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Identifying Risks in Your Foreign Supply Chain: Buy American Act

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Introductions



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Overview of the Series

- Sep. 20, 2023: New Rules and Restrictions in Foreign Supply Chains
- Oct. 4, 2023: **Buy American Act Requirements**
- Oct. 22, 2023: **Trade Agreements Act**
- Nov. 1, 2023: **U.S. Export Control Laws and Tariffs**
- Nov. 8, 2023: **Corruption/Foreign Corrupt Practices Act (FCPA)**
- Nov. 15, 2023: **Supply Chain Cybersecurity**

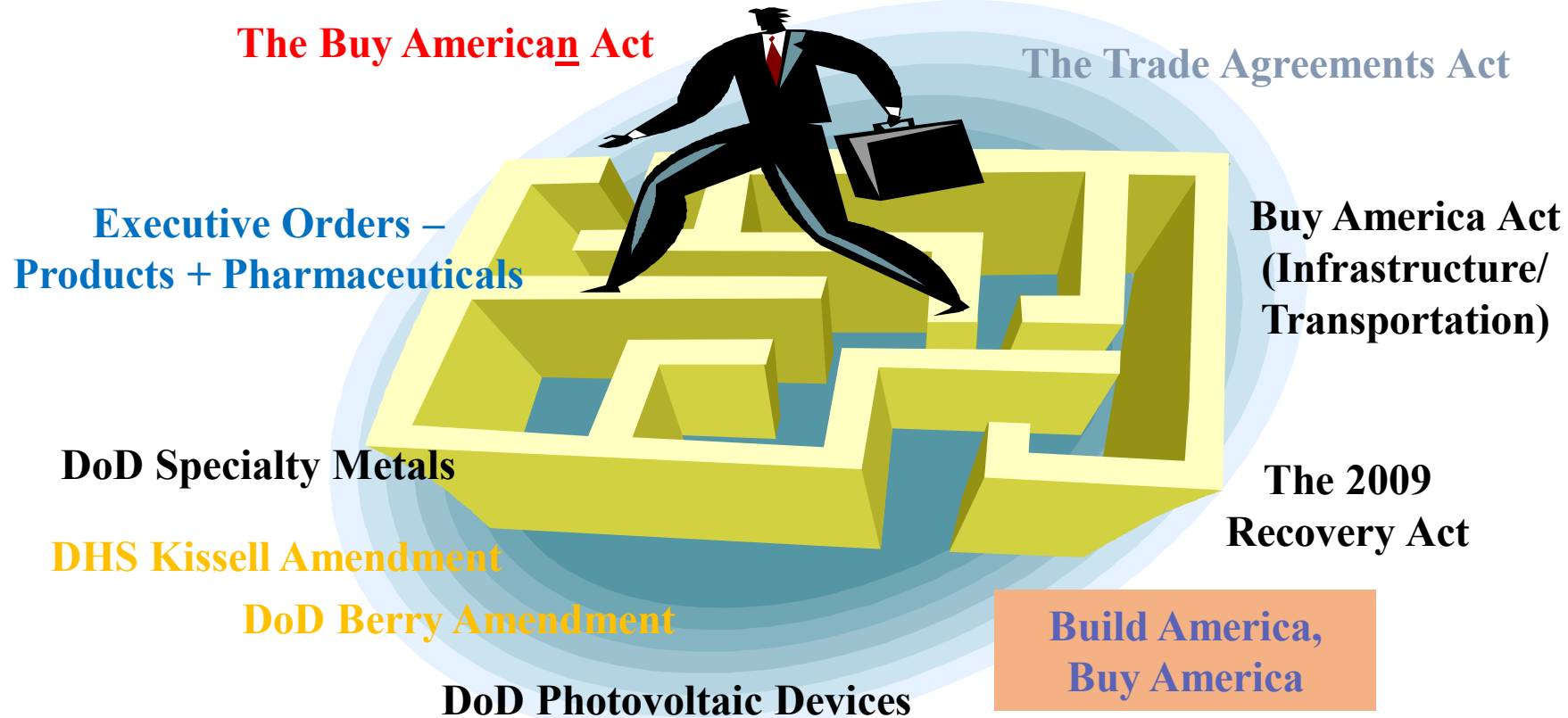
Today's Agenda: The Buy American Act



1. “Buy American” Generally
2. Key Concepts Under the Buy American Act (BAA)
3. Summary of Key Changes Under the BAA
4. Product Labeling

