The 2017 Regulatory Road Ahead

AGC’s primary regulatory objective is to help build a construction-friendly regulatory environment. With President Trump in office, there are many Obama administration executive orders, rules, and other requirements in AGC’s crosshairs. Additionally, with a Republican Congress, opportunity exists to reform the regulatory process to curb executive overreach. Questions remain, nevertheless, as to where traditional business interests and the populist president’s message will overlap and diverge. And, further uncertainty remains with many agency heads not yet confirmed by the Senate.

The regulations and actions discussed in this document include:

- **The Regulatory Short-Term**
  - Contractors Must Comply with the Law, Not Campaign Promises
  - The Regulatory Freeze & “Midnight Regulations”

- **Regulations of Note**
  - U.S. Occupational Safety and Health Administration’s Silica Rule
  - U.S. Occupational Safety and Health Administration’s Recordkeeping Rule (Drug Testing Position)
  - U.S. Department of Labor’s Wage & Hour Division Overtime Rule
  - U.S. Equal Employment Opportunity Commission’s (EEOC) New EEO-1 Report
  - U.S. Environmental Protection Agency’s Stormwater Construction General Permits
  - Army Corps of Engineers’ WOTUS/Wetlands Nationwide Permits
  - Fair Pay and Safe Workplaces (Blacklisting) Executive Order
  - Paid Sick Leave Executive Order

- **The Regulatory Long-Term**
  - Rescind Obama’s PLA Executive Order and Replace it with George W. Bush’s PLA Executive Order
  - Other Obama Executive Orders and Actions
  - The “Midnight Regulations” for Possible Congressional Repeal
  - Other Obama Administration Rules, Policy, Guidance & Enforcement
  - Regulatory Reform Begins

The Regulatory Short-Term

*Contractors Must Comply with the Law, Not Campaign Promises*

We can only be sure of one thing: what the law is today. No construction contractor should ignore the law on the books in reliance of a candidate’s campaign promise. Remember, among candidate Barack Obama’s biggest promises in 2008 was to close the prison at Guantanamo Bay, Cuba. That has not happened. Some of President Trump’s campaign promises may not come to fruition, or take longer to implement than expected. There are no guarantees. Again, construction contractors should not rely on campaign promises when it comes to deciding how their companies comply with the law. The answer is simple; your company must comply or otherwise risk the penalties for violations.

*The Regulatory Freeze & “Midnight Regulations”*

For more information, contact Jimmy Christianson at 703-837-5325 or christiansonj@agc.org.
On January 20, 2017, White House Chief of Staff issued a memorandum putting in place a federal government-wide regulatory freeze with several important caveats. Under this freeze, federal regulatory agencies cannot issue new proposed rules or finalize existing proposals until a Trump-appointee reviews and approve them. However, such proposed and final rules may be issued—without Trump-appointee review—if they relate to “health, safety, financial or national security matters.” The regulatory freeze also temporarily postpones the effective dates for 60 days—on or about March 21—regulations or guidance documents that have been published in the Federal Register but have not taken effect.

In a number of instances, it is difficult to say with much certainty how the regulatory freeze will impact many of the new or upcoming rules impacting the construction industry in the short term. To date, only two cabinet level secretaries—the Departments of Defense and Homeland Security—have been confirmed by the Senate. Below the secretary position, dozens of Trump-appointees must also be confirmed in the various agencies, including the Department of Labor and Environmental Protection Agency, among others. Without these appointees in office, there is limited Trump administration leadership to steer the regulatory helm of the agencies.

Nevertheless, are a number of federal agency regulations that have or are slated to take effect—either partially or wholly—in the coming months. Let’s begin to unravel six regulatory actions—the silica rule, the injury and illness recordkeeping rule (drug testing), the overtime rule, the new EEO-1 Report, the construction general permit and nationwide construction permit—which generally impact construction contractors regardless of owner—public or private. Then, this document will address some rules—Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders—that only impact direct federal construction contractors.

### U.S. Occupational Safety and Health Administration’s Silica Rule

On June 23, 2017, all construction contractors—public and private—will have to comply with OSHA’s new rule on respirable crystalline silica. The rule reduces the permissible exposure limit silica to 50 micrograms per cubic meter of air, averaged over an 8-hour shift. That is five times lower than the previous limit for construction. To abide by that standard, OSHA requires employers to use engineering controls to limit worker exposure; provide respirators when needed; limit worker access to high exposure areas; develop a written exposure control plan; offer medical exams to highly exposed workers; and train workers on silica risks and how to limit exposures.

