



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

BALLOT VOTE

Date: **OCT - 6 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 *PLC*
 Barbara E. Little, Attorney *BEL*

SUBJECT : Public Accommodations Facility: Proposed Interpretive Rule and Withdrawal Notice

BALLOT VOTE DUE: OCT 14 2010

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.”

On March 15, 2010, the Commission issued a proposed rule that would interpret the term “public accommodations facility” as used in the VGB Act 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” (75 Fed. Reg. 12167). On August 4, 2010, the Commission voted to instruct staff to withdraw the March 15, 2010 proposed interpretive rule and draft a new proposed interpretive rule with a sixty day comment period interpreting “public accommodations facility” as “an inn, hotel, motel, or other place of lodging, including, but not limited to, rental units rented on a bi-weekly or weekly basis.” The draft proposed interpretive rule removes from the interpretation of “public accommodations facility” the exception for owner-occupied establishments with five or fewer rooms for rent or hire. In addition, by adding the phrase, “including, but not limited to, rental units rented on a bi-weekly or weekly basis,” the definition in the draft proposed interpretive rule makes clear that rental units rented on a bi-weekly or weekly basis will be considered “public accommodations facilities” under the VGB Act.

RH 10/6/2010
 CLEARED FOR PUBLIC RELEASE
 UNDER CPSC 6(b)(1)

The Office of the General Counsel (“OGC”) is forwarding to the Commission the draft proposed rule interpreting “public accommodations facility” and a draft withdrawal notice for the March 15, 2010 proposed interpretive rule.

Please indicate your vote on the following options.

A. “Public Accommodations Facility” Proposed Interpretive Rule

- I. Approve publication in the *Federal Register* of the draft proposed 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 proposed interpretive rule interpreting “public accommodations facility” as used in the VGB Act, with changes (please specify changes):

Signature Date

- III. Do not approve publication in the *Federal Register* of the draft proposed interpretive rule interpreting “public accommodations facility” as used in the VGB Act.

Signature Date

- IV. Take other action (please specify):

Signature

Date

B. Withdrawal of Proposed Rule

- I. Approve publication in the *Federal Register* of the draft notice of withdrawal of the proposed interpretive rule regarding “public accommodations facility” published in the *Federal Register* on March 15, 2010 (75 FR 12167), without change.

Signature

Date

- II. Approve publication in the *Federal Register* of the draft notice of withdrawal of the proposed interpretive rule regarding “public accommodations facility” published in the *Federal Register* on March 15, 2010 (75 FR 12167), with changes (please specify changes):

Signature

Date

- III. Do not approve publication in the *Federal Register* of the draft notice of withdrawal of the proposed interpretive rule regarding “public accommodations facility” published in the *Federal Register* on March 15, 2010 (75 FR 12167).

Signature

Date

IV. Take other action (please specify):

Signature

Date

CONSUMER PRODUCT SAFETY COMMISSION

Virginia Graeme Baker Pool and Spa Safety Act; Public Accommodation

AGENCY: Consumer Product Safety Commission.

ACTION: Proposed interpretive rule.

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

DATES: Written comments in response to this document must be received no later than **[insert date that is 60 days after date of publication in the FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by Docket No. CPSC-2010-[DOCKET NUMBER], by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail) except through <http://www.regulations.gov>.

Written Submissions

Submit written submissions in the following way:

Mail/Hand delivery/Courier (for paper (preferably in five copies), disk, or CD-ROM submissions), to: Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to <http://www.regulations.gov>. Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

Docket: For access to the docket to read background comments or comments received, go to <http://www.regulations.gov>.

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). The proposed interpretive rule would interpret “public accommodations facility” to mean: “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.”

CPSC received six comments on the proposed interpretive rule, 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. CPSC staff prepared a draft final interpretative rule for the Commission’s approval, but, on August 4, 2010, the Commission voted to withdraw the proposed interpretive rule and to direct CPSC staff to draft a new proposed interpretive rule with a 60 day comment period and interpreting “public accommodations facility” as “an inn, hotel, motel, or other place of lodging, including, but not limited to, rental units rented on a bi-weekly or weekly basis.” This proposed interpretive rule is in response to the Commission’s vote; elsewhere in this issue of the Federal Register, we have published a document announcing the withdrawal of the proposed interpretive rule that was published in the Federal Register March 15, 2010.

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 proposed interpretive rule is limited to the interpretation of “public accommodations facility.”

2. *Comparable Federal Statutes.* The term “public accommodation” is defined in several other federal statutes in relevant part as “an inn, hotel, motel, or other place of lodging.” (*See, e.g.,* the Americans with Disabilities Act (ADA), 42 U.S.C. 12181(7), defining “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.” *See also,* the Federal Fire Prevention and Control Act of 1974 (FFPCA), 15 U.S.C. 2201 et seq., at §2203(7); the Civil Rights Act (CRA), 42 U.S.C. 1981 et seq., at §2000(b).) The Commission intends to incorporate this language into its proposed definition for “public accommodations facility.”

