

March 5, 2009

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Arlen Specter  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

The undersigned associations and organizations are writing regarding the proposed amendments to the civil False Claims Act (FCA) contained in Section 4 of S. 386, the “Fraud Enforcement and Recovery Act of 2009” (FERA), which are expected to be considered during markup this morning. We acknowledge and appreciate the various changes the sponsors have made to some of the provisions in the legislation, especially to the bill’s conspiracy provision and reverse false claims provision. However, we continue to have serious concerns that the legislation would have many unintended and undesirable consequences, that it contains many ambiguous provisions that would cause years of litigation over the meaning of the statute, and that it would unwisely and unnecessarily expand the scope of liability under the FCA.

For example, the bill specifies retroactive application for new liability in subparagraph B, which may violate the Due Process Clause of the Constitution and would lead to years of litigation affecting hundreds of currently pending cases. The bill also includes a broad and unclear new definition of “obligation” that would also require years of litigation to clarify and that could be misconstrued to impose liability on recipients of federal funds who have not engaged in any conduct that should subject them to treble damages and penalties.

Notwithstanding these and other concerns, the undersigned associations and organizations look forward to working constructively with the sponsors of the legislation to continue to improve the bill’s language as it moves through the legislative process.

Sincerely,

American Council of Engineering Companies  
American Hospital Association  
American Insurance Association  
American Petroleum Institute  
Greater New York Hospital Association  
National Defense Industrial Association  
Property Casualty Insurers Association of America  
TechAmerica  
The Association of American Medical Colleges  
The Coalition for Government Procurement  
U.S. Chamber of Commerce  
U.S. Chamber Institute for Legal Reform

Cc: Members of the Committee on the Judiciary