

April 21, 2009

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

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

The undersigned associations and organizations are concerned with H.R. 1788, the “False Claims Correction Act of 2009,” which proposes extensive amendments to the civil False Claims Act, 31 U.S.C. 3729-3733 (“FCA”). These revisions would 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 small businesses. If enacted, these provisions will also have adverse impacts on Stimulus Act programs, Department of Defense and Department of Homeland Security programs, federally funded construction projects, and other key programs.

The current False Claims Act works well to achieve the government’s goals. The U.S. Government has recovered more than \$21 billion in cases brought under the Act for false claims against the Government and continues enforcement actions today. In the past, the Department of Justice has expressed the opinion that the FCA works well and is not in need of dramatic, wholesale change. By contrast, the expanded liability and damages provisions of H.R. 1788 would raise companies’ costs of doing business, increase the Government’s procurement costs, and interfere with its ability to manage its programs. It would also discourage non-profits and small businesses from participating in Government programs and competing for Government business. Some of our specific concerns are outlined below.

First, H.R. 1788 would include an expansive new definition of “Government money or property” that is entirely unnecessary. The two key precedents that the legislation was designed to overturn – *Custer Battles* and *Totten* – have been reversed. Specifically, the 4th 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 need for the proposed changes to the liability provisions.

Second, H.R. 1788 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 all elements of fraud with particularity. The sensible purpose of Rule 9(b) is to prevent abusive plaintiffs from using conclusory allegations of fraud. There is no basis for holding relators to a lower standard than all other litigants in federal court, or holding relators to a lower pleading standard than DOJ.

Third, H.R. 1788 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. 1788 would prevent defendants from policing this distinction. Under H.R. 1788, 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. 1788 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.

Fourth, the legislation would impose liability for failure to disclose overpayments, even where the failure was not “knowing.” This is a radical departure from the existing Act, which imposes liability solely for “knowing” conduct, and would unfairly impose treble damages and penalties on those who act merely negligently. Moreover, the overpayment provision would inject False Claims Act litigation into the many existing procedures and practices in federal law and regulation through which the government reconciles under- and overpayments on a routine and scheduled basis.

Fifth, H.R. 1788 would 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.” This would lead to windfall recoveries for the Government. 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 paid before amounts are returned to the injured third party.

Finally, H.R. 1788 provides for retroactive application, which would create serious due process and other constitutional concerns. Litigation over the constitutionality of the legislation would tie up the courts for years.

In conclusion, the undersigned organizations believe that the current statute is working appropriately and that any new legislation is unwarranted and urge you not to report H.R. 1788 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
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

Cc: Members of the House Committee on the Judiciary