On April 4, 2016, AGC and other industry groups filed a lawsuit challenging this rule. Among other things, the suit challenges the rule as being arbitrary and capricious based, in part, on its technically feasibility. This argument is ground in the fact that the permissible exposure limit is beyond the capacity

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1 The memorandum provides a very broad definition of the term “regulation.” It includes any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking and notices of proposed rulemaking. It also covers any agency statement of general applicability and future effect that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.

2 The Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders only impact companies that hold prime contracts directly with or subcontracts through federal agencies like the Army Corps, Naval Facilities Engineering Command, Department of Veterans Affairs or U.S. General Services Administration; these executive orders do not impact federally-assisted contracts from state agencies, like state departments of transportation.

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of existing dust filtration and removal technology. Briefs are due in March 2017 with a court hearing shortly thereafter. There is no clear indication whether or not the Trump administration will continue to defend this Obama administration rule in court. No court or Trump administration action to date has impeded the June 23, 2017, compliance date as of publication of this document. About 90 members of Congress sent an AGC-backed letter to President Trump on January 25, 2017 calling on him and his DOL to take any and all action to nullify this rule.

There is no certain path forward on this rule, as candidate Trump never mentioned it during the campaign. President Trump’s regulatory vision specifically requires agencies put forth a list of wasteful and unnecessary regulations “which do not improve public safety” for elimination. As this rule does not necessarily improve public safety—given the feasibility challenges of implementation—there may be room for negotiation. There may be an opportunity to wrap in the silica rule with the regulatory freeze. As such, AGC is working with Congress and the new Trump administration to address the problems with this rule by seeking an extension of the compliance date for the construction industry to June 2018 and, ultimately, repeal of the rule. Construction contractors, however, may continue to prepare for compliance in the absence of certainty.

For more AGC information, click here. For useful DOL information, click here.

**U.S. Occupational Safety and Health Administration’s Recordkeeping Rule (Drug Testing Position)**

On December 1, 2016, the anti-retaliation provisions of the new OSHA injury and illness recordkeeping rule went into effect. Legal action to date has not altered implementation of the rule. AGC successfully worked with OSHA to recalibrate its stance on broadly banning mandatory post-incident employee drug testing. However, limited drug testing restrictions remain where state workers’ compensation laws do not address post-incident drug testing. Portions of the electronic reporting requirements of the rule take hold in July 2017.

President Trump did not speak on point about this rule. However, when it comes to OSHA and other DOL enforcement, Republican administrations traditionally relax enforcement efforts. Nevertheless, the Trump administration is not necessarily a traditional Republican administration. And, while he has put in place a moratorium on new federal regulations, he made an exception for regulations that involve public safety. The anti-retaliation provision, however, is—at a minimum—overbroad in its application to drug testing and an argument exists that it will actually jeopardize workplace safety rather than improve it.

AGC will work with the new administration and Congress to address construction industry concerns with this rule. AGC members may access a webinar on this topic, click here. For more AGC information on the OSHA’s drug testing position for the rule, click here. OSHA guidance documents—with helpful examples and explanation—can be found here and here.

**U.S. Department of Labor’s Wage & Hour Division Overtime Rule**

On November 22, 2016, a federal judge issued a nationwide injunction against the U.S. Department of Labor’s (DOL) overtime rule, which was scheduled to take effect on December 1, 2016. As a result of this court order, implementation of the rule is effectively halted. However, the injunction is a temporary measure that suspends the regulation until litigation comes to a close. On December 8, 2016, the U.S.
Court of Appeals for the Fifth Circuit granted DOL’s request for an expedited appeal of that injunction. The final deadline for briefs is January 31, 2017, which means the case is unlikely to be decided until February 2017 at the earliest. The Texas AFL-CIO has also filed as an intervenor in the case to potentially defend the rule in the event the Trump administration decides not to challenge the injunction. There remain unanswered questions as to this court-enjoined effective date delay will allow the Trump administration to further delay implementation under its regulatory freeze.

The most significant change under this rule is a doubling of the standard salary threshold for exempt employees – from $455 per week ($23,660 per year) to $913 per week ($47,476 per year). Many AGC contractors had already taken steps to implement this rule, such as by reducing employee hours or notifying employees of salary increases. Given the uncertain path ahead, those contractors may want to re-evaluate the overall impact of the changes made and either roll-back or keep those implementation efforts in place, considering both the impact on the company’s bottom line as well as employee morale.

