



President Trump's Executive Actions

President Trump, like his predecessor, is quickly taking action to implement his agenda via executive order, presidential memoranda and other directives. During this time, contractors must remember that such presidential directives—generally—do not instantaneously change the law. Rather, they direct federal agencies to make changes in their policies and regulations. Changing those policies and regulations often compels federal regulatory agencies to engage in the notice and comment rulemaking process. That process takes time. And, as we saw with many Obama administration executive orders and their implementing regulations, they are subject to legal challenge.

In this document, AGC will help the contracting industry keep tabs on various Trump administration executive directives, how they may impact AGC-member businesses, and their progress through the regulatory process. Below is a rundown of the specific items addressed in this document:

- **The Regulatory & Federal Employee Hiring Freezes**
- **The Obamacare Executive Order**
 - *Executive Order on Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal*
- **Immigration-Related Executive Action**
 - *Executive Order on Border Security and Immigration Enforcement Improvements*
 - *Executive Order on Enhancing Public Safety in the Interior of the United States*
- **Permit Streamlining & Regulatory Reduction for Construction Projects**
 - *Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*
 - *Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing*
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 - *Presidential Memorandum on the Construction of the Keystone XL Pipeline*
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The Regulatory & Federal Employee Hiring Freezes

The Regulatory Freeze

On January 20, 2017, White House Chief of Staff Reince Priebus 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-appointed reviews and approve them. However, such proposed and final rules may be issued—without Trump-appointed 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—

For more information, contact Jimmy Christianson at 703-837-5325 or christiansonj@agc.org.



regulations¹ 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. Agencies are assessing the applicability of the freeze and will publish impacted regulations in the coming days and weeks ahead.

Trump appointees are only beginning to establish themselves in their respective agencies. 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 many of these Senate-confirmed appointees in office, there is limited Trump administration leadership to steer the regulatory helm of the agencies. It will likely take several months before agencies fully staff up with Trump appointees.

Federal Employee Hiring Freeze

On January 23, 2017, President Trump issued a memorandum to the heads of all federal agencies instating a federal employee hiring freeze. Under the memorandum, no vacant positions—existing on or after January 22, 2017—may be filled and no new positions may be created. The hiring freeze does include exemptions for vacancies or positions necessary to meet national security or public safety responsibility. However, it does not specifically exempt federal agency employee vacancies or positions involving agency procurement—i.e., federal contracting officers—or officials that review and approve federal permit applications for construction projects.

AGC previously requested exemptions for agency procurement and permit reviewing officials with the presidential transition team in December 2016. AGC will request the administration again take those exemptions into account, especially given the president’s interest in permit streamlining and expediting construction project regulatory reviews.

The Obamacare Executive Order

Executive Order on Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal

On January 20, 2017, President Trump signed an executive order directing the Secretary of the Department of Health and Human Services (DHHS) (nominee is [Rep. Tom Price](#) (R-Ga.)) and other agency heads to make efforts to ease burdens with regards to the Affordable Care Act. Specifically, the order directs them to exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Affordable Care Act that

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.



would impose a fiscal burden on any State or a cost, fee, tax, penalty or regulatory burden on individuals. What does this mean for construction contractors?

In the short-term, not much. The president's nominee for DHHS Secretary is still pending confirmation by the Senate. Ultimately, the DHHS Secretary and other Trump-appointees in that agency will have to issue regulations or guidance to put meat on the bones of this executive order. That will take time, as many directives will likely be subject to notice and comment rulemaking. Any speculation beyond this would be purely that: speculation. That stated, AGC will continue to monitor regulatory actions stemming from this executive order and seek opportunities to advance its members' interests.

Immigration-Related Executive Action

Executive Order on Border Security and Immigration Enforcement Improvements

On January 25, 2017, President Trump began the process of fulfilling many of his campaign promises concerning immigration enforcement through executive order. The president issued an executive order that calls for "immediate construction of a physical wall on the southern border." It also directs the Secretary of Homeland Security to "immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico." In addition, the order calls for a wide range of enforcement action concerning illegal immigration.

