June 19, 2018
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2018 Development

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

AGC Regulatory Tracker: Table of Contents

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Agency	Regulatory Action Title	Type of Regulatory Action	Issue	Recent AGC Action	AGC Resources
SAFETY & HEALTH					
DOL/ OSHA	Permissible Exposure Level (PEL) for Silica	Final Rule issued 3/25/16 Federal Appeals Court Upholds Rule 12/22/17	The rule lowers employee exposure limit to silica to impracticable compliance levels. AGC filed suit against the rule in April 2016 and the D.C. Circuit upheld the rule in Dec. 2017. If your construction company operates under OSHA state-plans in one of 26 states or two territories, it is important that you check to see if your OSHA state-plan agency is following the federal OSHA's enforcement policies or has its own unique requirements or deadlines. OSHA expects to issue an RFI on Table 1 revision in Nov. 2018. OSHA is interested in the effectiveness of control measures and tasks and tools not currently included in Table 1 along with info. on the effectiveness of dust control methods in limiting exposure.	AGC is seeking to expand activities identified in Table 1, having participated in a technical meeting on the topic with OSHA in March 2018. The agency plans to issue a formal RFI on the subject. In addition, AGC National has encouraged AGC Chapters to participate in the silica sampling and objective data program to help further its case to expand Table 1. AGC and its coalition have also drafted FAQs—many of which OSHA has indicated it would accept—to help provide guidance for the regulated community.	• AGC Educational Resources • Silica Sampling & Objective Data Program • AGC Webinar 9.18.17 • AGC Coalition Comments 2.11.14 • AGC News Story 4.4.16 • AGC News Story 4.7.17 • AGC News Story 6.16.17 • AGC News Story 9.21.17
DOL/ OSHA	Electronic Tracking of Workplace Injuries and Illnesses (Drug Testing)	Final Rule Issued 5/12/16	The rule requires electronic reporting of injury and illness records to OSHA and impacts post-incident drug testing and safety incentive programs. In its 6/28/17 proposal delaying electronic reporting, OSHA also announced its intention to issue a separate proposal to reconsider, revise or remove other provisions this rule. The provisions under future consideration could include the anti-retaliation provision that focuses on post-incident drug testing, disciplinary policies and safety incentive programs. A proposal is expected in July 2018.	Following an AGC meeting in August 2016 with the head of OSHA and an AGC-backed letter from Congress, the agency on 10/19/16 published new guidance that recalibrated the agency's position relating to post-incident drug testing within the context of this rule. AGC awaits opportunity to comment on revising the rule and the "anti-retaliation" provision.	• AGC Coalition Comments 3.10.14 • Congress Hearing Letter 5.25.16 • AGC News Story 10.24.16 • AGC News Story 5.18.17 • AGC News Story 6.28.17 • AGC News Story 8.3.17
DOL/ OSHA	Crane Operator Qualification in Construction	Proposed Rule 5/21/18	OSHA's existing crane operator certification requirement in the Cranes and Derricks in Construction standard has been extended until 11/10/18. OSHA also extended the existing employer duty to ensure that crane operators are trained and competent to operate equipment safely for the same period of time. The proposed rule would: (1) require comprehensive training of operators; (2) remove the provision that requires certification by capacity; (3) clarify and permanently extend the employer's responsibility to evaluate crane operator competency; and (4) require documentation of that evaluation.	AGC sent a 5/1/18 letter to members of Congress urging them to provide the necessary resources to OSHA to finalize the rule. AGC coordinated a May 2018 meeting of industry stakeholders with OMB/OIRA staff to further express the need for OSHA to finalize the rule. AGC stressed the need for sufficient time for the industry to come into compliance with the qual. requirements under consideration.	• AGC News Story 6.8.17 • AGC Comments 3.12.14 • AGC Coalition Effort 10.30.14 • AGC News Story 6.8.17 • AGC News Story 9.19.17 • AGC News Story 5.4.18 • AGC News Story 5.29.18

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DOL/ OSHA	Multi-Employer Citation Policy	Policy 12/10/10 AGC filed amicus brief	Under the policy, OSHA may cite employers on multi-employer worksites for violations that expose other employers' workers to occupational hazards. As of this date, the policy remains in effect. On 4/28/2017, an Occupational Safety and Health Review Commission Administrative Law Judge found a construction company not liable for an OSHA violation of one of its subcontractors under the multi-employer citation policy where the violation occurs within the jurisdiction of the 5th Circuit, based on 5th Circuit precedent. OSHA has appealed the decision to the 5th Circuit and AGC has filed an amicus brief.	In Dec. 2016, AGC recommended that the agency adjust its policy to hold that that employers are only legally responsible for protecting the safety and health of their own workers. An Occupational Safety and Health Review Commission decision under the Obama administration overturned a Bush era OSHRC decision on this policy interpretation. AGC filed an amicus brief with the 5th Circuit in 2018.	• AGC News Story 9.2.10 • AGC Amicus Brief Supporting Contractor's 5th Circuit Litigation
DOL/ OSHA	Standard Improvement Project (SIP's) IV	Proposed Rule Issued 10/4/16	This rulemaking, the fourth in a series, is designed to remove or revise outdated, duplicative, unnecessary, or inconsistent requirements in the agency's safety and health standards. While most of the changes appear to be minor in nature, there are three that raise significant concerns based on AGC's review that involve excavations, personal protective equipment and lockout/tag out. A final rule is expected in July 2018.	AGC worked with a coalition of industry stakeholders to draft and submit comprehensive comments on 1/4/17.	• AGC Coalition Comments
DOJ	Criminal Prosecutions of Worker Safety and Environmental Law Violations	Guidance Issued 9/17/15 MOU b/w DOL and DOJ	Environmental and worker safety violations are being merged under DOJ's new "Worker Endangerment Initiative," which will lead to harsher fines and possible jail time. The initiative encourages DOJ and enforcement agencies to probe beyond areas of reasonableness in their investigations, press for unreasonable penalties of violations, and entangle innocent contractors in unwarranted litigation. Rather than using valuable enforcement resources wisely, these policies encourage fishing expeditions instead of calculated enforcement efforts to address the actions of bad actors. This initiative remains in effect.	In Dec. 2016, AGC recommended that the Attorney General withdraw this guidance and MOU and revisit the scope of this initiative. A recent memo from the DOJ notes that it will continue to pursue environmental enforcement, but will reserve criminal prosecution for more egregious violations and those that involve providing false information to the government.	• AGC News Story 3.29.16
DOJ	Individual Accountability for Corporate Wrongdoing	Guidance Issued 9/9/15	Under this guidance, DOJ intends to hold individuals responsible for corporate wrongdoing. As with its Worker Endangerment Imitative, this DOJ guidance encourages fishing expeditions rather than calculated enforcement efforts to address the actions of bad actors. The guidance remains in effect.	In Dec. 2016, AGC recommended to the presidential transition team that the Attorney General withdraw this guidance. On 5/9/2018, DOJ announced a new policy makes clear that the threat of criminal prosecution should not be used to coax a greater civil penalty.	• AGC News Story 3.29.16