1. “Buy American” Generally

The “Country of Origin” Maze



And Many, Many More...

“Buy American” Executive Orders

- American manufacturing – Biden EO 14005 (Jan. 2021) + Trump EO 13881 (July 2019)
- Pharmaceuticals/Public Health (Trump EO 13944 Aug. 2020)
- Semiconductors?
- Industrial base?

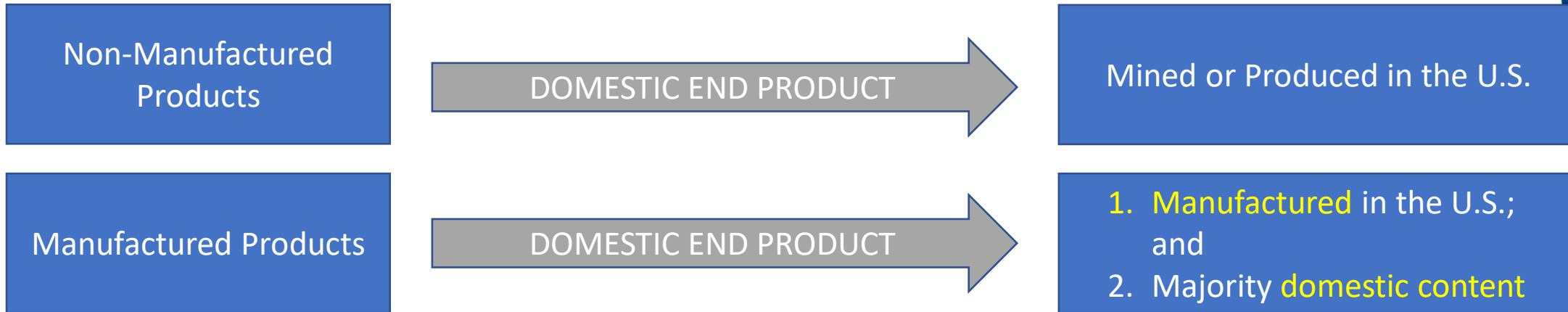


2. Key Concepts Under the Buy American Act (BAA)

Key Concepts Under the BAA

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

“Domestic End Product”



- If it’s not “domestic”... it is **foreign**

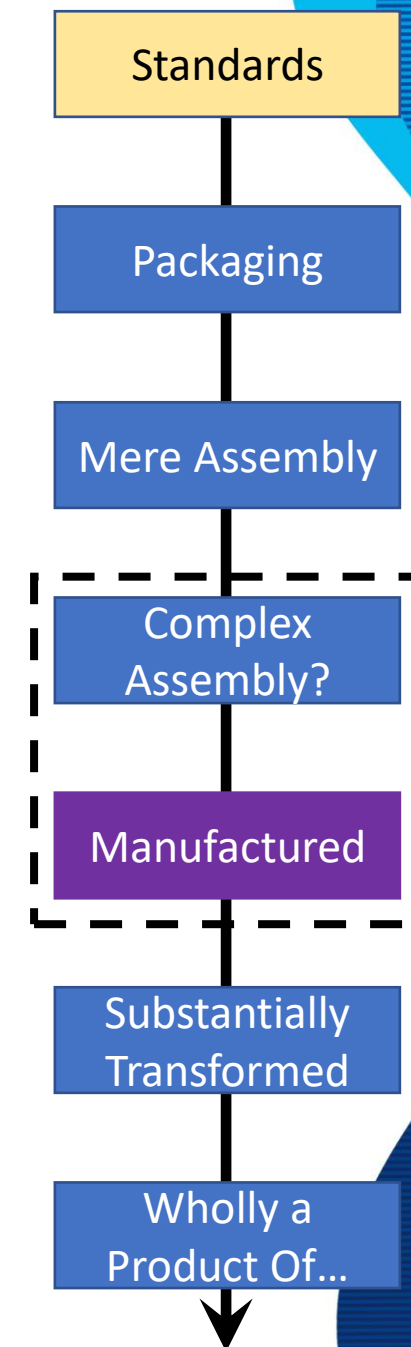
- ✓ Products made predominantly from iron and steel: $\geq 95\%$ domestic content
- ✓ Other manufactured products: $\geq 60\%$ domestic content
 - *Partial* exception for COTS products to domestic content test
 - Domestic content requirement rising incrementally in January 2024 to 65-75%

