INTEROFFICE MEMORANDUM

TO: WALT IVEY, DIRECTOR, OEHS
FROM: BRIAN J. SKINNER, GENERAL COUNSEL
SUBJECT: AUTHORITY OF THE REGULATE PERSONS WHO RENT ACCOMODATIONS IN THEIR OWN HOMES.
DATE: NOVEMBER 9, 2016
CC: RAHUL GUPTA, COMMISSIONER & STATE HEALTH OFFICER
     BARB TAYLOR, DEPUTY COMMISSIONER

It has recently come to the attention of Public Health Sanitation Division (PHS) of the Office of Environmental Health Services that accommodations for nightly rentals are being advertised on the website Airbnb.com. Airbnb, Inc. operates an online community marketplace for people to list, discover, and book accommodations worldwide online or from a mobile phone. Some of the rentals advertised are entire houses or apartments, others are rentals of a single room in a private residence.

A question has arisen about whether persons renting accommodations in their homes are subject to the provisions of W.Va. Code R. 64-18-1 et seq. (General Sanitation). The PHS staff is of the opinion that these rentals do not meet the definition(s) and these rentals should be required to comply with the rule and obtain an operational permit from the local health department.

The PHS has requested a legal opinion on whether persons renting accommodations utilizing Airbnb.com are subject to the provisions of the General Sanitation rule, including rentals of a sleeping room in a private residence.

QUESTION PRESENTED

Whether persons who rent accommodations in their own homes to others using Airbnb, Inc. are subject to the permit and inspection requirements of W.Va. Code R. §§ 64-18-1 et seq. (General Sanitation)?

SHORT ANSWER

No, despite the Secretary’s broad the authority to regulate “[t]he sanitary condition of || all other places open to the general public and inviting public patronage or public assembly, or tendering to the public any item for human consumption . . .”, and “[t]he health and sanitary conditions of establishments commonly referred to as bed and breakfast inns”, (W.Va. Code § 16-1-4 (b)) as currently promulgated, the General
Sanitation rule cannot be read to include in the definition of a “lodging facility”, persons who are providing accommodations to others in their home for a fee.

FACTS

Airbnb, Inc. operates an online community marketplace for people to list, discover, and book accommodations worldwide online or from a mobile phone. The Airbnb website, application and services can be used to facilitate the listing and booking of accommodations. Airbnb makes available an online platform with related technology for guests and hosts to meet online and arrange for bookings of accommodations directly with each other. Airbnb is not an owner or operator of properties, nor is it a provider of properties, and Airbnb does not own, sell, resell, furnish, provide, rent, re-rent, manage and/or control properties. Airbnb’s responsibilities are generally limited to facilitating the availability of properties, including, but not limited to, hotel rooms, motel rooms, other lodgings or accommodations.

The Airbnb terms of service inform hosts that they should:

- understand how the laws work in their respective cities. Some cities have laws that restrict their ability to host paying guests for short periods. These laws are often part of a city’s zoning or administrative codes. In many cities, hosts must register, get a permit, or obtain a license before listing a property or accepting guests. Certain types of short-term bookings may be prohibited altogether. Local governments vary greatly in how they enforce these laws. Penalties may include fines or other enforcement. Hosts should review local laws before listing a space on Airbnb.

Airbnb assumes no responsibility for a host’s compliance with any agreements with or duties to third parties, applicable laws, rules and regulations. By agreeing to the Airbnb terms and conditions, hosts are indicating that they understand and agree that they are solely responsible for compliance with any and all laws, rules, regulations, and tax obligations that may apply to their use of the website, application, services and collective content.

State Law

W. Va. Code § 16-1-4 (b) authorizes the Cabinet Secretary to regulate “[t]he sanitary condition of all institutions and schools, whether public or private, public conveyances, dairies, slaughteringhouses, workshops, factories, labor camps, all other places open to the general public and inviting public patronage or public assembly, or tendering to the public any item for human consumption...” (emphasis added), and “[t]he health and sanitary conditions of establishments commonly referred to as bed and breakfast inns. Bed and breakfast inn is defined as an establishment providing sleeping accommodations and,
at a minimum, a breakfast for a fee. W.Va. Code § 16-1-6(m) empowers the
Commissioner to “inspect and enforce rules to control the sanitary conditions of and
license . . . all other places open to the general public and inviting public patronage or
public assembly, or tendering to the public any item for human consumption . . . .”

