



Ballot Vote Sheet

TO: The Commission
Alberta E. Mills, Secretary

THROUGH: Austin C. Schlick, General Counsel
Jason Levine, Executive Director

FROM Daniel R. Vice, Assistant General Counsel,
Regulatory Affairs
David M. DiMatteo, Attorney, Regulatory Affairs

SUBJECT: Draft Direct Final Rule: "Marking of Toy, Look-Alike, and Imitation Firearms"

DATE: April 5, 2023

BALLOT VOTE DUE: Tuesday, April 11, 2023

In August 2022, Congress passed the Federal Energy Management Improvement Act Update, which transferred the authority for regulating the marking of toy, look-alike, and imitation firearms under 15 U.S.C. § 5001 from the Department of Commerce to CPSC. Pub. L. 117–167, div. B, title II, §10246(e), Aug. 9, 2022, 136 Stat. 1492.

The Office of the General Counsel is forwarding to the Commission a draft direct final rule that would create a new 16 CFR part 1272 that adopts the existing Department of Commerce rule for the marking of toys, look-alike, and imitation firearms with only non-substantive and conforming changes. Attached for Commission consideration is a draft *Federal Register* notice for that purpose. If the Commission approves the draft notice, the Office of the General Counsel will seek approval of the incorporations by reference from the Office of the Federal Register in accordance with the requirements in 1 CFR part 51, and upon receiving such approval, will send the notice to the *Federal Register* for publication.

Please indicate your vote on the following options:

- I. Approve publication of the attached document in the *Federal Register*, as drafted.

(Signature)

(Date)



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- II. Approve publication of the attached document in the *Federal Register*, with the specified changes.

(Signature)

(Date)

- III. Do not approve publication of the attached document in the *Federal Register*.

(Signature)

(Date)

- IV. Take other action specified below.

(Signature)

(Date)

Attachment: Draft Direct Final Rule: "Marking of Toy, Look-Alike, and Imitation Firearms"

[Billing Code 6355-01-P]

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1272

Marking of Toy, Look-Alike, and Imitation Firearms

[Docket No. CPSC-2023-00XX]

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: The Federal Energy Management Improvement Act Update transferred the authority for regulating the marking of toy, look-alike, and imitation firearms from the Department of Commerce to the Consumer Product Safety Commission. The Commission is issuing this direct final rule to adopt the Department of Commerce rule for the marking of toy, look-alike, and imitation firearms, with non-substantive and conforming changes.

DATES: The rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], unless CPSC receives a significant adverse comment by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If CPSC receives such a comment, it will publish a notice in the *Federal Register* withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You can submit comments, identified by Docket No. CPSC-2023-00XX, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: www.regulations.gov. Follow the instructions for submitting comments. Do not

submit through this website: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. CPSC does not accept comments submitted by email, except as described below.

Mail/Hand Delivery/Courier/Confidential Written Submissions: CPSC encourages you to submit comments by using the Federal eRulemaking Portal. You may, however, submit comments by mail, hand delivery, or courier to: Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504-7479.

Instructions: All submissions must include the agency name and docket number. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: www.regulations.gov. If you wish to submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public, you may submit such comments by mail, hand delivery, or courier, or you may email them to: cpsc-os@cpsc.gov.

Docket: For access to the docket to read background documents or comments received, go to: www.regulations.gov, and insert the docket number, CPSC-2023-00XX, into the “Search” box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Salman Sarwar, Compliance Officer, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504-7682; email: ssarwar@cpsc.gov.

SUPPLEMENTARY INFORMATION:

A. Background

Section 4 of the Federal Energy Management Improvement Act of 1988 made it unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless the firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce. 15 U.S.C § 5001. In 1989, the Department of Commerce promulgated regulations implementing this law at 15 CFR part 1150. 54 FR 19,356 (May 5, 1989). In 2013, the Department of Commerce moved those regulations to 15 CFR part 272. 78 FR 4764 (Jan. 23, 2013).

