UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

BP - Public Accommodations - Virginia Graeme Baker Pool and Spa Safety Act
The contents of this document will be discussed at the Open Commission Meeting on Wednesday, July 14, 2010

THIS MATTER IS NOT SCHEDULED FOR A BALLOT VOTE.

A DECISION MEETING FOR THIS MATTER IS SCHEDULED ON: July 21, 2010

Date: JUL - 7 2010

TO : The Commission
Todd Stevenson, Secretary

THROUGH: Kenneth R. Hinson, Executive Director KRH

FROM : Cheryl A. Falvey, General Counsel CAF
Philip L. Chao, Assistant General Counsel, RAD
Barbara E. Little, Attorney BEL

SUBJECT : Public Accommodations Facility, Final Interpretive Rule

The Virginia Graeme Baker Pool and Spa Safety Act, 15 U.S.C. 8001, ("VGB Act" or "Act") requires that drains in public pools and spas be equipped with ASME/ANSI A112.19.8 compliant drain covers, and that each public pool and spa with a single main drain other than an unblockable drain be equipped with certain secondary anti-entrapment systems. The Act defines "public pool and spa" to include a swimming pool or spa that is "open exclusively to patrons of a hotel or other public accommodations facility," but the Act does not define the term "public accommodations facility." A draft final interpretive rule interpreting "public accommodations facility" is attached for your consideration.

Please indicate your vote on the following options.

I. Approve publication in the *Federal Register* of the draft final interpretive rule interpreting "public accommodations facility" as used in the VGB Act, without change.

_____ _____
Signature Date

II. Approve publication in the *Federal Register* of the draft final interpretive rule interpreting "public accommodations facility as used in the VGB Act, with changes (please specify changes):

_____

RH 7/7/2010
CLEARED FOR PUBLIC RELEASE UNDER CPSA 6(b)(1)

THIS DOCUMENT HAS NOT BEEN REVIEWED OR ACCEPTED BY THE COMMISSION.

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_____

_____ _____

Signature Date

III. Do not approve publication in the *Federal Register* of the draft final interpretive rule interpreting "public accommodations facility" as used in the VGB Act.

_____ _____

Signature Date

IV. Take other action (please specify):

_____

_____

_____

_____ _____

Signature Date

[Billing Code 6355-01P]

CONSUMER PRODUCT SAFETY COMMISSION

Virginia Graeme Baker Pool and Spa Safety Act; Public Accommodation

AGENCY: Consumer Product Safety Commission.

ACTION: Final interpretive rule.

SUMMARY: The Consumer Product Safety Commission ("Commission" or "CPSC") is issuing this interpretive rule to interpret the term "public accommodation" as used in the Virginia Graeme Baker Pool and Spa Safety Act.

DATES: This rule is effective [**insert date that is 30 days after publication**].

FOR FURTHER INFORMATION CONTACT: Barbara E. Little, Regulatory Affairs Attorney, Office of General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814-4408; blittle@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. Background

The Virginia Graeme Baker Pool and Spa Safety Act, 15 U.S.C. 8001, ("VGB Act" or "Act") requires that drains in public pools and spas be equipped with ASME/ANSI A112.19.8 compliant drain covers, and that each public pool and spa with a single main drain other than an unblockable drain be equipped with certain secondary anti-entrapment systems. Section 1404(c) of the Act. The Act defines "public pool and spa" in relevant part as a "swimming pool or spa that is open exclusively to patrons of a hotel or other public accommodations facility." Section 1404(c)(2)(B)(iii) of the Act. The Act does not define the term "public accommodations facility."

In response to numerous inquiries regarding what constitutes a public accommodations facility under the VGB Act, the Commission published a proposed interpretive rule on the definition of "public accommodations facility" on March 15, 2010 (75 FR 12167). This final interpretive rule responds to comments received in response to the proposed interpretive rule and provides a definition of "public accommodation" as the term is used in the VGB Act.

