March 31, 2008

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

Dear Mr. Chairman:

We fully support the government’s ability to fight fraud and recover damages under the False Claims Act statutes.

I write you today to express the reservations of the university community about unintended consequences associated with the new authorities provided for in S. 2041, the False Claims Correction Act of 2007.

The attached document summarizes our concerns and I transmit it to you in advance of the Senate Judiciary Committee’s Thursday mark-up.

We hope that, as this bill progresses, we will have an opportunity to discuss our concerns in greater detail and discuss modifications that will accommodate both the government’s need to fight fraud and recover wasted funds and the ability of our universities to pursue their research and health care missions.

Sincerely,

Robert M. Berdahl
President
The False Claims Correction Act of 2007 (S. 2041), seeking to amend the Federal False Claims Act, will likely have a negative impact on colleges and universities. It may tip the existing system of checks and balances in favor of multiple and unduly punitive recoveries for the government and career whistleblowers.

**Damages.** The bill proposes to significantly expand the damages recoverable for even an inadvertent charge to the government. The bill seems to suggest the existence of a system of charges that are simple and straightforward to determine. This is not the reality. The administration of government contracts at universities, on both the research and patient care sides, often involves highly complex research and medical care decisions. University hospitals and clinics take care of some of our nation’s sickest patients, and universities conduct some of the most promising and complicated scientific research. In nearly every dispute about whether a university has properly charged the government, the damages initially thought to have occurred are reduced after the government acquires an understanding of the complexity of the charge and the variety of proper accounting methods. Under the bill, the government will recover three times the total paid on claim, even if within the total payment a substantial portion of the charges are valid.

This is a particular problem in the research area, as research universities usually obtain funding for approved federal research projects through periodic large “drawdowns” covering all grants from a single sponsor. If each drawdown is a claim, even a $5 overcharge in a $5 million drawdown might result in a $15 million recovery. Even if the government would refrain from taking so extreme a position, the *qui tam* provisions of the False Claims Act leave the choice of damage theories to relators and their attorneys, whose interests in maximizing recovery in each case can drive litigation. The plaintiff would be positioned to recover far more than the amounts actually lost due to improper charges; he or she will be able to recover a multiple of the valid charges of universities for important research and medical care. In essence, the bill implies that greater precision exists in charging on complex research and medical care than is the case. Such precision will remain unattainable so long as universities address highly complicated problems in science and medical care. The consequence of excessively punitive recoveries will be to take funding away from research and health care.

**Overpayments.** As noted above, the way in which universities typically draw down dollars from federal research sponsors is distinctly different from other industries. Universities receive payments through large drawdowns on sponsoring agency letters of credit, and those drawdowns are based on the charges that have been made to the grants of the sponsoring agency since the last drawdown. There can be literally thousands of charges to the grants of a single sponsor between drawdowns, and although universities have internal controls in place to help ensure that all charges are accurate, some internal controls come into play later in the grant term, up to and including a final review of grant charges at closeout. As a result, it is understood that during the term of a federal sponsored project there may at any given time be undercharges and overcharges, and university systems are designed to help ensure that any incorrect charges are adjusted, through cost transfers or otherwise, when they are detected. Federal sponsors are completely aware of how these systems work, and recognize that in reality, given the large volume of transactions and the decentralized nature of the grant charging process, the systems
could not work otherwise. In other words, processes are in place to discover overcharges (or undercharges) and to correct them once discovered. During the temporary period of any overcharge and on the assumption that these charges were simple to assess, the government might now seek to claim a fraudulent charge. Temporary overcharges that are subject to correction in the normal course of a university’s accounting procedures should not expose universities to false claims.

**Retroactivity.** In another over-reaching provision of the bill, the sponsors attempt to make the law retroactive to all pending cases, even to cases under seal, and therefore unknown, and cases on appeal. This is fundamentally unfair and would be an abuse of the government’s power.

**Public Disclosure.** Precluding universities and others from raising public disclosures as a defense unfairly denies them the legitimate opportunity to avoid burdensome whistleblower litigation that doesn’t serve the purposes of the *qui tam* statute. It is unfair to require universities to incur the cost of defending whistleblower lawsuits concerning publicly disclosed allegations of fraud when the government chooses not to pursue them despite having been twice put on notice: (1) by the public disclosure and (2) by the subsequent filing of a *qui tam* action.

**Statute of Limitations.** It is unfair to extend the statute of limitations for false claims beyond any other federal statute of which we are aware. It is particularly unfair if applied retroactively in pending cases awaiting trial or in discovery.

**Conclusion.** The university community acknowledges the government’s right to recover damages for fraudulent or false claims. We hope that, as this legislation proceeds, some discussion of the unintended consequences of S. 2041—as currently drafted—is possible.

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