The Department of Commerce regulations incorporate by reference ASTM F589-85, Standard Consumer Safety Specification for Non-Powder Guns, which “establishes performance requirements and test methods intended to provide a reasonable degree of safety in the normal use of non-powder guns and projectiles.” ASTM F589-85, § 3.1; 15 CFR 272.1(b). That 1985 ASTM standard also addresses “the misuse of non-powder guns and specifies the minimum warnings and instructions that are to be provided in literature and on labels and packages.” *Id.* § 3.2. ASTM later issued revised versions of F589, but the Department of Commerce did not incorporate the revisions into its regulations.

The Department of Commerce regulations also describe requirements for the use of blaze orange coloring on toy, look-alike, or imitation firearms. 15 CFR 272.3. Those regulations incorporate by reference the federal color standard, Federal Standard 595B, December 1989, color number 12199 (Fed-Std-595B 12199). 15 CFR 272.3(e). In February 2017, the General Services Administration cancelled Federal Standard 595B and it was replaced with SAE International’s Aerospace Material Specification (AMS) Standard 595A, Colors Used in

Government Procurement. The AMS standard defines a color index system used by, but not limited to, government activities in a format suitable for color identification, color selection, color matching, and quality control inspection. It also describes the designation and use of color media that are available to conduct these activities. The Department of Commerce, however, did not update its regulations after the cancellation of Federal Standard 595B, so those regulations continue to incorporate by reference that federal standard.

In August 2022, the President signed into law the Federal Energy Management Improvement Act Update.¹ That law transferred implementation and enforcement of 15 U.S.C § 5001 from the Department of Commerce to CPSC. This direct final rule creates a new 16 CFR part 1272 that adopts the substance of the existing Department of Commerce rule for the marking of toy, look-alike, and imitation firearms with only non-substantive and conforming changes.²

B. Description of the Rule

This direct final rule creates a new part 1272, “Marking of Toy, Look-Alike, and Imitation Firearms.” Part 1272 adopts in substance the Department of Commerce regulation found in 15 CFR part 272.

Part 1272 contains nomenclature and other non-substantive and conforming technical changes as described below.

- The incorporation by reference of ASTM F589-85 in section 1272.1(b) has been retained, with updates to provide current information reflecting the availability of the voluntary standard for public inspection, and to follow the current guidance of the Office of the Federal Register (OFR) for incorporating a voluntary standard by

¹ Pub. L. 117–167, div. B, title II, §10246(e), Aug. 9, 2022, 136 Stat. 1492.

² The Commission voted TBD-TBD to approve publication of this notice.

reference. Incorporation of the 1985 version of the ASTM F589 standard is being retained for consistency with the Department of Commerce regulation.

- “Secretary of Commerce” in section 1272.3 has been changed to “Consumer Product Safety Commission.”
- The incorporation by reference in section 1272.3(e) has been updated from Federal Standard 595B-85 to reference SAE International’s standard AMS STD 595A-17, Colors Used in Government Procurement. The current version incorporated in the rule is AMS STD 595A-17. The color 12199 referenced in FED STD 595B is identical to color 12199 in AMS STD 595A-17. Thus, this change of the color standard incorporated in the regulation is not substantive.
- The contact information for submitting a waiver request under section 1272.4 has been changed to CPSC.

C. Incorporation by Reference

Sections 1272.1 and 1272.3 of the direct final rule incorporate by reference ASTM F589-85 and AMS STD-595A-17, respectively. The OFR has regulations regarding incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss, in the preamble to a final rule, ways in which the material the agency incorporates by reference is reasonably available to interested parties, and how interested parties can obtain the material. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR regulations, this preamble summarizes the provisions of ASTM F589-85 and AMS STD 595A-17 that the Commission incorporates by reference into 16 CFR part 1272. These standards are reasonably available to interested parties. A read-only copy

of ASTM F589-85 is available for viewing, at no cost, on ASTM’s website at:

www.astm.org/READINGLIBRARY/.