B. Legal Analysis

1. *Public Pool or Spa.* A public pool or spa open exclusively to patrons of a hotel or other public accommodations facility is only *one* category of public pools and spas under the VGB Act. The Act also defines a public pool and spa to include a swimming pool or spa that is:

- Open to the public generally, whether for a fee or free of charge (Section 1404(c)(2)(A) of the Act);
- Open exclusively to members of an organization and their guests (Section 1404(c)(2)(B)(i) of the Act);
- Open exclusively to residents of a multi-unit apartment building, apartment complex, residential real estate development, or other multi-family residential area (other than a municipality, township, or other local government jurisdiction) (Section 1404(c)(2)(B)(ii) of the Act); and
- Operated by the Federal Government (or by a concessionaire on behalf of the Federal Government) for the benefit of members of the Armed Forces and their dependents or employees of any department or agency and their dependents (Section 1404(c)(2)(C) of the Act).

This interpretive rule is limited to the interpretation of "public accommodations facility."

2. *Comparable Federal Statutes.* As mentioned in the preamble to the proposed interpretive rule (75 FR at 12167), in adopting a reasonable interpretation of "public accommodations facility," the Commission examined how other federal statutes define this same term. The Americans with Disabilities Act (ADA) defines "public accommodation" in relevant part as "an inn, hotel, motel, or other place of lodging, *except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor*"(emphasis added). 42 U.S.C. §12181(7). The Civil Rights Act (CRA) employs the same definition of "public accommodation" in relevant part as does the ADA, i.e., "any inn, hotel, motel, or other establishment which provides lodging to transient guests, *other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence*" (emphasis added). 42 U.S.C. §2000(b).

The phrase "public accommodation" also appears in a federal statute administered by the CPSC. Section 104(c)(2)(D) of the Consumer Product Safety Improvement Act of 2008 (CPSIA) (15 U.S.C. 2056a(c)(2)(D)) provides that the provision pertaining to cribs applies to any person who "*owns or operates a public accommodation* affecting commerce (as defined in section 4 of the Federal Fire Prevention and Control Act of 1974 (FFPCA) (15 U.S.C. 2203)" (emphasis added). Section 4 of the FFPCA defines a place of public accommodation as "any inn, hotel, or other establishment not owned by the Federal Government that provides lodging to transient guests, *except that such term does not include* an establishment treated as an apartment building for purposes of any State or local law or regulation or *an establishment located within a building that contains not more than 5 rooms for rent or hire and that is actually occupied as a residence by the proprietor of such establishment*" (emphases added). 15 U.S.C. § 2203(7).

Parties familiar with the CPSC may already be familiar with the definition of "public accommodation" as used in the CPSIA. Thus, as indicated in the preamble to the proposed interpretive rule (75 FR at 12168), the Commission believes it is appropriate to enforce the same interpretation of the phrase "public accommodation" in the VGB Act as used in the CPSIA, especially given the similar public safety goals of the statutes. This will also aid in the consistent interpretation and enforcement of the statutes we administer.

3. *Five or Fewer Rooms for Rent or Hire.* All three federal statutes exclude from the definition of public accommodation an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied as a residence by the proprietor of such establishment. This exclusion is intended to apply to establishments such as bed and breakfasts with five or fewer rooms for rent or hire that are occupied by the proprietor as his/her residence year-round.

4. *Residential Properties.* The ADA also excludes residential properties from the definition of public accommodation. The legislative history to the ADA provides that the phrase "other places of lodging" does not include residential facilities. H.R. Resp. No. 101-485(11), 101st Cong., 2d Sess. 383 (1990), *reprinted in* U.S. Code Cong. & Admin. News 1990, at p. 267. The Appendix to the ADA regulations explains that the rationale for excluding solely residential facilities from the category places of lodging is "because the nature of a place of lodging contemplates the use of the facility for short term stays." 28 C.F.R.App. B, § 36.104, p. 614-615 (1997). Thus, while a residential facility is excluded from the definition of public accommodation, if the facility were to offer a significant number of short term stays, it would lose its characterization as a residential facility and become a "place of lodging," thereby a public accommodation. Letters from the Department of Justice and case law illustrate this point.

