

From: David Karmol

To: USOGE

Subject: Proposed Amendments to Part 2635

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Attachments: [ICC Comments on OGE Part 2635-v2.doc](#)

Please find attached our comments regarding the proposed Amendments to Part 2635.

Thank you for your consideration.

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Comments on RIN 3209-AA04, Proposed Amendments to Part 2635

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Background

The International Code Council (ICC) is a membership association dedicated to building safety, fire prevention, and energy efficiency. ICC was established in 1994 as a non-profit organization with the purpose of developing a single set of comprehensive and coordinated national model construction codes. The founders of the ICC are Building Officials and Code Administrators International, Inc. (BOCA), International Conference of Building Officials (ICBO), and Southern Building Code Congress International, Inc. (SBCCI). Since the early part of the last century, these non-profit organizations developed three separate sets of model codes used throughout the United States. Although regional code development had been effective and responsive to our country's needs, the time came for a single set of codes. The nation's three model code groups responded by creating the International Code Council and by developing codes without regional limitations; the International Codes.

The International Codes, or I-Codes, are model building codes published by ICC, developed to provide minimum safeguards for people at home, at school and in the workplace. Building codes benefit public safety and support the industry's need for one set of codes without regional limitations. The International Code Council also publishes the International Energy Conservation Code (IECC), which is referenced in the Energy Policy Act of 2005, the Energy Independence and Security Act (EISA) of 2007, and is a national requirement in section 410 of the American Recovery and Reinvestment Act of 2009.

Fifty states and the District of Columbia have adopted one or more of the I-Codes at the state or jurisdictional level. Federal agencies including the Architect of the Capitol, General Services Administration, National Park Service, Department of State, U.S. Forest Service and the Veterans Administration also enforce the I-Codes for the facilities that they own or manage. The Department of Defense references the International Building Code for constructing military facilities, including those that house U.S. troops, domestically and abroad. Many of these same Federal agencies, and many others, are members of ICC, and personnel from these agencies regularly attend and participate in the code development process that ICC manages to update and revise its model codes.

In addition to the development of the codes, and the publication of the codes, ICC also publishes a broad range of publications, that assist those who use and enforce the codes to understand the rationale for code provisions, the methods to achieve compliance and the recommended procedures to assure that the code provisions are effectively incorporated into building systems and structures. ICC provides a range of educational programs, in a wide variety of formats and venues, all aimed at the goal of improving the safety, healthiness and energy efficiency of the built environment. Code officials, fire marshals, engineers, contractors, designers and other construction industry participants all utilize the educational and publication products and services offered by the code council.

ICC is registered as a 501c6 organization with the Internal Revenue Service.

Concerns with the Proposed Amendments

ICC develops its model codes and standards using what it describes as the "governmental consensus process," a variation on the consensus standards process that is specifically designed to address concerns related to codes that are intended to be adopted as legal requirements by state, local and federal jurisdictions.

The governmental consensus process varies from a traditional consensus process by limiting eligibility for the final vote in the code development process to governmental officials actively engaged in the health, safety and welfare of the built environment, in order to limit commercial or other special interests from unduly influencing the resulting codes. ICC believes that this process, that relies on the active participation of government personnel, with no other interest than the safety and welfare of the public, is critical to maintain the integrity of the code process, and the widespread respect for the provisions that are continually revised and included in the code requirements.

For these reasons, ICC is supportive of the rationale and reasons to limit gifts to public officials, and the possible influence such gifts might have on the independence of public officials. ICC

has itself implemented a number of restrictions on government officials participating in its process, that are similar in nature to the restrictions contained in 5 CFR Part 2635, that are the subject of this rulemaking. We understand and support the need for clearly describing the conduct and activity that is permissible, and that which is not, for public officials who owe their duty to the public. Because the very safety of the public depends upon public officials who participate in ICC's code development process being free from outside influences, we take this issue very seriously.

However, the proposed rule that has been put forward has some problems that will likely make the job of the Federal public official more difficult, as he or she attempts to comply with the proposed regulations. We see the following problem:

- The definition of a registered lobbyist or lobbying organization, and specifically the exceptions in Sec. 2635.203 (h) are not clear, and may very well have a chilling effect on the participation of public officials in activities that are not only of value to the public officials involved, but of real value to the United States, and its agencies.