A read-only copy of AMS STD 595A-17 is available for viewing until the direct final rule takes effect, at no cost, on SAE’s website at: [INSERT HYPERLINK]. Once the rule takes effect, a read-only copy of the standard will be available for viewing, at no cost, on SAE’s website at: <https://www.sae.org/standards/reading-room>. Interested parties can purchase a copy of SAE AMS STD 595A-17, *Colors Used in Government Procurement*, approved February 10, 2017, from SAE International, 400 Commonwealth Dr., Warrendale, PA 15096; telephone (888) 875-3976; www.sae.org. Interested parties can also schedule an appointment to inspect a copy of the standards at Office of the Secretary, U.S. Consumer Product Safety Commission 4330 East West Highway, Bethesda, MD 20814, telephone: (301) 504-7479; email: cpssc-os@cpssc.gov.

D. Direct Final Rule Process

The Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA; 5 U.S.C. 551-559) generally requires agencies to provide notice of a rule and an opportunity for interested parties to comment on it, section 553 of the APA provides an exception when the agency “for good cause finds” that notice and comment are “impracticable, unnecessary, or contrary to the public interest.” *Id.* 553(b)(B). The Commission concludes that because this rule adopts the substantive requirements of the Commerce regulation found in 15 CFR part 272 with only non-substantive and conforming changes, notice and comment are not necessary. The existing Commerce regulation has been in effect for over 30 years and stakeholders have been subject to the requirements of the regulation. CPSC is merely adopting the existing regulation in response to Congress transferring the authority for regulating markings

on toy, look-alike, and imitation firearms under 15 U.S.C. 5001 from the Department of Commerce to CPSC.

In Recommendation 95-4, the Administrative Conference of the United States (ACUS) endorses direct final rulemaking as an appropriate procedure to expedite rules that are noncontroversial and not expected to generate significant adverse comments. *See* 60 FR 43108 (Aug. 18, 1995). ACUS recommends that agencies use the direct final rule process when they act under the “unnecessary” prong of the good cause exemption in 5 U.S.C. 553(b)(B). Consistent with the ACUS recommendation, the Commission is publishing this rule as a direct final rule, because CPSC does not expect any significant adverse comments.

Unless CPSC receives a significant adverse comment within 30 days of this notification, the rule will become effective on [INSERT 45 DAYS AFTER PUBLICATION]. In accordance with ACUS’s recommendation, the Commission considers a significant adverse comment to be “one where the commenter explains why the rule would be inappropriate,” including a showing that challenges “the rule’s underlying premise or approach,” or that the rule “would be ineffective or unacceptable without a change.” 60 FR 43108, 43111 (Aug. 18, 1995). As noted, this rule adopts the existing Commerce regulation without making substantive changes, and thus any public comments should address only this specific action.

If the Commission receives a significant adverse comment, the Commission will withdraw this direct final rule. Depending on the comment and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking, providing an opportunity for public comment.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601-612) generally requires agencies to review proposed and final rules for their potential economic impact on small entities, including small businesses, and to prepare regulatory flexibility analyses. 5 U.S.C. 603, 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed in section D. Direct Final Rule Process of this preamble, the Commission has determined that notice and the opportunity to comment are unnecessary for this rule. Therefore, the RFA does not apply.

F. Effective Date

Unless the Commission receives a significant adverse comment by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], the rule will become effective on [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The requirements of 16 CFR part 1272 apply to look-alike and imitation firearms manufactured or imported after the effective date.

G. Certification

Look-alike and imitation firearms are subject to the new 16 CFR part 1272. Section 14(a)(1) of the Consumer Product Safety Act (CPSA) requires manufacturers of non-children's products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, to certify that the products comply with all applicable CPSC requirements based on a test of each product, or on a reasonable testing program. 15 U.S.C. 2063(a)(1). Such certification is known as general conformity certification (GCC). Look-alike and imitation firearms that are not children's products are subject to the requirement to issue a GCC.

