

April 21, 2009

TO THE MEMBERS OF THE UNITED STATES SENATE:

The undersigned associations and organizations are writing regarding the upcoming floor debate of S. 386, the “Fraud Enforcement and Recovery Act of 2009” (FERA). Our particular concerns are with some of the proposed amendments to the civil False Claims Act (FCA) contained in Section 4 of the bill.

We acknowledge and appreciate the various changes and improvements the sponsors of S. 386 have made to some of the provisions thus far, especially to parts of the bill’s retroactivity provision as well as the overall conspiracy and reverse false claims provisions. However, we still have concerns with the language of the bill as it was reported out of the Senate Judiciary Committee – including the definition of “obligation,” the new definition of “claim,” and the materiality provision. We are encouraged by an amendment that Senator Kyl plans to offer on the floor to clarify “obligation” and we urge you to support that amendment. While it does not alleviate all of our concerns, Senator Kyl’s amendment does help clarify that an actionable “obligation” would not include a contingent or potential duty to pay penalties or fines, and that the legislation only imposes liability for knowing and improper “retention” of an overpayment, as opposed to mere “receipt” of an overpayment. The amendment also uses more narrowly-defined key terms.

We remain concerned, however, about the materiality provision in S. 386. As drafted, the language attempts to do away with the “intent” requirement explained in the Supreme Court’s *Allison Engine* decision. It also provides a potentially broad and unclear new definition of “material” that could require years of litigation to clarify. While parts of the bill’s original retroactivity language has been removed, we are concerned that the bill’s remaining retroactivity language will lead to years of difficult litigation affecting dozens of pending cases. There are serious concerns that retroactive application of any part of the new liability provisions would violate both the Due Process and Ex Post Facto clauses of the Constitution. Accordingly, we believe that all of the changes contemplated by Section 4 should only be applied prospectively.

More fundamentally, we believe that recent court decisions have also eliminated the need for any changes to the Act. The two key precedents that Section 4 of the legislation was designed to overturn – *Custer Battles* and *Totten* – have been reversed. Specifically, the 4<sup>th</sup> Circuit recently reversed the *Custer Battles* decision, and the Supreme Court’s *Allison Engine* decision overturned the “presentment” requirement identified in the *Totten* case. These decisions demonstrate that there is no overarching need for the proposed changes contemplated by Section 4.

The undersigned organizations urge you to give serious consideration to these concerns as the bill is debated and amendments are offered. We look forward to working

constructively with the Senate to improve the bill's language as it is debated on the floor and moves through the legislative process.

Sincerely,

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