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LABOR RELATIONS					
NLRB	Representation-Case Procedures ("Quickie" or "Ambush" Elections Rule)	Final Rule Issued 12/15/14 RFI issued 12/14/17	The rule expedites and otherwise revises the election process for determining union representation and requires employer disclosure of employee email addresses and phone numbers. The effect is to limit employers' opportunity to communicate information with employees about union representation. The rule enhances unions' ability to organize open-shop contractors and to solidify relationships with 8(f) union contractors. On 12.14.17, the NLRB issued an RFI seeking public comment on whether or not to retain, modify or rescind the rule. The NLRB is currently reviewing those comments.	On 4/18/18, AGC submitted a response to the National Labor Relations Board's Request for Information (link is external) regarding representation-case procedures. AGC also signed onto a response submitted by the Coalition for a Democratic Workplace (CDW). Both responses call on the Board to rescind or modify its 2014 rule that changed the procedures for union representation elections.	• AGC Comments 2014 • AGC News Story 12.16.14 • AGC Webinar Recording 5.18.15 • AGC Comments to NLRB RFI • AGC Coalition Comments to NLRB RFI
NLRB	Joint Employer Standard Under Decision in Browning-Ferris Case	Court Case impacting Standard 8/27/15	The Obama administration NLRB established a broader standard for determining joint employer status in the Browning-Ferris Industries case in 2015. Under the new standard, joint employer status may exist even when a company merely exercises indirect control over, or has simply reserved the right to control, essential employment terms of another company's employees. While the case was on appeal pending decision in the DC. Circuit, the Board reversed the Browning-Ferris decision in a separate case called Hy-Brand Industrial Contractors in Dec. 2017. The DC Circuit remanded the Browning-Ferris case back to the Board for reconsideration in light of the Hy-Brand ruling. However, on 2.9.18, an NLRB IG report concluded that Board Member Emanuel should have recused himself from the Hy-Brand deliberations. Referencing that report in a 2.26.18 ruling, the Board vacated the Hy-Brand decision. This re-instituted the Browning-Ferris standard and left the appeal in an uncertain state. On 5/9/2018, the NLRB announced that it is considering rulemaking to address the standard for determining joint-employer status under the NLRA.	AGC-supported legislation to invalidate the Browning-Ferris standard and codify a standard requiring direct and immediate control is making its way through Congress. The Save Local Business Act passed the House in Nov. 2017. The bill would also codify the joint employer standard under the Fair Labor Standards Act.	• AGC Coalition Amicus Brief 6.26.14 • AGC News Story 9.3.15 • AGC News Story 1.10.18 • AGC News Story 3.14.18 • AGC News Story 5.9.18

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DOL/ OLMS	Persuader Agreements: Employer and Labor Relations Consultant Reporting Under the LMRDA	Final Rule Issued 3/24/16 Perm. Injunction Issued 11/16/16 DOL proposed rule to rescind rule issued on 6/12/17	The rule expands the reporting obligations of labor relations "consultants" – which is broadly defined – who conduct activities to persuade employees about their rights to join a union or bargain collectively, as well as the reporting obligations of employers who receive assistance from such consultants. By narrowing the "advice" exemption to the reporting obligations, the rule requires reporting even when the consultant communicates only to the employer and has no direct contact with employees, if an object of the communications is to "persuade" employees. A federal judge issued a permanent injunction halting the rule nationwide on Nov. 16, 2016. The DOL issued a proposed rule to rescind the Obama rule on 6.12.17. On 6.15.17, U.S. Court of Appeals for the Fifth Circuit granted DOL's request to stay its appeal of a decision that blocked the rule. As a result, no action on the appeal is required for six months, or 30 days after the DOL issues a final rule rescinding the persuader rule, whichever comes sooner. DOL held out that a final rule to rescind the Obama rule would be issued in May 2018. However, that rule is still pending.	AGC recommended that the rule be rescinded by the Trump administration in 12/16. AGC also worked on efforts to block the rule in Congress. On, 8/10/17, AGC submitted formal comments on the proposed rule to rescind the Obama-era rule.	• AGC Comments 9.21.11 • AGC Comments 8.10.17 • AGC Newsletter Story 11.18.16 • AGC News Story 3.29.16 • AGC News Story 8.10.17