The Secretary’s legislative rule-making authority provides the authority for W.Va.
Code R. §§ 64-18-1 et seq. (General Sanitation). The rule establishes the minimum public
health sanitation requirements governing all institutions and schools, care facilities, lodging
facilities, recreational facilities, and public restrooms and is applicable to every person who
in any manner establishes, conducts, controls, manages, maintains, or operates a facility
included under the scope of [the] rule. W.Va. Code R. §§ 64-18-1.1 & 5. The rule is
applicable to lodging facilities, which include, but are not limited to, bed and breakfast

**General Sanitation Rule**

Whenever a facility governed under the scope of this rule is constructed or
extensively remodeled, and whenever an existing structure is converted to use as one of the
facilities governed by the rule, the owner or operator must submit plans and specifications
for the construction, remodeling, or conversion to the health officer for review and

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1 The secretary may not require an owner of a bed and breakfast providing sleeping
accommodations of six or fewer rooms to install a restaurant-style or commercial food service
facility. The secretary may not require an owner of a bed and breakfast providing sleeping
accommodations of more than six rooms to install a restaurant-type or commercial food service
facility if the entire bed and breakfast inn or those rooms numbering above six are used on an
aggregate of two weeks or less per year;

2 Defined as an establishment providing lodging facilities in the form of sleeping accommodations

3 Defined as every building where food and lodging are furnished to guests and payment is required.

4 Defined as any lumber, mining, agricultural, construction, or other industrial camp where ten or
more persons are employed and housed in temporary quarters, such as cars, motor homes, camper

5 Defined as every building constructed, designed, maintained, offered or used to furnish lodging to
automobile transient guests or the traveling public. The term motel includes auto courts, motor
§ 64-18-2.15

6 Colleges and universities, and public restrooms, unless the public restroom is included as part of a
facility governed under this rule, are exempt from the plan review and permitting provisions of the
rule.

7 Health Officer is defined by the rule as either the Commissioner or a local health officer. See
approval at least forty-five (45) days before construction, remodeling, or conversion is begun. *W.Va. Code R.* § 64-18-3.1.a.

Anyone operating a facility governed by the rule must possess a valid permit issued by the health officer. *W.Va. Code R.* § 64-18-3.2.a. Application for a permit to operate a facility must be submitted at least 15 days before the actual or proposed operation of the facility. *W.Va. Code R.* § 64-18-3.2.c. Prior to the approval of an application for a permit, the health officer must inspect the proposed facility to determine compliance with the rule. *W.Va. Code R.* § 64-18-3.2.d.

The health officer must inspect a facility governed by the rule at least once a year. *W.Va. Code R.* §§ 64-18-4.1. The health officer must make additional inspections as necessary to determine satisfactory compliance with the provisions of this rule or any orders, notices, instructions or specifications issued pursuant to this rule. *W.Va. Code R.* § 64-18-4.2.

Whenever the health officer makes an inspection of a facility and discovers that any of the provisions of this rule have been violated, he or she shall notify the operator of the violations by means of an inspection report form or other written notice. § 3.3.a. Whenever the health officer finds that any facility governed by this rule constitutes an imminent hazard to public health, he or she may, without notice or hearing, issue a written order to the operator or person in charge citing the existence of the condition and requiring action to be taken to remedy the condition, including the suspension of the permit to operate. *W.Va. Code R.* §§ 64-18-3.3.b. Any person to whom the order is directed shall comply with the order immediately, but upon written petition to the health officer will be afforded an administrative hearing. *W.Va. Code R.* § 64-18-3.3.b.1.

**DISCUSSION**

It is well-established that the Cabinet Secretary has the authority to regulate, and the Commissioner to enforce, regulation regarding the sanitary condition of “places open to the general public and inviting public patronage or public assembly, or rendering to the public any item for human consumption . . .”, including bed and breakfast inns. *W.Va. Code* § 16-1-4(b) & *W.Va. Code* § 16-1-6(m).

As noted above, a bed and breakfast inn is defined as an establishment providing sleeping accommodations and, *at a minimum, a breakfast* for a fee. See *W.Va. Code* § 16-1-4(b)(7). This definition is problematic in the present case, since it requires that hosts who

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*Colleges and universities and public restrooms which are not part of a facility governed by this rule may be inspected on a complaint basis only. Schools shall be inspected at least once every two years. *W.Va. Code R.* §§ 64-18-4.1.a & b.*
provide accommodations must also provide breakfast. Accommodations booked via Airbnb.com, do not require a host to provide breakfast.

However, given the breadth of the Secretary’s regulatory authority over “all places open to the general public and inviting public patronage”, it may be unnecessary to determine whether the bed and breakfast definition is applicable. Persons advertising sleeping accommodations in their home on an online public marketplace, may be included within the Secretary and Commissioner’s regulatory authority, since advertising accommodations on the Airbnb website or application is evidence of (1) an invitation for the public patronage, and (2) an intention to make a room(s) available to the general public. See W.Va. Code § 16-1-4(b).

Consequently, it appears that the Secretary’s statutory authority may be broad enough to include the regulation of persons who provide sleeping accommodations in their homes. However, the next question that must be considered is whether the provisions of W.Va. Code R. §§ 64-18-1 et seq. can be read to include such accommodations?