The Border Wall

Regarding the border wall, its construction is unlikely to begin immediately. Congress must specifically appropriate funds for its construction. That has not happened to date. However, Congressional Republicans are [considering](#) funding an unspecified amount towards 700 miles of "reinforced fencing" that was not completely funded under the Secure Fence Act of 2006. Such funding could be included in legislation necessary to fund the government for the remainder of fiscal year 2017 at the end of April. However, Democrats could derail that funding legislation and, in turn, threaten to shut down the federal government. According to the Washington Post, more than \$7 billion has been spent to build what is now about 650 miles of Southwest border fencing — costing nearly \$5 million per mile in some spots — nearly half in Arizona.

Another potential roadblock is right-of-way approvals. Many private citizens own portions of land along the border. The administration will have to work with them in areas that it may want to place such a border protection.

In addition, planning, design, and an array of federal permitting and construction approval requirements will be necessary before construction can begin. It may be possible, however, for the Trump administration to reprogram or allocate some funds to begin the various pre-construction actions necessary for constructing the wall. Undoubtedly, the administration will look for ways. Various interest groups could possibly undertake legal action challenging the

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federal permitting approvals required and, perhaps, even the reprogramming of funds towards this effort without explicit congressional authorization.

The U.S. Army Corps of Engineers is the federal construction agency generally responsible for executing construction of border security walls and fences for the Department of Homeland Security's Customs and Border Protection agency. AGC will meet with the leaders of the Army Corps and discuss this potential project at its [2017 Federal Contractors Conference](#) in May.

Border Detention Facilities

The executive order also calls for the construction of detention facilities along the southern border. Again, as with the border wall, construction of new facilities will require congressional authorization and funding. It is unclear if any such authorization or funding exists for new facilities.

The U.S. General Services Administration (GSA) is the federal construction agency generally responsible for building facilities for the Department of Homeland Security's Customs and Border Protection (CBP) agency. GSA works closely with CBP to design, construct, maintain, and operate land ports of entry along more than 1,900 miles of border between the southern United States and Mexico and more than 5,500 miles of border between the northern United States and Canada. AGC will meet with the leaders of GSA and discuss these potential projects at its [2017 Federal Contractors Conference](#) in May.

Law Enforcement Efforts Concerning Illegal Immigration

This executive order also includes a wide range of law enforcement directives to tighten efforts to carry out immigration laws. AGC is currently reviewing these directives and will provide more information shortly.

Executive Order on Enhancing Public Safety in the Interior of the United States

On January 25, 2017, President Trump signed an executive order that seeks to bring "sanctuary cities" in compliance with federal immigration enforcement law and efforts. Sanctuary cities offer safe harbor for undocumented immigrants who might otherwise be deported by federal immigration law enforcement officials. According to CBS News, there are over 140 sanctuary jurisdictions -- cities and counties -- across the U.S., including at least 37 cities -- San Francisco, New York, Chicago, Seattle, Miami and Los Angeles, among others.

The order indicates that sanctuary cities "that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." More specifically, it mandates that "the Attorney General and the [Homeland Security] Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C.

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1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.”

It may be reasonable to speculate that only federal funds given directly to sanctuary cities in the form of a grant could be impacted under the order. An example of this would be a grant to a sanctuary city for a road or port project through U.S. DOT’s TIGER grant program or such a grant for public housing construction through the U.S. Department of Housing and Urban Development. However, that remains unclear and purely speculative. We will have to wait for the Department of Justice and Homeland security to provide more details through regulation, on which AGC will comment accordingly. AGC will continue to review this order and take appropriate action, if necessary, on Capitol Hill and in regulatory agencies.

Permit Streamlining & Regulatory Reduction for Construction Projects

Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects

On January 24, 2017, President Trump signed an executive order setting forth a roadmap for streamlining and expediting federal government environmental reviews and approvals for all infrastructure projects. That roadmap outlines the following process:

- Upon request by the governor of a state or the head of any federal agency, the White House Council on Environmental Quality (CEQ) must within 30 days decide whether an infrastructure project qualifies as a “high priority.”
- The CEQ determination will be made based on a number of factors: the project’s importance to the general welfare, value to the nation, environmental benefits, and other factors CEQ deems relevant.
- CEQ must coordinate with other federal agencies to expedite procedures and deadlines for completion of environmental reviews and approvals for high priority projects.
- Federal agencies must give the highest priority to meeting the deadlines set by CEQ. Failure to meet a deadline will require written explanation from the head of an agency explaining its delay.