It is not clear how President Trump will proceed as this is a rule that pits Trump, the populist, against Trump, the businessman. On the campaign trail, he did not clearly oppose or support the rule. It is also unclear as to how the Fifth Circuit will rule. Contractors must bear this uncertainty in the meantime. AGC has and will continue to support legislation and regulatory changes to repeal the overtime rule.

For more AGC information on this rule, click here.

**U.S. Equal Employment Opportunity Commission’s (EEOC) New EEO-1 Report**

On September 29, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) announced that starting March 2018, it will collect summary employee wage and hours-worked data from some employers concerning employee race, sex, gender and ethnicity, among other bases. This reporting requirement is in addition to Davis-Bacon related information reporting. Under this requirement, certain employers are required to use new EEO-1 form in March 2018, when 2017 data will be reported.

How does it apply? All employers—public and private—with 100 or more employees have to submit the revised EEO-1 report in 2018. Federal and federally-assisted\(^3\) prime and first-tier subcontractors that have 50 or more employees would be required to submit the currently used EEO-1 report that does not include compensation and hours-worked data, as they did before. Federal and federally-assisted contractors and first-tier subcontractors with 49 or fewer employees, and companies without federal or federally-assisted contracts with 99 or fewer employees, will not be required to complete the EEO-1 report.

This new reporting requirement came as a result of an Obama administration Presidential Memorandum. AGC has called upon the Trump administration and Congress to repeal this memorandum and the new EEO-1 form requirement. Because this is a form, removal of the requirement

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\(^3\) Federal and federally-assisted contractors refers to contractors that fall under Executive Order 11246. The Executive Order prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over $10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. It applies to those contractors that work directly for federal agencies and those that work on federal-aid transportation contracts issued through state contracting agencies, like the U.S. Department of Labor.

For more information, contact Jimmy Christianson at 703-837-5325 or christiansonj@agc.org.
may not necessarily require notice and comment action or other regulatory procedures. There is no indication to date how the Trump administration or Congress will act.

For more AGC information, click here. For helpful EEOC information, click here. For a sample of the new form, click here.

U.S. Environmental Protection Agency’s Stormwater Construction General Permits

The U.S. EPA’s 2017 stormwater Construction General Permit (CGP) is scheduled to effect on Feb. 16, 2017, the date when the 2012 CGP expires. Although the permit goes into effect during the regulatory freeze, the EPA has said that the 2017 CGP will not be impacted. Nevertheless, there is a possibility that the Trump administration reevaluates that determination as Trump-appointees begin work at the EPA.

Those jurisdictions that the CGP covers include Idaho, Massachusetts, New Hampshire, New Mexico, the District of Columbia, Puerto Rico, all other U.S. territories with the exception of the Virgin Islands. Although the vast majority of states have been authorized to issue their own National Pollutant Discharge Elimination System permits, EPA’s CGP remains the standard-bearer for state and local stormwater discharge permits for construction projects. Therefore, it is important for AGC to monitor it closely because state and local environmental agencies look to EPA’s CGP for guidance concerning their own versions of the permit.

Among other achievements, AGC was successful in ensuring that the final permit does not require contractors to electronically report their site-specific stormwater pollution prevention plans (SWPPPs) for public, online examination — which would have increased the possibilities of erroneous citizen environmental lawsuits. However, the new CGP holds that regardless of whether there is a group SWPPP or several individual SWPPPs, all operators may be jointly and severally liable for compliance with the permit.

President Trump has not commented on this permit. However, he did comment on the campaign trail about the unnecessarily long delays in building projects, thanks in part to environmental reviews and permit requirements.

For AGC information on the 2017 CGP, click here. For EPA information on the permit and gaining coverage under it, click here. Page 21 of the EPA document outlines notice of intent submittal deadlines and official start dates for permit coverage to help guide operators that must renew their permits.

Army Corps of Engineers’s WOTUS/Wetlands Nationwide Permits

On January 6, 2017, the U.S. Army Corps of Engineers finalized its 2017 nationwide permits, as the current package of 50 permits expires on March 18, 2017. Obtaining these federal “general” permits (i.e., 404/wetlands permits), which are required for construction activities in “Waters of the United States” (WOTUS), is critical to the completion of the private and public infrastructure and buildings. Thanks to AGC advocacy efforts, the Corps removed references to the 2015 changes to the definition of WOTUS, which is currently stayed nationwide by order of a District court while the many lawsuits over this rule proceed. As with the EPA’s 2017 CGP, the Corps’ new nationwide permits fall into the time

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period during which the regulatory freeze is in place. It is unclear how the freeze will impact this new permit.