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HUMAN RESOURCES & TRAINING, EDUCATION & DEVELOPMENT					
DOL/ WHD	Doubling Salary Threshold for Overtime Consideration	Pres. Memo 3/13/14 Final Rule Issued 5/23/16 RFI issued 7/26/17 to review rule Court Perm. Injunction of Rule 8/31/17 DOL Appeals Ruling	The rule more than doubles the standard overtime salary threshold for exempt employees – from $455 per week ($23,660 per year) to $913 per week ($47,476 per year) effective 12.1.16. To impose such a large and immediate increase as proposed will result in unintended consequences, particularly for small construction companies, construction employers in lower-wage regions, and construction personnel. On 11.22.17, a federal judge issued a nationwide preliminary injunction blocking the rule from taking effect as scheduled. That judge permanently enjoined implementation of the rule on 8/31/17. On 7.26.17, DOL's WHD issued a RFI on the 2016 overtime rule changes. The WHD could put forth new regulatory changes to existing overtime regulations. On 10.1.17, DOL appealed court's ruling to defend its authority to create an overtime rule, but not the salary limit set by previous administration.	AGC testified against the rule before Congress in Sept. 2016. AGC supported legislative efforts to mitigate the impact of the rule during the 114th Congress. Further efforts are to be seen in the 115th Congress. AGC submitted its comments to WHD's RFI on 9/25/17. WHD expects to issue a proposed rule in January 2019. The proposal will determine what the salary level for exemption of executive, administrative and professional employees should be.	• AGC Comments 9.4.15 • AGC Coalition Comments 9.4.15 • AGC Comments 9.25.17 • AGC Testimony 9.13.16 • AGC News Story 9.29.17 • AGC News Story 10.1.17 • AGC News Story 5.10.18
DOL/ WHD	Child Labor Regulations	Final Rule 5/20/10	The rule leaves in place an AGC-supported exemption for 16- and 17-year-old apprentices and student learners working in construction, however, modernization is still needed. Several of the tools and processes prohibited by DOL for 16- and 17-year-olds have now been modernized with new technologically advanced and/or injury prevention mechanisms required by OSHA that were not in place when the Fair Labor Standards Act was written. OSHA expects to issue a proposed rule in October 2018 for "Expanding Apprenticeship and Employment Opportunities for 16 and 17-Year Olds Under the FLSA."	AGC recommended in Dec. 2016, that the WHD modernize the regulatory guidance associated with the FLSA's Child Labor provisions in regard to the construction industry; especially the list of occupations and tools prohibited by the regulations and change the interpretation of intermittently, short periods of time, and direct and close supervision.	• AGC Comments 7.16.07 • AGC News Story 6.21.10 • AGC News Story 5.10.18

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DOL/ WHD	Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act	Guidance Issued 1/20/16 Rescinded on 6/7/17	The Wage and Hour Administrator's Interpretation set forth a new standard for determining when two or more employers are "joint employers" under the FLSA and MSPA. The intent is to hold companies jointly accountable for FLSA and MSPA violations of their subcontractors, staffing agencies, joint venture partners, and the like through use of an "economic realities" analysis that is even broader than the controversial joint employer analysis recently adopted by the NLRB.	In Dec. 2016, AGC recommended that the Trump transition team work to rescind this guidance. Following AGC's recommendation, Sec. Acosta announced on 6/7/17 the withdrawal of this guidance.	• AGC News Story 1.28.16 • AGC News Story 6.8.17
DOL/ EBSA	Expansion of Association Health Plans (AHPs)	Pres. Executive Order 10/12/17 Proposed Rule Issued 1/5/18 Final Rule Issued 1/19/18	The proposed rule would modify the definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) regarding entities (AHPs) that could sponsor group health coverage. The change would allow employers to band together to offer health coverage if they either are: "(1) in the same trade, industry, line of business, or profession; or (2) have a principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State)." AGC is currently reviewing the final rule issued on June 19, 2018.	AGC submitted comments to DOL in March 2018. AGC urged DOL to be mindful of Chapter options, especially those who currently offer AHPs, and take the necessary steps to ensure that any changes do not arbitrarily disrupt the affordable and quality health coverage that these arrangements consistently provide. AGC also warned that adding proposed nondiscrimination protections would critically threaten the solvency of existing Chapter plans and advised the DOL to further investigate exempting AHPs from varying state regulations.	• AGC News Story 1.11.18 • AGC Comments 3.6.18 • AGC News Story 3.14.18

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ENVIRONMENT					
EPA, USACE, DOT, DOC, DOI	Regulatory Reform & Permit Streamlining	Executive Order (EO) 13777 – Regulatory Reform 2/24/17 EO 13783 – Energy Independ-ence and Economic Growth 3/28/17 EO 13807 - Federal Permitting Const. 8/15/17 Ongoing Policy Adjustments and Opportunities to Provide Feedback	AGC has long advised Congress, the White House and the federal agencies on ways to streamline the federal environmental review and permitting process for infrastructure projects. Most recently, senior leaders within this Administration have turned to AGC to better understand the current "chokepoints" in the approval process and for common-sense recommendations on how to expedite the delivery of construction projects. AGC developed and widely circulated an Environmental Permitting Flowchart, a Flowchart Backgrounder, as well as a 34-page white paper – titled "Reforms for Improving Federal Environmental Review and Permitting" – to educate our Federal Government on the opportunities for meaningful reform. These documents have made the rounds, opened the door for meaningful discussions with the White House, federal agencies and Congressional committee staff and ultimately formed the foundation of the Trump Administration's Infrastructure Legislative Plan/Principles (see AGC's environmental streamlining summary of the plan) and a newly-released Memorandum of Understanding wherein 12 federal agencies establish a "one federal decision" framework for project reviews that includes target deadlines, permitting timetables, concurrent reviews and dispute resolution.	Top Message: • Eliminate duplicative federal requirements, explore cooperative enforcement solutions (e.g., Find It; Fix It); reduce paperwork burdens • Merge the NEPA and Clean Water Act Section 404 permitting processes. • Work done to satisfy NEPA should satisfy federal permitting requirements. • Congress must consider a reasonable and measured approach to citizen suit reform to prevent misuse of environmental laws.	AGC White Paper • Reforms for Improving Federal Environmental Review and Permitting Related Comments: • U.S. Environmental Protection Agency (EPA) • U.S. Department of Commerce (DOC) • U.S. Department of Transportation (USDOT) • U.S. Army Corps of Engineers (USACE) Testimony: • House Small Business Committee • Senate Committee on Environment and Public Works • House Transportation and Infrastructure Committee • House Natural Resources Committee

