

April 2, 2008

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

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

The undersigned associations and organizations write to express our strong opposition to S. 2041, which proposes extensive amendments to the civil False Claims Act, 31 U.S.C. 3729-3733 (“FCA”). These revisions would dramatically 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, as well as virtually any organization that does business with the Federal government. If enacted, these provisions will also have adverse impacts Department of Defense and Department of Homeland Security programs, federally funded construction projects, and other key programs.

The current False Claims Act works well as currently crafted. The U.S. Government has recovered over \$20 billion in cases brought under the Act for false claims against the Government and continues enforcement actions today. Even the Department of Justice has expressed the opinion that the FCA works well and is not in need of change. Moreover, the expanded liability and damages provisions of S. 2041 would raise companies’ costs of doing business, increase the Government’s procurement costs and interfere with its ability to manage its programs. It will discourage non-profits and small businesses from involvement with Government programs and competing for Government business as well. Some of our specific concerns with the language of the original substitute amendment to S. 2041 (circulated prior to the Easter recess) are outlined below.

First, the expansion of the definition of “claim” and removal of any requirement that claims be presented to the United States will significantly expand the reach of the underlying statute. Under S. 2041, any person submitting claims to a grantee or other recipient could be liable under the statute, even if no claims are ever presented to the Government or its agents. This would effectively displace State contract and tort laws, imposing treble damages and penalties on garden variety contract or fraud claims between small businesses and other private entities that are currently addressed by State contract and fraud laws.

Second, the language in the substitute amendment would dramatically expand the way recoveries are calculated under the FCA. Instead of looking to the Government’s actual loss, as is done now, the bill would allow the recovery of treble “the amount of money or property paid or approved because of the act of” the defendant. This change might grant to the Government enormous windfalls because it might be entitled to recover treble the amount of a contract or claim even in those cases where it suffered no loss at all. Thus, a person committing what may

be considered a very minor regulatory violation that causes the government no loss could be liable for treble the full contract amount, contrary to current law. This proposed change would transform the FCA into even more of a punitive statute than it already is and possibly trigger constitutional problems under the Eighth Amendment's prohibition against "excessive fines."

Third, the legislation re-defines the type of "obligations" actionable under the FCA's reverse false claim provision to include not only "fixed" duties, but also "contingent" duties. This means that, contrary to current law, the FCA would permit *qui tam* plaintiffs to bring lawsuits based on alleged underpayment of customs duties or other duties that are uncertain until completion of administrative appeals. This amendment would, in practice, allow *qui tam* plaintiffs a private right of action to enforce the customs laws, and could permit recovery of treble the amount of the underpayment owed.

Fourth, the substitute amendment would extend the statute of limitations from 6 to 10 years, far longer than almost all other federal limitations periods. The bill would subject defendants to claims involving ten-year-old events, after recollections have dimmed and evidence may no longer be available. The bill would unfairly allow the Government to revive stale claims by adding otherwise time-barred claims to *qui tam* cases, including breach of contract claims and other claims that otherwise would have been barred for years.

Fifth, the bill would strip defendants of the ability to challenge unfounded *qui tam* lawsuits that are based on publicly available information. Under S. 2041, 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 S. 2041 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.

Sixth, the legislation encourages U.S. Government employees to file *qui tam* suits. Allowing Government employees to benefit financially from information they discover on the job would create significant ethical concerns and conflict-of-interest problems, and undermine public trust in the Government. It would seriously disrupt the Government's ability to manage its programs, and turn every difference of opinion between managers and employees into a potential *qui tam* action.

Finally, S. 2041 provides for retroactive application, which creates serious due process and other constitutional concerns. Litigation over the constitutionality of the legislation would tie up the courts for years.

While we understand that new versions of the legislation may attempt to address some of these concerns, we do not believe that they will be able to prevent the far-reaching negative effects that S. 2041 will have. We ultimately believe that the current statute is working appropriately and that any new legislation is unwarranted. We urge you to reach the conclusion that S. 2041 is unnecessary to protect the federal fisc, and would amend the FCA in ways that do not serve the interests of the United States, its partners in the greater business community or

those in the educational and non-profit sectors. Accordingly, we oppose S. 2041 and urge you to not report it out of Committee.

Sincerely,

Aerospace Industries Association
America's Health Insurance Plans (AHIP)
American Council of Engineering Companies
American Insurance Association
American Petroleum Institute
American Tort Reform Association (ATRA)
Association of American Medical Colleges
Information Technology Association of America
National Association of Mutual Insurance Companies (NAMIC)
National Association of Wholesaler-Distributors
National Defense Industrial Association
National Federation of Independent Business (NFIB)
Professional Services Council
The Associated General Contractors of America
The Coalition for Government Procurement
U.S. Chamber of Commerce
U.S. Chamber Institute for Legal Reform

Cc: Members of the Committee on the Judiciary