Nationwide permits are valid for five years. However, if a project is currently under construction, or is under contract to commence prior to March 18, 2017, contractors can obtain a one-year extension to complete the project under the existing permit authorization. If that is not the case, contractors will need to request authorization under a new permit (i.e., renew the nationwide permit during construction or secure individual permit coverage).

While President Trump did not directly comment on this permit, he did call for the elimination of the WOTUS rule. That rule remains on hold under a nationwide court order.

For AGC information on permit, click here. For information on the WOTUS rule and where it generally stands, click here and here respectively.

**Fair Pay and Safe Workplaces (Blacklisting) Executive Order**

On January 1, 2017, the paycheck transparency requirement of the Fair Pay and Safe Workplaces Executive Order went into effect. Although a federal court halted enforcement of the executive order’s provisions relating to labor law violation reporting and restricting pre-dispute arbitration, that court action did not put a hold on the paycheck transparency requirement. That requirement requires covered contractors and subcontractors to provide wage statements that contain: 1) hours worked, 2) overtime hours, 3) rate of pay, 4) gross pay, and 5) an itemization of each addition to and deduction from gross pay. If a significant portion of the contractor’s workforce is not fluent in English, the wage statement must also be provided in the language(s) other than English in which that portion or those portions of the workforce are fluent.

President Trump has called for repealing all of President Obama’s executive orders. However, again, there is no certainty with which that President Trump will keep his promise with respect to this order. AGC is working with Congress to repeal this executive order and its underlying regulations as a whole under the Congressional Review Act. The association is also communicating to the administration about the need for repeal. For AGC’s detailed analysis of this executive order, webinars and other resources, click here.

**Paid Sick Leave Executive Order**

On January 1, 2017, the Paid Sick Leave Executive Order went into effect. The order requires federal contractors to provide seven days (56 hours) of paid leave to employees for sickness and other purposes.

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4 As noted above, the Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders only impact companies that hold prime contracts directly with or subcontracts through federal agencies like the Army Corps, Naval Facilities Engineering Command, Department of Veterans Affairs or U.S. General Services Administration; these executive orders do not impact federally-assisted contracts from state agencies, like state departments of transportation.

5 See Footnote 2.
President Trump campaigned for six weeks of paid maternity leave for new mothers whose employers do not guarantee paid leave. There is little information to reflect his position one way or the other on this particular executive order. However, the fact that he supports paid maternity leave could make it difficult for him to oppose this paid sick leave order.

AGC notified Congress about its ability to repeal this executive order’s implementing regulations—through the Congressional Review Act—and will continue to press for repeal, as it is administratively impracticable in the context of the construction industry. AGC may also seek to work with the Trump administration on ways to revamp the order, at a minimum. AGC has requested that the Trump administration repeal this executive order and unwind the Federal Acquisition Regulation rule that implements it.

For AGC information on the order, click here. For DOL's helpful FAQ document, click here.

The Regulatory Long-Term

There are many things that can, cannot and may not happen in the regulatory sphere. Nevertheless, AGC will be there to fight for construction contractors. Among the first item on the agenda is addressing the current Project Labor Agreement (PLA) Executive Order. AGC will also seek ways to work with Congress to repeal regulations and the new administration to unwind or tweak costly and over burdensome regulations.

**Rescind Obama’s PLA Executive Order and Replace it with George W. Bush’s PLA Executive Order**

AGC has communicated to the administration its desire for President Trump to rescind the Obama PLA Executive Order and replace it with the George W. Bush PLA Executive Order. The Obama order encourages—but does not require—federal agencies to use project labor agreements on large scale construction projects estimated to cost $25 million or more. The order is limited to direct federal construction contracts. The Bush PLA order neither encouraged, restricted nor required PLAs on federal and federally-funded construction projects. The Bush order is in line with AGC’s decades-held position on leaving the need for PLAs up to contractors to voluntarily decide.

As a refresher, the Bush PLA order preserved open competition and government neutrality towards government contractors’ labor relations. The order allows construction contractors and labor unions to voluntarily institute PLAs on federal and federal-funded construction contracts. Under this order, two things happen: (1) there would be no federal agency mandated/government PLAs on construction contracts; and (2) there would be no state agency/government mandated PLAs on contracts that include federal funds. To the first point, direct federal contractors will not have to respond to sources sought notifications regarding the consideration of PLAs. To the latter point, federal-aid contracts issued from state agencies—like

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6 Federal agencies generally release what are called “sources sought” notices as a means to solicit and gather market information. Under the existing PLA FAR Rule, federal agencies must make case-by-case determinations as to whether it a government mandated PLA would increase the economy and efficiency of project delivery. These agencies released sources sought notices to help them gather market information, as these notices often included a host of survey questions.