“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 CLIN

“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 Mfr'd by Contractor	All costs associated with mfr'ing components, but NOT mfr'ing the end product

- Does not consider the source of sub-components
- 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 product
 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”

“Fastener”

- “Hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.”
- Special exception under BAA for COTS fasteners
 - Need only be manufactured in the U.S. (no “domestic content” requirement)
- COTS fasteners are also excluded from the calculation of “iron and steel” when considering whether something is made “predominantly from iron or steel”



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*
 - “Critical items” and “critical components” will get an additional “adder”
 - *FAR Council considering a new rule at FAR 25.105 listing “critical” products and preferences*



3. Summary of Key Changes Under the BAA

Key 2021 Changes

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

Key 2022 Changes

1. Updated Content Requirement

Effective Date	Domestic Content Threshold*
Prior to January 21, 2021	50%
January 21, 2021 - October 24, 2022	55%
October 25, 2022 - December 31, 2023	60%
January 1, 2024 - December 31, 2028	65%
January 1, 2029 and later	75%

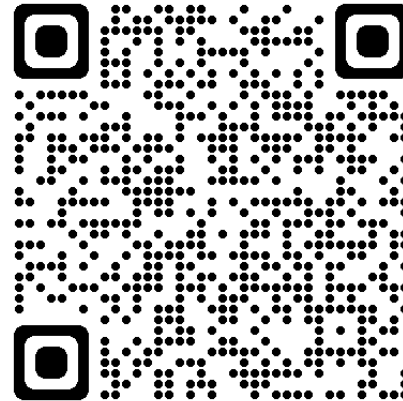
*Potential Exceptions

- ✓ “Alternate domestic content” threshold may be approved by Agency’s senior procurement executive + White House Made in America Office
- ✓ “Fallback” threshold = $\geq 55\%$, when the Agency concludes that higher content requirement cannot be met or requires an unreasonable cost

