U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING
August 4, 2010

Chairman Inez M. Tenenbaum convened the August 4, 2010, meeting of the U. S. Consumer Product Safety Commission at 10:00 a.m. in open session. Commissioners Thomas H. Moore, Robert S. Adler and Anne M. Northup were also in attendance. Commissioner Nord was not present.

Decisional Matter: Virginia Graeme Baker Pool and Spa Safety Act ("VGB Act"): Public Accommodations Facility, Final Interpretive Rule

Chairman Tenenbaum made opening remarks and introduced the pending decisional matter before the Commission. Chairman Tenenbaum asked the Commission whether there were any questions of the staff or discussion about the interpretative rule. There being none, Chairman Tenenbaum asked for any motions. Commissioner Adler moved that the Commission withdraw the proposed interpretative rule titled "Virginia Graeme Baker Pool and Spa Safety Act; Public Accommodation," (published at 75 *FR* 12167 on March 15, 2010) and redraft for publication in the *Federal Register* a new proposed interpretative rule with a 60-day comment period that defines a public accommodation facility as an inn, hotel, motel, or other place of lodging. Chairman Tenenbaum seconded the motion and opened the matter for discussion. After a discussion of what constitutes a public accommodation facility and place of lodging, Commissioner Northup moved to propose an amendment to clarify Commissioner Adler's motion by adding the clause "including rental units rented on a weekly or bi-weekly basis." After a discussion of the amendment motion, Commissioner Northup revised the amendment motion to read, "including, but not limited to, rental units rented on a bi-weekly or weekly basis." Commissioner Adler seconded the motion. After comments about the issue, Chairman Tenenbaum called the question on the amendment motion. The Commissioners present voted (4-0) to adopt the amendment motion. Chairman Tenenbaum called the question on the original motion by Commissioner Adler as amended. The Commission voted unanimously (5-0) to adopt the motion as amended. Commissioner Nord later voted by ballot in writing to adopt the motion as amended.

Chairman Tenenbaum and Commissioners Moore, Nord, Adler and Northup issued the attached statements about the matter.

There being no further business, Chairman Tenenbaum adjourned the meeting at 10:25 a.m.

For the Commission:
Todd A. Stevenson
Secretary to the Commission

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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August 4, 2010

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE COMMISSION DECISION TO REVISE THE PROPOSED INTERPRETIVE RULE DEFINING "PUBLIC ACCOMMODATIONS FACILITY" UNDER THE VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT

Today I vote in favor of reproposing a definition of "public accommodation facility" that requires *all* inns, hotels, motels, or other places of lodging to comply with the requirements of the Virginia Graeme Baker Pool and Spa Safety Act (VGB Act).

When Congress passed the VGB Act in 2007, it defined a "public pool and spa" to include pools in apartment complexes, public parks, and also pools or spas that are "open exclusively to patrons of a hotel or other public accommodations facility."[1] The term "public accommodations facility" is not defined in the Act, and the Commission received many questions regarding the scope of this term. In an effort to provide clarity on the question of what qualifies as a "public accommodations facility," the Commission decided to develop an interpretive rule that would provide needed clarity on the issue.

On March 15, 2010, I voted to approve publication in the *Federal Register* of a proposed interpretive rule defining the term "public accommodations facility" in a way that is consistent with the Americans with Disabilities Act (ADA) and the Civil Rights Act (CRA). Consistent with the ADA and CRA, the proposed interpretive rule expressly excluded owner-occupied establishments with five or fewer rooms for rent. Upon further reflection, however, I no longer support the exclusion of these establishments. I see no reason, based upon safety or the law, to distinguish between establishments with five or fewer rooms and establishments with six or more rooms. Indeed, the number of units in an establishment bears no relationship to whether a pool or spa on the premises may contain a deadly hazard to the patrons of such an establishment. Additionally, neither the statute nor legislative history requires or even contemplates any such exclusion as the statute never expressly refers to the ADA or CRA definitions, unlike most other federal statutes which incorporate this exclusion.

I also support amending the interpretive rule to clarify that the VGB Act definition of public accommodation includes residential investment properties that are rented to the public on a frequent and short term basis. Under existing case law, these "places of lodging" share characteristics normally associated with inns, hotels, and motels and would thus be considered "public accommodations" subject to the requirements of the VGB Act.

