April 23, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C.  20510

Dear Chairman Leahy:

As Senate consideration of S. 386, the “Fraud Enforcement and Recovery Act of 2009,” continues, I contact you to provide input on behalf of the nation’s leading research universities.

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.

First, I wish to thank you on behalf of the research university community for your support of the Kyl Amendment. We are grateful that the full Senate saw fit to clarify its intention that liability is not to be imposed for retention of overpayments pending return through normal reconciliation processes, and absent evidence of falsity, concealment, or improper action.

Secondly, I want to alert you to continuing reservations we have about other provisions of S. 386. I hope you will consider addressing what we believe are unintended consequences of S. 386 as the legislative process moves forward. As currently drafted:

- The bill contains an overly broad definition of materiality that would take years of litigation to clarify. S. 386 also attempts to correct last year’s Supreme Court Allison Engine Decision regarding “intent” to defraud the government (see below).
- S. 386 contains retroactivity provisions that likely are constitutionally problematic.
- We would argue that S. 386 would expand fraud enforcement statutes in terms that remain subject to interpretation—and consequently, litigation. As current law is a whistleblower-driven and enforced statute, any change to existing statute would result in fresh litigation as new laws are tested.
Finally, I would note that the original justification for the false claims provisions of S. 386 has been addressed by the judicial process. The two court decisions that the current bill seeks to correct have recently been reversed. The expanded definitions provided in S. 386 are now unnecessary, as the Custer Battles decision was overturned by the 4th Circuit. Similarly, the presentment precedent of Totten was 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.

Last year, during Senate consideration of S. 2041, the False Claims Act Correction Act of 2008, we had an opportunity to discuss the unintended consequences of new fraud statutes with Senate staff. We look forward to working with you and your staff as the Senate continues consideration of the fraud provisions of S. 386 as well as S. 458, The False Claims Act Clarification Act of 2009.

Sincerely,

Robert M. Berdahl
President

cc: United States Senate