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Alexander Hoehn-Saric
Chair
Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

Gina M. Raimondo
Secretary
Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Dear Chair Hoeh-Saric and Secretary Raimondo:

I write today concerning the long-standing need for strong, coherent federal regulations mandating distinct visual differences between three categories of consumer products: 1) toy, lookalike, and imitation guns (hereinafter “toy guns”), 2) non-powder (bb, air and pellet) guns, and 3) firearms. The ready availability of products that are visually indistinguishable from real, lethal powder firearms has, for decades, proven to have dangerous and—far too often—deadly consequences. In fact, according to *The Washington Post*'s police shooting database, at least 249 people have been killed by police while in possession of a toy or non-powder guns since 2015.¹ Six of those individuals identified by *The Post* were New Yorkers.² Just last month, another New Yorker, not yet included in the database, was killed by police while in possession of a bb gun.³

My office, through the Office of Special Investigation (“OSI”), is charged with investigating and, where appropriate, prosecuting all police killings in the State of New York. In the nearly three years I have served as attorney general, I have seen time-and-again the tragic consequences of split-second

¹ *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last accessed Nov. 19, 2021)

² *Id.*

³ David Mayer, *AG Opens Probe Into NYPD Killing Of Belt Parkway Driver*, N.Y. POST, Nov. 14, 2021 (available at: <https://nypost.com/2021/11/14/ag-opens-probe-into-nypd-killing-of-belt-parkway-driver/>)

decisions made by armed officers in high-stress situation. Deadly mistakes do not require indistinguishable imitation guns—Saheed Vassell of Brooklyn was shot multiple times by four different officers because they believed a length of silver pipe he was holding was a firearm.⁴ But realistic fake firearms make such tragedies exponentially more likely to occur—as when Michael Wallace of Schenectady was killed while in possession of a pellet gun OSI investigators found to be “very realistic.”⁵ OSI is currently investigating the killing of 17-year-old Judson Albahm of Jamesville⁶—who police shot to death while he was holding an officially licensed Glock BB gun, which retails for \$75 online and is advertised as having “the unmistakable look of the original pistol.”⁷ Nor is the toll of realistic fake guns limited to the most tragic of incidents. Far too often, fake guns are used to commit real crimes. The last attempt at a large-scale study of this phenomenon, found that police recovered thousands of fake crime guns every year, including in approximately 15% of all robberies.⁸ However, all available anecdotal evidence suggests the problem has not abated and may, in fact, be accelerating.⁹ After all, fake guns are commonly available, less expensive than authentic firearms, and can be bought legally without a background check or federal record of the transaction even by individuals who are barred from legally purchasing firearms.

Realistic toy firearms may also increase the risk of accidental shootings with *real* firearms, particularly among children. A 2018 Emory University study found that a majority of children could not distinguish a real gun from a realistic toy gun, even following careful visual examination.¹⁰

Existing regulations, essentially unchanged for decades, have proven inadequate to protect the health and welfare of Americans. As it currently stands, toy guns must (1) have a permanently affixed blaze orange plug inserted in the firearm’s barrel, (2) have a similar marking on the exterior of the barrel, (3) be constructed entirely of transparent or translucent materials, or (4) be covered in certain bright colors.¹¹ The appearance of non-powder guns remains wholly outside the scope of formal federal

⁴ N.Y. Atty. Gen., Spec. Inv. & Pros. Unit, REPORT ON THE INVESTIGATION INTO THE DEATH OF SAHEED VASSELL, (Mar. 29, 2019) https://ag.ny.gov/sites/default/files/oag_report_-_saheed_vassell_3.29.pdf

⁵ N.Y. Atty. Gen., Spec. Inv. & Pros. Unit, REPORT ON THE INVESTIGATION INTO THE DEATH OF MICHAEL WALLACE, (Apr. 22, 2021) https://ag.ny.gov/sites/default/files/oag_report_-_wallace.pdf

⁶ CNYCENTRAL.COM, *NY AG To Investigate Fatal Officer-Involved Shooting Of 17-Year-Old In Dewitt*, CNYCENTRAL.COM (Mar. 9 2021) (available at: <https://cnycentral.com/news/local/ny-ag-to-investigate-fatal-officer-involved-shooting-of-17-year-old-in-dewitt>).

⁷ AMAZON.COM, GLOCK 19 GEN3 .177 CALIBER BB GUN AIR PISTOL, (available at: <https://www.amazon.com/Glock-177-Caliber-Steel-Pistol/dp/B07FT2LLLK>) (last visited Nov. 19, 2021)

⁸ BUREAU OF JUSTICE STATISTICS, TOY GUNS: INVOLVEMENT IN CRIME AND ENCOUNTERS WITH THE POLICE 1 (1990).

