

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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September 26, 2011

The Honorable Inez M. Tenenbaum
Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Chairman Tenenbaum:

It has come to our attention that the Consumer Product Safety Commission (Commission) is planning to revoke or revise an interpretative rule it promulgated in April 2010 regarding the Virginia Graeme Baker Pool and Spa Safety Act (VGBA). It is not clear to us what has triggered the Commission's review of the existing rule or why you are contemplating a change in your interpretation without providing an opportunity for public comment. The Commission's haste is particularly troublesome inasmuch as you appear to be overturning a decision on which there has already been reliance and without any evidence that the benefits of the new interpretation will justify the costs.

Chief among our concerns is the terrible precedent this approach would set for all future Commission rules and interpretations. The Commission is expected to monitor all of its safety rules and to revise them when changes are warranted. However, if the regulated community perceives that the Commission may spontaneously reverse any rule or guidance—even without supporting evidence, analysis or due process--regulatory chaos is inevitable. Uncertainty among job creators, particularly regulatory uncertainty, is already a major obstacle to our economic recovery. It is imperative that the Commission avoid adding unnecessarily to that uncertainty.

We are doubly concerned that the Commission may reverse itself without seeking comments from the public. The Commission's interpretative rule on unblockable drains was issued after lengthy deliberations, including issuance of a proposed position, invitation of public comments, consideration of those comments, and a public hearing. How can the Commission justify a complete reversal—one that will vitiate prior investments made in reliance on the current interpretation—without input from stakeholders? We are not aware of any pool or spa

entrapment incidents resulting from the current interpretative rule or of any other considerations that compel a change, much less one made in haste without public input.

Accordingly, we have several questions that must be answered before you proceed to any consideration of a revision or revocation of the rules or interpretations for the VGBA. Please respond to the following questions and requests for information by close of business on October 4, 2011:

1. Under what procedure are you bringing this rule before the Commission for consideration? Did any person file a petition for reconsideration of the interpretative rule or other petition for rulemaking complying with the requirements that generally apply under the Commission's rules?
2. If the Commission decides sua sponte to change an existing legal interpretation, is it not usual to provide prior notice to the public?
3. Does the Commission intend to publish notice of its new interpretation of the statute and provide an opportunity to comment before finalizing the revised interpretation? If not, why not?
4. Has the Commission identified any entrapment incidents resulting from the prior interpretation? If so, please provide copies of all documents related to such incidents.
5. Has the Commission determined how many entities have installed unblockable drain covers in reliance on the prior interpretation? Has the Commission determined the extent to which inventory of these products will be reduced in value by its new interpretation?
6. Has the Commission determined the probable costs of complying with the interpretative rule?
7. Has the Commission staff withdrawn its support for the current interpretation? If so, please provide all documents relating to such change, including but not limited to letters, email and memoranda.
8. Has the Commission staff developed any analysis showing expected safety benefits of the revised interpretation?
9. Has the Commission determined to apply the revised interpretation retroactively or will those who relied upon the earlier interpretation be considered in compliance with the law?
10. Please explain why the Commission is proceeding on an apparent expedited schedule now rather than waiting to assemble necessary information to determine whether the rule even warrants reconsideration or revision. With the summer swimming season eight months away for the majority of the country, is there not enough time to notify the public that you wish to reexamine the issue, gather public comments, propose revisions if

warranted, and conclude proceedings in time for pools to comply before next year's swimming season?

11. Is the Commission considering revisions to the definition of the term "public accommodations facility"? If so, please provide the basis for such change and your analysis of the associated costs.

We urge you to take the appropriate time to gather the information necessary to review the current state of compliance with the VGBA. Additionally, it would be prudent to determine what the effects of any potential changes in the Commission rules or interpretation would have on entrapment incident rates at public pools and spas as well as compliance rates. Please contact Gib Mullan, Brian McCullough, or Shannon Weinberg on Committee staff at (202) 225-2927 should you have any questions. We look forward to your response.

Sincerely,



Mary Bono Mack
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade



Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations

cc: The Honorable Fred Upton, Chairman

The Honorable Henry A. Waxman, Ranking Member

The Honorable G.K. Butterfield, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Thomas Hill Moore

The Honorable Nancy Nord

The Honorable Robert Adler

The Honorable Anne Northup