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 political appointees that lead agencies 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

- **Existing 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. Occupational Safety and Health Administration’s Extension of Statute of Limitations for Recordkeeping Violations Rule
  - 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 Outlook**
  - 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 did not happen. 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.

Contractors will have to pay close attention to what’s happening in Washington, D.C., which AGC always does for its members. So, AGC members should continue to read AGC’s weekly newsletters, like the Construction Legislative Week in Review and check the latest AGC news here.

Existing Regulations of Note

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 several regulatory actions—the silica rule, the injury and illness recordkeeping rule (drug testing), the extended statute of limitations for recordkeeping violations rule, 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.¹

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 of existing dust filtration and removal technology. Final briefs are due in March 23 with a court hearing to be scheduled for May/June. There is no guarantee that a decision will be issued before the June 23 compliance date.

¹ 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.
Similarly, there is no clear indication whether or not the Trump administration will continue to defend this Obama administration rule in court. Secretary of Labor Nominee Alexander Acosta stated before a Senate panel on March 22, 2017, that he will reexamine the rule. However, he did not provide any further insight as to whether the rule would be delayed or undergo a new rulemaking. 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 also no certain regulatory 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.

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 23, 2018 and, ultimately, repeal of the rule. But, without a Trump appointed and Senate confirmed Department of Labor Secretary and a host of other Senate confirmed appointee positions in place, it will probably be a number of months before any movement could happen on this issue.² Many Obama administration holdovers currently remain in high ranking DOL positions awaiting the new appointees’ confirmation. Construction contractors, however, may continue to prepare for compliance in the absence of certainty.

For more AGC information, click here. For AGC’s comprehensive silica educational website, 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. Specifically:

² The U.S. Senate Committee on Health, Education, Labor and Pensions is scheduled to hold a hearing on March 22, 2017, regarding the nomination of Alex Acosta to serve as Secretary of Labor. Assuming that the committee approved his nomination, he could be confirmed before the end of March.

For more information, contact Jimmy Christianson at 703-837-5325 or christiansonj@agc.org. March 23, 2017
• Establishments with 250 or more employees must electronically submit information from their 2016 Form 300A by July 1, 2017. These same employers will be required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

• Establishments with 20-249 employees must submit information electronically from their 2016 Form 300A by July 1, 2017, and their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

To date, OSHA is not accepting electronic submissions of injury and illness logs. The agency has not also provided no indication as to when the electronic submission portal will be open and available.

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 did put in place a temporary freeze 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.

The administration and DOL can address some of industries’ concerns through guidance. Unlike rolling back or tweaking a regulation—which can take years—an agency can issue new guidance to help implement a regulation with a stroke of the pen. To the extent AGC can work with DOL to make existing guidance on this rule better reflect the concerns of the industry, the association will do so. Nevertheless, as with the silica rule, it may take several weeks—at minimum—to gain traction on this as the agency staffs up with Senate confirmed Trump appointees.

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. Occupational Safety and Health Administration’s Extension of Statute of Limitations for Recordkeeping Violations Rule

3 The federal regulatory freeze expired on March 21, 2017.

For more information, contact Jimmy Christianson at 703-837-5325 or christiansonj@agc.org.
On January 18, 2017, the statute of limitations (SOL) for injury and illness recordkeeping liability extends from six months to, essentially, five-and-a-half years. OSHA extended its SOL under a new rule issued on December 19, 2016. The Occupational Safety and Health Act clearly states that “no citations may be issued after the expiration of six months following the occurrence of any violation.” However, this new rule will allow contractors to be cited for honest mistakes, or inaccuracies, related to recordkeeping dating back as far as five-and-a-half years.

Previously, federal courts had struck down OSHA’s interpretation that it could cite contractors for recordkeeping violations going back 5 years. For example, in a unanimous decision that vacated a series of citations OSHA leveled against Louisiana construction company Volks Constructors for failing to timely record injuries, a D.C. Circuit panel in 2012 said OSHA’s rule extending the statute of limitations on penalizing late records to cover the existing five-year retention period exceeded its statutory authority. On December 29, 2016, the Fifth Circuit issued a similar ruling.

Neither of these court decisions, however, impact this OSHA rule on its SOL. The court decisions were based on OSHA’s interpretation of the SOL—rather than its new rule establishing the SOL—being unlawful. After an agency undergoes a rulemaking process, different legal standards and parameters apply.

As it stands, Congress and President Trump are poised to repeal the rule under the Congressional Review Act thanks to AGC advocacy efforts. The House passed a bill to repeal the rule on March 1. The Senate passed the repeal legislation as on March 23. If the president signs it into law, the regulation will be repealed. The White House had previously indicated that it would sign the legislation.

