May 7, 2002

The Honorable Robert Barr  
Chairman  
Subcommittee on Commercial and Administrative Law  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

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 H.R. 4561, the “Federal Agency Protection of Privacy Act.” I ask that this letter and attachment be included in the record of the hearing that was held on May 1, 2002, regarding this legislation.

H.R. 4561 would require federal agencies to formally consider the impact that new regulations will have on the privacy of individuals. Among other things, the bill would: (1) require agencies to include an initial privacy impact analysis with proposed regulations; (2) require agencies, after an opportunity for public comment, to include a final privacy impact analysis that describes the steps that were taken to minimize the significant privacy impact of 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 this bill, we are writing to express our opposition to H.R. 4561 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, and attached for your consideration is a copy of the ABA’s resolution and report on this issue. (The resolution expresses the official policy of the Association; the accompanying report is included for information purposes only.) 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 a privacy impact analysis would meet this test for several reasons. First, requiring an agency to undertake a privacy impact analysis does nothing, 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 would appear to sweep within its ambit the overwhelming majority of rules that do not have any impact on privacy. 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. Finally, and perhaps most important, there does not appear to be a widespread or persistent pattern of agency regulations unjustifiably or unintentionally invading privacy. Thus, a 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.

Federal government action that inadvertently or unnecessarily invades privacy should not be tolerated. However, the ABA is not convinced that sweeping legislation like H.R. 4561 is the appropriate vehicle for addressing this issue. We therefore urge you to move cautiously and engage in additional evaluation and deliberation before taking any further action on this legislation. We also stand ready to work with you 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 more information regarding the ABA’s positions on these issues, please contact our legislative counsel for privacy issues, Ellen C. McBarnette, at 202/662-1767 or our legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,

Robert D. Evans

attachment

cc: All members of the House Judiciary Committee