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EPA/ USACE	Definition of WOTUS	Final Rule Issued 6/29/15 WOTUS EO Issued 2/28/17 Step 0 – Delay Implementation of 2015 WOTUS Rule Step 1 – Proposal to Rescind 2015 WOTUS Rule Step 2 (Pre-Proposal Replace 2015 Rule)	Step 0: On 1/31/18, EPA and the U.S. Army Corps of Engineers (USACE) finalized a rule that effectively delays implementation of the 2015 definition of "Waters of the United States" (WOTUS) until February 2020. In light of activity in the courts, this action maintains the status quo nationwide and provides continuity and regulatory certainty for contractors in the field while the agencies continue to work to repeal and replace the 2015 WOTUS rule. Step 1: On 7/27/17, EPA and USACE proposed a rule to repeal the 2015 WOTUS Rule. The proposal is in line with the WOTUS Executive Order issued by President Trump. That order, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule* (issued 2/28/17), calls for a complete review of the WOTUS rule and directs the agencies to "consider interpreting the term 'navigable waters' . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*." Step 2: The agencies will propose a new, narrower definition of which streams and wetlands are protected by the federal government (vs. by the states), in line with the principles that Justice Scalia outlined in the *Rapanos* opinion. The agencies are reviewing public comments submitted during a series of meetings and a non-regulatory docket to gather stakeholders' recommendations.	On 5/8/17, AGC with the Waters Advocacy Coalition met with EPA Administrator Pruitt's Deputy Chief of Staff and his lead on WOTUS reform efforts to express support of the new rulemaking process and to call to mind the extensive knowledge on this issue represented by the coalition. In comments filed 9/27/17, AGC offered strong support for the agencies' plan to re-codify regulatory text that existed prior to the 2015 WOTUS rule to "reflect[] the current legal regime under which the agencies are operating" following a nationwide stay of the rule by the U.S. Court of Appeals for the Sixth Circuit. The stay has been lifted; however, the 2015 WOTUS rule has not gone into effect because the administration further delayed its implementation via rulemaking (Step 0). AGC additionally filed 11/28/17 pre-proposal comments to the EPA and USACE on a new definition of WOTUS.	• AGC News Story 6.15.18 • AGC News Story 2.2.18 • AGC News Story 1.26.18 • AGC News Story 11.30.17 • AGC News Story 9.29.17 • AGC News Story 7.27.17 • AGC News Story 6.29.17 • AGC News Story 4.28.17 • AGC News Story 3.2.17 • AGC News Story 1.23.17 • AGC News Story 1.19.17 • AGC News Story 2.24.16 • AGC Comments 9.27.17 • AGC Comments 11.13.14

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EPA	Discharges to Groundwater	EPA Request for Comment – Pre-Proposal *Hawai'i Wildlife Fund v. City of Maui* (9th Cir., 2018) *Update Forever v. Kinder Morgan Energy Partners, L.P.* (4th Cir., 2018)	EPA and the courts have been inconsistent ruling whether the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program regulates discharges to groundwater. EPA accepted public comment on whether the Act covers point source discharges to (or through) groundwater that hydrologically connects to a "Water of the United States" or WOTUS. Over the years, and in varied settings, EPA has stated that such pollutant discharges may be subject to CWA requirements. If EPA were to expand its NPDES program to cover releases to groundwater, stormwater collection systems (e.g., detention/retention ponds, settling basins) as well as "green" infiltration practices) that are built to control point source runoff, per fed/state Construction General Permits, would require separate, brand-new NPDES permits. Recent decisions out of the Fourth and Ninth Circuits underscore the need for EPA to act. Those rulings have expanded the CWA "conduit theory" liability — that groundwater can act as a "conduit" of pollutants from facilities/operations to traditional navigable water (surface water) and trigger the need for a CWA permit – so long as pollutants that reach WOTUS are "fairly traceable" or "directly connected" to the point source, or present in WOTUS in "measurable quantities," for example.	AGC provided EPA with comments: (1) the CWA point source program does not regulate discharges to groundwater; (2) such an action would impact contractors that own/operate stormwater infrastructure that "treats" or "stores" water runoff; groundwater releases to surface waters already are controlled under other federal as well as state laws (e.g., Safe Drinking Water Act).	• AGC News Story 5.30.18 • AGC News Story 3.27.18

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EPA/ OAR	NAAQS – NOx, Ozone, Ongoing Policy Adjustments	Final Ozone Rule Issued 10/26/15 Court ordered deadline for final ozone designations by 4/30/18 Final rule to retain NOx standards 4/18/18 Proposal to keep current sulfur oxide standards 5/25/18 (Pre-publication version)	NAAQS Review/Implementation - Presidential Memo: President Trump on April 12 issued a memo ordering EPA to take a series of "actions" to accelerate and ease state and industry compliance with national ambient air quality standards (NAAQS). This includes decisions for the air permits needed to construct new facilities or to expand or modernize existing facilities which, as the memo notes, have become increasingly difficult to obtain as NAAQS have become more stringent. EPA "Back to the Basics" Memo: EPA Administrator Pruitt followed with a May 9 memo to his assistant administrators on plans for meeting the President's directive, including an imperative to meet statutory deadlines, timely issuance of guidance, as well as streamline and standardize the process.	AGC closely tracks and responds to proposed NAAQS revisions. More stringent standards could push counties across the country into areas of "nonattainment," which puts highway/transit funding and new construction of large facilities in jeopardy. Construction firms in nonattainment areas may also face restrictions on equipment emissions via bid preferences or contract requirements. Restrictions on new and existing facilities in those areas create a disincentive to build and/or expand. AGC had called on EPA to delay implementation of the 2015 ozone	• AGC's Environmental Observer 5.30.18 – News Roundup (SOx proposal) • AGC's Environmental Observer 4.26.18 – News Roundup (NOx final) • AGC News Story 4.27.18 (NAAQS Review) • AGC News Story 8.14.17 (Ozone) • AGC News Story 7.27.17 (NOx proposal) • AGC News Story 10.2.15 • AGC Comments 3.16.15