See, e.g., Letter from Joan A. Magagna, Deputy Chief, Public Access Section, U.S. Department of Justice (June 15, 1993) (condominium complex does not constitute a place of public accommodation, assuming it does not offer such short term stays that it could be considered a place of lodging); see also Access 4 All, Inc. v. The Atlantic Hotel Condominium Ass'n, 2005 U.S. Dist. LEXIS 41601 (November 22, 2005) (condominium buildings may be covered as places of public accommodation if they operate as places of lodging; determining whether a particular condominium facility is a place of public accommodation would depend on the extent to which it shares characteristics normally associated with a hotel, motel, or inn); Thompson v. Sand Cliffs Owners Ass'n, Inc., 1998 U.S. Dist. LEXIS 23632 (1998) (according to the commentary related to the ADA regulations, the difference between a residential facility and a non-residential "place of lodging" is the length of the occupant's stay; the nature of a place of lodging contemplates the use of a facility for short-term stays). The Commission intends to use the same criteria as that found in the ADA regulations, legislative history, case law, and DOJ guidance regarding whether a particular facility is residential in nature or an "other place of lodging" such that it is subject to the provisions for public accommodations facilities under the VGB Act. (Note that while a residential apartment complex would be excluded from the definition of "public accommodations facility" under the ADA, a pool or spa located in a residential apartment complex would not be excluded from the definition of a public pool or spa under the VGB Act because section 1404(c)(2)(B)(ii) of the Act includes pools or spas open exclusive to "residents of a multi-unit apartment building, apartment complex, residential real estate development , or other multi-family residential area" within the definition of "public pool or spa.")

C. Response to Comments

The Commission received six comments regarding the proposed interpretive rule for public accommodations facilities, including two comments from state health departments, one from the Tennessee Hospitality Association, one from an individual, one from a manufacturer, and one from members of Congress. These comments and the Commission's responses are discussed below.

1. Resort Condominiums and Mountain Lodge Homes

a. Comment: One commenter asked whether condominium units at resort condominiums would constitute "public accommodation facilities" under the VGB Act. According to the commenter, the condominiums often have a spa in each unit. The owner lives in the condominium during certain periods of time and the rest of the time the unit is available for rent by others. The building itself could easily have more than five condominium units for rent or hire, and while the proprietor of the establishment is a resident of the condominium, he/she is not present at the time the condominium is being rented. Another commenter asked whether mountain lodge homes that are owned by individuals and rented for portions of the year would constitute "public accommodation facilities" under the Act.

Response: First, the Commission would consider any *community* pool or spa open exclusively to the residents of the condominium complex or mountain lodge community to be a "public pool" or "public spa" of a multi-family residential area or apartment complex. Thus, the community pool or spa would need to adhere to the requirements for public pools and spas under the VGB Act.

The commenters, however, were asking specifically about spas located within each condominium unit or mountain lodge home. The exclusion for establishments located within a building that contains not more than five rooms for rent or hire and that is actually occupied by

the proprietor of such establishment as the residence of such proprietor is meant to apply to establishments such as bed and breakfasts with five or fewer rooms for rent or hire that are actually occupied by the proprietor year-round as his/her residence. This exception, therefore, would not apply to condominium complexes, as each condominium is treated as a separate unit. (The exception would clearly not apply to the mountain lodge home complex either.) As for spas within the individual condominium units or mountain lodge homes, the inquiry involves determining whether the condominium unit or mountain lodge itself shares characteristics with inns, hotels, or motels, or whether the unit is rented for a sufficient number of short-term stays such that it becomes a "place of lodging" and thus a public accommodations facility. These determinations are fact-specific, and the Commission will rely on the same criteria as that used by courts and the Department of Justice in making such determinations.

2. Barrier requirements.

a. Comment. One commenter asked whether facilities that have been exempted from compliance with the Virginia Graeme Baker Act as public accommodations with five or fewer rooms available for rent or hire with the owner living on site need to comply with the barrier requirements of the Act.

b. Response. The classification of public accommodations facility is relevant in determining whether the pool or spa is a public pool or spa under the Act and must therefore comply with the requirements applicable to public pools and spas; the classification of public accommodations facility is not relevant to the requirement of barriers. The barrier requirements are found in section 1406 of the Act, which pertains to minimum state law requirements for grant eligibility purposes—i.e., if a state wishes to be eligible to receive grant monies, it must have certain requirements in its state statue, one of which is the "enclosure of all outdoor residential

pools and spas by barriers to entry." Thus, the determination of whether a pool is part of a public accommodations facility has no bearing upon whether or not a pool must have barriers. The barrier requirement will be a separate and distinct state law requirement applicable to all outdoor residential pools in those states that enact such laws and seek to obtain grant money.

