

MAKE FEDERAL AGENCIES RESPONSIBLE AGAIN

*A Regulatory, Compliance and Enforcement Plan to
Help Build Infrastructure, Encourage Job Growth and
Cut Red Tape*



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INTRODUCTION

The time has come to make federal agencies responsible again. The regulatory onslaught of the past eight years—on top of decades of existing regulatory regimes—has exacted a toll on the ability of construction contractors to hire new employees, remain competitive and continue to innovate and build the nation’s civil and social infrastructure.

For every perceived problem, many federal agencies have sought regulatory “solutions.” Oftentimes, those solutions fail to adequately—let alone comprehensively—solve the alleged ills they seek to address. Instead, a new regulation is generally stacked on top of a host of existing regulatory requirements without sufficient consideration of its overall impact on the greater regulatory compliance and enforcement scheme. The result is a chaotic patchwork of federal mandates that often create considerable economic hardship on the construction industry—especially small businesses—amounting to fewer construction projects built and fewer construction jobs available.

There are a variety of studies that detail the draconian impact of this federal regulatory pattern. Some of these studies have found that:

Federal regulatory compliance costs reached \$1.885 trillion in 2015. To put this in perspective, regulatory compliance costs exceed the \$1.882 trillion that the U.S. Internal Revenue Service is expected to collect in both individual and corporate income taxes from 2015.

The average time for approval of infrastructure projects is six years. Some \$3.7 trillion has been spent as a result of these delays for infrastructure projects ranging from roads and bridges, locks and dams, drinking and waste water treatment facilities, and power plants and transmission lines.

The federal government has imposed \$808 billion in regulatory costs on business since 2008. For every ten percent increase in regulatory costs, there is a five to six percent fall in the number of businesses with fewer than 20 employees. Over 90 percent of construction businesses have fewer than 20 employees.

In addition to squeezing the construction industry with unreasonable regulation after unreasonable regulation, many federal agencies engage with the construction industry as opponents rather than partners seeking a sensible regulatory path forward. The upshot is less informed regulations, more litigation and less opportunity to build the civil and social infrastructure that helped make America the world’s only economic and cultural superpower.

The Trump administration will have a wide range of options to make federal agencies responsible again. Some of these options can be instituted rather quickly under the authority of the executive branch. Others may face time consuming statutory and institutional challenges. In this plan, the Associated General Contractors of America (AGC) puts forth a range of options the new administration should consider when addressing the regulatory challenges the our nation’s construction industry, infrastructure and economy face. In addition, the AGC puts forth a set of specific recommendations concerning the litany of executive orders, presidential memoranda, rules, guidance, and policy statements issued during the Obama administration that the Trump administration should repeal, twea1 Tc k3 Tueptcustr9 -13035p,arEqd cmEe082 -1.15c gs

IMPLEMENTING THE PARADIGM SHIFT FROM INDUSTRY OPPONENT TO PARTNER

To regulate any industry effectively and efficiently, it is essential that regulators have a realistic, working understanding of the industry for which they regulate. Federal regulators are not in the business of construction. Their staff does not lay asphalt, erect steel beams or operate cranes on a construction site. The construction industry does.

For the last eight years, many regulators have not engaged with the construction industry. Yet, they have regulated it immensely. Federal employee conference attendance at industry events has been severely restrained. Industry days at federal offices have been reduced. In general, all avenues through which regulators can obtain a first-hand or in-person understanding of the industry they regulate have been curtailed. While some agencies held “listening sessions” with the industry, these often proved to be check-the-box activities where little substantive engagement was even possible. The consequences have been seen in many regulations that do not fit the industry and create more problems. All of this has led to an expanded level of distrust between the construction industry and federal agencies.

The Trump administration can quickly implement a paradigm shift within federal agencies that allows them to regulate the industry and enforce the law in a coherent and reasonable manner. First, the administration can work through the executive branch

In order to curb enforcement efforts ensnaring innocent contractors, the Trump administration must take a more thoughtful and fair approach to enforcement. This includes instating “right to cure” policies, whereby contractors have an opportunity to correct alleged violations before “gotcha” fines and penalties are assessed. The U.S. Environmental Protection Agency (EPA) uses such a method when enforcing its Spill Prevention Control and Counter-Measure program. Similarly, the Occupational Safety and Health Administration (OSHA) allows for “quick fix” incentives for safety and health hazards that are abated by the employer while an inspection is underway. These types of measures should be expanded under the new administration.