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[1] Section 1404(c)(2)(B)(iii) of the Act.

Today's action by CPSC will remove the exclusion for establishments with five or fewer rooms from the definition of "public accommodations facility" and directs the staff to redraft, for publication, a new proposed interpretive rule consistent with this approach. While this process will delay publication of a final interpretative rule, I believe it is the responsible approach for the Commission to pursue as consumers should be afforded the maximum level of protection envisioned by the Act in all places of lodging that are commercial in nature, regardless of the size of the establishment at which their family may choose to stay.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
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STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE VOTE TO DIRECT THE STAFF TO WITHDRAW THE PROPOSED INTERPRETIVE RULE DEFINING "PUBLIC ACCOMMODATIONS FACILITY" IN THE VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT AND REDRAFT IT FOR COMMISSION CONSIDERATION

August 4, 2010

When I voted to adopt a proposed interpretation of "public accommodations facility" last March, it was based on our legal staff's analysis that since other federal statutes (including the Consumer Product Safety Improvement Act of 2008) had defined "public accommodations" in a specific, consistent way, it made sense to use the same definition of that term for the Virginia Graeme Baker Pool and Spa Safety Act (VGB). I still believe the staff recommendation is reasonable and defensible. The VGB Act does not define the term and there is no legislative history to guide the Commission as to the intent of Congress on the definition.

Since my earlier vote, however, I have examined the history behind the exclusion of small **owner-occupied** (and owner-occupancy is the key) places of lodging from various federal requirements. A review of the history of that definition in statutes such as the Americans with Disabilities Act (where one might have assumed that cost considerations were a reason to use a narrow definition of "public accommodations") indicates they merely used the definition in the Civil Rights Act of 1964. The exclusion of owner-occupied lodging establishments with five rooms or less for rent from the Civil Rights Act was a concession to the realities of those times, attempting to balance the rights of home owners who rent out part of their homes to transient guests to decide who those guests would be (or more accurately who they *wouldn't* be), with the right we all have to be treated fairly in having access to places of public accommodation.

Whatever you may think of the "a man's home is his castle" argument in *that* context, it has nothing to do with protecting families from potentially unsafe conditions in and around their temporary rental residences. From the standpoint of pool and spa safety, there is no logical distinction to be made between a six-room lodging facility and a five-room lodging facility or between a facility where the owner lives in the building and one where he does not. In my view, if a lodging facility is open to the public and provides a pool or a spa for the enjoyment of paying guests, then those pools and spas need to comply with the requirements of the Virginia Graeme Baker Pool and Spa Act. The VGB Act's definition of "public accommodations" should further **that** Act's goals and provide the same level of safety to <u>all</u> renters rather than use a definition based on a nearly fifty year-old political compromise that was unrelated to safety.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD ON THE DECISION TO REVISE THE PROPOSED INTERPRETIVE RULE DEFINING "PUBLIC ACCOMMODATIONS FACILITY" UNDER THE VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT

August 4, 2010

I voted with my colleagues today to re-propose for a 60 day comment period an interpretative rule to define the term "public accommodations facility" as that term is used in the Virginia Graeme Baker Pool and Spa Safety Act. I agreed to re-propose because I am interested in the insights and feedback from the public. Unlike the definition proposed last March which exempted the smallest establishments, the new proposal defines a public accommodations facility as every inn, hotel, motel or other place of lodging, including but not limited to, rental units rented on a bi-weekly or weekly basis.

I would also note, nonetheless, that I am comfortable with the definition we published last March in our proposed interpretative rule. This definition was recommended by staff, it appears elsewhere in our statutes, and is based on the history of other statutes: the American for Disabilities Act, the Civil Rights Act and the Federal Fire Protection and Control Act. In addition, Section 104c(2)(D) of the CPSIA also refers to the definition in the Federal Fire Protection and Control Act in discussing crib safety, a subject I believe that all would agree is a critical priority for this agency. As yet I am not persuaded that safety requires that we construct a different definition from that which is widely accepted as the correct definition of this term. I do see merit in the predictability that comes from following past precedent.