3. Exemption for Establishments with Five or Fewer Rooms for Rent or Hire Actually Occupied by Proprietor.

a. Comments. One commenter agreed with the proposed exclusion of establishments with five or fewer rooms for rent or hire actually occupied by the proprietor and with the reliance on other recognizable federal statutes to instruct the interpretation of the term. Another commenter objected to excluding residential properties under the exclusion for establishments with five or fewer rooms for rent or hire unless the proprietor is a full-time resident. Another comment, submitted by four members of Congress to three separate Commissioners, disagreed with the exemption for such establishments on the basis that the number of units in a building has no relationship to whether a pool or spa may be hazardous.

b. Response. The Commission agrees that the exception for establishments with five or fewer rooms for rent or hire only applies where the proprietor is living in the establishment year-round. However, the ADA does exclude residential properties from the definition of public accommodations facilities. Thus, a single family home may be excluded from the definition of public accommodations facilities if the single family home does not share characteristics of a hotel, motel, or inn and does not rent for a sufficient number of short term stays such that it becomes an "other place of lodging."

The Commission appreciates the Congressional interest in this rulemaking. While the Commission welcomes the views of individual legislators, it notes that the Supreme Court has

stated that "isolated statements by individual Members of Congress or its committees, all made after enactment of the statute under consideration, cannot substitute for clear expression of legislative intent at the time of enactment." Southeastern Community College v. Davis, 442 U.S. 397, 411 n. 11 (1979). See also Petit v. U.S. Department of Education, 578 F. Supp. 2d 145, 158 (D.D.C. 2008) (quoting Petry v. Block, 697 F.2d 1169, 1171 (D.C. Cir. 1983)("post-enactment statements of legislators involved in the enactment process ... have no probative weight and represent only the personal views of the legislator"); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118-119 (1980) (statement by legislator after the fact not entitled to "much weight"). The Commission believes the structure of the VGB Act evidences an intent on the part of Congress to impose certain requirements on public pools and spas (found in section 1404 of the Act), and leave it to the states to regulate pools and spas on residential properties in their own states (in section 1406 of the Act). In addition, it is instructive to look at the other categories of public pools and spas in section 1404 of the Act, which include community pools, pools open to members of an organization and their guests, and pools open to residents of a multi-unit apartment building or residential complex. The categories of pools and spas included under the public pool and spa definition found in section 1404(c)(2) of the Act all contemplate pools open to use by large numbers of people. The Commission believes that the term "public accommodations facility" similarly is meant to encompass pools open to or accessible by relatively large groups of people, and continues to believe the threshold set by comparable federal statutes is appropriate.

D. Description of the Final Rule

The final rule creates a new part 1450 containing two sections. Section 1450.1, Scope, explains that part 1450 pertains to the Virginia Graeme Baker Pool and Spa Safety Act and that

the statute is designed to prevent child drowning, drain entrapments, and eviscerations in pools and spas.

Section 1450.2, Definitions, defines "public accommodations facility" at paragraph (a) as "an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor."

List of Subjects in 16 CFR Part 1450

Consumer protection, Infants and children, Law enforcement.

E. Conclusion

For the reasons stated above, the Commission amends Part 1450 of title 16 of the Code of Federal Regulations as follows:

PART 1450 – Virginia Graeme Baker Pool and Spa Safety Act Regulations

1. The authority citation for part 1450 continues to read as follows:

Authority: 15 U.S.C. 2051-2089, 86 Stat. 1207; 15 U.S.C. 8001-8008, 121 Stat. 1794

2. Section 1450 is revised to read as follows:

§ 1450.1 Scope.

This part pertains to the Virginia Graeme Baker Pool and Spa Safety Act, ("Act"), 15 U.S.C. 8001 et seq., which is designed to prevent child drowning, drain entrapments and eviscerations in pools and spas.

§ 1450.2 Definitions.

(a) *Public accommodations facility* means an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for

rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor.

Dated:

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Todd A. Stevenson, Secretary
Consumer Product Safety Commission