UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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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

[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.