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federal-aid highway contracts—could not require PLAs. However, this order could not and would not
apply to state construction contracts that only use state funds—i.e., include no federal construction
funds. Such an order would likely fail to pass constitutional muster under the Tenth Amendment, which
protects states from certain types of federal government actions.

Assuming President Trump takes this course, regulatory action will be required to put the Bush PLA
order back into effect. The Federal Acquisition Regulation Council and U.S. Department of
Transportation, for example, will have to issue new regulations. This will take time, as proposed rules
will have to go through the notice and comment period. This will not happen with the simple stroke of
President Trump’s pen. AGC will keep its contractors closely informed about developments on this front.

Other Obama Executive Orders and Actions

In addition to the executive orders and actions already discussed, AGC is looking for ways to work with
the Trump administration to address such Obama orders like those regarding greenhouse gas emissions
and climate change, sustainable federal facilities, and flood risk management, among others. AGC will
also suggest ways to streamline the federal permitting processes and expand public-private partnership
collaboration through the regulatory process.

The “Midnight Regulations” for Possible Congressional Repeal

AGC is working with Congress to repeal a host of unnecessary, costly and burdensome Obama
administration regulations under the Congressional Review Act (CRA). The regulations that Congress
could possibly roll back under the CRA include: implementing regulations for both the Fair Pay and Safe
Workplaces Executive Order and the Paid Sick Leave Executive Order; the Equal Employment
Opportunity Commission’s revised EEO-1 Report, which would expand pay data reporting requirements;
and OSHA’s injury and illness recordkeeping rule that would extend liability for properly reporting to five
years instead of the existing statute of limitations of six months.

The CRA enables Congress to overturn a federal agency rule, guidance or general policy statements—
with simple majorities in both the House and Senate—issued within 60 legislative days. Historically
speaking, such agency actions potentially ripe for CRA repeal for the new Republican Congress and
president would have to have been finalized sometime after May 20, 2016. The regulations AGC put
forth fit those and other parameters under the CRA. It should also be noted that the CRA has only been
effectively used once since its enactment in 1996. Given the time restraints for bringing forth a CRA
resolution, there will more likely than not be only a handful of rules repealed through Congress.

The CRA is a more powerful and effective tool for, essentially, permanently eliminating these Executive
Branch actions than President Trump simply rescinding those executive orders and using the regulatory
process to unwind the regulations. Under the CRA, a federal agency cannot reissue the rule that has
been repealed unless Congress passes and the president signs into law provisions authorizing the
disapproved rule. As a result, a new president and administration cannot merely issue a new rule later.

Because of the procedure set forth under the CRA, any regulation repeal bills would not likely be sent to
President Trump’s desk until February at the earliest.

Other Obama Administration Rules, Policy, Guidance & Enforcement

For more information, contact Jimmy Christianson at 703-837-5325 or christiansonj@agc.org.
When it comes to other rules, guidance and policy directives put forth by federal agencies during the Obama administration, federal agencies in the Trump administration may make changes or throw them out entirely. For rules that initially went through the notice and comment process under President Obama’s term, the Trump administration can only change or repeal them through notice and comment rulemaking. Again, this takes time. In addition, those who oppose such changes or repeal could delay the process in court.

For agency directives or rules that did not go through the notice and comment rulemaking process, the Trump administration can instantaneously change or repeal them. In addition, the Trump administration, just as the Obama administration can, rather quickly, alter the overall enforcement efforts of agencies.

**Regulatory Reform Begins**

Given the executive overreach of the Obama administration, AGC will work with Congress to make significant changes to the regulatory process. AGC will push for reforms that allow Congress to have a greater say in the rulemaking realm and require agency guidance and directives that have the practical impact of law to undergo notice and comment rulemaking. Many of these reforms have already passed the House in January 2017 and are pending action in the Senate.

The association will seek a return to fact-based rulemaking, where regulations undergo thorough economic analysis; are based in sound science and/or substantial empirical data; and are transparent in methods and goals. And, AGC will work to limit pre-construction reviews, studies and reports that often delay construction projects.

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