2. Domestic Item Price Preference for “Critical” Items – in process

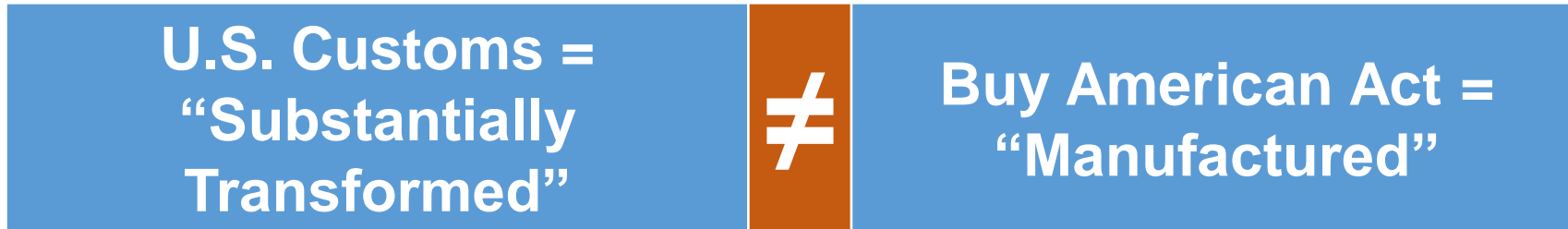
New 2023 Changes


- June 9, 2023 proposed rule for the DFARS
 - Proposed harmonizing DFARS requirements with the FAR
 - Comments accepted through August 2023
 - Final rule expected by the end of the year
- Best practice: Assume that the FAR and DFARS rules are the same, effective immediately



4. Product Labeling

Determining Compliance From Product Label



- Companies **certify** BAA compliance (express or implied)
- Contractors **may** be able to rely on product labels to determine “BAA compliance”
 - “Made in America” label = “BAA compliant”
 - “Manufactured in America” label \neq “BAA compliant”
 - “Product of India” \neq “BAA compliant” 



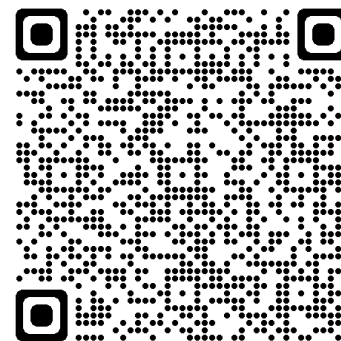
“Made in the USA” Labeling

“Made in the USA”



Buy American Act =
“Manufactured”

- “Made in the USA” label = Truth in advertising/FTC
- **Manufactured** in the U.S. + “**all or substantially all**” U.S. content
- Alternative labels?
 - “Manufactured in the U.S. from foreign components”
 - “Assembled in the U.S.”
- FTC Regulations: [16 CFR Part 323](#)
- FTC Guidelines: <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>



Conclusion

Overview of Current BAA Requirements

BAA Requirement	Previously	New
“Domestic end product”	<ul style="list-style-type: none"> • Manufactured in the U.S. • >50% domestic cost of components (waived if COTS) 	<ul style="list-style-type: none"> • Manufactured in the U.S. • >60% domestic cost of components (partial COTS waiver)
“Domestic end products” made “predominantly from iron or steel”	<ul style="list-style-type: none"> • Manufactured in the U.S. • >50% domestic cost of components (waived if COTS) 	<ul style="list-style-type: none"> • Manufactured in the U.S. • >95% domestic cost of components (even if COTS)
COTS Fasteners made “predominantly from iron or steel”	Manufactured in the U.S.	Manufactured in the U.S.
COTS domestic end products (<i>not</i> made “predominantly from iron or steel”)	Manufactured in the U.S.	Manufactured in the U.S.
Exceptions?	<ul style="list-style-type: none"> • Public interest • Nonavailability • Unreasonable cost (6-12%) • COTS • Commercial IT • Resale/commissary 	<ul style="list-style-type: none"> • Public interest (limited) • Nonavailability • Unreasonable cost (20-30%) + ?% more for “critical” items • COTS (limited) • Commercial IT (under review) • Resale/commissary
Certification?	Yes	Yes

Certification and Labeling Reminders...

- Be careful when you certify/label your products...

52.225-2 Buy American Certificate.

As prescribed in 25.1101(a)(2), insert the following provision:

BUY AMERICAN CERTIFICATE (FEB 2021)

(a)(1) The Offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product.

(2) The Offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

(3) The terms "domestic end product," "end product," and "foreign end product" are defined in the clause of this solicitation entitled "Buy American—Supplies."

