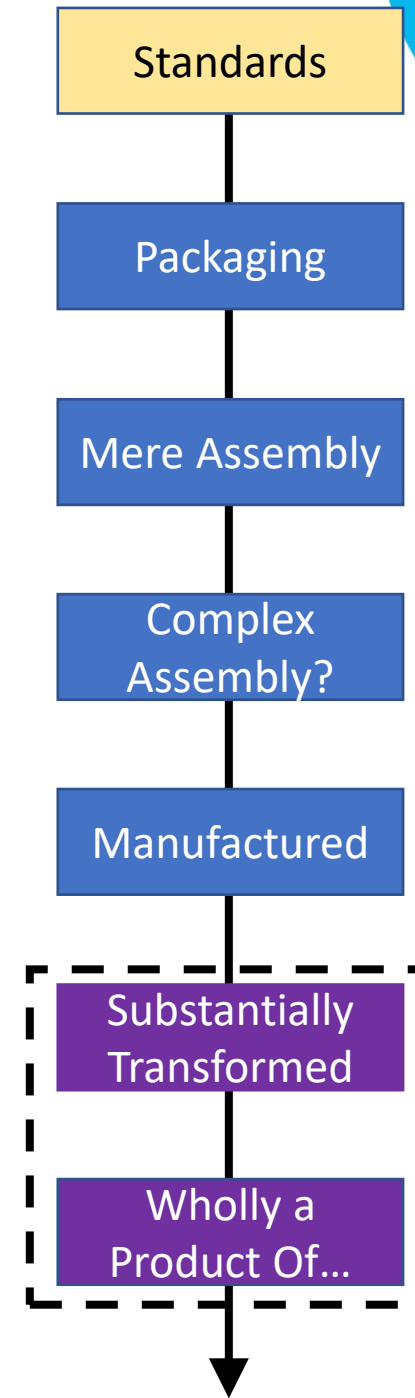
# “Manufactured”: *Acetris Health*

- Even though “manufactured” is a lesser standard than “substantially transformed,” a product “manufactured” in the U.S. may still qualify under the TAA
- *Acetris Health LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020)
  - “U.S.-Made End Product” is a two-part definition:
    - “Mined, produced, or manufactured” OR
    - “Substantially transformed”
  - Products do not need to be “**wholly**” manufactured in the U.S.



# “Designated Country End Products”

- An article that is:
  - “**Wholly** the growth, product, or manufacture” of an approved country; or
  - “**Substantially transformed**” in an approved country “into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.”



# “Designated Country”

- 126 countries
- Four types of countries:
  - Countries with a Free Trade Agreement with the U.S.
  - Countries that have signed on to the World Trade Organization Government Procurement Agreement (WTO GPA)
  - Caribbean Basin countries
  - “Least Developed Countries”



# “Designated Country” (cont’d)

- Afghanistan
- Angola
- Antigua and Barbuda
- Armenia
- Aruba
- Australia
- Austria
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belgium
- Belize
- Benin
- Bhutan
- Bonaire
- British Virgin Islands
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Canada
- Central African Republic
- Chad
- Chile
- Colombia
- Comoros
- Costa Rica
- Croatia
- Curacao
- Cyprus
- Czech Republic
- Denmark
- Democratic Republic of Congo
- Djibouti
- Dominica
- Dominican Republic
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Ethiopia
- Finland
- France
- Gambia
- Germany
- Greece
- Grenada
- Guatemala
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Honduras
- Hong Kong
- Hungary
- Iceland
- Ireland
- Israel
- Italy
- Jamaica
- Japan
- Kiribati
- Laos

# “Designated Country” (cont’d)

- Latvia
- Lesotho
- Liberia
- Liechtenstein
- Lithuania
- Luxembourg
- Madagascar
- Malawi
- Mali
- Malta
- Mauritania
- Mexico
- Moldova
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Nepal
- Netherlands
- New Zealand
- Nicaragua
- Niger
- Norway
- Oman
- Panama
- Peru
- Poland
- Portugal
- Romania
- Rwanda
- Saba
- Saint Kitts and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- Samoa
- Sao Tome and Principe
- Senegal
- Sierra Leone
- Singapore
- Sint Eustatius
- Sint Maarten
- Slovak Republic
- Slovenia
- Solomon Islands
- Somalia
- South Korea
- South Sudan
- Spain
- Sweden
- Switzerland
- Taiwan
- Tanzania
- Timor-Leste
- Togo
- Trinidad and Tobago
- Tuvalu
- Uganda
- Ukraine
- United Kingdom
- Vanuatu
- Yemen
- Zambia