It should be remembered that an interpretative rule like the one being proposed today does not preempt states from choosing a different level of protection. I encourage public comments on this interpretative rule.

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August 4, 2010

Statement of Commissioner Robert S. Adler on the revised proposal to define "public accommodation" in the Virginia Graeme Baker Pool and Spa Safety Act

On December 19, 2007, Congress passed the Virginia Graeme Baker Pool and Spa Safety Act,[1] ("VGBA" or "the Act"). The purpose of the Act is to prevent child drowning in swimming pools and spas. Sadly, every year nearly 400 children die and 10 times that number are treated in hospitals for pool or spa submersion incidents. The CPSC estimates that on average, 77 percent of those deaths and near-death incidents involve children 5 years of age or younger.

On March 1, 2010, the Commission voted to publish a proposed interpretive rule in the Federal Register defining the term "public accommodations facility" as found in the VGBA.[2] The Act mandates safety requirements for each "public pool and spa in the United States."[3] It provides a three part definition of "public pool and spa" including one that covers units "open exclusively to patrons of a hotel or other public accommodations facility"[4] (emphasis added). In March, the Commission proposed to define the term "public accommodations facility" as:

> *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. (Emphasis added).

Under that interpretation VGBA's safety provisions were not applied to inns, hotels, motels, and other places of lodging with five or fewer rooms for rent. I dissented from that decision based on my belief that any establishment with a pool, hot tub, or spa that rents rooms to the public should be subject to the Act and that a plain language reading of the statute leads to that result. [5]

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[1] P.L. 110-140, Title XIV, 15 U.S.C. § 8001, et. seq.
[2] *See* Record of Commission Action, March 1, 2010.
[3] Section 1404(c)(1)(A)(i) of the VGBA.
[4] Section 1404 (c)(2)(B)(iii) of the VGBA.
[5] My statement is available at: http://www.cpsc.gov/pr/adler04022010.pdf.

Accordingly, today, I introduced an amendment for the Commission to withdraw its previously published definition and to propose a new interpretive rule defining "public accommodations facility" in a manner that reaches all public pools and spas. I am pleased that my fellow Commissioners joined me in voting to publish a new proposed definition. The end result of this vote is that more pools and spas will be covered under the VGBA than the Commission previously proposed and this expanded coverage will hopefully make pools and spas safer for our children. Because there is no indication that pool and spa safety is correlated to the number of rooms at a public accommodation, I believe a broader interpretation is the correct approach.

The definition the Commission has proposed today reads as follows:

> *Public accommodations facility* means an inn, hotel, motel, or other place of lodging, including but not limited to, rental units rented on a bi-weekly or weekly basis.[6]

The critical term here is "other place of lodging." As I understand it, there is rich precedent for interpreting this term in the Americans with Disabilities Act ("ADA"),[7] which is where I believe the Commission should look for guidance to interpret this term.[8] The Commission's definition makes clear those who rent rooms to the public and provide a pool, hot tub, or spa will be responsible for complying with the safety requirements of VGBA regardless of whether they are the on-site proprietors of a small bed and breakfast or the owners of a beach house that is rented out every week of the summer.

As I read it, the VGBA contemplates that all places of public accommodation with pools were to be covered by the "public pools" section of the Act (§ 1404), and this amendment is designed to provide that coverage. To be clear, a "place of lodging" should not be read to cover every rental home with a pool. More precisely, as I understand it, the term covers only those "residential" facilities that operate more like an inn, hotel, or motel, and have therefore lost their residential character.[9] Put another way, those units that rent rooms to transient guests or provide short term rentals are generally considered by the

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[6] The final clause in the amendment was suggested by my colleague, Commissioner Anne Northup.

[7] 42 U.S.C. § 12181(7).

[8] Let me be clear about my reference to the ADA. While I look to the ADA for guidance on the meaning of the term "place of lodging," I reject any reliance on the explicit exclusion in the ADA for establishments with five rooms or fewer. VGBA, unlike ADA, contains no such exclusion and, as I have argued, provides no useful precedent on the point.

