



# Homeland Security

**MEMORANDUM FOR:** Department of Homeland Security  
Heads of the Contracting Activities

**FROM:**

  
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Deputy Chief Procurement Officer

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**SUBJECT:** Rescission – Homeland Security Acquisition Regulation (HSAR)  
Class Deviation Number 09-02, Amendment 02; Prohibition on  
Contracting with Inverted Domestic Corporations

**1. Purpose:** The purpose of this memorandum is to rescind HSAR Class Deviation Number 09-02 including amendments 01 and 02.

**2. Effective Date:** October 1, 2010

**3. Background:** The Department of Homeland Security (DHS) Act of 2003 prohibited DHS from contracting with expatriated corporations at 6 U.S.C. 395. This is an enduring prohibition without a sunset provision. The 2008, 2009, and 2010 appropriations acts applied the prohibition government-wide but renamed it as the prohibition on contracting with inverted domestic corporations. Despite the name change, the prohibition was the same as contained in the Homeland Security Act although limited to the funding covered in the individual appropriations act. The prohibition was not included in the 2011 appropriations act or any subsequent appropriations acts covering the Department of Homeland Security, so currently there is no government-wide prohibition against contracting with inverted domestic corporations. Therefore, it is necessary for DHS to revert to the HSAR coverage prohibiting contracts with corporate expatriates for any contract actions funded with appropriations later than FY 2010 to comply with our enduring statutory prohibition.

**4. Acquisition Impact and Required Component Action:** The DHS Contracting Officers shall include HSAR 3052.209-70, Prohibition on Contracts With Corporate Expatriates (JUN 2006), in solicitations/contracts funded with 2004 through 2007 appropriations and funded with FY2010 or later. Solicitations/contracts funded with FY 2008, FY 2009, and FY 2010 appropriations shall include the provision at FAR 52.209-2 and clause at 52.209-10. Components must adjust their contract writing systems accordingly to reflect the HSAR coverage.

**5. Additional Information:** Questions or comments about this class deviation may be directed to Ann VanHouten at (202) 447-5285, or by email at [ann.vanhouten@hq.dhs.gov](mailto:ann.vanhouten@hq.dhs.gov).

Attachments

### **3009.108-70 Prohibition on contracts with corporate expatriates.**

#### **3009.108-7001 General.**

Except as provided in (HSAR) 48 CFR 3009.108-7004, DHS may not enter into any contract with a foreign incorporated entity, which is treated as an inverted domestic corporation under subsection (b) of Section 835 of the Homeland Security Act, 6 U.S.C. 395(b), or any subsidiary of such entity.

#### **3009.108-7002 Definitions.**

As used in this subpart—

*Expanded Affiliated Group* means an affiliated group as defined in section 1504(a) of the Internal Revenue Code of 1986 (without regard to section 1504(b) of such Code), except that section 1504 of such Code shall be applied by substituting 'more than 50 percent' for 'at least 80 percent' each place it appears.

*Foreign Incorporated Entity* means any entity which is, or but for subsection (b) of Section 835 of the Homeland Security Act, 6 U.S.C. 395(b), would be, treated as a foreign corporation for purposes of the Internal Revenue Code of 1986.

*Inverted Domestic Corporation.* A foreign incorporated entity shall be treated as an inverted domestic corporation if, pursuant to a plan (or a series of related transactions)—

- (1) The entity completes the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a domestic corporation or substantially all of the properties constituting a trade or business of a domestic partnership;
- (2) After the acquisition at least 80 percent of the stock (by vote or value) of the entity is held—
  - (i) In the case of an acquisition with respect to a domestic corporation, by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation; or
  - (ii) In the case of an acquisition with respect to a domestic partnership, by former partners of the domestic partnership by reason of holding a capital or profits interest in the domestic partnership; and
- (3) The expanded affiliated group which after the acquisition includes the entity does not have substantial business activities in the foreign country in which or under the law of which the entity is created or organized when compared to the total business activities of such expanded affiliated group.

*Person, domestic, and foreign* have the meanings given such terms by paragraphs (1), (4), and (5) of section 7701(a) of the Internal Revenue Code of 1986, respectively.

### **3009.108-7003 Special Rules.**

The following special rules shall apply when determining whether a foreign incorporated entity should be treated as an inverted domestic corporation.

(a) *Certain stock disregarded.* For the purpose of treating a foreign incorporated entity as an inverted domestic corporation these shall not be taken into account in determining ownership:

(1) Stock held by members of the expanded affiliated group which includes the foreign incorporated entity; or

(2) Stock of such entity which is sold in a public offering related to the acquisition described in subsection (b)(1) of Section 835 of the Homeland Security Act, 6 U.S.C. 395(b)(1).

(b) *Plan deemed in certain cases.* If a foreign incorporated entity acquires directly or indirectly substantially all of the properties of a domestic corporation or partnership during the 4-year period beginning on the date which is 2 years before the ownership requirements of section 835(b)(2) of the Act are met, such actions shall be treated as pursuant to a plan.

(c) *Certain transfers disregarded.* The transfer of properties or liabilities (including by contribution or distribution) shall be disregarded if such transfers are part of a plan a principal purpose of which is to avoid the purposes of this section.

(d) *Special Rule for Related Partnerships.* For purposes of applying subsection (b) to the acquisition of a domestic partnership, except as provided in regulations, all domestic partnerships which are under common control (within the meaning of section 482 of the Internal Revenue Code of 1986) shall be treated as a partnership.

(e) *Treatment of Certain Rights.*

(1) Certain rights shall be treated as stocks to the extent necessary to reflect the present value of all equitable interests incident to the transaction, as follows:

- (i) Warrants
- (ii) Options
- (iii) Contracts to acquire stock
- (iv) Convertible debt instruments
- (v) Others similar interests

(2) Rights labeled as stocks shall not be treated as stocks whenever it is deemed appropriate to do so to reflect the present value of the transaction or to disregard transactions whose recognition would defeat the purpose of Section 835 of the Act.

**3009.108-7004 Waiver.**

(a) The Secretary shall waive the provisions of (HSAR) 48 CFR 3009.108-7001 with respect to any specific contract if the Secretary determines that the waiver is required in the interest of national security.

(b) Contractors shall submit waiver requests to the CPO. A copy of the waiver request or the approved waiver shall be attached with the bid or proposal.

**3009.108-7005 Clause.**

Insert the provision (HSAR) 48 CFR 3052.209-70, Prohibition on Contracts With Corporate Expatriates, in all solicitations and contracts.