April 20, 2009

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. AAU stands for the 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 Wednesday’s markup of H.R. 1788, the False Claims Act Correction Act of 2009. As I did during the House Judiciary Committee’s consideration of H.R. 4854 during the 110th Congress, I wish to express the research university community’s strong reservations about the pending bill’s unintended consequences. We believe that H.R. 1788, 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 compliance, audit and reconciliation processes.

Before detailing our concerns, I would note that the original justification for this legislation has been addressed by the judicial process. The two court decisions that the Committee’s bill seeks to correct have recently been reversed. The expanded definition of “government money or property” provided for in H.R. 1788 is now unnecessary as the Custer Battles decision was overturned by the 4th Circuit. Similarly, the “presentment” precedent of the Totten case has been reversed in the Supreme Court’s Allison Engine decision. We respectfully submit that, as a result of these decisions, the judicial process has been affirmed and legislation to change existing liability statutes is unnecessary.

Our specific concerns with H.R. 1788 remain the same as in last year’s version.

As currently drafted, H.R. 1788 would exempt qui tam plaintiffs (and not the Department of Justice) from Federal Rule of Civil Procedure 9(b) that all relators asserting fraud in federal court must plead all elements of fraud with particularity. This change almost certainly exposes non-profit institutions such as universities and hospitals to abusive lawsuits by holding relators to a lower standard of evidence than all other potential litigants including, most importantly, the federal government. As
with judicial opinions reversing those that led to the Committee's concern on other issues, several Courts have corrected the Rule 9(b) standard and pulled back from the overly stringent standard from which this proposal arose, obviating the need for this unprecedented change.

The Committee’s bill would prevent defendants from being able to challenge unfounded qui tam lawsuits that arise from publicly available information. Such a change would penalize original whistleblowers who discover and expose fraud by inviting additional “parasitic” and frivolous lawsuits filed by, in the most egregious cases, relators who have merely read a newspaper article. Taking the right to challenge such copycat lawsuits away from defendants and investing it solely with the government not only leaves defendants far more vulnerable but also significantly increases the burden on the Department of Justice to disqualify cases it has already determined to be unworthy of prosecution.

H.R. 1788 would impose liability for inadvertent retention of overpayments, even if such overpayment was not “knowingly” kept. Aside from the fact that universities and academic medical centers have rigorous reconciliation systems to settle federal accounts in an accurate and timely matter, the Committee draft makes no distinction between inadvertent overpayment retention—which would almost certainly be identified and rectified—and a conscious attempt by an individual or individuals to keep overpayments.

Finally, H.R. 1788 would provide for retroactive application of its provisions, with quite serious due process and constitutional consequences. It is likely that such a provision, if passed into law, would tie up the federal court system in needless litigation for years to come.

During the Committee’s consideration of H.R. 4854 last year, we were grateful for several opportunities to discuss our concerns. We regret that we have had no such opportunity this year. We do hope the Committee will consider our concerns as expressed above and be willing to work with the research university community going forward. Please know that research universities understand and agree that the federal government and taxpayers must be able to recover damages when federal dollars are fraudulently misappropriated. Please also consider the unique nature and vulnerability of research universities to frivolous and expensive lawsuits.

Sincerely,

Robert M. Berdahl
President

cc: House Judiciary Committee