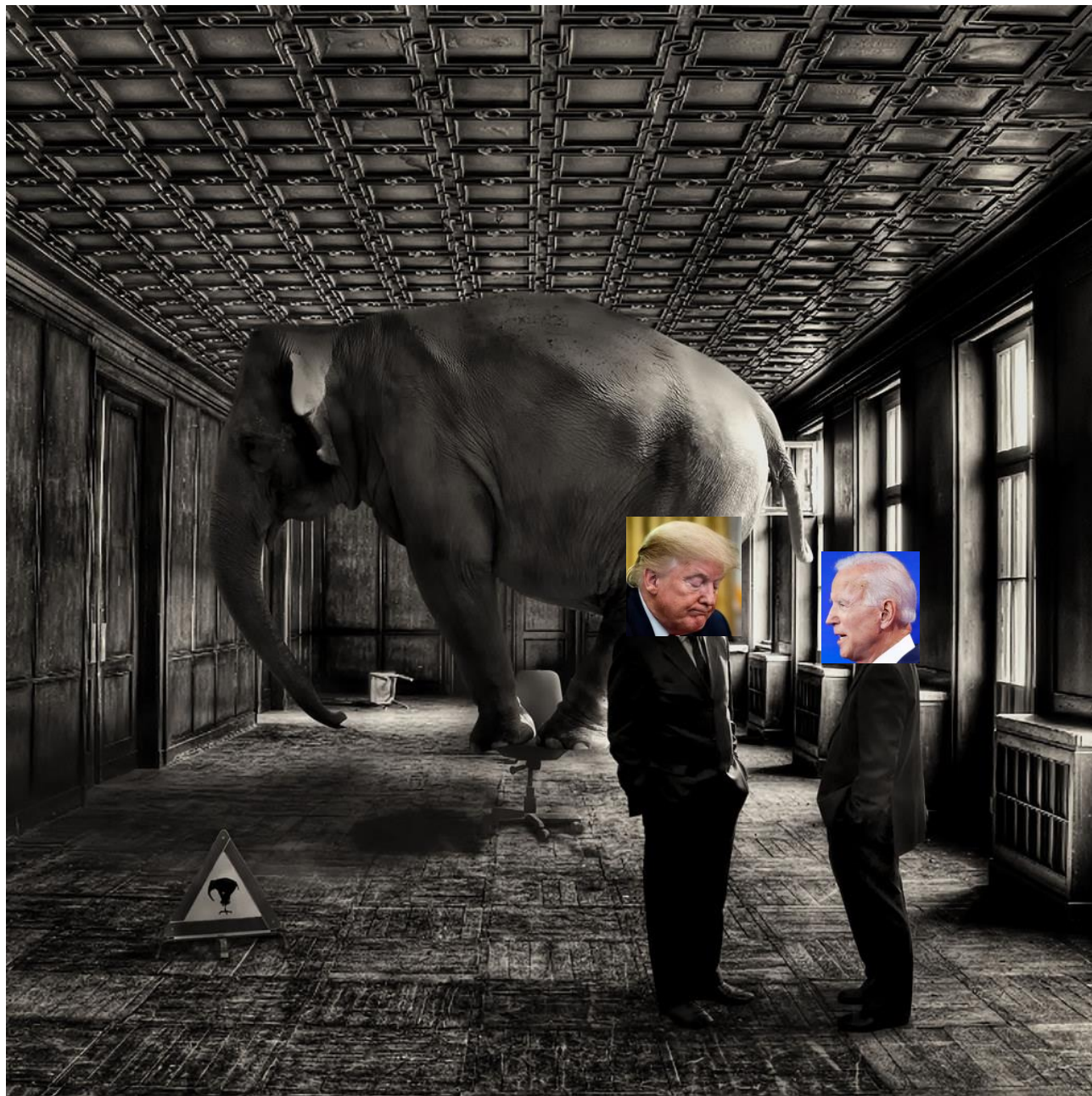
(b) Foreign End Products:

Line item No.	Country of origin

[List as necessary]

(c) The Government will evaluate offers in accordance with the policies and procedures of part 25 of the Federal Acquisition Regulation.





Questions?



Next Session on October 18, 2023...

- **Trade Agreements Act**