July 15, 2008

The Honorable John Conyers, Jr.
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Conyers:

The Association of American Universities (AAU) comprises 60 leading U.S. research universities which together perform 60 percent of federally funded university-based research. Many of our member institutions also have academic medical centers that provide clinical care under Medicare and Medicaid.

We stand for principles of academic integrity and financial honesty. We fully support the government’s efforts to fight fraud and abuse of federal programs and to recover damages under the statutes of the False Claims Act.

I write you in advance of tomorrow’s markup of H.R. 4854, the False Claims Act Correction Act of 2007, to express the research university community’s strong reservations about the bill’s unintended consequences. We believe the legislation, as currently drafted, will frustrate our members’ efforts to monitor their financial relationships with the government through strong internal controls and well-established and rigorous federal compliance, audit and reconciliation processes.

Attached please find a two-page explanation of our concerns. Please also find suggested legislative language to address the overpayments and the public disclosure issues in H.R. 4854.

We have appreciated the consideration that Committee staff have given our concerns since the beginning of July. We hope that, as this bill progresses, we will have more time and opportunity to discuss our concerns and develop a workable solution. To be sure, the federal government must be able to recover damages when fraud occurs. But any new statute must recognize the unique nature—and vulnerability to frivolous lawsuits—of research universities that receive federal research grants and provide federally reimbursed clinical care.

Sincerely,

Robert M. Berdahl
President

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President
H.R. 4854
False Claims Correction Act
Impact on Colleges and Universities

The False Claims Correction Act of 2007 (H.R. 4854) will likely have a negative impact on colleges and universities. Because the complexity and fluidity of the financial relationships between research universities and the Federal agencies, universities will likely become an even more inviting target for whistleblowers and attorneys eager to test the broad reach of the new statute. The legislation would tip the existing system of checks and balances in favor of litigation pursued by whistleblowers and plaintiffs’ attorneys and against the orderly pursuit of scientific research.

1. Liability Upon Receipt of Overpayments. (Section 2, new § 3729(a)(1)(C)). The manner in which universities typically receive funds from federal research sponsors is distinctly different from contract or fee-for-service payments made to other types of entities. 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 federally 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; H.R. 4854 would empower whistleblowers to disrupt, and cause prosecutors and investigators to disrupt, these orderly regulatory processes. During the temporary period of any overcharge and on the assumption that these charges were simple to assess, a whistleblower could allege, under the new § 3729(a)(1)(C), 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 Act liability.

2. Abolition of the Public Disclosure Defense. (Section 3(d), new § 3730(e)(4)). Precluding universities and others from raising public disclosures as a defense would unfairly deny them the legitimate opportunity to avoid burdensome whistleblower litigation that doesn’t serve the purposes of the qui tam statute. It would be inappropriate 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. Worse still, the new definitions of “based upon” and “public disclosure” would permit to be pursued lawsuits by individuals who are not whistleblowers, which is especially problematic in conjunction with the limitation on disclosure in “federal” proceedings as opposed to statute or local proceedings.
3. Special, Unfair Pleading Rules for Relators. (Section 4(e), new § 3730(e)). While seeking to strengthen the “government’s principle weapon against fraud,” the bill would confer on relators a status unavailable to other litigants who bring fraud claims in federal court. The bill effectively exempts whistleblowers from the requirement that fraud claims be pled with particularity under Rule 9(b) of the Federal Rules of Civil Procedure. Every Circuit has held the government and qui tam plaintiffs to the same pleading requirements that are applicable in every other fraud plaintiff. That rule is founded in well-established common law principles requiring a minimum amount of detail be know to the plaintiff as a means to protect defendants from slap suits based on unfounded, scandalous allegations of improper conduct. There is no principled basis to strip qui tam defendants of this protection.

4. Unnecessary Amendments Guaranteed to Expand Whistleblower Litigation. (Section 2, new § 3729(c)). Proposed new Section 3729(c) appears drafted to place some limitation on the manner in which Courts interpret, construe and apply the statute. Since Courts already purport to impose liability only on the basis of elements set out in the statute, the new provision will unnecessarily launch a new round of costly and burdensome litigation in declined qui tam cases across the country as parties, primarily whistleblowers, test every jury instruction and every articulation of a False Claims Act standard anew against the words of the statute. The bill ambiguously suggests that unspecified “elements” of common law fraud have been engrafted onto the statute, apparently by federal courts. Universities frequently battle relators over issues as wide-ranging as materiality, implied certification and conditions of payment all of which derive from the language of the statute, many of which have analogs at common law. The new provision would re-ignite litigation of resolved legal issues, like when these standards apply, giving rise to uncertainty and resulting legal costs for Universities and others alike.

5. Statute of Limitations. (Section 4(a), new § 3731(b)(1)). 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.
AVOIDING UNINTENDED CONSEQUENCES

QUI TAM FOR OVERPAYMENTS

Amend Section 3 of H.R. 4854 as follows:

Section 3. CIVIL ACTIONS FOR FALSE CLAIMS.

(d) CERTAIN ACTIONS BARRED.—Paragraph (4) of Section 3730(e) of title 31, United States Code, is amended as follows—

* * * * *

[To insure an action or investigation fro retention of an overpayment is not commenced prematurely, add the following:]

“(5) No action shall be brought for a violation of section 3729(a)(1)(G) of this subchapter based on an alleged overpayment—

(A) where a means or process of payment reconciliation, periodic or otherwise, is applicable to payments received by a defendant, including an annual cost report, a monthly, quarterly, annual or other scheduled reconciliation statement, or a final accounting or report under a grant or contract, unless and until the recipient has failed to account for the alleged overpayment through that means or process; or

(B) where a claim remains open or subject to re-opening by statute, regulation, or contract for a defined period during which there is an opportunity to correct any payment thereon, unless and until the period for correcting payment has expired.”
AVOIDING THE UNINTENDED CONSEQUENCES

PRESERVING INTERNAL WHISTLEBLOWER PROTECTIONS

Amend Section 3 of H.R. 4854 as follows:

Section 3. CIVIL ACTIONS FOR FALSE CLAIMS.

(d) CERTAIN ACTIONS BARRED. — Paragraph (4) of Section 3730(e) of title 31, United States Code, is amended as follows—

* * * *

[To insure fair notice under an employer’s own whistleblower policies and an opportunity to cure, add the following:]

“(6) No person may proceed against an entity that is his or her employer or principle under sub-paragraph (b)(4)(B)(ii) unless and until that person demonstrates to the Court that, before bringing the action,

(A) that person disclosed in writing substantially all material evidence and information that the person possessed that relates to each alleged violation of Section 3729(a) upon which the action is based to

(i) a compliance officer having authority to investigate the allegations on behalf of the employer or principle who the person believes is not culpable of a violation upon which the action is based, or

(ii) a person having supervisory authority over the person who the person believes is not culpable of a violation upon which the action is based, and

(B) the entity failed to take action to investigate and report the violation for a period of 90 days. The Court may dismiss, with prejudice to the person, any action brought by a person who fails to comply with this sub-section on its own motion or on motion of a Defendant.”