For AGC information on this new rule, click here. To see the final rule, click 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 was January 31, 2017, but—with the new administration coming in—the court delayed that deadline to May 3. A decision may not be expected until summer 2017 at the earliest.

That stated, the appeal is unlikely to be decided before a new secretary of labor is confirmed. The labor secretary, once confirmed, would have the authority to withdraw the appeal and allow the district court to make the injunction permanent, effectively halting the new rules for

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good. The newly constituted DOL would then be free either to keep the 2004 salary levels, start a new rulemaking on the issue, or defer to the House and Senate to pass legislation. It should also be noted that the Texas AFL-CIO has also filed as an intervener in the case to potentially defend the rule in the event the Trump administration decides not to challenge the injunction.

The most significant change under 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.

On March 22, 2017, Department of Labor Nominee Alexander Acosta testified before a Senate Committee. During this confirmation hearing, he declined to commit to defend the rule in court. He did express concern as to whether the Secretary of Labor “even has the power to enact this [rule] in the first place.” Assuming he is confirmed, the rule is likely to be reviewed by the new administration. It may be reasonable—and purely speculative—to guess that DOL under Acosta’s leadership would raise the overtime threshold. However, that raise would likely be far less than the threshold sought under the existing rule.

That stated, 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 prime and first-tier

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4 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,
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 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. AGC has joined with other business groups to challenge this form requirement.

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

Army Corps of Engineers and U.S. Environmental Protection Agency’s “Waters of the United States Rule”

On May 27, 2015, the Army Corps of Engineers and the U.S. EPA issued a rule redefining the definition of “waters of the United States” (WOTUS) under the Clean Water Act, thereby expanding federal jurisdiction over the nation’s wetlands. The rule, however, has not taken effect to date due to various legal challenges.

Following AGC’s recommendation to the Presidential Transition Team, President Trump issued on Feb. 28 an executive order (EO) that begins the process of unwinding the (WOTUS) rule. In addition, the EO—also in line with AGC’s recommendation—calls for a new “review” of the WOTUS rule in a manner consistent with the late Justice Anthony Scalia’s opinion in a 2007 Supreme Court case addressing the WOTUS definition.

The EO in and of itself, does not remove the WOTUS rule from the books. Rather it merely directs the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers — who issued the rule in 2015 — to begin the lengthy and complex regulatory process necessary to rescind or revise the rule. That process will take time, as it is subject to the same notice and comment rulemaking processes as the rule underwent when it was written. And, that process is subject to legal challenge by environmental groups, which may use the government reports and documentation the agencies used to justify the rule as ammunition against their now altering it. Notably, the Order states for any revised proposed rule, the EPA and Corps “shall

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.
consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).”

The EO also directs the regulatory agencies to notify the U.S. Attorney General about the pending review of the WOTUS rule so he may “inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule.” But, at this point, it remains unclear how this EO will impact current litigation against rule. In the midst of this uncertainty, the Corps continues to use the *1986 regulations and applicable jurisdictional guidance* (status quo as it existed before the new rule) in making jurisdictional determinations or taking other actions based on the definition of WOTUS.

For AGC information on the WOTUS rule and where it generally stands, [click here](#) and [here](#), respectively.

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

The U.S. EPA’s 2017 stormwater Construction General Permit (CGP) took effect on Feb. 16, 2017, the date when the 2012 CGP expired. 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. This later issue is currently being litigated.

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](#).
Army Corps of Engineers’ 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 expired 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. On February 8, 2017, the Corps also exempted these permits from the regulatory freeze, as AGC had requested.

For AGC information on permit, click here.

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 (CRA). On February 3, 2017, the House of Representatives voted to repeal the Blacklisting regulations under the CRA. The Senate voted in support of repeal on March 7, 2017. President Trump indicated on February 1, 2017, that he

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5 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.

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would sign the repeal bill into law upon Senate passage. As of this date, the bill awaits the president’s signature into law.

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.

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 Outlook**

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

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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. These sources sought notices will not be necessary and no longer be issued. To the latter point, federal-aid contracts issued from state agencies—like 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.

7 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.

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

Other Obama Administration Rules, Policy, Guidance & Enforcement

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

For more information, contact Jimmy Christianson at 703-837-5325 or christiansonj@agc.org.
Given the executive overreach of the Obama administration, AGC has been work with Congress to make significant changes to the regulatory process. AGC continues to 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 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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