

October 29, 2004

Re: Section 5091 of House-passed version of S. 2845, the "9/11 Recommendations Implementation Act"

Dear Conferee:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members throughout the country, I write to express our concerns regarding Section 5091 of the House-passed version of S. 2845, the "9/11 Recommendations Implementation Act." As Chair of the ABA Section of Administrative Law and Regulatory Practice, I have been authorized to express the ABA's views on this important matter. These concerns are similar to those that we conveyed to the House Judiciary Committee on March 5, 2004 in connection with similar legislation then under consideration, H.R. 338, the "Federal Agency Protection of Privacy Act of 2004."

Section 5091, like the previous legislation, would require federal agencies to formally consider the impact that certain new regulations will have on the privacy of individuals. Among other things, Section 5091 would: (1) require agencies to prepare an initial privacy impact analysis for certain proposed regulations pertaining to the "collection, maintenance, use or disclosure of personally identifiable information from 10 or more individuals"; (2) require agencies, after an opportunity for public comment, to prepare a final privacy impact analysis that describes the steps that were taken to minimize the significant privacy impact of these proposed regulations and that justifies the alternative chosen by the agency with respect to privacy; (3) permit judicial review of the adequacy of an agency's final privacy impact analysis; and (4) require agencies to periodically review rules that have either a significant privacy impact on individuals or a privacy impact on a significant number of individuals.

The ABA certainly agrees that the American public should be protected from unjustified or unintended invasions of privacy by the federal government through legislative enactments, executive orders, regulatory action and other appropriate measures. While we applaud the purpose of Section 5091, we are writing to express our opposition to this Section because we do not believe that the need for rulemaking privacy impact analyses has been demonstrated or that imposing such a requirement would, on balance, prove useful in protecting privacy rights.

In February 1992, the ABA House of Delegates adopted a formal policy position concerning rulemaking impact analyses. In adopting this policy, the ABA urged the President and Congress to: exercise restraint in requiring rulemaking impact analyses; assess the usefulness of existing and planned analyses; and ensure agencies' adherence to recommendations of the ABA and the Administrative Conference of the United States regarding such impact analyses requirements.

The ABA adopted this policy in an effort to address the virtual explosion in analytical requirements that have been imposed on the rulemaking process in recent years and in the belief that too many such requirements detract from the seriousness with which any requirement is taken. In our view, before establishing a new regulatory impact analysis, the President and Congress should assess whether the proposed new analytical requirement would benefit the public by improving the rulemaking process.

The ABA does not believe that the privacy impact analysis required by Section 5091 would meet this test for several reasons. First, requiring an agency to undertake a privacy impact analysis does little, in and of itself, to protect the public from unjustified or unintended invasions of privacy by the federal government. Second, a general requirement to conduct a privacy impact analysis for new rules would appear to sweep within its ambit many rules that, though they might incidentally involve "personally identifiable information from 10 or more individuals," do not have a significant impact on privacy rights in general. Examples of such rules include federal tire safety standards, EPA rules establishing limits on toxic substances, FDA rules for the approval of prescription drugs, and Commerce Department export control regulations, to name just a few. Third, and perhaps most important, no widespread or persistent pattern of agency regulations unjustifiably or unintentionally invading privacy has been demonstrated that would justify the requirements of Section 5091. Thus, a general requirement for a privacy impact analysis could result in make-work for most agencies with little benefit to the rulemaking process or the public's privacy.

The ABA first raised these concerns in its May 7, 2002 letter to the House Judiciary Subcommittee on Commercial and Administrative Law regarding similar legislation then pending in the 107th Congress, H.R. 4561¹. Since that time, Congress passed legislation known as the "E-Government Act of 2002," P.L. 107-347, which includes a requirement for Privacy Impact Assessments when an agency either uses information technology to gather personally identifiable information or obtains information technology that collects, retains, or disseminates personally identifiable information. *See* Section 208 (44 U.S.C. 3501 note). Restricting a requirement for such analyses to situations such as these, where the potential threat to privacy is particularly critical, may be an appropriate step. With that step taken, however, the need for new, additional privacy impact analyses under Section 5091 is even further reduced.

¹ Although Section 5091 and H.R. 338 are substantially similar to H.R. 4561 in most respects, certain aspects of Section 5091 and H.R. 338, unlike the previous bill, would only apply to proposed rules relating "...to the collection, maintenance, use or disclosure of personally identifiable information from 10 or more individuals, other than agencies, instrumentalities, or employees of the Federal government."

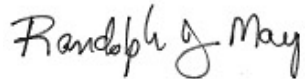
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Federal government action that inadvertently or unnecessarily invades privacy should not be tolerated. However, the ABA is not convinced that sweeping legislation like Section 5091 is the appropriate vehicle for addressing this issue. We therefore urge you not to include Section 5091 in the final conference report for S. 2845. We also stand ready to work with you in the next Congress to craft legislation directed at specific, identified problems of the federal government inappropriately violating the privacy of any individual.

Thank you for considering the views of the ABA on these important matters. If you would like to discuss the ABA's views in greater detail, please feel free to contact me at 202/289-8928 or the ABA's legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,

A handwritten signature in cursive script that reads "Randolph J. May".

Randolph J. May
Chair, ABA Section of Administrative Law
and Regulatory Practice