

116TH CONGRESS
1ST SESSION

S. 2139

To prohibit the award of Federal Government contracts to inverted domestic corporations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 17, 2019

Mr. DURBIN (for himself, Mr. REED, Mr. WHITEHOUSE, Ms. DUCKWORTH, and Mr. SANDERS) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To prohibit the award of Federal Government contracts to inverted domestic corporations, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “American Business for
5 American Companies Act of 2019”.

6 **SEC. 2. PROHIBITION ON AWARDING CONTRACTS TO IN-**
7 **VERTED DOMESTIC CORPORATIONS.**

8 (a) CIVILIAN CONTRACTS.—

1 (1) IN GENERAL.—Chapter 47 of title 41,
 2 United States Code, is amended by adding at the
 3 end the following new section:

4 **“§ 4714. Prohibition on awarding contracts to in-**
 5 **verted domestic corporations**

6 “(a) PROHIBITION.—

7 “(1) IN GENERAL.—The head of an executive
 8 agency may not award a contract for the procure-
 9 ment of property or services to—

10 “(A) any foreign incorporated entity that
 11 such head has determined is an inverted domes-
 12 tic corporation or any subsidiary of such entity;
 13 or

14 “(B) any joint venture if more than 10
 15 percent of the joint venture (by vote or value)
 16 is held by a foreign incorporated entity that
 17 such head has determined is an inverted domes-
 18 tic corporation or any subsidiary of such entity.

19 “(2) SUBCONTRACTS.—

20 “(A) IN GENERAL.—The head of an execu-
 21 tive agency shall include in each contract for
 22 the procurement of property or services award-
 23 ed by the executive agency with a value in ex-
 24 cess of \$10,000,000, other than a contract for
 25 exclusively commercial items, a clause that pro-

hibits the prime contractor on such contract
from—

“(i) awarding a first-tier subcontract
with a value greater than 10 percent of the
total value of the prime contract to an en-
tity or joint venture described in paragraph
(1); or

“(ii) structuring subcontract tiers in a
manner designed to avoid the limitation in
paragraph (1) by enabling an entity or
joint venture described in paragraph (1) to
perform more than 10 percent of the total
value of the prime contract as a lower-tier
subcontractor.

“(B) PENALTIES.—The contract clause in-
cluded in contracts pursuant to subparagraph
(A) shall provide that, in the event that the
prime contractor violates the contract clause—

“(i) the prime contract may be termi-
nated for default; and

“(ii) the matter may be referred to
the suspension or debarment official for
the appropriate agency and may be a basis
for suspension or debarment of the prime
contractor.

1 “(b) INVERTED DOMESTIC CORPORATION.—

2 “(1) IN GENERAL.—For purposes of this sec-
 3 tion, a foreign incorporated entity shall be treated as
 4 an inverted domestic corporation if, pursuant to a
 5 plan (or a series of related transactions)—

6 “(A) the entity completes on or after May
 7 8, 2014, the direct or indirect acquisition of—

8 “(i) substantially all of the properties
 9 held directly or indirectly by a domestic
 10 corporation; or

11 “(ii) substantially all of the assets of,
 12 or substantially all of the properties consti-
 13 tuting a trade or business of, a domestic
 14 partnership; and

15 “(B) after the acquisition, either—

16 “(i) more than 50 percent of the stock
 17 (by vote or value) of the entity is held—

18 “(I) in the case of an acquisition
 19 with respect to a domestic corpora-
 20 tion, by former shareholders of the
 21 domestic corporation by reason of
 22 holding stock in the domestic corpora-
 23 tion; or

24 “(II) in the case of an acquisition
 25 with respect to a domestic partner-

1 ship, by former partners of the do-
2 mestic partnership by reason of hold-
3 ing a capital or profits interest in the
4 domestic partnership; or

5 “(ii) the management and control of
6 the expanded affiliated group which in-
7 cludes the entity occurs, directly or indi-
8 rectly, primarily within the United States,
9 as determined pursuant to regulations pre-
10 scribed by the Secretary of the Treasury,
11 and such expanded affiliated group has
12 significant domestic business activities.

13 “(2) EXCEPTION FOR CORPORATIONS WITH
14 SUBSTANTIAL BUSINESS ACTIVITIES IN FOREIGN
15 COUNTRY OF ORGANIZATION.—

16 “(A) IN GENERAL.—A foreign incorporated
17 entity described in paragraph (1) shall not be
18 treated as an inverted domestic corporation if
19 after the acquisition the expanded affiliated
20 group which includes the entity has substantial
21 business activities in the foreign country in
22 which or under the law of which the entity is
23 created or organized when compared to the
24 total business activities of such expanded affili-
25 ated group.