# 4. The Buy America\* Act

\* (Note: No “n”)



# Buy America Act

Purchasing Agency?	Any federal, state, local government spending federal transportation dollars
Contract Value?	Applies to all grants/contracts $\geq$ \$150,000 using covered funds
Types of Products/Services?	Iron & steel; other manufactured products (including, potentially, facilities)
Exceptions/Waivers?	Waivers available, but limited
Legal Requirement?	<ul style="list-style-type: none"><li>✓ Iron &amp; steel = <u>all</u> manufacturing processes, including melting, shaping, and drilling</li><li>✓ Manufactured Products<ul style="list-style-type: none"><li>• End product = manufactured in U.S.</li><li>• <u>All</u> components = manufactured in U.S.</li></ul></li></ul>

# Key Concepts Under Buy America

- “End Product”
- “Component”
- Subcomponent
- “Manufacturing”
- Waivers

# “End Product”

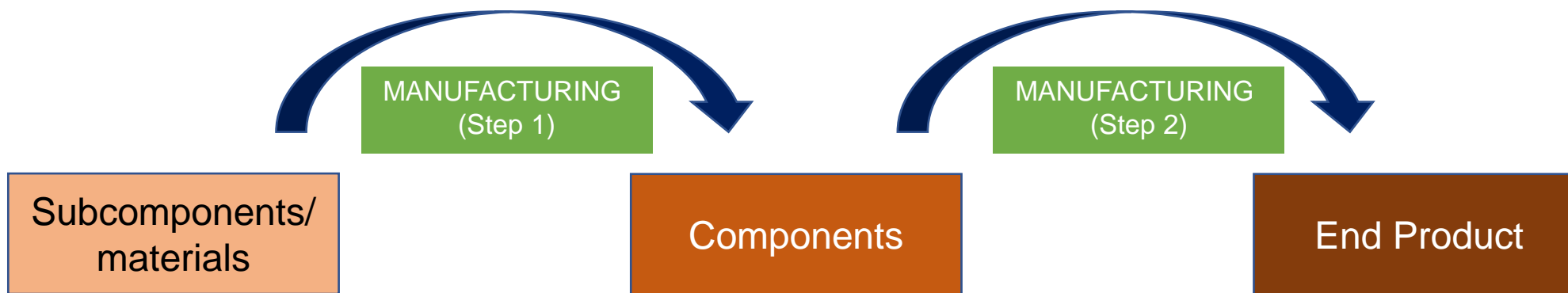
- Includes vehicles, structures, systems, or manufactured products
  - This is typically defined in the prime contract
- “Directly incorporates constituent components **at the final assembly location**”
- Includes only items acquired for public use under a federally-funded contract
  - Temporary structures not being delivered are not covered (e.g., scaffolding)
- *NOTE: The “End Product” does not necessarily change at the subcontract level*

# “End Product” (cont’d)

- Examples...
  - Rolling Stock
    - Buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats
  - Steel and iron end products
    - Structures, bridges, and track work (including rail)
  - Manufactured end products:
    - **Infrastructure projects** not made primarily of steel or iron, including structures (terminals, depots, garages, and bus shelters);
    - Rail not made primarily of steel or iron;
    - Fare collection systems;
    - Computers, information systems, data processing systems;
    - Security systems;
    - Mobile lifts, hoists, and elevators