Toy guns are children’s products currently regulated under CPSC’s mandatory toy standard. Specifically, toy guns are subject to the requirements for toy gun markings contained in section 4.30 of ASTM F963-17 that are incorporated by reference at 16 CFR 1250.2. The requirements of section 4.30 are in turn based on the requirements in the Department of Commerce regulation at 15 CFR part 272. Section 14(a)(2) of the CPSA requires the manufacturer or private labeler of a children’s product that is subject to a children’s product safety rule to certify, based on a third-party conformity assessment body’s testing, that the product complies with the applicable children’s product safety rule. *Id.* 2063(a)(2). Such certification is referred to as a children’s product certificate (CPC). Section 14(a)(3) also requires the Commission to publish a notice of requirements (NOR) for a third-party conformity assessment body (*i.e.*, testing laboratory) to obtain accreditation to assess conformity with a children’s product safety rule. *Id.* 2063(a)(3)(A).

In accordance with section 14(a)(3)(B)(vi) of the CPSA, the Commission previously published an NOR for accreditation of third party conformity assessment bodies for testing toy imitation firearms under section 4.30 for the required toy gun markings. 76 FR 46598 (Aug. 3, 2011); 15 U.S.C. 2063(a)(3)(B)(vi). The NOR provided the criteria and process for CPSC to accept accreditation of third party conformity assessment bodies for toy gun markings under section 4.30 of ASTM F963. The NORs for all mandatory standards for children’s products are listed in the Commission’s rule, “Requirements Pertaining to Third Party Conformity Assessment Bodies,” codified in 16 CFR part 1112. Specifically, the NOR for section 4.30 of ASTM F963-17 is codified at 16 CFR 1112.15(b)(32)(ii)(CC). Toy guns subject to the toy gun marking requirements of section 4.30 of ASTM F967-17 are currently required to certify, based on third party testing by a CPSC-accepted laboratory, that the toy gun complies with the

requirements of section 4.30. Issuance of this rule does not impact the requirement for certification of toys guns under section 4.30 of ASTM F967-17. That requirement remains unchanged and manufacturers are expected to continue complying with it.

H. Preemption

15 U.S.C. § 5001(g) provides that the provisions of that section shall supersede any provision of state or local laws or ordinances which provide for markings or identification inconsistent with provisions of section 5001(g), provided that no State shall:

- prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or
- prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

15 U.S.C. 5001(g). Therefore, new 16 CFR part 1272 will preempt any state or local laws in accordance with section 5001(g).

I. Environmental Considerations

Commission rules are categorically excluded from any requirement to prepare an environmental assessment or an environmental impact statement where they “have little or no potential for affecting the human environment.” 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

J. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801-808) states that before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The CRA submission

must indicate whether the rule is a “major rule.” The CRA states that the Office of Information and Regulatory Affairs determines whether a rule qualifies as a “major rule.”

Pursuant to the CRA, OMB’s Office of Information and Regulatory Affairs has determined that this rule does not qualify as a “major rule,” as defined in 5 U.S.C. 804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General.

List of Subjects in 16 CFR Part 1272

Consumer protection, Imports, Incorporation by reference, Law enforcement, Safety.

For the reasons stated in the preamble, the Commission amends title 16 of the CFR to add part 1272 to read as follows:

PART 1272 - MARKING OF TOY, LOOK-ALIKE, AND IMITATION FIREARMS

Sec.

1272.1 Applicability.

1272.2 Prohibitions.

1272.3 Approved Markings.

1272.4 Waiver.

1272.5 Preemption.

Authority: 15 U.S.C. 5001.

§ 1272.1 Applicability.