1 “(B) SUBSTANTIAL BUSINESS ACTIVI-
2 TIES.—The Secretary of the Treasury (or the
3 Secretary’s delegate) shall establish regulations
4 for determining whether an affiliated group has
5 substantial business activities for purposes of
6 subparagraph (A), except that such regulations
7 may not treat any group as having substantial
8 business activities if such group would not be
9 considered to have substantial business activi-
10 ties under the regulations prescribed under sec-
11 tion 7874 of the Internal Revenue Code of
12 1986, as in effect on January 18, 2017.

13 “(3) SIGNIFICANT DOMESTIC BUSINESS ACTIVI-
14 TIES.—

15 “(A) IN GENERAL.—For purposes of para-
16 graph (1)(B)(ii), an expanded affiliated group
17 has significant domestic business activities if at
18 least 25 percent of—

19 “(i) the employees of the group are
20 based in the United States;

21 “(ii) the employee compensation in-
22 curred by the group is incurred with re-
23 spect to employees based in the United
24 States;

1 “(iii) the assets of the group are lo-
2 cated in the United States; or

3 “(iv) the income of the group is de-
4 rived in the United States.

5 “(B) DETERMINATION.—Determinations
6 pursuant to subparagraph (A) shall be made in
7 the same manner as such determinations are
8 made for purposes of determining substantial
9 business activities under regulations referred to
10 in paragraph (2) as in effect on January 18,
11 2017, but applied by treating all references in
12 such regulations to ‘foreign country’ and ‘rel-
13 evant foreign country’ as references to ‘the
14 United States’. The Secretary of the Treasury
15 (or the Secretary’s delegate) may issue regula-
16 tions decreasing the threshold percent in any of
17 the tests under such regulations for deter-
18 mining if business activities constitute signifi-
19 cant domestic business activities for purposes of
20 this paragraph.

21 “(c) WAIVER.—

22 “(1) IN GENERAL.—The head of an executive
23 agency may waive subsection (a) with respect to any
24 Federal Government contract under the authority of

1 such head if the head determines that the waiver
2 is—

3 “(A) required in the interest of national
4 security; or

5 “(B) necessary for the efficient or effective
6 administration of Federal or federally funded—

7 “(i) programs that provide health ben-
8 efits to individuals; or

9 “(ii) public health programs.

10 “(2) REPORT TO CONGRESS.—The head of an
11 executive agency issuing a waiver under paragraph
12 (1) shall, not later than 14 days after issuing such
13 waiver, submit a written notification of the waiver to
14 the relevant authorizing committees of Congress and
15 the Committees on Appropriations of the Senate and
16 the House of Representatives.

17 “(d) APPLICABILITY.—

18 “(1) IN GENERAL.—Except as provided in para-
19 graph (2), this section shall not apply to any con-
20 tract entered into before the date of the enactment
21 of this section.

22 “(2) TASK AND DELIVERY ORDERS.—This sec-
23 tion shall apply to any task or delivery order issued
24 after the date of the enactment of this section pur-

1 suant to a contract entered into before, on, or after
 2 such date of enactment.

3 “(3) SCOPE.—This section applies only to con-
 4 tracts subject to regulation under the Federal Acqui-
 5 sition Regulation.

6 “(e) DEFINITIONS AND SPECIAL RULES.—

7 “(1) DEFINITIONS.—In this section, the terms
 8 ‘expanded affiliated group’, ‘foreign incorporated en-
 9 tity’, ‘person’, ‘domestic’, and ‘foreign’ have the
 10 meaning given those terms in section 835(c) of the
 11 Homeland Security Act of 2002 (6 U.S.C. 395(c)).

12 “(2) SPECIAL RULES.—In applying subsection
 13 (b) of this section for purposes of subsection (a) of
 14 this section, the rules described under 835(c)(1) of
 15 the Homeland Security Act of 2002 (6 U.S.C.
 16 395(c)(1)) shall apply.”.

17 (2) CLERICAL AMENDMENT.—The table of sec-
 18 tions at the beginning of chapter 47 of title 41,
 19 United States Code, is amended by inserting after
 20 the item relating to section 4713 the following new
 21 item:

“4714. Prohibition on awarding contracts to inverted domestic corporations.”.

22 (b) DEFENSE CONTRACTS.—

23 (1) IN GENERAL.—Chapter 137 of title 10,
 24 United States Code, is amended by adding at the
 25 end the following new section:

1 **“§ 2339. Prohibition on awarding contracts to in-**
 2 **verted domestic corporations**

3 “(a) PROHIBITION.—

4 “(1) IN GENERAL.—The head of an agency may
 5 not award a contract for the procurement of prop-
 6 erty or services to—

7 “(A) any foreign incorporated entity that
 8 such head has determined is an inverted domes-
 9 tic corporation or any subsidiary of such entity;
 10 or

11 “(B) any joint venture if more than 10
 12 percent of the joint venture (by vote or value)
 13 is owned by a foreign incorporated entity that
 14 such head has determined is an inverted domes-
 15 tic corporation or any subsidiary of such entity.