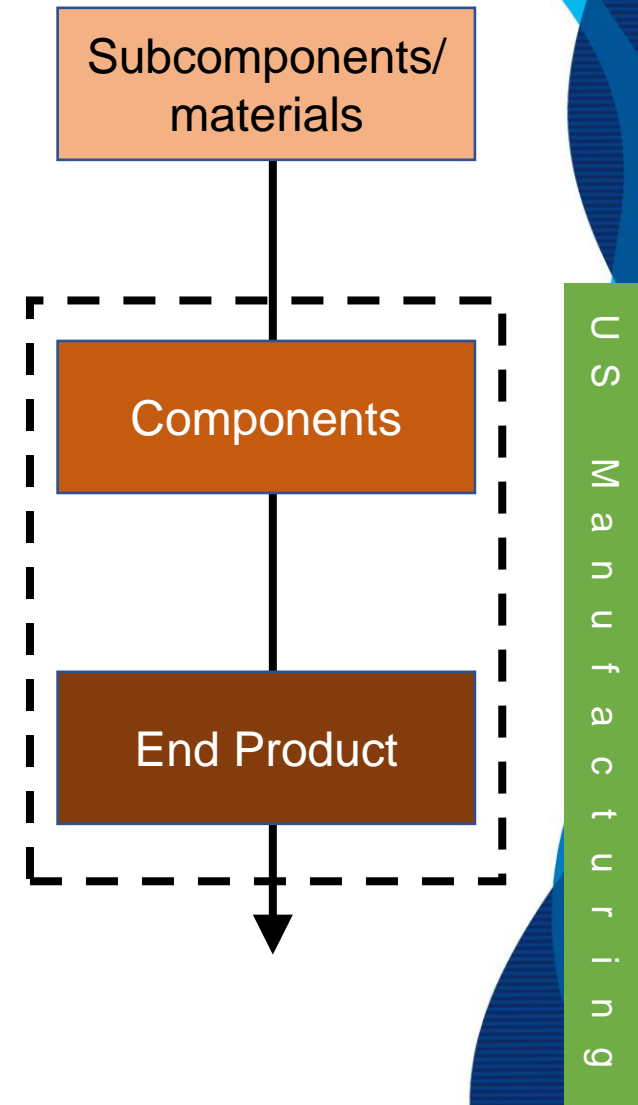
# “Component”

- “Any article, material, or supply, whether manufactured or unmanufactured, that is **directly incorporated into the end product** at the final assembly location.”
- A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.



# Subcomponent

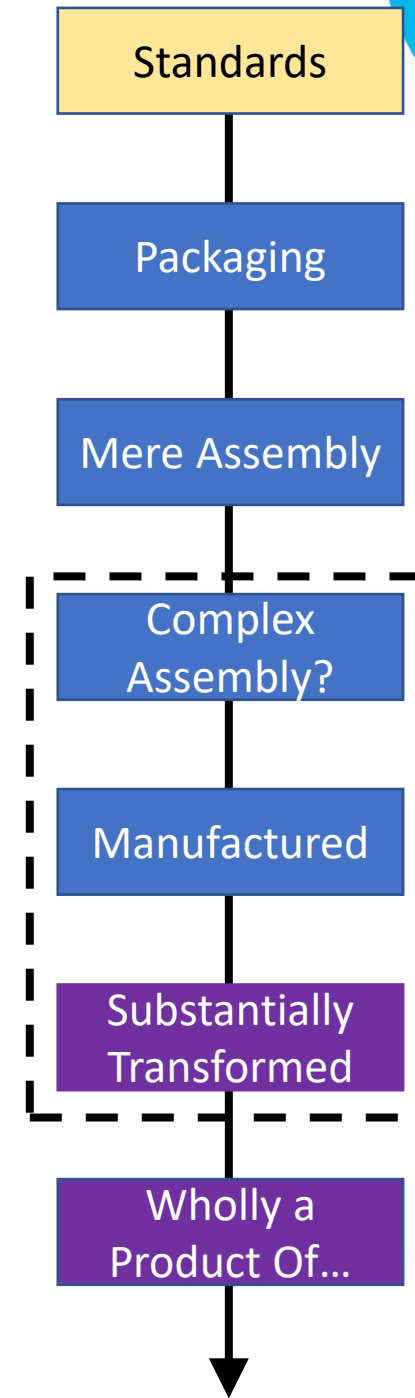
- Materials incorporated into a “component”
  - May be unmanufactured materials
  - May be manufactured supplies
- Subcomponents/materials **do not need to be 100% U.S. origin**, they merely need to be manufactured into U.S.-origin “components”
  - Slight exception for “Rolling Stock,” which *does* consider country of origin for some subcomponents





# “Manufacturing”

- “Application of processes to **alter the form or function of materials** or of elements of the product in a manner **adding value and transforming** those materials or elements so that they represent a **new end product** functionally different from that which would result from **mere assembly** of the elements or materials.”