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EPA/ OPPTS	Current LRRP Program and its Expansion to Public & Commercial Buildings	Advanced Notice of Proposed Rulemaking for P&C Program Issued 5/6/10 (Moved to Long-Term Agenda)Moved to Long-term Action List Outlook: Proposed Revisions to Lead Dust Hazard Standard & Definition of LBP (Expected in mid-2018) President's Task Force of Reducing Childhood Lead Exposure	The last couple of Unified Agendas note a delayed schedule for determining whether or not to propose lead paint "work practice" rules for public and commercial buildings. For years, EPA has been trying to determine whether such work creates a lead-based paint hazard. AGC testified at an EPA public hearing on 6/26/13 that the existing OSHA standards for lead adequately protects workers and the surrounding public. EPA is more than a year past a court deadline to decide this matter. In recent news, the Office of Inspector General will be evaluating EPA's existing LRRP (Lead Renovation, Repair & Painting) program while the agency remains under court order to update its lead dust hazard standard (i.e., what constitutes a dangerous level of exposure) for floors and window sills in housing and child-occupied facilities. The 9th Circuit granted the agency's motion for more time -- until June 26, 2018 -- to issue that proposed rule. As part of the rulemaking, EPA also is reviewing the regulatory definition of lead-based paint under the Toxic Substances Control Act.	AGC has presented a strong case that OSHA's Lead in Construction Standard is already in full effect and sufficient to protect the employees who are actually performing the renovation work as well as the surrounding public from lead dust exposures. There is a lack of information on the existence of, and any causal impacts from, lead-based paint hazards caused by remodeling activities in commercial buildings. AGC and other real estate/development groups met with EPA in April 2018 to discuss lead-based paint regulatory developments and, more specifically, EPA's focus on further reducing childhood lead exposure. EPA Administrator Scott Pruitt recently convened an interagency meeting with representatives from at least a dozen federal agencies to work on a joint strategy: a 2018 EPA priority.	• AGC News Story 4.13.18 • AGC News Story 7.26.17 • AGC Coalition Comments 4.1.13 • AGC News Story 7.3.13 • AGC Testimony Presentation 6.26.13

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EPA	Aerosol Cans	Proposed Rule 3/16/18	EPA proposed a rule that would streamline the regulation of hazardous waste aerosol cans. The rule would allow the disposal of aerosol cans as a universal waste thereby exempting them from the more expensive hazardous waste requirements under the Resource Conservation and Recovery Act Subtitle C. According to EPA, the proposed revisions would save at least $3 million per year in regulatory costs and facilitate recycling of the metal used to make the cans.	AGC supported this proposal: it could change a company's generator status, reduce program costs, facilitate recycling and save money. AGC recommended that EPA: (1) allow very small quantity generators (VSQG) to treat aerosol cans as either universal waste or follow the existing VSQG regs and (2) allow non-hazardous, non-intact and intact aerosol cans to be managed together as universal waste.	• AGC News Story 5.22.18 • AGC News Story 1.27.18
FWS/ NOAA/ NMFS	Listings, Critical Habitat and Mitigation	Changes to Endangered Species Act Critical Habitat Designations, and 'Adverse Modification' Definition (Finalized 2/11/16) Mitigation Policy and ESA Comp. Mitigation Policy (Finalized 11/6/16) Request for Public Comment (Proposal 11/6/17)	One rule revises the definition of "destruction or adverse modification" of critical habitat. The other rule clarifies the procedures and standards used for designating critical habitat. The new policy addresses how the Services consider exclusion of areas from critical habitat designations. The result will be more designation of state, local and private land as critical habitat, and increased regulatory burdens and costs on land activities. Obama-era mitigation policies set – for the first time -- a "net conservation gain" goal for mitigation, which goes further than the ESA requires. The U.S. Fish and Wildlife Service (FWS) under the Trump Administration opened the policies up for additional comment and review.	AGC recommended that the Trump administration entirely repeal the rule and policy. AGC submitted detailed ESA reform ideas to Congress on May 23, 2017. DOI intends to review and revise the regulations for listing species and designating critical habitat in 2018. In comments dated 1/5/18, AGC urged FWS to remove the goal of "net conservation gain" from the Service's Mitigation Policy and ESA Compensatory Mitigation Policy.	• AGC News Story 1.12.18 • AGC News Story (Proposal) 5.30.14 • AGC News Story 5.25.17

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DOI	Migratory Bird Treaty Act - Ongoing Policy Adjustments	Guidance Issued 4/13/18 re: DOI Memo (M-37050 Opinion 12/22/17) Outlook: Proposal to update MBTA list of birds (Expected in mid-2018)	FWS issued guidance to clarify the Department of Interior's new legal memorandum (M-37050 Opinion issued 12/22/17) that withdrew/reversed an Obama administration memo -- and a decades-long interpretation of the Migratory Bird Treaty Act (MBTA) -- that had criminalized "incidental take" of migratory birds, nests or eggs. The new M-37050 Opinion reinterprets the MBTA and takes a narrow view, finding the Act does not impose liability for such unintentional takes. An "incidental take" generally means a taking that results from an activity, but is not the purpose of that activity.	AGC has recently joined a coalition focusing on species issues to better provide information and resources to members. The new guidance provides a statement of Trump's DOI/FWS's interpretation on the nature of the MBTA's "take" prohibition. The language is not codified in law or regulation. Moreover, it does not resolve the circuit split among the courts of appeals regarding the reach of the MBTA to incidental takes. Legislative or regulatory action is possible during this administration to provide more clarity. Contractors also must remain mindful of the other federal laws (Endangered Species Act, and Bald and Golden Eagle Protection Act) as well as any applicable state laws that protect migratory birds.	• AGC's Environmental Observer 4.26.18 – News Roundup • AGC News Story 2.21.18