16 “(2) SUBCONTRACTS.—

17 “(A) IN GENERAL.—The head of an execu-
 18 tive agency shall include in each contract for
 19 the procurement of property or services award-
 20 ed by the executive agency with a value in ex-
 21 cess of \$10,000,000, other than a contract for
 22 exclusively commercial items, a clause that pro-
 23 hibits the prime contractor on such contract
 24 from—

25 “(i) awarding a first-tier subcontract
 26 with a value greater than 10 percent of the

1 total value of the prime contract to an en-
2 tity or joint venture described in paragraph
3 (1); or

4 “(ii) structuring subcontract tiers in a
5 manner designed to avoid the limitation in
6 paragraph (1) by enabling an entity or
7 joint venture described in paragraph (1) to
8 perform more than 10 percent of the total
9 value of the prime contract as a lower-tier
10 subcontractor.

11 “(B) PENALTIES.—The contract clause in-
12 cluded in contracts pursuant to subparagraph
13 (A) shall provide that, in the event that the
14 prime contractor violates the contract clause—

15 “(i) the prime contract may be termi-
16 nated for default; and

17 “(ii) the matter may be referred to
18 the suspension or debarment official for
19 the appropriate agency and may be a basis
20 for suspension or debarment of the prime
21 contractor.

22 “(b) INVERTED DOMESTIC CORPORATION.—

23 “(1) IN GENERAL.—For purposes of this sec-
24 tion, a foreign incorporated entity shall be treated as

1 an inverted domestic corporation if, pursuant to a
2 plan (or a series of related transactions)—

3 “(A) the entity completes on or after May
4 8, 2014, the direct or indirect acquisition of—

5 “(i) substantially all of the properties
6 held directly or indirectly by a domestic
7 corporation; or

8 “(ii) substantially all of the assets of,
9 or substantially all of the properties consti-
10 tuting a trade or business of, a domestic
11 partnership; and

12 “(B) after the acquisition, either—

13 “(i) more than 50 percent of the stock
14 (by vote or value) of the entity is held—

15 “(I) in the case of an acquisition
16 with respect to a domestic corpora-
17 tion, by former shareholders of the
18 domestic corporation by reason of
19 holding stock in the domestic corpora-
20 tion; or

21 “(II) in the case of an acquisition
22 with respect to a domestic partner-
23 ship, by former partners of the do-
24 mestic partnership by reason of hold-

1 ing a capital or profits interest in the
 2 domestic partnership; or

3 “(ii) the management and control of
 4 the expanded affiliated group which in-
 5 cludes the entity occurs, directly or indi-
 6 rectly, primarily within the United States,
 7 as determined pursuant to regulations pre-
 8 scribed by the Secretary of the Treasury,
 9 and such expanded affiliated group has
 10 significant domestic business activities.

11 “(2) EXCEPTION FOR CORPORATIONS WITH
 12 SUBSTANTIAL BUSINESS ACTIVITIES IN FOREIGN
 13 COUNTRY OF ORGANIZATION.—

14 “(A) IN GENERAL.—A foreign incorporated
 15 entity described in paragraph (1) shall not be
 16 treated as an inverted domestic corporation if
 17 after the acquisition the expanded affiliated
 18 group which includes the entity has substantial
 19 business activities in the foreign country in
 20 which or under the law of which the entity is
 21 created or organized when compared to the
 22 total business activities of such expanded affili-
 23 ated group.

24 “(B) SUBSTANTIAL BUSINESS ACTIVI-
 25 TIES.—The Secretary of the Treasury (or the

1 Secretary’s delegate) shall establish regulations
 2 for determining whether an affiliated group has
 3 substantial business activities for purposes of
 4 subparagraph (A), except that such regulations
 5 may not treat any group as having substantial
 6 business activities if such group would not be
 7 considered to have substantial business activi-
 8 ties under the regulations prescribed under sec-
 9 tion 7874 of the Internal Revenue Code of
 10 1986, as in effect on January 18, 2017.