# Waivers

- Public interest
  - Existing waiver for all “small purchases” < \$150,000
- Non-availability
  - Not available domestically in sufficient quantities/quality
  - Standing waivers for microprocessors, computers, microcomputers, etc., which are used solely for the purpose of processing or storing data
- Price-differential
  - Requiring the use of U.S.-manufactured products will increase the **cost of the contract** by more than 25%
- Rolling Stock
  - Only 70% of the components need to be U.S.-origin
  - Heightened requirements for subcomponents

# 5. Infrastructure Act

# Infrastructure Act

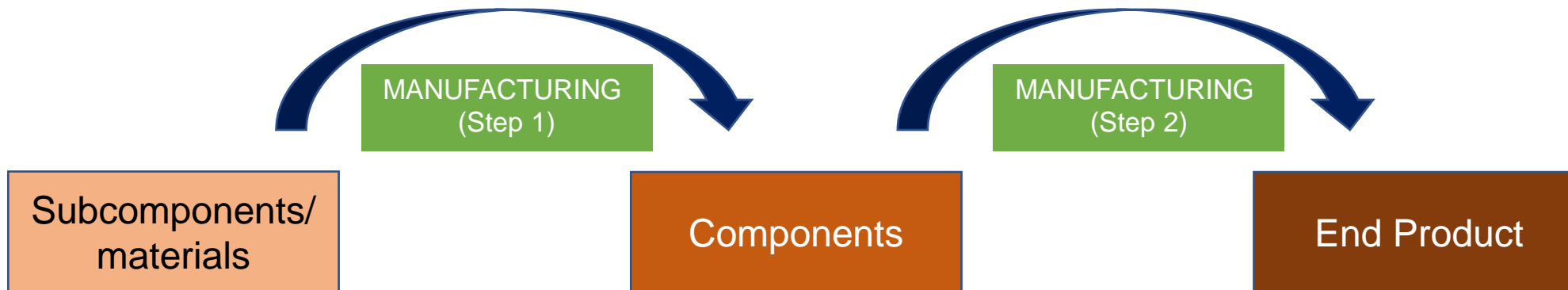
Purchasing Agency?	Any federal, state, local government spending federal infrastructure dollars
Contract Value?	Applies to all grants/contracts using covered funds
Types of Products/Services?	Iron & steel + manufactured products
Exceptions/Waivers?	Waivers available, but limited
Legal Requirement?	<ul style="list-style-type: none"><li>✓ Iron &amp; steel = <u>all</u> manufacturing processes, including melting, shaping, and drilling</li><li>✓ Manufactured Products<ul style="list-style-type: none"><li>• End product = manufactured in the U.S.</li><li>• <math>\geq</math> 55% U.S.-origin content</li></ul></li></ul>

# Build America, Buy America

- Iron & Steel: All manufacturing processes take place in the U.S.
  - Initial melting stage
  - Melting
  - Shaping
  - Application of coatings
  - Origin of elemental materials irrelevant
- Two-part test for manufactured products:
  1. **Manufactured** in the U.S.; and
  2. Majority **domestic content** ( $\geq 55\%$  domestic content)
    - ✓ Statute does not distinguish between “products made predominantly from iron and steel” and other “manufactured products”

# Key Concepts

- End-product, Component, Subcomponent?
  - Likely to be similar to Buy America/BAA standards
  - Regulations to be published by OMB in 2022





# Key Concepts (cont'd)

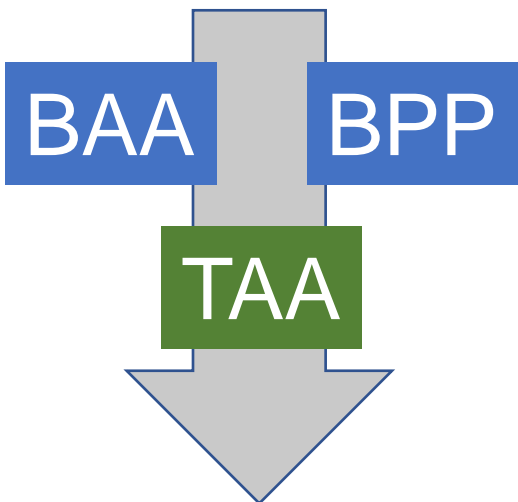
- Manufacturing
  - Exact meeting unknown
  - Likely to be similar to existing meanings under Buy America or BAA
    - More than mere assembly
    - Substantive process to create the final end product



