

July 15, 2008

The Honorable John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

The Honorable Lamar Smith  
Ranking Member  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

It is our understanding that H.R. 4854 is scheduled for markup on Wednesday, July 16, 2008 in the House Committee on the Judiciary. Accordingly, the undersigned associations and organizations write to express our strong opposition to H.R. 4854, which proposes extensive amendments to the civil False Claims Act, 31 U.S.C. 3729-3733 (“FCA”). These revisions would dramatically expand the scope of liability under the statute, increase its financial penalties, and remove safeguards against unfounded *qui tam* lawsuits. We believe these amendments are unnecessary and will impose enormous burdens on non-profits, universities, hospitals, and businesses of all sizes. If enacted, these provisions will also have adverse impacts on Department of Defense and Department of Homeland Security programs, federally funded construction projects, and other key programs.

The existing False Claims Act already contains powerful mechanisms to achieve the government’s goals. The U.S. government has recovered over \$20 billion in cases brought under the act for false claims against the government and continues enforcement actions today. Even the Department of Justice has expressed the opinion that the FCA works well and is not in need of change. By contrast, the expanded liability and damages provisions of H.R. 4854 would raise companies’ costs of doing business, increase the government’s procurement costs, and interfere with its ability to manage its programs. It will also discourage non-profits and small businesses from participating in government programs and competing for government business. Some of our specific concerns with H.R. 4854 are outlined below.

First, H.R. 4854 would include a new definition of “government money or property” that would lead to a dramatic expansion of the scope of FCA liability. Under H.R. 4854, any person submitting claims to a grantee or other recipient of federal funds could be liable under the statute. Given the broad reach of federal funding, this would effectively displace state contract and tort laws, imposing treble damages and penalties on garden variety contract or fraud claims between small businesses and other private entities that are currently addressed by state contract and fraud laws.

Second, H.R. 4854 would dramatically expand the calculation of treble damages under the FCA. Instead of looking solely to the government’s losses, as is done now, the bill would also allow the recovery of treble the damages sustained by third party “administrative beneficiaries.” The bill would also improperly protect the interest of relators at the expense of the harmed third party, by providing that the relator’s share is to be paid before amounts are returned to the injured third party.

Third, H.R. 4854 would unfairly exempt *qui tam* plaintiffs (but not DOJ) from the requirement of Federal Rule of Civil Procedure 9(b) that all persons asserting fraud actions in federal court must plead the elements of fraud with particularity. The sensible purpose of Rule 9(b) is to prevent abusive plaintiffs from using conclusory allegations of fraud to embroil defendants in litigation and to give defendants sufficient information to prepare a defense. There is no basis for holding relators to a lower standard than all other litigants in federal court, and certainly no basis for holding relators to a lower standard than DOJ in FCA actions.

Fourth, the legislation would impose liability for retaining overpayments, giving employees who discover overpayments the incentive to file a whistleblower lawsuit first and inform their employers later, if ever. This change will pose significant disruption to government programs. Many contracts and grants have provisional payment provisions with a periodic settlement feature. This approach is critical to efficient functioning of the program. Audits occur regularly to assure that settlements are made. This proposal would eliminate the government's ability to manage these programs and require absolute certainty with every payment.

Fifth, H.R. 4854 extends the statute of limitations from 6 to 10 years, far longer than almost all other federal limitation periods. The bill would subject defendants to claims involving ten-year-old events, after recollections have dimmed and evidence may no longer be available. The bill would unfairly allow the government to revive stale claims by adding otherwise time-barred claims to *qui tam* cases, including breach of contract claims and other claims that otherwise would have been barred for years.

Sixth, H.R. 4854 would strip defendants of the ability to challenge unfounded *qui tam* lawsuits that are based on publicly available information. The purpose of the current bar on such suits is to reward the original whistleblowers who are genuinely responsible for bringing fraud to light, and to prevent "parasitic" litigants who are not themselves responsible for exposing fraud. H.R. 4854 would prevent defendants from policing this distinction. Under H.R. 4854, only the government could challenge whistleblowers – imposing substantial burdens on government agencies in non-intervened *qui tam* lawsuits. These non-intervened cases already are a huge burden to federal agencies, and H.R. 4854 would add substantially to that burden. Moreover, these non-intervened cases are ones that the DOJ has already decided are non-meritorious, and that lead to extremely low levels of recoveries – less than two percent of the total amount recovered under the FCA. The best mechanism for getting rid of these non-meritorious cases is the existing public disclosure provision, which deputizes defendants to seek dismissal of parasitic *qui tam* lawsuits.

Seventh, the legislation encourages U.S. government employees to file *qui tam* suits. Allowing government employees to benefit financially from information they discover on the job would create significant ethical concerns and conflict-of-interest problems, and undermine public trust in the government. It would seriously disrupt the government's ability to manage its programs, and turn every difference of opinion between managers and employees into a potential *qui tam* action.

Finally, H.R. 4854 provides for retroactive application, which creates serious due process and other constitutional concerns. Litigation over the constitutionality of the legislation would tie up the courts for years.

In conclusion, we believe that the current statute is already sufficiently powerful to achieve the government's goals and that any new legislation is unwarranted. We urge you to reach the conclusion that H.R. 4854 is unnecessary to protect the federal fisc, and would amend the FCA in ways that do not serve the interests of the United States, its partners in the greater business community, those in the educational and non-profit sectors, or taxpayers. Accordingly, we oppose H.R. 4854 and urge you not to report it out of Committee.

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  
BlueCross BlueShield Association  
Federation of American Hospitals  
Information Technology Association of America  
National Association of Manufacturers  
National Association of Mutual Insurance Companies (NAMIC)  
National Association of Wholesaler-Distributors  
National Federation of Independent Business  
Professional Services Council  
Property Casualty Insurers Association of America  
The Associated General Contractors of America  
The Coalition for Government Procurement  
U.S. Chamber of Commerce  
U.S. Chamber Institute for Legal Reform

Cc: Members of the House Committee on the Judiciary