The ADA, FFPCA, and CRA exclude from the definition of public accommodation an establishment located within a building that contains not more than five rooms for rent or hire that is actually occupied as a residence by the proprietor of such establishment. While there may be a rationale for this exclusion in the context of these other federal statutes, the Commission sees no basis for this exclusion in the context of pool and spa safety. The number of units in an establishment bears no relationship to whether a pool or spa on the premises may contain a safety hazard to the patrons of such an establishment. Thus, the proposed definition would not contain an exclusion for an establishment with five or fewer units for rent or hire.

3. *“Other Place of Lodging.”* The Commission’s proposed interpretation of “public accommodations facility” would include the phrase “other place of lodging.” The Commission intends to follow the legal precedent of the ADA in interpreting this term. 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 CFR App. B, § 36.104, p. 614-615 (1997). Thus, a residential facility is excluded from the definition of public accommodation. However, under relevant ADA precedent, 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, alternatively, an “other place of lodging” subject to the provisions for public accommodations facilities under the VGB Act. To make this clear, the proposed interpretive rule would include the phrase, “including, but not limited to, rental units rented on a bi-weekly or weekly basis.” (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.”)

Thus, for example, for spas within individual condominium units or mountain lodge homes, the inquiry would involve 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.

C. Description of the Proposed Interpretive Rule

The proposed interpretive rule would create a new part 1450 containing two sections. Section 1450.1, Scope, would explain 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, would define “public accommodations facility” at paragraph (a) as “an inn, hotel, motel, or other place of lodging, including, but not limited to, rental units rented on a bi-weekly or weekly basis.”

List of Subjects in 16 CFR Part 1450

Consumer protection, Infants and children, Law enforcement.

E. Conclusion

For the reasons stated above, the Commission proposes to amend 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 would be 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, including, but not limited to, rental units rented on a bi-weekly or weekly basis.

Dated:

Todd A. Stevenson, Secretary
Consumer Product Safety Commission

Billing Code 6355-01-P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1450

Virginia Graeme Baker Pool and Spa Safety Act; Public Accommodation; Withdrawal of Proposed Rule

AGENCY: Consumer Product Safety Commission.

ACTION: Withdrawal of proposed rule.

SUMMARY: In the Federal Register of March 15, 2010, the Consumer Product Safety Commission (“CPSC” or “Commission”) issued a proposed interpretive rule that would interpret the term “public accommodations facility” as used in the Virginia Graeme Baker Pool and Spa Safety Act (“VGB Act” or “Act”) 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” (75 FR 12167). The Commission is withdrawing the March 15, 2010 proposed interpretive rule and, elsewhere in this issue of the Federal Register, is issuing a new proposed interpretive rule with a sixty-day comment period which would interpret “public accommodations facility as “an inn, hotel, motel, or other place of lodging, including but not limited to, rental units rented on a bi-weekly or weekly basis.”

DATES: The proposed interpretive rule is withdrawn as of [insert date of publication in the FEDERAL REGISTER].

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

SUPPLEMENTARY INFORMATION:

The Commission published a proposed interpretive rule on the definition of “public accommodations facility in the FEDERAL REGISTER of March 15, 2010 (75 FR 12167). The proposed interpretive rule would interpret “public accommodations facility” to mean: “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.”

CPSC staff prepared a draft final interpretative rule for the Commission’s approval, but, on August 4, 2010, the Commission voted to withdraw the proposed interpretive rule and to direct CPSC staff to draft a new proposed interpretive rule with a 60 day comment period and interpreting “public accommodations facility” as “an inn, hotel, motel, or other place of lodging, including, but not limited to, rental units rented on a bi-weekly or weekly basis.” The Commission preliminarily determined that the exception for an owner-occupied establishment located within a building that contains not more than five rooms for rent or hire is inappropriate in the context of pool and spa safety because the number of units for rent or hire has no bearing on the safety of the pool. In addition, the Commission wanted to make clear that a residential facility may become a “place of lodging” if the facility were to offer a significant number of short term stays.

Thus, the Commission, through this notice, is withdrawing the March 15, 2010 proposed interpretive rule. Elsewhere in this issue of the Federal Register, the Commission is issuing a new proposed interpretive rule to interpret “public accommodations facility” in the VGB Act as “an inn, hotel, motel, or other place of lodging, including, but not limited to, rental units rented on a bi-weekly or weekly basis.”

Dated: _____

Todd A. Stevenson,
*Secretary, Consumer Product Safety
Commission.*