

115TH CONGRESS  
1ST SESSION

# S. 1637

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

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## IN THE SENATE OF THE UNITED STATES

JULY 26, 2017

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

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## 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 2017”.

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   **“§4713. 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-

1           hibits the prime contractor on such contract  
2           from—

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

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

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

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

21                   “(ii) the matter may be referred to  
22                   the suspension or debarment official for  
23                   the appropriate agency and may be a basis  
24                   for suspension or debarment of the prime  
25                   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 4712 the following new  
21      item:

      “4713. 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 **“§ 2340. 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 Committees on Armed Services and Appropriations  
8 of the Senate and the House of Representatives.

9 “(d) APPLICABILITY.—

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

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

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

23 “(e) DEFINITIONS AND SPECIAL RULES.—

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



1       tity’, ‘person’, ‘domestic’, and ‘foreign’ have the  
2       meaning given those terms in section 835(c) of the  
3       Homeland Security Act of 2002 (6 U.S.C. 395(c)).

4               “(2) SPECIAL RULES.—In applying subsection  
5       (b) of this section for purposes of subsection (a) of  
6       this section, the rules described under 835(c)(1) of  
7       the Homeland Security Act of 2002 (6 U.S.C.  
8       395(c)(1)) shall apply.”.

9               (2) CLERICAL AMENDMENT.—The table of sec-  
10       tions at the beginning of chapter 137 of title 10,  
11       United States Code, is amended by inserting after  
12       the item relating to section 2339 the following new  
13       item:

“2340. Prohibition on awarding contracts to inverted domestic corporations.”.

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

16               (1) IN GENERAL.—The Secretary of the Treas-  
17       ury (or the Secretary’s delegate) shall, for purposes  
18       of section 4713(b)(1)(B)(ii) of title 41, United  
19       States Code, and section 2340(b)(1)(B)(ii) of title  
20       10, United States Code, as added by subsections (a)  
21       and (b), respectively, prescribe regulations for pur-  
22       poses of determining cases in which the management  
23       and control of an expanded affiliated group is to be  
24       treated as occurring, directly or indirectly, primarily  
25       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.

○