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April 3, 2003

John D. Graham
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10202 725 17th Street,NW
Washington, DC 20503

Dear Mr. Graham:

I am writing to express some serious concerns about the ''Draft Report to Congress on the Costs and Benefits of Federal Regulation," which includes "OMB Draft Guidelines for the Conduct of Regulatory Analysis and the Format of Accounting Statements" (herein referred to as "Guidelines"). Federal regulations cover a wide variety of topics. Therefore, this document is far-reaching and deserves careful attention. I am most troubled by the Guidelines' bias toward what can be quantified in their proposed analytical requirements for agencies, which I believe could predispose agencies toward weakening our nation's health, safety and environmental regulations.

My most grave concern about the Guidelines is their predisposition toward quantifying, and more specifically monetizing, as much as possible throughout the regulatory process, including monetizing human lives. The Introduction to the Guidelines admits "It will not always be possible to assign monetary values to all of the important benefits and costs" but then goes on to state, "you should exercise professional judgment in determining how important the non-quantifiable benefits or costs may be in tipping the analysis one way or the other, but you should not use non-quantifiables as 'trump cards,' especially in cases where the measured net benefits overwhelmingly favor a particular alternative."

What is stliking about this statement, which becomes somewhat of a refrain in the document, is the ease with which OMB proposes to defer to "professional judgment." When it comes to quantifiable benefits, such as supply, investments, and market share, OMB requires the highest level of precision and rigorous data and analysis. But when it comes to "non-quantifiables," such as freedom or quality of life, OMB is perfectly content to defer to "professional judgment," which is never defined. As a result, non-quantifiables might easily be slighted ln an agency's analysis with little further review.

Furthermore, in the nebulous realm of "professional judgment" there is a predisposition against using non-quantifiables as "trump cards," In other words, non-quantifiables can

never count more than quantifiable items. The Guidelines emphasize that this is "especially" the case "where the measured net benefits ovenvhelmingly favor a particular alternative." Paradoxically, the OMB is, in effect, quantifylng the non-quantifiable, by suggesting it can never be of greater value than the net benefits that can be quantified. In so doing, the Guidelines are strongly disposed against the issuance of regulations that protect public health and safety and the environment, as these are most likely to have many non-quantifiable benefits.

The quantification issue becomes most problematic with respect to human lives. Throughout the Guidelines, the principle of "discounting" is discussed, and there is one section dedicated to this issue. The Guidelines deepen a widening gap between theory and reality by discounting future regulatory benefits, including lives saved. Discounting may make sense when it comes to money, but it trivializes the value of human lives and future generations. The Guidelines admit that there are some ethical considerations when deaIing with future generations (one would hope there would be some when dealing with present human lives as well), it promotes the use of discounting by reasoning that future generations will be wealthier, meaning that benefits will be worth less to them. Yet the Guidelines fail to contemplate that future generations would be more willing to pay more to reduce risk than the current generations. Furthermore, the OMB does not acknowledge that failure to address environmental and other problems could lead to greater poverty in the future. By calculating future lives saved such that they are worth less, discounting creates an automatic bias against public health and safety and environmental regulations, which ofien provide protections over a long period of time. This approach has especially troubling consequences for the elderly, children, and future generations, all of whom are considered less "valuable" in this analytical paradigm.

Second, the Guidelines specify that agencies must conduct a probabilistic analysis, to provide an accounting for the probability of the consequences,or the benefits and/or costs, of regulations. Aside from asking for a theoretical analysis of the future, this requirement embodies a strong disposition toward delaying regulations unlil there is certainty. Indeed, the Guidelines state, "when the uncertainty is due to a lack of data, you might consider deferring the decision, as an explicit regulatory alternative, pending furtherstudy to obtain sufficient data." The Guidelines go on to specify, "Your analysis should not reflect any unstated or unsupported preferences, even for such worthy objectives as protecting public heaIth or the environment." I am concerned that these requirements, and the Guidelines' own unsupported preference toward certainty, will significantly hamper the effectiveness o f our nation's health, safety and environmental laws and regulations. The difficulty of predicting the future and the range of available scientific analysis should not delay reasonable protections of public health and safety and the environment.

Finally, the Guidelines fail to recognize the clear role of Congess in regulations. Indeed, one main purpose of regulations is to implement or interpret laws that Congess passes. Whereas the Guidelines quotes Executive Order 12566 regarding "failures of private markets or public institutions that warrant new agency action," the Guidelines overlook another statement from this Executive Order: "Federal agencies should promulgate only

such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the pubiic, the environment, or the well-being of the American people...." In the Guidelines' section I, "Why Regulatory Action is Needed," the role of the law is barely discussed. Rather, there is a great deal of theoretical discussion about markets, and other economic paradigms and theories. It is necessary for agencies to consider the law in the regulatory process, and the Guidelines woefully overlook this fact. Furthermore, while the Guidelines venture into some discussion of more meaningful reasons for regulation, such as to "protect privacy or promote civil rights or permit more personal freedom," there is no affirmative discussion in section 1regarding the public health and safety and the environment. It is disappointing that these values, often at the very heart of many key regulations, are completely omitted in this section.

For the sake of our public health and safety and the environment, I urge you to consider a more balanced and thoughtful approach to regulations. Thank you for your consideration.

Sincerely,

Richard J. Durbin
United States Senator