⁹ See, e.g., Michael Rubinkam, *Fake Gun, Real Crime: Police Notice Uptick In Replicas*, APNEWS.COM, SEPT. 18, 2016, (available at: <https://apnews.com/article/99a1b40cf1c14bf48f88b1544e7d3bf5>; <https://www.thegazette.com/crime-courts/realistic-nonpowder-guns-can-create-challenges-for-police/>); Mike Chapman, *Replica Guns Draw Attention: Police Apprehend Man On Placer Street With Fake Firearm*, REDDING REC. SEARCHLIGHT, (Apr. 3, 2021) (available at: <https://www.redding.com/story/news/2021/04/03/police-placer-street-potentially-armed-man/7079222002/>; Alan Collins, *Why Are Criminals Using BB Guns?*, WBRC.COM, (May 24, 2018) (available at: <https://www.wbrc.com/story/38272632/bb-guns-used-in-crimes/>); Hannah Knowles, *Police Warn Of Altering Fake Guns After Robberies Involving Bulletless Weapons*, WWMT.COM, (Dec. 10, 2019) (available at: <https://wwmt.com/news/local/police-warn-of-altering-pneumatic-guns-after-armed-robberies-with-bulletless-weapons>).

¹⁰ Kiesha Fraser Doh et al., A COMPARISON OF PARENTAL FIREARM STORAGE PATTERNS AND CHILDREN’S ACCESS TO FIREARMS, *Pediatrics* (2019).

¹¹ 15 C.F.R Part 272; 15 C.F.R. 1150.3

regulation, though I understand that CSPC has worked with industry to secure voluntary standards analogous to those governing toy guns.¹²

However, it is clear that the “blaze orange plug,” which represents the bare minimum distinctive marking and also the most common among fake guns designed to look authentic, utterly fails to serve its intended purpose. The plugs are notorious for being easily removed or camouflaged.¹³ Anyone with an internet connection can immediately access scores of instructional videos that will demonstrate how to remove these meager safeguards step-by-step. However, even untampered with, all available evidence makes clear, and has for decades made clear, that an orange tip is all-but-useless in split-second, high-stress situations.

In fact, as far back as 1989 when, as part of a statutorily mandated federal study, researchers put active-duty law enforcement officers in simulated confrontations with armed assailants it was found that 96% fired at seeing the weapon with the orange plug.¹⁴ The next year, the Bureau of Justice Statistics (BJS) released a survey of large-sized police departments that found that 1) thousands of crimes were committed every year using imitation firearms and 2) not a single law enforcement officer interviewed by BJS thought that blaze orange markings were adequate to imitation guns from real ones.¹⁵ Improvements in manufacturing technology and the increasingly lucrative market for authentic-looking replicas of real firearm models¹⁶ ensure that it has almost certainly become harder, not easier for police, crime victims, or children to distinguish fake guns from real ones.

There remains more work to be done on the state level here in New York. While New York City has some of the strongest laws governing the sale of toy and imitation guns and non-powder guns in the country,¹⁷ our state law could and should be further strengthened. I intend to advocate forcefully for those changes during the coming state legislative session. However, as with common-sense public safety regulations of actual firearms, there is no substitute for uniform federal regulations. From the outset, this administration has demonstrated a clear and consistent willingness to use the levers of its regulatory authority to protect consumers and to take on our gun violence epidemic. I believe this issue—which sits at a critical intersection between those two key priorities—deserves to be part of that ambitious agenda.

Sincerely,



Letitia James

¹² ASTM F589

¹³ Alain Stephens, *Gunmakers Are Profiting From Toy Replicas That Can Get Kids Killed*, THE TRACE.ORG., (May 9, 2019) (available at: <https://www.thetrace.org/2019/05/replica-gun-licensing-deals/>); Jay Caspian Kang, *Off Target on Toy-Gun Regulation*, N.Y. TIMES MAG., (Dec. 16, 2014) (available at: <https://www.nytimes.com/2014/12/21/magazine/off-target-on-toy-gun-regulation.html>)

¹⁴ NAT'L INSTITUTE OF JUSTICE, TEST OF THE VISIBILITY OF TOY AND REPLICHA HANDGUN MARKINGS 1 (1989)

¹⁵ BJS Study, *supra* n. 8, at 1.

¹⁶ Stephens, *supra* n. 13.

¹⁷ N.Y. Admin. Code § 10-131