



December 12, 2011

Office of the Secretary
Consumer Product Safety Commission
Room 820
4330 East West Highway
Bethesda, MD 20814

Re: Docket No. CPSC-2011-0071

To Whom It May Concern:

We are writing on behalf of the National Multi Housing Council (NMHC) and the National Apartment Association (NAA) in response to the Federal Register Notice of a Final Rule to revoke the Consumer Product Safety Commission's (CPSC) 2010 interpretive rule defining "unblockable drain" under the Virginia Graeme Baker (VGB) Pool and Spa Safety Act. The notice requests public comment on the ability for the regulated community to comply with this change by May 29, 2012.

NMHC and NAA represent the nation's leading apartment firms. Our combined memberships are engaged in all aspects of the industry, including ownership, development, management and finance. NMHC represents the principal officers of the industry's largest and most prominent firms. NAA is the largest national federation of state and local apartment associations with 170 state and local affiliates comprised of more than 50,000 members. Together we represent approximately six million apartment homes.

We write today to share our thoughts, experiences and concerns about not only the revocation decision but also broader compliance issues. The apartment industry is committed to ensuring the pools in their communities are safe for their residents and guests. While they have demonstrated a willingness and determination to meet the requirements of this new law, the road to compliance has been challenging. The Commission's latest decision once again subjects some in the industry to a long and frustrating, if not expensive, process to come into compliance with a new interpretation of the law.

The VGB Act and 2010 Interpretive Rule On "Unblockable Drains"

The VGB Act requires each public pool and spa in the United States with a single main drain, other than an unblockable drain, be equipped, at a minimum, with one or more secondary anti-entrapment systems. Further, Section 1403(7) of the VGB Act defines an "unblockable drain" as "a drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard." This definition is the subject of the CPSC's latest action.

In 2010, the CPSC offered interpretive guidance stating that when a drain cover meeting certain specifications was attached to a drain, the covered drain constituted an "unblockable drain." If a pool owner followed this guidance, it was unnecessary for the pool to have a secondary anti-entrapment system. As a result, pool owners and operators across the country relied on this guidance as a means of meeting their compliance obligations.

However, this “change of mind” by the CPSC revokes that guidance and will require anyone who followed it to make additional changes.

This frustration comes on the heels of earlier compliance challenges stemming from the most basic requirement of the VGB Act. The Act required each pool and spa in the United States to be equipped with a drain cover that complies with the ASME/ANSI A112.19.8 performance standard by December 18, 2008. It became clear in early November 2008 that the supplies of the newly manufactured and certified drain covers were not keeping pace with demand, making it impossible to meet the effective date.

NMHC/NAA sent a letter to then Acting Chairman Nord seeking a six month extension. We cited the results of a member survey indicating that 40 percent of respondents who placed orders with manufactures were still waiting on backorders and in most cases were informed they would not receive the product in time to meet the compliance deadline. Furthermore, our findings also revealed much uncertainty at the state and local level relative to the federal requirements. We learned that some states required permits to perform the installation and others required certified professionals, resulting in additional delays. It is our opinion that these issues should have been anticipated and factored into the timetable for compliance.

While the industry did not receive an extension, the CPSC issued a Press Release clarifying their enforcement priorities and granting relief to pools that were not in operation. This unfortunately failed to provide the certainty that our members rely upon when potentially exposed to liability for noncompliance. Fortunately over time, the supply of product increased and operators were able to come into full compliance.

May 2011 Recall by Manufacturers

In May of 2011 our members were significantly affected when the CPSC announced a voluntary recall of certain pool and in-ground spa drain covers. They were incorrectly rated for protection against body entrapment by independent third party laboratories. As a result, any pool outfitted with a recalled product was ordered to close until a certified replacement cover could be installed. This meant that apartment owners were forced to close Memorial Day weekend, traditionally the time of year most pools open for the summer. Ever mindful of the seriousness of these product safety issues, our members took the necessary steps to identify whether they were affected by the recall and to replace the drain covers in question.

However, once again they were presented with the consequences of supply and demand. While warranty provisions were available from the manufacturers, they required the use of a certified service professional to install the covers once they became available. Owners were quoted wait times of two weeks to two months and in many cases longer for product. Even when the covers were finally in stock, scheduling an available certified service professional was challenging. Some of these issues and delays could have been avoided if the Commission offered additional guidance permitting the use of alternative service professionals.

Oct 2011 Revocation of Interpretive Rule on “Unblockable Drains”

With the Oct 11, 2011 decision to revoke the interpretive rule on “unblockable drains,” the CPSC has taken an action that will once again require those impacted owners to replace drain covers, reengineer systems, install new devices and/or simply close their pools. The action penalizes those owners who have relied on the 2010 guidance without offering evidence of increased safety associated with this decision.

In an effort to help our members comply with the required changes, we request additional guidance from the CPSC, especially in those situations where a compliant solution may be to modify the current drain openings and fittings rather than installing a secondary anti-entrapment system. The Commission should provide guidance identifying such approved methods along with illustrations of compliant systems. It would also be helpful for the Commission to establish a system for responding to inquiries about proposed system designs. Our industry feels that the level of guidance coming from the CPSC has inadequately met the needs of the industry.

May 28, 2012 Compliance Timeframe

NMHC/NAA surveyed member companies to assess their ability to come into compliance with this Final Rule. We also sought information relative to original VGB compliance costs, recall costs and estimated costs associated with this latest decision and would like to share them with the Commission. Keep in mind these are estimates and may exclude labor costs.

- **Costs associated with the installation of the new VGB drain covers**
\$6,539.00 per respondent.
- **Costs associated with the May 2011 drain cover recall**
\$2,235.00 per respondent.
- **Projected costs associated with revocation of “unblockable drain” interpretation**
Preliminary estimates range from \$1,000 - \$70,000 per respondent.

The cost of compliance to the industry is significant. These figures also exclude losses associated with closed pools and disgruntled residents. While the health and safety of those who swim in our pools is our greatest concern, we cannot ignore the costs associated with any regulatory requirement, especially in these difficult economic times. It is therefore our hope and expectation that going forward the CPSC will provide certainty concerning regulation and offer the requested guidance sought by the regulated community to assist with compliance. Provided these resources are made available, the majority of our members believe they can come into compliance by May 28, 2012. However, we strongly encourage the CPSC to evaluate the progress made by the pool owner and operator community before the May 28, 2012 deadline and amend the timetable if necessary.

Thank you for the opportunity to respond to this notice.

Sincerely,



Cindy V. Chetti
Senior Vice President of Government Affairs
National Multi Housing Council



Gregory Brown
Vice President of Government Affairs
National Apartment Association