ORGANIZATION *for* INTERNATIONAL INVESTMENT
Global Investment Grows America's Economy

October 23, 2014

The Honorable Barbara Mikulski
Chairwoman
Committee on Appropriations
United States Senate
Washington, DC 20510

The Honorable Richard Shelby
Ranking Member
Committee on Appropriations
United States Senate
Washington, DC 20510

The Honorable Hal Rogers
Chairman
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Re: "No Federal Contracts for Corporate Deserters Act of 2014"

Dear Senators Mikulski and Shelby and Representatives Rogers and Lowey:

On behalf of the Organization for International Investment (OFII), I write to express our significant concerns with "No Federal Contracts for Corporate Deserters Act of 2014" **(**S. 2704, H.R. 5278), legislation to prevent the award of federal government contracts to foreign companies based on a broadly expanded definition of an inverted domestic corporation. By preventing U.S. subsidiaries of multinational companies from contracting with the federal government, this legislation would jeopardize American jobs, undermine federal agencies' abilities to effectively operate, and violate the United States' international trade commitments. Given these concerns, OFII urges the Appropriations Committees to prevent this legislation from being included in a larger appropriations bill.

OFII is a business association representing the U.S. subsidiaries of many of the world's leading global companies. The U.S. subsidiaries of companies based abroad directly employ 5.6 million Americans and support an annual U.S. payroll of over $400 billion. OFII works to ensure the United States remains the top location for global companies to invest, increase American employment, and boost U.S. economic growth.

The "No Federal Contracts for Corporate Deserters Act of 2014" establishes a bar on federal government contracting with any foreign incorporated entity, or any of its subsidiaries, that is determined to be an "inverted domestic corporation." The legislation would treat any foreign corporation as an inverted domestic corporation if it acquires, the properties of a U.S. corporation or partnership if either (i) after the acquisition, the former shareholders of the U.S. corporation or partnership own more than 50 percent of the stock of the foreign corporation, *or* (ii) the "expanded affiliated group" that includes the foreign corporation is "directly or indirectly, primarily" managed and controlled in the United States and has significant domestic business activities. This would apply not only to acquisitions going forward but retroactively to all acquisitions made in the past when such rules were neither in place nor even reasonably foreseeable.

OFII has many serious concerns with this legislation and the negative impact it would have on foreign direct investment.

Historic Foreign Companies Inadvertently Impacted

First, the management and control test introduces such a sweeping definition of an inverted company that it would capture and penalize U.S. subsidiaries of historical foreign companies, irrespective of the fact these companies are not expatriated domestic corporations. This would occur because many foreign corporations grow or establish U.S. operations through acquisitions of U.S. companies. If these foreign entities, including the newly acquired U.S. subsidiary or any other member of the combined group, have substantial business in the United States (which is common given the size of the U.S. market) and are "primarily" managed or controlled in the United States, the entity would be labeled as an inverted company, and it and its subsidiaries would be banned from federal contracting. Additionally, this definition would apply to both the prime contractor and subcontractors, creating a burdensome and costly compliance requirement for both U.S. and foreign-based prime contractors that may otherwise not be captured by the expanded definition.

The absence of a rigorous standard for what constitutes "primarily" managed and controlled combined with an ambiguous definition of "expanded affiliated group" could give rise to a wide range of possible interpretations. The legislation could capture global companies with management structures including and ranging from a U.S. citizen serving as the CEO of a foreign company with significant business in the United States; a foreign company that bases its global research and development, supply chain, or other unit headquarters in the United States; a U.S. subsidiary of a foreign company operating as the global group's regional headquarters for all of North America or North and South America; to a foreign corporation that leaves the management of a newly acquired U.S. business in place after the acquisition. These are all commonplace examples of how global companies operate in the United States and around the world and have nothing to do with the legislation's intent to deter domestic corporations from inverting.

Furthermore, this legislation and the new tests for whether a foreign corporation and its subsidiaries are treated as inverted domestic corporations applies to all foreign acquisitions of U.S. companies that have ever been or will be completed. This indisputably retroactive definition, establishing a new vague and subjective standard, is unworkable and will have a freezing effect on foreign investment in the United States as U.S. subsidiaries and their parent companies attempt to determine the impact of the legislation on their operations.

Discourages Foreign Direct Investment and Puts American Jobs at Risk

Overall, the subjective management and control test sets a terrible precedent by punishing global companies for keeping senior management personnel and key management functions in the United States. These are exactly the kind of jobs and functions the United States wants to attract. Basing high-level management and key business units in the United States provides a direct benefit to the U.S. economy and American workers. Keeping these decision makers and functions in the United States helps encourage future investment in the United States and the purchase of local goods and services, creating opportunities for local businesses to become part of a global supply chain and for American workers that provide support services such as marketing. At a time when the U.S. is focused on job creation, Congress should not encourage global companies to move high-level, well-paying jobs overseas.

Undermines Fair Competition and Increases Costs for U.S. Government and Taxpayers

The impact on federal agencies and American citizens from preventing U.S. subsidiaries of foreign companies from fairly competing for federal government contracts should not be understated. Government agencies, including all branches of the military and Veterans hospitals, are likely to be significantly harmed by this ban, losing access to cutting edge innovations, technologies and services, such as highly specialized and essential fire control and security products, energy efficient technologies, software, patient monitoring equipment, and vaccines. In addition, limiting the number of companies eligible to bid on government procurement contracts simultaneously puts thousands of jobs of U.S. workers who provide goods and services to the U.S. government at risk and hinders competition. This will result in higher prices and fewer choices for the U.S. government, all to the detriment of the American public.

Invites International Retaliation and Weakens U.S. Trade Enforcement Efforts

Lastly, this legislation, which effectively excludes only foreign incorporated companies and their subsidiaries from government procurement contracts, would violate the United States' WTO obligations under the Government Procurement Agreement (GPA). The GPA states that countries cannot discriminate against suppliers on the basis of nationality or factors unrelated to a supplier's ability to perform the contract. By disregarding these obligations contained in the GPA and U.S. bilateral free trade agreements, this government contract ban would expose U.S. companies to retaliatory and discriminatory treatment abroad. Furthermore, Congress and the Administration place a high priority on the enforcement of trade agreements, yet this legislation would undermine the United States' credibility on trade enforcement and give foreign countries an opening to dismiss market access concerns raised by the U.S. government.

Restricting access of U.S. subsidiaries to federal government contracts and penalizing companies for investing and creating jobs in the United States is a flawed response to the issue of inversions and it will harm the U.S. economy and American workers. OFII urges the Appropriations Committees to exclude the "No Federal Contracts for Corporate Deserters Act of 2014" or any type of management and control test for federal contractors from legislation to fund the federal government beyond December 11.

Thank you for your consideration.

Sincerely,

Nancy McLernon
President & CEO
Organization for International Investment