As discussed above, the General Sanitation rule applies to lodging facilities. Lodging facilities, include, but are not limited to, bed and breakfast inns, hotels, labor camps, and motels. W.Va. Code R. § 64-18-2.13. A person offering accommodations in their own home for a fee, does not fit neatly into any of the categories contained in the definition of “lodging facilities.” First, in each case, the primary purpose of the lodging facility is to provide sleeping accommodations. Bed and breakfast inns, hotels, labor camps and motels are business establishments, the primary purpose of which, is to provide sleeping accommodations, and in some cases, food. This cannot be said of all accommodations advertised on Airbnb, many of which are persons offering accommodations in their own homes. This is not to say that all accommodations advertised on Airbnb are in private homes, however those that meet the General Sanitation rule’s definition of a lodging facility, are clearly subject to the requirements contained in the rule.

Thus, the question then becomes, whether the “include, but are not limited to” clause contained in the definition of a “lodging facility” can be used to include persons who host others in their private residence for a fee? In deciding the meaning of a statutory provision”, courts will “look first to the statute’s language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.” Appalachian Power Co. v. State Tax Dep’t, 195 W.Va. 573, 587, 466 S.E.2d

\footnote{A rule “proposed by an agency and approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Procedures Act, W. Va.Code, 29A-1-2(d), and such a legislative rule has the force and effect of law.” Syl. Pt. 5, Smith v. West Virginia Human Rights Comm’n, 216 W.Va. 2, 602 S.E.2d 443 (2004).}
424, 438 (1995). See also Syl. pt. 2, Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970) ([ w ]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.); Syl. pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951) ([ a ] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.).

In West Virginia “[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” Sizemore v. State Farm Gen. Ins. Co., 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted).

With regard to the use of the phrase “include, but not limited to” the West Virginia Supreme Court of Appeals has recognized that “[t]he term ‘include[s]’ in a statute is to be dealt with as a word of enlargement and this is especially so where ... such word is followed by ‘but not limited to’ the illustrations given.” State Human Rights Comm'n v. Paulry, 158 W.Va. 495, 501, 212 S.E.2d 77, 80 (1975) (citations omitted). However, the Court has also recognized that “[i]n the interpretation of statutory provisions the familiar maxim expressio unius est exclusio alterius, the express mention of one thing implies the exclusion of another, applies.” Syllabus Point 3, Manchin v. Dunfee, 174 W.Va. 532, 327 S.E.2d 710 (1984). See also, State ex rel. Rittle v. Ranson, 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995) (“Expressio unius est exclusio alterius (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction.”) (citing Brockway Glass Co. Inc., Glassware Div. v. Caryl, 183 W.Va. 122, 394 S.E.2d 524 (1990); Dotts v. Taressa, J.A., 182 W.Va. 586, 591, 390 S.E.2d 568, 573 (1990)). The expressio unius maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional. As the Court explained in Rittle, “[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.” 195 W.Va. at 128, 464 S.E.2d at 770.

Here, as indicated above, the list of establishments contained in the definition of “lodging facility” are those whose the primary function of the establishment is to provide sleeping accommodations. Certainly, that may not be said of a person who is renting a room in their home or renting an entire house or apartment that serves has a residence. Secondly, the Legislature specifically defined a “bed and breakfast inn” as an establishment providing lodging facilities in the form of sleeping accommodations and, at a minimum, a breakfast for a fee. W.Va. Code § 16-4-4(b)(7). By making it necessary that an establishment provide breakfast as prerequisite to it meeting the definition, it appears that the Legislature intended to limit the application of the Secretary’s regulatory authority to a specific factual situation. Consequently, if a host does not provide breakfast as a part of the
accommodations subject to a fee, than the host is not a bed and breakfast inn subject to the provisions of the General Sanitation rule.

Consequently, as currently promulgated, the General Sanitation rule cannot be read to include in the definition of a “bed and breakfast inn” persons who are providing accommodations to others in their home for a fee, unless the host not only provides sleeping accommodations, but also breakfast. However, persons renting a house or apartment that is not their residence may be subject to the provisions of the General Sanitation rule, but only if the house or residence meets one of the definitions included in the general definition of a “lodging facility.”

CONCLUSION

Airbnb, Inc. has become a virtual marketplace for people to list, discover, and book accommodations worldwide online or from a mobile phone. However, many rentals advertised are single rooms in a private residence. The recent upsurge of accommodations for nightly rentals being advertised on the website Airbnb.com, has led to the question of whether the Bureau’s General Sanitation rule applies to persons who rent rooms in their private residence.

While the Cabinet Secretary given broad the authority to regulate “[t]he sanitary condition of [ ] all other places open to the general public and inviting public patronage or public assembly, or tendering to the public any item for human consumption . . . ,” and “[t]he health and sanitary conditions of establishments commonly referred to as bed and breakfast inns”, (W.Va. Code § 16-1-4 (b)), the language of the General Sanitation rule is circumscribed and cannot be read to include in the definition of a “lodging facility” persons who are providing accommodations, in their home, to others for a fee.

Consequently, the Bureau may consider requesting that that Secretary consider proposing to the Legislature for promulgation, amendments to the General Sanitation legislative to expand its scope to include rule persons who rent sleeping accommodation in their homes.