October 27, 2021

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Grassley:

We, the undersigned, write to express our concerns with and opposition to S. 2428, the "False Claims Amendments Act of 2021" (FCAA), as it would be amended by the manager's amendment. While we appreciate the improvements this amendment makes to S. 2428 as it was introduced, the amended bill still would contain provisions that will facilitate meritless *qui tam* litigation.

The False Claims Act (FCA) is an important civil statute that prohibits the submission of false claims to the government. The law is a strong deterrent to fraud, as it allows the federal government to recover its losses plus impose severe penalties when it makes payments because of fraud. However, the statute does have problems and can be abused by plaintiffs who bring meritless claims. Rather than address these problems, the amended version of S. 2428 would exacerbate some of them.

Under the FCA, the government can assert that false claims have occurred where there have been alleged violations of various federal laws. The FCA also gives private parties – called "*qui tam* relators" – the ability to bring suit on behalf of the government under certain circumstances. Relators in FCA cases are entitled to a share of any recovery, ranging from 15 to 30 percent. Violations of the FCA are subject to treble damages plus statutory, per-claim penalties of $11,665-$23,331 (updated periodically for inflation). Defendants that violate the FCA may also be subject to administrative penalties and exclusion from participation in federal programs. Because of the potential for severe penalties, defending against *qui tam* actions is high-risk and costly, often forcing defendants to settle even if they have done nothing wrong. Furthermore, the FCA's financial incentives propel some relators to file questionable *qui tam* actions in the hopes of negotiating a nuisance settlement.

The FCAA, as amended, would exacerbate the problem of excessive FCA litigation in three ways. First, it could undermine the U.S. Supreme Court's unanimous 2016 decision in *Universal Health Services v. U.S. ex rel Escobar*. The Court ruled that because of the FCA's potential penal application, it could not be used to punish garden-variety breaches of contract or regulatory violations. The Court stated that an alleged misstatement or misrepresentation had to be material to the government's decision to pay a claim, which is a rigorous inquiry. A plaintiff had to prove that it went to the very essence of the bargain between the government and the private party. Regarding materiality, the manager's amendment to S. 2428 is much improved from the burden-shifting approach contained in the introduced bill. However, it would still undermine *Escobar's* rigorous test for materiality and make it more difficult to dismiss meritless FCA cases.

Second, the bill, even as amended, would narrow the ability of the Department of Justice (DOJ) to dismiss problematic *qui tam* suits that it finds to be meritless. *Qui tam* cases are brought in the name of the U.S. government, and the government is in the best position to evaluate whether a claim by a private party will waste taxpayer dollars or conflict with federal programs. The DOJ has

used this authority sparingly and only for cases it has found to be truly problematic: in the last few years, it has moved to dismiss only 4% of all *qui tam* cases. During the same time, it has recovered nearly $12 billion dollars under the FCA. Circumscribing the DOJ's authority in this way also would undermine the FCA's constitutionality.

Finally, there is no temporal or other limit on the bill's backward-looking anti-retaliation provision for former employees. An employer may validly terminate an employee, including a *qui tam* relator, for performance issues that are unrelated to their status as an FCA plaintiff, and the employer can lawfully communicate these valid reasons to another prospective employer.

Although we appreciate the improvements that the manager's amendment makes to the introduced version of the FCAA, the amended bill is still problematic. We hope to be able to work with members of the committee to address our concerns.

Sincerely,

AdvaMed -- The Advanced Medical Technology Association
American Institute of CPAs
Ambulatory Surgery Center Association
American Hospital Association
Civil Justice Association of California
Federation of American Hospitals
Florida Chamber Litigation & Regulatory Reform Center
Healthcare Leadership Council
Kentucky Chamber of Commerce
Lawsuit Reform Alliance of New York
Louisiana Coalition for Common Sense
National Association of Manufacturers
Ohio Chamber of Commerce
Pennsylvania Chamber of Business and Industry
Pennsylvania Coalition for Civil Justice Reform
Pharmaceutical Research & Manufacturers of America
Small Business & Entrepreneurship Council
The Florida Justice Reform Institute
The State Chamber of Oklahoma
The West Virginia Chamber of Commerce
U.S. Chamber of Commerce
U.S. Chamber Institute for Legal Reform
Washington State Liability Reform Coalition
Wisconsin Civil Justice Council
Wisconsin Manufacturers & Commerce

cc: Members of the Senate Committee on the Judiciary