ICC, believes it should be covered by the exceptions to Sec.2635(h), because of its clear purpose that fulfills a public need and serves a Federal purpose, as well as its educational programs, as explained above. However, in reviewing the exceptions numbered (1) through (4) to Sec. 2635(h), it is not at all clear that one of those exceptions would apply. (1) does not apply, since ICC is a 501c6 organization. (2) also does not apply, as ICC is not an institution of higher education as defined in 20 U.S.C 1001. (3) does not apply, since ICC is not a media organization as defined. (4) does not appear to apply, but is not at all clear, and provides no bright line test or simple way of determining what organizations are included, and which are not. The problem with subsection (h)(4) is that the term used: "nonprofit professional association, scientific organization, or learned society" do not have any recognized definitions, and on their face would appear to exclude ICC. We suspect that there are many other organizations similarly situated to ICC, that might not neatly fit into the terms used in subsection (h)(4), and thus would find Federal employees deterred from participating in events such as dinners in connection with training events, or even meetings where refreshments are served, due to the total ban on acceptance of anything of value, unless an organization fits into the definition for one of the exclusions.

The problem with an unclear, or undefined term, in a regulation such as this, is that in the absence of clarity, and with the risk of disciplinary action, loss of employment and potential criminal penalties involved, the reasonable Federal employee will avoid the risk of violating the regulation by simply not attending any functions that might fall into the banned category, where any doubt exists. This result is unacceptable, and will harm the interests of both the employees and the Federal government.

ICC believes that deterring Federal employees from participating in ICC meetings, code development hearings, and other related events as a result of this proposed rule would negatively impact the interests of the public, the Federal employees who decline to participate as a result of the regulation, and the Federal government itself. The Federal government currently benefits from both the development of common building codes that reduce the cost of constructing and operating Federal buildings, and by the inclusion of Federal policy and

operational concerns reflected in the codes produced by ICC, as a result of Federal employee participation in the ICC code development process.

It is insufficient to say that the language is intended to include ICC in its terms, for the language is so vague that a reasonable person might not be able to determine whether ICC is included in the exemption or not, and that uncertainty is sufficient to chill participation. The language must be clear, easily interpreted by the layman, and simple to apply. Without such simplicity and ease, the proposed rule will without question deter participation.

We would strongly encourage the OGE to revise the definition, and produce a rule with bright line definitions, such as “501c3, 501c4 and 501c6 organizations.” These existing definitions are currently known, and easily determined, to avoid confusion and the detrimental effect of employees avoiding participation out of caution and fear of prosecution. We believe that the risk of employees being influenced by the few additional organizations that would be included in such a bright line definition, especially with all of the other restrictions that remain clearly in place, is most definitely outweighed by the benefits to the government of participation in useful, and clearly educational or public benefit activities.

A second, but no less important concern, is as follows:

-OGE has failed to even consider any activities that Federal employees might be engaged in with an organization that happens to employ a lobbyist (exercising its Constitutional rights), beyond “educational or professional development activities.” The development of building codes or consensus standards that ICC is engaged in do not fall into the category of “educational or professional development activities,” but they are no less important to Federal employees and agencies, and have been repeatedly recognized as such, by both the Executive branch and the Congress. (e.g., OMB A-119, National Technology Transfer and Advancement Act [NTTAA], PL104-113)

In fact, NTTAA directs the National Institute of Standards and Technology (NIST), a division of the U.S. Department of Commerce, to develop a plan for, and report annually on, the increased participation of Federal agencies and their personnel in the development of private sector standards, and the implementation and use of such standards and codes by the Federal government in lieu of governmental standards. It should be noted that many of the organizations that sponsor and manage the standards development which the Federal government is required by law to participate in and utilize, are actually the “trade associations” that are referred to as specifically not included in the exception that is at issue in this proposed regulation.

We strongly encourage OGE to look at this issue, and to carve out a very clear exception for standards and code development activity, that Federal government employees must be participants in, to comply with existing and long-standing Federal law. The omission of this activity, and any mention of it in the proposed regulation is a serious oversight, that will create conflicts between the proposed regulation and the regular activities and duties of many Federal employees.