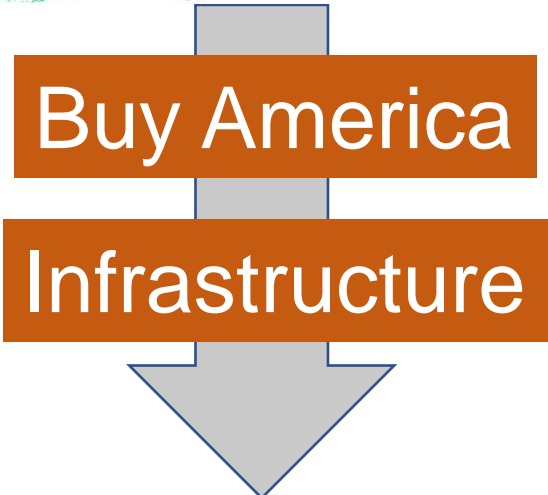
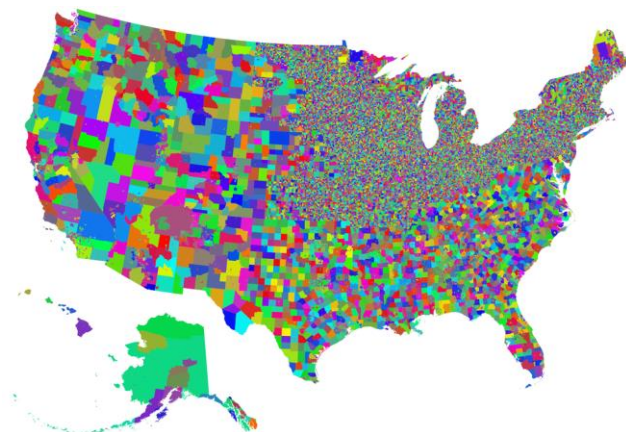
# Conclusion

# Common Country of Origin Requirements

Federal/U.S. Government



State/Local



# How The BAA And TAA Interact...

- The BAA generally applies to procurements > \$10,000
- But **if**:
  - The product being purchased is covered by an FTA;
  - The agency conducting the procurement is covered by an FTA;
  - The procurement is at or above the FTA \$\$\$ threshold...
- **Then...**