The Trump administration should also work to address the “Sue and Settle” approach used at federal agencies, including the EPA. Under this approach, private interest groups use lawsuits that seek to force federal agencies to issue regulations that advance their policy priorities. These lawsuits are used to negotiate rulemaking schedules and other concessions from agencies outside of the traditional regulatory process. There are instances where, rather than fighting the lawsuit, the EPA quickly agrees to special interest demands. Unfortunately, impacted parties, including private citizens and states who may be subject to the regulations at issue, have been denied the opportunity to intervene in these suits as some courts have held that they lack standing to participate.

Again, for construction contractors and federal agencies to partner effectively, agencies should engage in enforcement efforts targeting bad actors, not innocent contractors. Likewise, regulatory agencies must not actively engage in judicial rulemaking tactics that leave the construction industry for which it regulates outside the process.

REESTABLISHING FEDERAL AGENCY R

REIGNING IN THE FEDERAL REGULATORY MACHINE

Unlike changing the paradigm in federal agencies, truly reigning in the federal regulatory machine will take a considerable amount of time. There is long-standing statutory and jurisprudential precedent that the new administration will have to effectively navigate. Here, AGC puts forth guidance on a range of strategies the Trump administration should consider in its effort to make federal agencies responsible again.

REASONABLY HALTING NEW OR PENDING FEDERAL RULES, GUIDANCE AND POLICIES

AGC supports halting new or pending federal rules, guidance and policy on January 20, 2017. Nevertheless, certain pending rules—if delayed—could have significant deleterious impacts upon the construction industry throughout the nation.

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or—at a minimum—overly burdened the construction industry with many of those executive actions. We provide detailed explanations and recommendations for many of these actions in the appendix of this document. However, we would like to highlight five items of particular concern to our industry:

MAKING THE CONSTRUCTION PROJECT REVIEW & PERMITTING PROCESSES EFFICIENT

President Obama famously stated that, “there’s no such thing as shovel-ready [construction] projects.” For example, just to raise New York’s Bayonne Bridge—and avoid the multi-billion dollar expense of building a new bridge or tunnel—the project waded through a five year process with a 10,000 page environmental assessment and an additional 10,000 pages of required permitting and regulatory materials. Deepening the Port of Savannah has been delayed for almost 30 years, including 14 years of environmental review alone. Given the various regulatory reviews necessary to issue federal permits, President Obama’s statement is sadly true. However, it does not have to be. And, it should not be accepted.

AGC and the construction industry challenge this administration to put America on a path towards shovel-ready construction projects. To do so, the Trump administration will have to work with Congress and federal agencies on streamlining environmental and regulatory permitting reviews that are mandated by statute. Though President Obama and federal agencies sought to maximize review efficiencies by conducting concurrent agency reviews, creating a permit dashboard and establishing some centralization in permitting decision making, those efforts do not go nearly as far as needed.

Foremost among Trump administration permitting reforms should be to establish a six month time limit for completing all federal National Environmental Policy Act reviews. If no decision has been made by the end of those six months, the project should automatically be allowed to move forward. In addition, the administration and Congress should establish a loser-pays provision requiring any plaintiff who files a legal challenge to block an infrastructure project to pay all related legal fees if their challenge is unsuccessful.

AGC does not recommend the new administration stop there. Opportunities exist to reduce permitting and regulatory review delays within the operations of EPA, USACE and the Fish and Wildlife Service, among other agencies. Efforts should be undertaken to reduce the number of agencies involved in the various approval processes to allow construction projects to move forward. It’s difficult enough to have one agency make a decision. But, when dozens are involved—at a federal, state and local government level—it’s no wonder why we wait decades to undertake significant infrastructure improvements. Not only should the Trump administration reduce the number of agencies needed to conduct the countless regulatory and permitting reviews, it should also have one agency authorized to and held accountable for moving projects through the process.

AGC looks forward to working with the new administration on these initiatives and others to make federal review and permitting processes meet today’s infrastructure demands and needs.

REINVIGORATING COMPETITION IN FEDERAL AND FEDERALLY-ASSISTED CONSTRUCTION PROJECT PROCUREMENT & DELIVERY

Federal and federally-assisted construction projects include significantly more paperwork, reporting and other requirements than private construction projects. These many additional requirements often drive competition away from bidding on these projects, which can lead to higher prices to the taxpayer without, necessarily, higher quality infrastructure delivered. There are several procurement areas the Trump administration should endeavor to engage in reform efforts. Those include, but are not limited to:

- Revamping the Federal Acquisition Regulation to More Realistically Provide for Innovative Project Delivery Methods and to Eliminate Procurement Tools, Like Reverse Auctions, That Do Not Work For Construction Services; and
- Holding the Federal Acquisition Workforce Accountable for Indecision and Project Delays.

