

Guidance on Toy Gun Marking Requirements

TIA often receives questions from members regarding how to insure that they are in compliance with marking requirements for toy guns in all jurisdictions in which they wish to distribute these products. Indeed, this is a confusing area, as comprehensive federal requirements have existed for many years (at 15CFR 272 and incorporated by reference under ASTM F963, section 4.30), but several subnational jurisdictions have enacted requirements that were superseded by such federal requirements and which differ and sometimes conflict with these long-established federal requirements.

While we cannot provide legal advice here, we can provide general guidance for producers and retailers.

The federal regulation at 15CFR 272 is one of the few toy safety requirements under the jurisdiction of the U.S. Commerce Department, while ASTM F963 is now a U.S. Consumer Product Safety Commission (CPSC)-administered regulation. **The requirements of 15CFR 272 are found in Appendix "A"**. In summary, they require toy guns to be transparent or have a predominant color chosen from an approved list or have a blaze orange band at the muzzle or have a blaze orange plug in the muzzle end of the barrel (if the item is non-functional). Manufacturers may choose to apply more than one of these treatments, but only one is required.

The requirements in ASTM F963 essentially mirror and were intended to defer to the above regulation, and are found in Appendix "B".

State and local imitation firearm statutes generally define *Imitation weapon* to mean:

"Any device or object made of plastic, wood, metal or any other material which substantially duplicates or can reasonably be perceived to be an actual firearm, air rifle, pellet gun, or "B-B" gun, excluding nonfiring replicas of an antique firearm, the original of which was designed, manufactured and produced prior to eighteen hundred ninety-eight." New York City (NYC Administrative Code section 10-131(g)) makes no distinction for pre-1898 imitation firearms.

Some state and local statutes and ordinances may restrict sale of such imitation weapons unless they are a bright color (singly or in combination) and have the muzzle end of the barrel plugged with the same material as the rest on the gun, unless functional (i.e. NY State General Business Law, Article 39(b), section 871; see also NYC Administrative Code section 10-131(g)).

As a practical matter federal statutes and regulations govern this area, and supersede (preempt) *inconsistent* marking requirements. In our opinion, affirmatively requiring *different* marking would be inconsistent, but requiring multiple federal alternative marking (e.g.

coloration and barrel plug or circumferential band) may or may not be deemed "inconsistent" by the courts. While it is the clear intent of Congress that 15CFR 272 preempt any state or local requirement dealing with toy guns and look-alike or imitation firearms (15CFR 272.5 explicitly states this), and it can be argued that ASTM F963 also is preemptive of such state and local regulations based on the preemption clause of the Consumer Product Safety Act (15 USC 2075(a)), several local jurisdictions such as New York State contend that their own requirements for multiple types of marking are "consistent" with federal requirements.

Here then, are some general "rules of thumb" for insuring compliance with both state and federal requirements:

- 1) To avoid problems, we recommend coloration in one of the federally-specified colors.
- 2) Toy guns should never have a laser pointer affixed to them, regardless of compliance with the other requirements outlined here; however, a light source which cannot be confused with a laser (i.e., that is a color other than those typical of lasers used as sighting aids on real firearms: red, green, or sometimes blue), or that is used on a toy that could not reasonably be confused with a real firearm, is acceptable.
- 3) Bright blue is permissible for coloration; examples are "neon" or Day-Glo™ blue, but any "bright" blue is acceptable. Dark blue colors similar to bluing used on steel firearms would be inconsistent with federally permitted coloration.
- 4) Toy guns may include black, steel blue, silver or aluminum on the exterior surface of the device as an accent color, provided it is minor and not the predominant color ("predominant" being defined as more than 50% of total visible surface area), that the predominant color(s) is the federally-designated bright color(s); while not mandatory, some manufacturers elect to use both bright exterior colors and a blaze orange barrel plug or band at the muzzle (a plug is not required on functional product).
- 5) Toy guns which clearly are futuristic (e.g., space-themed ray guns, etc.) or otherwise do not resemble a real weapon in configuration generally do not need to meet any of the federal options in 15CFR 272; provided that such items cannot reasonably be perceived to be an actual firearm, they are arguably outside the ambit of state and local regulations as well. This same argument could be applied to toys that resemble in shape and proportions a real weapon, but are either so small (see maximum dimensions in 15CFR 272) or so large that they could not reasonably be perceived to be a real weapon.

It is possible for a toy gun or imitation firearm to comply with the federal requirements but not with one or more of the requirements in 1-5 above. Internet sites offering for sale federally-compliant toys or imitation firearms that do not meet the above requirements should display a disclaimer indicating that such products are not for sale or use in New York.