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EPA	Enforcement, General	Memos issued by DOJ & EPA change how feds will approach enforcement EPA Final Rule - increased federal civil penalties for violations of all enviro laws/permits 1/10/18	Memo Ending of Sue-And-Settle (Oct. 2017) – EPA Administrator Pruitt's directive sets procedures EPA will follow when it is sued in federal court to ensure there is public transparency and to stop EPA from entering into any consent decree that dictates (or predetermines) the agency's regulatory agenda or timelines for action. The directive also requires EPA to post online for review and public comment any proposed consent decree or draft settlement agreement that would resolve claims against the Agency. Memo Limiting Use of Guidance Documents (Jan. 2018) – DOJ cannot use "its enforcement authority to effectively convert agency guidance documents into binding rules" -- party's noncompliance with other agencies' guidance in not "a basis for proving violations of applicable law" in civil enforcement cases. Memo Limiting Use of Settlement Payments (Jan. 2018) – DOJ cannot make 3rd party settlement payments under federal consent decrees that were neither victims of the violations nor parties to the lawsuit... exception if $ would fix the enviro harm that is at issue. Memo Deferring EPA Enforcement to Authorized States (Jan. 2018) – OECA guidance instructs agency staff to generally defer inspections and enforcement to authorized states "as the primary day-to-day implementation of their authorized/delegated programs." Early Notice of Regional EPA Referrals to DOJ (March 2018) – Instructs Regional Offices to provide EPA HQs (OECA) with advance notice of civil enforcement cases recommended for referral to DOJ and include a statement of the Regional Administrator's position on the matter.	AGC has long opposed agency efforts to regulate industry using guidance documents because it circumvents the public notice and comment process. AGC supports cooperative federalism and, more specifically, an approach that provides states with the flexibility to implement their programs to address specific local and state concerns -- coupled with the necessary oversight and standardization to avoid inconsistencies. National one-size-fits-all approaches (such as construction numeric limits for stormwater, runoff limits for postconstruction, and federal control over all wet areas) does not recognize business and economic realities.	AGC News Stories: • AGC News Story 5.15.18 • AGC News Story 6.29.17 • New Report Exposes Surge in Sue and Settle • AGC News Story 4.11.13 Other Sue & Settle Resources: • U.S. Chamber of Commerce

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EPA/ OECA	Inspect and Correct: Cooperative Approach to Enforcement	EPA's Audit Policy EPA's eDiscolosure EPAs New Owner Audit Policy	On 5/15/2018, EPA announced a renewed emphasis on encouraging regulated entities to voluntarily discover, promptly disclose, expeditiously correct, and take steps to prevent recurrence of environmental violations. EPA highlighted its new Web-based "eDisclosure" portal, designed to receive and automatically process self-disclosed civil violations of environmental law. Some have criticized that the system is too complex for small businesses and calls into question the confidentiality of information released to EPA. EPA is also pointing to its "New Owner Audit Policy" that offers "flexibility that is available to new owners who self-disclose violations." EPA appears to be looking at other tailored programs designed to "encourage[e] regulated entities to voluntarily discover, promptly disclose, expeditiously correct, and take steps to prevent recurrence of environmental violations" – in particular, a "Find It and Fix It" pilot effort.	AGC is calling for construction contractors to be treated as industry partners and not "industry opponents." To do so, AGC calls for agency enforcement initiatives to focus on bad actors, rather than lumping innocent contractors in with bad actors. AGC recommends that the agency develop reforms to help companies discover and promptly correct environmental problems. Ideas include: reintroducing a process/protocol for making a Voluntary Disclosure under EPA's Small Business Compliance Policy; reintroduce Expedited Settlement Offer Policy under NPDES stormwater permit program; and expand the "Find It and Fix It" protocol that's currently being used under the SPCC Program.	
TAX					
IRS	Pending Regulatory Action re: Tax Cuts and Jobs Act of 2017	Pending	AGC is preparing for a wide range of rulemakings stemming from passage of the Tax Cuts and Jobs Act of 2017. Among the most important regulatory items for consideration include Section 199A—the 20 percent deduction for "qualified business income" meant to help pass-through, single taxation business entities. There will likely be multiple rulemakings concerning Section 199A. In addition, AGC has identified the need for regulatory clarification for Section 163(j)—the interest expense limitation—which could have unintended consequences for P3 projects.		

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TRANSPORTATION					
DOT	Geographic-Based Hiring Preferences in Administering Federal Awards	Pilot Program and Proposed Rule Issued 3/6/15 DOT withdrew the proposed rule and ended the pilot program on 10/6/17	Overturns prohibitions against states using local hiring requirements on federal-aid highway contracts. It restricts competition and violates the U.S. Supreme Court ruling in *United Building & Construction Trades v.Camden* which held that in-state hiring preferences discriminate against non-residents, violating the Privileges and Immunities Clause of the Constitution. USDOT established a pilot program to allow states to use local hire mandates and has issued a Notice of Proposed Rulemaking to make this change permanent. The Obama administration extended the pilot program for 5 years (thru 3/6/22) on 1/17/17. On 10/6/17, DOT formally withdrew the proposed rule and ended the pilot program.	In 12/16, AGC recommended to the Trump transition team that it discontinue the pilot program and ensure that the rulemaking does not move forward, as it is patently illegal and a blatant example of executive overreach. On 1/31/17, the day of Sec. Chao's confirmation, AGC urged her to do the same.	• AGC Comments 5.1.15 • AGC News Story 5.7.15 • AGC Letter to Sec. Chao 1.31.17 • AGC News Story 1.20.17 • AGC News Story 3.24.17 • AGC News Story 9.6.17 • AGC News Story 10.6.17
DOT/ FHWA	National Performance Management Measures relating to GHG	Round 1: Final Rule issued 1/18/17; Rule suspended on 5/19/17; States sue 9/20/17 Round #2: Proposal issued 10/5/17 to rescind rule; Final rule to rescind GHG measure on 5/31/18	The Round #1 rule would have required state DOTs to establish performance measures for climate-related (greenhouse gas or GHG) mobile-source emissions. The rule went beyond MAP-21 requirements by attempting to use the rulemaking to address the Obama administration's climate agenda. MAP-21 specified what performance standards were to be adopted and GHG was not included. FHWA also suggested it may include emissions from off-road construction equipment as part of this metric. Though the rule was set to take effect on 2/17/17, it went under a regulatory freeze until 5/20/17. On 5/19/17, FHWA suspended the portions of the rule. On 9/20/17, eight states sued DOT, challenging its suspension of the rule. On 9/28/17, DOT lifted its indefinite suspension of the rule. In Round #2, on 10/5/17, FHWA formally issued a proposed rule to withdraw the rule, which was finalized on 5/31/18.	AGC requested that the Trump Administration take action to halt and repeal this rule. We requested similar action in a letter to Sec. Chao on 1/31/17. When first proposed, AGC raised concerns about its legality and application in a 14-page letter. Later, AGC joined with 38 other organizations to submit a coalition letter. AGC also submitted a second round of comments pointing out that the GHG measurement rule would undermine the transportation planning process, could adversely impact air quality and duplicates other federal initiatives related to GHG already underway. AGC again suggested repealing the rule in response to the White House's and DOT's notifications of regulatory review.	• AGC Comments 8.19.16 • AGC-backed letter to House T&I Committee 8.18.16 • AGC News Story 2.16.17 • AGC News Story 5.18.17 • AGC News Story 9.22.17 • AGC News Story 10.5.17 • AGC News Story 11.13.17 AGC News Story 5.30.18