AGC and its membership have ongoing forums within the association that are constantly addressing and reassessing reform ideas based on these—and other—major themes. AGC looks forward to putting forth more robust reform plans in these areas to help the new administration deliver more infrastructure—both horizontal and vertical—in a safe, efficient and effective manner.

CONCLUSION

The legacy of the Obama administration is written in hundreds of thousands of pages of the Federal Register in the form of more than 20,000 regulations issued since 2009. As of today, there are approximately 3,320 federal regulatory actions at various stages of development. Of those, 1,019 are in the “final rule” stage and near ready for issuance before Inauguration Day 2017.

Not every one of those regulations, however, should be a high priority for the Trump administration to address. Some of them help provide certainty to the construction industry. Some, in fact, help resolve problems in a fairly reasonable manner. Nevertheless, there are far more executive orders and presidential memoranda, federal regulations, guidance documents and policy statements that the construction industry find hurt its ability to build America.

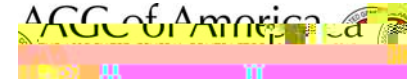
The purpose in putting together this document for the incoming administration is to provide a prioritized regulatory guide that will help President-elect Trump fulfill his campaign promise to rebuild the nation’s infrastructure and ensure that it is “second to none.” In Tc 0.0009 Tw 23.404 0 Td8elp Puioritized

Executive Orders & Presidential Memoranda (Repeal, Tweak, Keep)

December 20,

Executive Orders & Presidential Memoranda (Repeal, Tweak, Keep)

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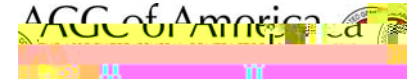
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Executive Orders & Presidential Memoranda to Tweak

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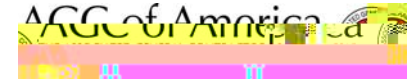
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Federal Agency Rules, Guidance, and Policy to REPEAL

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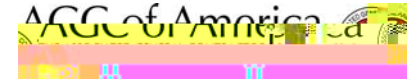
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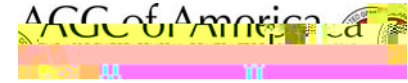
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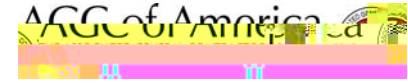
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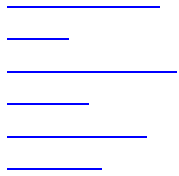
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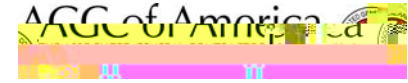
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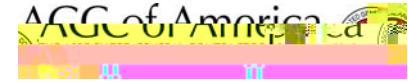
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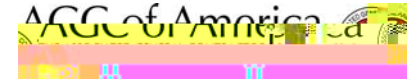


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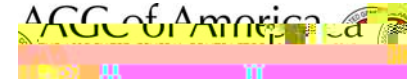


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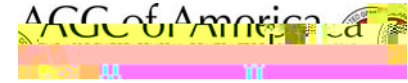
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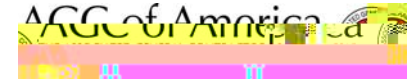


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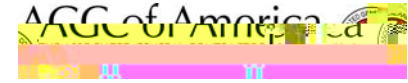


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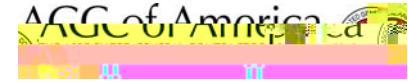
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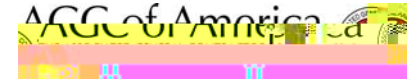
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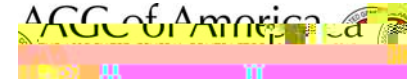
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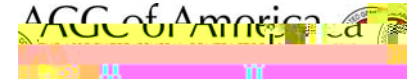


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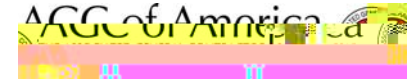
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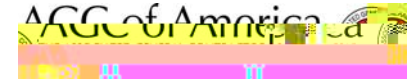
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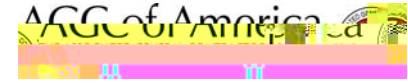
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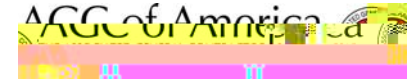
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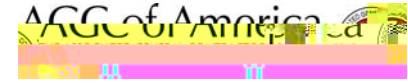
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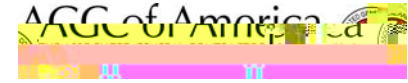


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