



March 31, 2009  
Mr. Peter R. Orszag  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Dear Mr. Orszag,

I am writing in reply to the February 26, 2009 request for comments for a new Executive Order on Federal Regulatory Review, published in the Federal Register at 74 FR 8819. I am an assistant professor of law who specializes in the study of scientific uncertainties in the federal administrative process. My research has focused on the role that such uncertainties play in both administrative and judicial decisionmaking in the area of risk regulation. As such, I welcome this opportunity to provide some thoughts for your consideration.

**Recommendation:** The new Executive Order should expressly remind the OMB, in evaluating regulatory proposals, that uncertainties in the economic analyses may be equal or greater than the scientific uncertainties in the underlying agency risk assessments, and that the mere presence of uncertainties in either context is not itself cause for delaying regulatory action.

In drafting the new Executive Order, care should be taken to place economic uncertainties in perspective with scientific uncertainties in any cost-benefit analyses—or any similar type of economic analyses—that may be used by the OMB. As a number of scholars have observed,<sup>1</sup> interested parties often use the existence of scientific uncertainties as arguments against risk regulation—often without attention to the scale, scope, or nature of the actual uncertainties involved. This problem is compounded when statutory mandates such as the Data Quality Act bring focus to uncertainties in agencies' scientific analyses, without analogous requirements for the OMB to similarly emphasize data quality and uncertainty factors in its cost-benefit analyses as well. The end result of this asymmetry is that, in cost-benefit analyses, the presence of scientific uncertainties in proposed actions to address environmental and public health risks may lead the benefits of taking action to systemically appear to be more ambiguous than the costs associated with those proposed actions, even though the uncertainties involved with the economic analyses may be far greater than the uncertainties involved in the initial risk assessment.

My suggestion, however, is not to require similar levels of uncertainty analysis in OMB's economic assessments. Such a change would simply increase the opportunities for the strategic use of uncertainties to delay regulatory action. Rather, I urge the new Executive Order to adopt an approach that expressly reminds the OMB that analytical and data uncertainties can exist in both its own economic analyses as well as any underlying agency risk assessments, and that the mere presence of uncertainties in either context is not itself cause for delaying regulatory action.

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<sup>1</sup> See, e.g., David Michaels & Celeste Monforton, Scientific Evidence in the Regulatory System: Manufacturing Uncertainty and the Demise of the Formal Regulatory System, 13 J.L. & POL'Y 17, 17 (2005).



Thank you in advance for consideration of this recommendation. If I can be of assistance in any way during the development of the new Executive Order on Regulatory Review, then please do not hesitate to contact me.

Sincerely,

Stephanie Tai  
Assistant Professor of Law  
University of Wisconsin Law School