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DOT	DBE Program Implementing Modifications	Final Rule Issued 10/2/14	DOT's approach to increasing DBE participation on DOT assisted contracts is to focus on compliance with achieving numerical goals rather than on business development. Much of the regulatory requirements are paperwork exercises that significantly increase state DOT, prime contractor, and DBE workloads that are costly to implement and carry out. These additional burdens and costs have not increased DBE success. As of 7/20/17, DOT was preparing guidance to clarify that states must require all bidders to submit DBE utilization information regardless of whether the state requires the bidder to submit the information at time of bid or allows a five day grace period following bid submission. On 6/16/17, AGC formally requested that the guidance be changed to require only the apparent low bidder to submit this information. On 7/7/17, DOT indicated to AGC that it plans to move ahead with guidance that requires all bidders to submit DBE commitments even if states choose the five day grace period.	AGC has encouraged DOT to explore creating opportunities for giving incentives to contractors for DBE utilization and to focus the program on business development. In a 1/31/17 letter to Sec. Chao, we also pressed this issue. On May 16, 2017, the U.S. Court of Appeals for the Ninth Circuit reaffirmed that that the states within that circuit cannot lawfully impose contract goals for DBE participation in federal-aid highway projects unless, and until, they "establish the presence of discrimination within [their] transportation contracting industr[ies]." In May of 2015, AGC of America and its Montana chapter had jointly filed a friend-of-the-court brief in the Ninth Circuit in support of the contractor's position.	• AGC Comments 12/20/12 • AGC Supplemental Comments 12/20/13 • AGC News Story 10.1.14 • DOT IG Report on Issues with DBE Programs 4.23.13 • AGC DOT Meeting on IG Report 10.24.14 • AGC News Story 7.20.17
FMCSA	Commercial Truck Driver Hours of Service	Final Rule Issued 12/27/11	The major provisions in this rule that impact commercial motor vehicle drivers in the construction industry are as follows: Construction industry drivers transporting construction materials and equipment to and from an active construction site within a 50- air-mile radius of the driver's normal work reporting location are allowed to restart the on-duty counting period following any off-duty period of 24 or more successive hours. Drivers that do not meet the construction driver definition can restart the weekly on-duty clock following a 34-hour off duty period that includes at least two periods between 1:00 a.m. and 5:00 a.m. The rule limits the use of the "34-hour restart" to once a week thus limiting restarts to one every 168 hours. The practical effect of new on-duty limits result in weekly driving time being reduced from 82 to 70 hours during a seven-consecutive day driving period.	AGC recommended to the Trump transition that FMSCA revisit this rule and exempt construction drivers from its application. If no exemption, increase the distance coverage to a 150-air-mile radius for construction industry drivers. AGC put this request forth in a 1.31.17 letter to Sec. Chao and noted its concerns in a meeting with her as well. AGC also supported a request by the National Asphalt Pavement Association to exempt asphalt transport and placement operations from provisions in the HOS rule.	• AGC Comments 10.10.17 • AGC Comments 3.4.11 • Supplementary AGC Comment 6.8.11 • Previous AGC Comment 3.17.08 • AGC News Story 6.21.13 • AGC News Story 10.13.17

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FMCSA	Electronic Logging Devices for Hours of Service Enforcement	Final Rule Issued 12/16/15	The rule requires the installation and use of electronic logging devices (ELDs) on commercial motor vehicles used in interstate commerce but does not fully account for the uniqueness of construction truck needs. The effective date of the rule was Feb. 16, 2017, and the compliance date is Dec. 18, 2017, after which there is a two-year phase-in period. Accordingly, beginning Dec. 16, 2019, all drivers and carriers subject to the rule must use certified, registered ELDs that comply with the ELD rule and regulations. Rep. Brian Babin (R-Texas) introduced AGC-supported legislation to delay the mandate for two years. However, the legislation failed to advance. On 9/11/17, an amendment to a House omnibus appropriations bill to extend this mandate for one year was defeated by a 173-246 vote.	AGC has sought an exemption from this requirement for construction industry truck drivers but that request has not been accepted. Specifically, AGC has sought to exempt the construction industry from this rule. Section 395 of the National Highway System Designation Act allows FMCSA to provide special consideration to construction drivers in the hours-or-service regulations. To date, the Trump Administration has not signaled that it will modify the ELD rule or delay its implementation. Congress initiated the rule in 2012, mandated as part of the Moving Ahead for Progress in the 21st Century Act (MAP-21).	• AGC Comments 6.26.14 • AGC News Story 12.11.15 • AGC News Story 8.3.17 • AGC News Story 9.12.17 • AGC News Story 9.12.17
FMCSA	Minimum Training Reqs for Entry-Level Commercial Vehicle Operators	Final Rule Issued 12/8/16	The rule sets a core classroom curriculum for those seeking a CDL. It also requires behind-the-wheel training, but it does not require a minimum amount of behind-the-wheel training time. The rule was slated to take effect 2/6/17, however the agency delayed the rule's effective date to 3/21/17, to comply with Trump's order to federal agencies to freeze new. On 3/21/17, the agency announced another delay of the rule to 5/22/17. And, on 5/22/17 the agency announced another delay to 6/5/17. The rule's Feb. 7, 2020, compliance date does not appear to be affected by the delay, however.	AGC recommended that the final rule drop the 30-hour behind the wheel training requirement that was included in the proposed rule. That provision was dropped.	• AGC Comments 4.6.16 • AGC News Story 4.8.16 • AGC News Story 2.16.17