11 “(3) SIGNIFICANT DOMESTIC BUSINESS ACTIVI-
 12 TIES.—

13 “(A) IN GENERAL.—For purposes of para-
 14 graph (1)(B)(ii), an expanded affiliated group
 15 has significant domestic business activities if at
 16 least 25 percent of—

17 “(i) the employees of the group are
 18 based in the United States;

19 “(ii) the employee compensation in-
 20 curred by the group is incurred with re-
 21 spect to employees based in the United
 22 States;

23 “(iii) the assets of the group are lo-
 24 cated in the United States; or

1 “(iv) the income of the group is de-
2 rived in the United States.

3 “(B) DETERMINATION.—Determinations
4 pursuant to subparagraph (A) shall be made in
5 the same manner as such determinations are
6 made for purposes of determining substantial
7 business activities under regulations referred to
8 in paragraph (2) as in effect on January 18,
9 2017, but applied by treating all references in
10 such regulations to ‘foreign country’ and ‘rel-
11 evant foreign country’ as references to ‘the
12 United States’. The Secretary of the Treasury
13 (or the Secretary’s delegate) may issue regula-
14 tions decreasing the threshold percent in any of
15 the tests under such regulations for deter-
16 mining if business activities constitute signifi-
17 cant domestic business activities for purposes of
18 this paragraph.

19 “(c) WAIVER.—

20 “(1) IN GENERAL.—The head of an agency may
21 waive subsection (a) with respect to any Federal
22 Government contract under the authority of such
23 head if the head determines that the waiver is re-
24 quired in the interest of national security or is nec-
25 essary for the efficient or effective administration of

1 Federal or federally funded programs that provide
2 health benefits to individuals.

3 “(2) REPORT TO CONGRESS.—The head of an
4 agency issuing a waiver under paragraph (1) shall,
5 not later than 14 days after issuing such waiver,
6 submit a written notification of the waiver to the
7 congressional defense committees.

8 “(d) APPLICABILITY.—

9 “(1) IN GENERAL.—Except as provided in para-
10 graph (2), this section shall not apply to any con-
11 tract entered into before the date of the enactment
12 of this section.

13 “(2) TASK AND DELIVERY ORDERS.—This sec-
14 tion shall apply to any task or delivery order issued
15 after the date of the enactment of this section pur-
16 suant to a contract entered into before, on, or after
17 such date of enactment.

18 “(3) SCOPE.—This section applies only to con-
19 tracts subject to regulation under the Federal Acqui-
20 sition Regulation and the Defense Supplement to the
21 Federal Acquisition Regulation.

22 “(e) DEFINITIONS AND SPECIAL RULES.—

23 “(1) DEFINITIONS.—In this section, the terms
24 ‘expanded affiliated group’, ‘foreign incorporated en-
25 tity’, ‘person’, ‘domestic’, and ‘foreign’ have the

1 meaning given those terms in section 835(c) of the
 2 Homeland Security Act of 2002 (6 U.S.C. 395(c)).

3 “(2) SPECIAL RULES.—In applying subsection
 4 (b) of this section for purposes of subsection (a) of
 5 this section, the rules described under 835(c)(1) of
 6 the Homeland Security Act of 2002 (6 U.S.C.
 7 395(c)(1)) shall apply.”.

8 (2) CLERICAL AMENDMENT.—The table of sec-
 9 tions at the beginning of chapter 137 of title 10,
 10 United States Code, is amended by inserting after
 11 the item relating to section 2338 the following new
 12 item:

“2339. Prohibition on awarding contracts to inverted domestic corporations.”.

13 (c) REGULATIONS REGARDING MANAGEMENT AND
 14 CONTROL.—

15 (1) IN GENERAL.—The Secretary of the Treas-
 16 ury (or the Secretary’s delegate) shall, for purposes
 17 of section 4714(b)(1)(B)(ii) of title 41, United
 18 States Code, and section 2339(b)(1)(B)(ii) of title
 19 10, United States Code, as added by subsections (a)
 20 and (b), respectively, prescribe regulations for pur-
 21 poses of determining cases in which the management
 22 and control of an expanded affiliated group is to be
 23 treated as occurring, directly or indirectly, primarily
 24 within the United States. The regulations prescribed

1 under the preceding sentence shall apply to periods
2 after May 8, 2014.

3 (2) EXECUTIVE OFFICERS AND SENIOR MAN-
4 AGEMENT.—The regulations prescribed under para-
5 graph (1) shall provide that the management and
6 control of an expanded affiliated group shall be
7 treated as occurring, directly or indirectly, primarily
8 within the United States if substantially all of the
9 executive officers and senior management of the ex-
10 panded affiliated group who exercise day-to-day re-
11 sponsibility for making decisions involving strategic,
12 financial, and operational policies of the expanded
13 affiliated group are based or primarily located within
14 the United States. Individuals who in fact exercise
15 such day-to-day responsibilities shall be treated as
16 executive officers and senior management regardless
17 of their title.

○