This part applies to toy, look-alike, and imitation firearms (“devices”) having the appearance, shape, and/or configuration of a firearm and produced or manufactured and entered

into commerce on or after May 5, 1989, including devices modelled on real firearms manufactured, designed, and produced since 1898. This part does not apply to:

(a) Non-firing collector replica antique firearms, which look authentic and may be a scale model but are not intended as toys modelled on real firearms designed, manufactured, and produced prior to 1898;

(b) Traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof, as described in ASTM F589-85, Standard Consumer Safety Specification for Non-Powder Guns. ASTM F589-85, Standard Consumer Safety Specification for Non-Powder Guns, approved June 28, 1985, is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. This material is available for inspection at the Consumer Product Safety Commission (CPSC) and at the National Archives and Records Administration (NARA). Contact CPSC at: Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone (301) 504-7479, e-mail cpsc-os@cpsc.gov. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations.html or e-mail fr.inspection@nara.gov. A read-only copy of the standard is available for viewing on the ASTM website at www.astm.org/READINGLIBRARY/. You may obtain a copy from ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428-2959; telephone (610) 832-9585; www.astm.org.

(c) Decorative, ornamental, and miniature objects having the appearance, shape and/or configuration of a firearm, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the objects measure no more than

thirty-eight (38) millimeters in height by seventy (70) millimeters in length, the length measurement excluding any gun stock length measurement.

§ 1272.2 Prohibitions.

No person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm (“device”) covered by this part as set forth in § 1272.1 unless such device contains, or has affixed to it, one of the markings set forth in § 1272.3, or unless this prohibition has been waived by § 1272.4.

§ 1272.3 Approved markings.

The following markings are approved by the Consumer Product Safety Commission:

(a) A blaze orange (AMS STD 595A-17 color 12199) or orange color brighter than that specified by the AMS standard color number, solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel.

(b) A blaze orange (AMS STD 595A-17 color 12199) or orange color brighter than that specified by the AMS standard color number, marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters.

(c) Construction of the device entirely of transparent or translucent materials which permits unmistakable observation of the device's complete contents.

(d) Coloration of the entire exterior surface of the device in white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink, or bright purple, either singly or as the predominant color in combination with other colors in any pattern.

(e) SAE AMS STD 595A-17, Colors Used in Government Procurement, approved February 10, 2017, is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. This material is available for inspection at the Consumer Product Safety Commission (CPSC) and at the National Archives and Records Administration (NARA). Contact CPSC at: Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone (301) 504-7479, e-mail cpsc-os@cpsc.gov. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations.html or e-mail fr.inspection@nara.gov. A read-only copy of the standard is available for viewing on the SAE website at <https://www.sae.org/standards/reading-room>. You may obtain a copy from SAE International, 400 Commonwealth Dr., Warrendale, PA 15096; telephone (888) 875-3976; www.sae.org.

§ 1272.4 Waiver.

The prohibitions set forth in § 1272.2 may be waived for any toy, look-alike, or imitation firearm that will be used only in the theatrical, movie, or television industry. A request for such a waiver should be made, in writing, by email to RegulatoryEnforcement@cpsc.gov and by physical mail to U.S. Consumer Product Safety Commission, Office of Compliance and Field Operations, Regulatory Enforcement Division, 7500 Lindbergh Dr. Unit-A, Gaithersburg, MD 20879-5413. The request must include a sworn affidavit which states that the toy, look-alike, or imitation firearm will be used only in the theatrical, movie, or television industry. A sample of the item must be included with the physically mailed request.

§ 272.5 Preemption.

In accordance with section 4(g) of the Federal Energy Management Improvement Act of 1988 (15 U.S.C. 5001(g)), the provisions of section 4(a) of that Act and the provisions of this part supersede any provision of State or local laws or ordinances which provides for markings or identification inconsistent with the provisions of section 4 of that Act or the provisions of this part.

Dated: _____

Alberta E. Mills, Secretary
Consumer Product Safety Commission