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DOT/ FHWA	Buy America Nationwide Waiver Notification for COTS Products With Steel or Iron Components and for Steel Tie Wire Permanently Incorporated in Precast Concrete Products	Notice of Proposed Rulemaking Issued 10/18/16	This proposed rule will help contractors with Buy America requirements on Federal-aid Highway contracts that have been expanded to include small components and subcomponents of products that are impossible to monitor. To meet Buy America mandates, contractors must request certifications from their suppliers indicating that products provided fulfill these requirements. Taken to its extreme, manufactured products that incorporate a variety of iron and steel components need to have individual certifications for each of the various component parts. The process is burdensome, costly and not in the public interest.	AGC strongly supports this proposed rule. AGC recommends that the final rule: (1) allow FHWA to issue a nationwide waiver for specialized steel lifting devices that are incorporated in precast concrete products; (2) raise the dollar threshold for the minimum amount of steel products that can be exempted from Buy America requirements from $2,500 to $20,000 or base it on a PPI escalator; and (3) exempt utility relocation work required as part of highway improvement projects. Given the recent executive actions seeking to narrow and limit Buy America/n waivers, it seems unlikely that further movement on finalizing this rule will occur under this administration.	• AGC Comments 12.2.16 • AGC Comments on Previous Buy America Waiver Notice 9.9.13 • AGC News Story 12.2.16 • AGC News Story 1.14.16 • AGC Request for FHWA to Clarify Buy America Requirement 2.23.16
DOT/ FHWA	DBE Prompt Payment and Return of Retainage: Questions and Answers	Guidance Issued 4/15/16	FHWA issued new guidance to states regarding the prompt payment requirements in the DBE program. The guidance is not new policy but reemphasizes what is already in the DBE regulations and points out the need for state DOTs to monitor payments to subcontractors. The provision requires primes to pay all subcontractors (DBE and non-DBE) within 30 days of the prime receiving payment from the state. The payment should include any retainage held by the prime on the sub after the sub has successfully completed it subcontract. According to the guidance, states are supposed to accept portions of the work on a contract as completed thereby eliminating the need for the prime to hold retainage.	AGC has informed the Trump Transition of its opinion on this guidance. Retainage is a standard industry practice used by owners and contractors to ensure that construction work is completed according to the contract specifications and is acceptable to the owner. Contractors should be allowed to withhold retainage on subcontractors until their completed work is formally accepted by the owner and this guidance should explicitly state this notion.	• AGC News Story 5.13.16

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FEDERAL CONTRACTING					
FAR	Use of Project Labor Agreements for Federal Construction Projects, FAR Rule	Final Rule Issued Exec. Order Issued 2/6/09	The rule encourages federal agencies to mandate project labor agreements on projects valued at $25 million or more. AGC strongly believes that the choice of whether to adopt a project labor agreement should be left to the contractor-employers and their employees, and that such a choice should not be imposed as a condition to competing for, or performing on, a publicly funded project. Government mandates and preferences for PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining. To date, this rule is still in effect.	AGC recommended that President-elect Trump revoke this rule and the executive order and replace it with former President George W. Bush's PLA Executive Order 13202 in 12/16 to the transition team. AGC joined coalition allies in urging the president to take that action in a letter on 1/10/17. AGC supported the introduction of the Fair and Open Competition Act (S. 622 / H.R. 1522) by Sen Jeff Flake (R-Ariz.) and Dennis Ross (R-Fla.) in 3/17. A House Committee passed the legislation shortly after it was introduced. In a 6/15/17 meeting with the GSA COS, AGC called on the agency to abandon its bid preference policy for PLA proposals.	• AGC PLA Website • Recent PLA Letter to Agency • AGC News Story 1.12.17 • AGC Coalition letter to Trump 1.10.17 • AGC News Story 3.23.17

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DOL/ WHD	Establishing Paid Sick Leave for Federal Contractors, FAR Rule	Executive Order Issued 9/7/15 Interim Final Rule Issued 9/30/16	The requirements of this rule are ill-fitting and impractical given the project-based, transitory, and seasonal character of construction work and the history of paying craft workers only for time worked. Additionally, the mandate is inconsistent with the Davis-Bacon Act and would increase costs and inefficiency in federal procurement. Furthermore, construction contractors should be allowed to take credit for paid leave toward meeting DBA prevailing wage obligations and meet their paid leave obligations by contributing to a benefit trust fund. The administration signaled that it will not repeal the rule, but rather permanently finalize it with a final rule. There has been no indication to date that the GOP controlled Congress will take legislative action to block the rule. The optics of the issue are too much for the GOP to overcome: the taking away of a benefit to American workers. There is an effort underway to enact a voluntary opt-in ERISA style safe harbor from state/local mandates for employers who offer a minimum threshold of compensable leave and flexible work arrangements to all employees. The effort would include language to satisfy the EO on sick leave.	AGC recommended to the Trump transition team in 12/16 that this final guidance and the executive order be rescinded. AGC contractors are not alone in voicing their displeasure with the EO and other mandates. A coalition, Employers for Flexibility (E4F), will be launching to support a legislative option. Once we see the final legislative language AGC may join and this effort.	• AGC Comments 4.12.16 • AGC Testimony 9.13.16 • AGC News Story 9.30.16
SBA	Credit for Lower Tier Small Business Subcontracting	Final Rule Issued 12/23/16	The rule allows prime contractors to count first tier and lower tier small business contractors towards the prime's small business subcontracting goals. The rule went into effect on 1/23/17. However, credit for lower tier small business subcontractors will not be available until the FAR Council issues a rule implementing the SBA rule. The SBA has also interpreted the statutory text to allow them to instate 2 subcontracting goals: one for first tier subcontractors and one for lower tiers (below the first) subcontractors.	AGC was successful in passing legislation forcing this rulemaking in 2013. AGC will continue to work with the FAR Council to work on implementation. AGC met with GSA—a member of the FAR Council—in February 2017 on this issue, during which time the agency noted that it is reviewing how to update the electronic subcontracting reporting system to meet the needs of this rule. It is unclear when the FAR Council will issue a rule to implement this initiative. AGC is working to improve the SBA rule.	• AGC Comments • AGC News Story 1.5.17 • AGC Testimony 9.18.15 • AGC Testimony 5.23.13