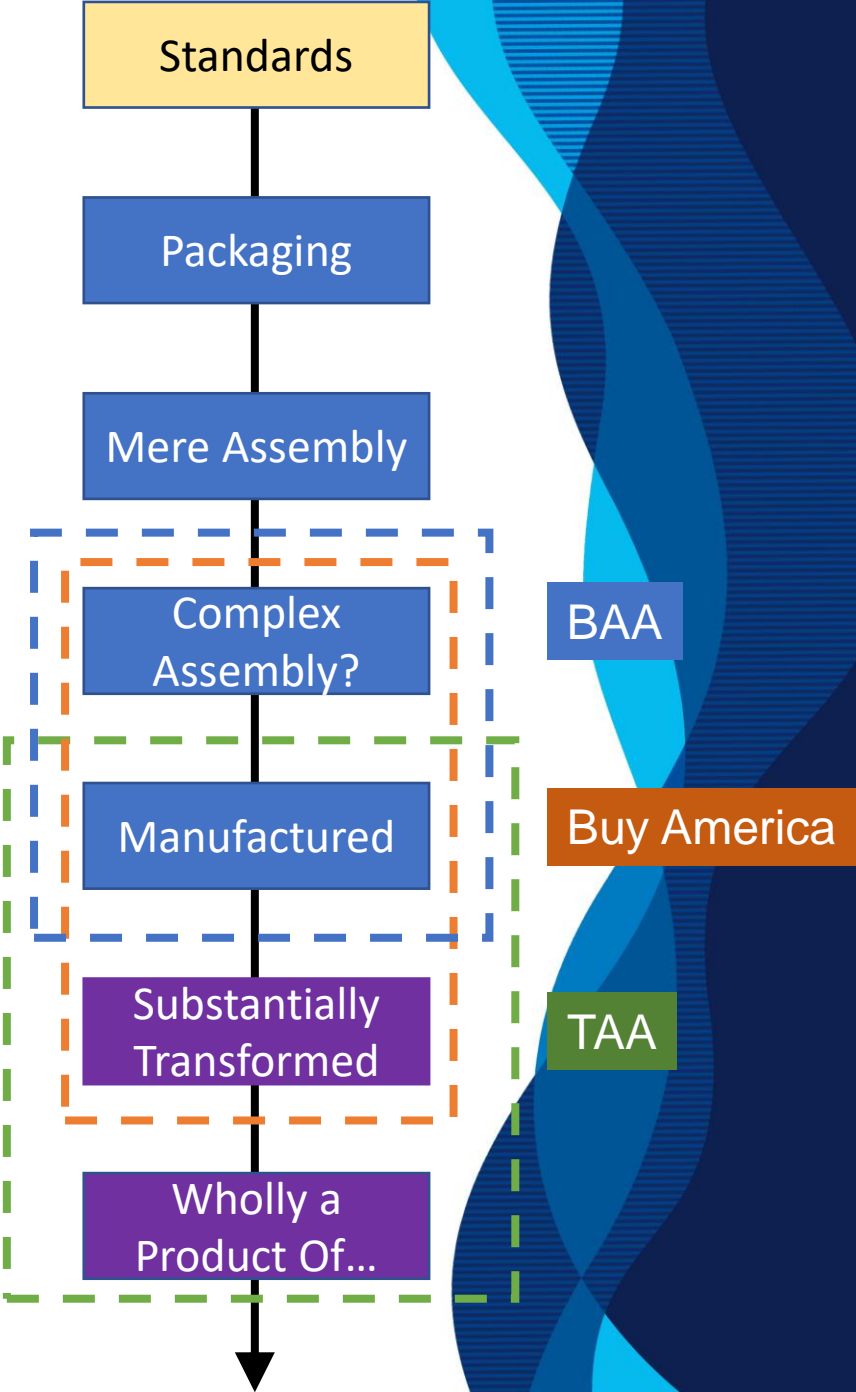


# Comparison of Country of Origin Regimes

	BAA/BPP	TAA	Buy America	Infrastructure
<b>Purchasing Agency</b>	USG (esp. DOD)	USG agencies covered by FTAs	State/local + maybe USG	State/local + maybe USG
<b>Contract Value</b>	\$10K-\$183K (supplies) or \$10K-\$7M (construction)	≥ \$183K (supplies) or ≥ \$7M (construction)	≥ \$150K using USG transportation dollars	All contracts using infrastructure dollars?
<b>Products/ Services</b>	Products	Both	Products (including, potentially facilities)	Products
<b>Exceptions/ Waivers</b>	COTS (partial); other waivers available	Very limited	Waivers available, but limited	Waivers available, but limited
<b>Legal Requirement</b>	<ul style="list-style-type: none"> <li>End product = manufactured in the U.S.</li> <li>≥ 55% U.S.-origin content (&gt; 95% for items made predominantly from iron &amp; steel)</li> </ul>	<ul style="list-style-type: none"> <li>End product = substantially transformed in the U.S.</li> </ul>	<ul style="list-style-type: none"> <li>Iron &amp; steel = <u>all</u> manufacturing processes, including melting, shaping, and drilling</li> <li>Manufactured Products                             <ul style="list-style-type: none"> <li>End product = manufactured in U.S.</li> <li><u>All</u> components = manufactured in U.S.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Iron &amp; steel = <u>all</u> manufacturing processes, including melting, shaping, and drilling</li> <li>Manufactured Products                             <ul style="list-style-type: none"> <li>End product = manufactured in the U.S.</li> <li>≥ 55% U.S.-origin content</li> </ul> </li> </ul>



# Key Manufacturing Processes





# Key Questions to Consider

What do you mean when you say it must meet “Buy American”?

What is the specific contract/solicitation requirement that I need to meet?

Where is my product manufactured/substantially transformed?

Where are my components manufactured?

What is the end product that is being delivered to the customer?

What waivers are available?

Has the government already issued any waivers?

# Questions?



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