CEQ will now work to put in place a detailed process to implement this order. The agency may establish more formal parameters for its determinations of “high priority” projects and articulate how it will set deadlines with its federal agency partners. This may also include laying out a more specific definition of what infrastructure projects may be considered for this designation or ones that may be of higher importance. As it stands, the order places highest emphasis on improving the electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges and highways. In addition, CEQ will have to explain which environmental reviews and approvals for which it will expedite/streamline processes (NEPA process, wetlands permits, stormwater permits, and so forth).

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To clarify all of this will likely take CEQ a number of months—or longer. To date, President Trump has not appointed a head of CEQ. AGC will work with CEQ to highlight areas construction contractors would like the agency to focus its efforts.

Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing

On January 24, 2017, President Trump executed a presidential memorandum directing federal agencies to expedite reviews of and approvals for proposals to construct or expand manufacturing facilities. To do so, the directive calls for reductions in burdens affecting domestic manufacturing.

There are essentially no other details regarding this initiative. The president leaves that to the Secretary of the Department of Commerce (nominee is [Wilbur Ross](#)) to execute. There is no definition of what “manufacturing facilities” are. There are no examples of regulatory burdens impeding construction of those facilities mentioned in the document. It is conceivable that such manufacturing facilities may include power plants, refineries, and other heavy industrial construction projects that face significant regulatory burdens to build. However, that remains purely speculation at this time.

AGC will submit its thoughts to the Department of Commerce and other agencies seeking comment on regulatory burdens that may be reduced in order to build these facilities in a timely and efficient matter.

“Buy America” Executive Action

Presidential Memorandum on Construction of American Pipelines

On January 24, 2017, President Trump signed a presidential memorandum instructing the Secretary of the Department of Commerce to develop a plan ensuring all *new* pipelines built within the U.S., use materials and equipment domestically produced. This requirement essentially instates—through executive decree—“Buy America” provisions to pipeline construction.

The directive defines “produced in the United States” to mean:

- With regard to iron or steel products, that all manufacturing processes for such iron or steel products—from initial melting stage through the application of coatings—occurred in the United States;
- Steel or iron material or products manufactured abroad from semi-finished steel or iron from the United States are not “produced in the United States”; and
- Steel or iron material or products manufactured in the United States from semi-finished steel or iron of foreign origin are not “produced in the United States.”

The directive does not provide significant clarity as to what types of “pipelines” will fall under these requirements. It does state that “new pipelines” include retrofitted, repaired or expanded pipelines. However, it remains a question as to whether it will apply to water pipelines, gas pipelines, oil pipelines, and so forth. Presumably, this requirement only applies to pipelines that cross state borders and/or pipeline projects that receive federal funding. Unfortunately, again, that too is unclear.

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AGC generally opposes Buy America requirements for construction projects. For more AGC information on Buy America / Buy American laws in place, [click here](#).

Specific Construction Project-Related Executive Actions

Presidential Memorandum on the Construction of the Keystone XL Pipeline

On January 24, 2017, President Trump issued a directive to the Secretaries of State, the Army and Interior to help move the Keystone XL Pipeline project approval process forward. The presidential memorandum does not automatically grant any federal approvals for the project. It does, however, invite TransCanada Keystone Pipeline, L.P., to resubmit its application to the Department of State; require the Secretary of State to issue a final permitting decision within 60 days of TransCanada's application; instructs the U.S. Army Corps of Engineers to expedite the process for a Section 404, Clean Water Act nationwide permit; and directs the Secretary of the Interior to expedite requests for right-of-ways, among other things.

These agencies will shortly begin the process of reviewing and, perhaps, approving necessary permits for the project. However, environmental interest organizations could possibly take legal action challenging any federal permits issued and, thereby, delay construction of this project.

Presidential Memorandum on the Construction of the Dakota Access Pipeline

On January 25, 2017, President Trump issued a presidential memorandum directing the Secretary of the Army and U.S. Army Corps of Engineers to take all lawful actions necessary to move forward with the Dakota Access Pipeline. As with the Keystone presidential memorandum, this one does not automatically grant any federal approvals for the Dakota Access Pipeline project. Rather, the document instructs the Army Corps to expedite various permits reviews for the project and to consider modifying or rescinding Obama administration directives delaying project approvals, among other things.

These agencies will shortly begin the process of reviewing and, perhaps, approving necessary permits for the project. However, environmental interest organizations could possibly take legal action challenging any federal permits issued and, thereby, delay construction of this project.

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