[9] *See, e.g.* Access 4 All, Inc. v. The Atlantic Hotel Condominium Ass'n, 2005 U.S. Dist. LEXIS 41601 (Nov. 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); *see also* Legislative history of the ADA *at* 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 (explaining that "other place of lodging" does not include residential facilities).

law to be places of lodging – and the Commission will treat them accordingly. While I personally believe this is a reasonably clear line, I invite comments addressing the difference between a short term rental and a long term lease. Further, I invite comments as to whether the Commission should choose, for the purposes of this Act, to cover any rental property regardless of the length of the lease in the definition of "public accommodations facility."

Previous definitions of "public accommodations": As discussed, I disagree that the Commission should retain its previously published definition just because several other federal statutes explicitly limit the term "public accommodations" to a building with five or fewer rooms for rent. This approach would leave an enormous inventory of unregulated units numbering in the tens of thousands of public pools and spas across the country for no discernible reason. Such an interpretation would certainly not be based on a safety rationale or on the legislative history of the VGBA, but only on some vague sense that the Commission should read the Act in a fashion similar to other acts which, frankly, are unrelated to VGBA. I believe there is no safety reason, legal requirement, or good public policy argument for the Commission to follow other distinguishable – and differently worded[10] – statutes.

Some have argued that this proposed definition cannot be adopted because of cost. They suggest the definition of a *public accommodations facility* must take cost into account regardless of the language of the statute. I agree that a cost argument can be made to exclude small hotels and B&Bs from complying with provisions of the ADA.[11] The same cost analysis, however, does not apply with respect to VGBA, which is why I have chosen to omit the ADA's exclusion of establishments of five rooms or fewer in my amendment. No one is required to install a pool, hot tub, or spa at his or her establishment. All the Act says is that once a facility's owner has made the decision to incur the cost of installation (or to continue to offer the use of a pool, hot tub, or spa to guests), he or she should take the reasonable steps necessary to make the pool, hot tub, or spa safe.[12] One might draw an analogy to driving a car. No one requires a citizen to drive a car, but if he or she does so, society requires the citizen to wear a seat belt and follow traffic safety laws.

Residential pools and VGBA: There are still too many pool deaths in residential pools that this amendment does not address.[13] Although the portion of the Act this amendment addresses is the public pools and spas section (§ 1404), VGBA does address residential pools through model state legislation and a grant program (§§ 1405, 1406). As I read the

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[10] The VGBA does not contain language that excludes businesses with five units or less. To the contrary, the VGBA simply defines a "public pool or spa" as one that is open to "patrons of a hotel or other public accommodations facility." Section 1404(c)(2)(B)(iii) of the VGBA.

[11] See Adler Statement, note 5.

[12] Any safety system required under VGBA will constitute a small percentage of the costs of the pool, hot tub, or spa.

[13] According to the CPSC, approximately 54 percent of the estimated injuries for 2007 – 2009 and 74 percent of the fatalities for 2005 – 2007 involving children younger than fifteen occurred at a residence. *See* Pool or Spa Submersion: Estimated Injuries and Reported Fatalities 2010 Report, *available at:* http://www.cpsc.gov/library/foia/foia10/os/poolsub2010.pdf.

VGBA, Congress intended to leave no regulatory gap between public and residential pools. Those pools and spas not covered by the public pool and spa section of VGBA are considered residential pools and addressed under the model state legislation. In other words, if this proposed definition becomes final and if a state also enacts the model state legislation then every pool and spa in that state would be subject to the VGBA – there would be no gaps in coverage. If a pool is not a "public" pool under VGBA, then it is by default covered by the model state law. I believe this to be the clear intent of the statute.

Other provisions of the VGBA's Model State Law: Perhaps the most important safety feature of the model state legislation is that it requires all residential homeowners to construct barriers to the pool that will "effectively prevent small children from gaining unsupervised and unfettered access to the pool or spa."[14] Far too many deaths occur every year because small children gain access to a pool when no one is watching. I urge every state to carefully consider enacting the model law for this reason alone.

The model state law would also require all pools and spas to be equipped with devices and systems designed to prevent entrapment by pool or spa drains. I will soon recommend that the Commission amend both its previously issued draft model state law and its technical guidance for the model state law to reflect in a more accurate fashion the language of the relevant section.[15] My amendment will clarify that if states enact the model state law all pools and spas that fall under the relevant definition will be required to use both a compliant drain cover *and* a backup device and system. To the extent this was not clear in the previously published version of either the model law or the Commission's technical guidance, I believe it was a mistake and a misreading of the plain language of the statute.

Implementation of the model state law is not without great hurdles. To receive a grant, states must adopt the entire model law. While the model law is likely an improvement on most, if not all, state pool codes, the incentive to undertake the heavy lifting to enact a new piece of legislation on a statewide basis is slim at best. States and most large counties generally have budgets in the billions. One of the smallest state budgets in FY 2010 in the United States was that of South Dakota, at over $1 billion. To encourage states to enact laws by dangling a carrot of $4 million *total* for all 50 states is not nearly enough.[16] Therefore, while I urge states to take up the model state law, I also urge Congress to consider providing a much larger appropriation for this program or at the very least allow the grants to flow to qualifying counties or municipalities, thus making the likelihood of its adoption greater.

Comment Period: This proposed interpretive rule will have a 60 day comment period allowing all stakeholders including owners of small dwelling units that are rented to the

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[14] Section 1406(a)(1)(A)(1) of the VGBA.

[15] The model state code is available at: http://www.poolsafety.gov/modelvgb.pdf. The Technical Guidance for Section 1406 of the Virginia Graeme Baker Pool and Spa Safety Act: Minimum State Requirements for Grant Eligibility1is available at: http://www.poolsafety.gov/grant.pdf.

[16] $4 million was appropriated over a two year period - $2 million in fiscal 2010 and $2 million in fiscal 2011. To date, no state has applied for the grant.

public, the safety community, those who rent from small bed and breakfasts, and realtors that specialize in seasonal house rentals to comment on the newly proposed definition. I urge all parties to weigh in.

In sum, I am pleased that today the Commission chose to take another step in its long tradition of considered judgments for safety.

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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE VOTE TO DIRECT THE STAFF TO WITHDRAW THE PROPOSED INTERPRETIVE RULE DEFINING "PUBLIC ACCOMMODATIONS FACILITY" IN THE VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT AND REDRAFT IT FOR COMMISSION CONSIDERATION

August 4, 2010

The Consumer Product Safety Commission today voted to adopt a different definition of "public accommodations facility" from the one that we adopted in draft form last March for purposes of enforcing the Virginia Graeme Baker Pool and Spa Safety Act. The new definition, which we are re-proposing pending a 60-day comment period, adopts an understanding of public accommodation that differs from the definition used in nearly every other federal statute of the past few decades and one that is different from the definition which the CPSC itself already uses in enforcing our crib standard against public accommodation facilities.

I do not support broadening the definition of public accommodations facility in this way. The law does not require it and the cost of compliance is out of proportion with the risk. Since there is no record in the floor debate or in the conference committee report of a different intended meaning of public accommodations facility as the term is used in the House and Senate versions of the Virginia Graeme Baker Pool and Spa bill, it can only be assumed that the majority of the Members of Congress had in mind the standard definition of public accommodation. Furthermore, the staff has not presented evidence of even a single entrapment death or injury occurring in the pool or spa of a rental property. So we are stretching the law to cover a category that has never been demonstrated to pose a problem.

Commissioner Adler, the author of the re-proposal idea, explained in his comments at today's hearing that this newly proposed definition means to include rental properties whose owners let them on a weekly or bi-weekly basis. I offered a clarifying amendment to incorporate such wording into the definition itself, which the Commission adopted unanimously. I voted in support of putting this new definition out for public comment, despite my objections to it, because I want to be part of the final discussion and vote on this matter in 60 days, hoping we might find some compromise.

Today's decision is the kind of action that causes Americans to lose faith in their government. It will cause a waste of perfectly good assets, as many rental homes may not be able to comply with this law at a reasonable cost. The average person will thus properly perceive forcing this kind of spending as grossly wasteful. Requiring these safety measures solely for new construction or in the context of a pool or spa renovation or replacement would make far more sense. I am hoping that in the next 60 days the comments we receive will help us to clarify the impact of this rule and that the Commission can find a way to ensure pool safety without requiring wasteful spending.