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2011 April 25

The Honorable Kevin de Leon
California State Senate
State Capitol Building
Room 5108
Sacramento, CA 95814

RE: California Senate Bill 798

The Honorable Kevin de Leon:

I write on behalf of my client, Crosman Corporation, one of the largest airgun and airsoft distributors in United States. *Crosman opposes Senate Bill 798, because it is unnecessary, and preempted by federal law. If passed, this bill would jeopardize the safety of the public and, especially, police officers.*

The Relevant State Statutes

California Penal Code Section 12555¹ prohibits the purchase, sale, manufacture, shipment, transportation, distribution and receipt of “imitation firearms” in and into California. For purposes of this section, a “BB device” is not considered an “imitation firearm.” Cal.PenalCode §12555(c).² California law defines “BB device” as “any instrument that expels a projectile, such as a BB or a pellet, not exceeding 6mm caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun.” Cal.PenalCode §12001(g). This definition encompasses both traditional airguns and airsoft guns.

The “BB-device” exclusion from this statute is a logical, sound, and correct exclusion. Yet, Senate Bill 798 would remove that exclusion and would include BB devices in the definition of imitation firearms for purposes of section 12555 (20165). Thus, the purpose of SB 798 is to prohibit the purchase, sale, manufacture, shipment, distribution, and receipt in and into California of traditional airguns and airsoft guns.

¹ Section 20165, operative January 1, 2012, “continues” section 12555(a)-(b) without substantial change.

² Section 16700, operative January 1, 2012, continues section 12555(c) without substantial change.

The Relevant Products

It is critical to understand the nature of the products that would be impacted by the proposed legislation.

Traditional airguns utilize air or carbon dioxide gas as the propellant to propel or discharge a *metal* projectile, either a BB or pellet, of diameters (caliber) typically ranging from .177 inch to .22 inch. Traditional airguns are not toys. As is true with many products, misuse or careless use of traditional airguns can result in serious injury and, in some rare instances, death.

Airsoft guns also use air or gas as a propellant. Unlike traditional airguns, however, airsoft guns discharge only a *plastic* pellet, usually 6mm (approximately .24 inch) in diameter. The velocity at which the plastic pellet is discharged is much less than the velocity a metal projectile is discharged from a traditional airgun. Thus, the risk of serious injury from the careless use or misuse of an airsoft gun is extremely remote; the only notable exception would be if a user discharged an airsoft gun directly into the eye of another at very close, if not point blank, range.

The Relevant Federal Law

To reduce the possibility that any look-alike firearm, including toy guns, might be mistaken for a firearm, more than 20 years ago the United States Congress enacted legislation. That federal law prohibits the manufacture, sale, shipment, transportation, distribution or receipt of “*any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it . . . as an integral part, permanently affixed, a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm . . . recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm.*” 15 U.S.C. §5001(a)(b). Congress permitted the Secretary of Commerce to “provide for an alternate marking or device for any toy, look-alike, or imitation firearm not capable of being marked as provided” above. 15 U.S.C. §5001(b). The Secretary of Commerce has done so.

Congress distinguished between traditional airguns and airsoft guns. Congress defined a “look-alike firearm” as “any imitation of any original firearm which was manufactured, designed, and produced since 1898, including and limited to toy guns, water guns, replica nonguns, and *air-soft guns firing nonmetallic projectiles.*” 15 U.S.C. §5001(c). A “look-alike” firearm *does not* include “*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(c).

Congress preempted state law and stated that this federal statute would supersede any state or local laws requiring “*markings or identification inconsistent with provisions*” of the federal statute. 15 U.S.C. §5001(g). In addition, this federal statute specifically prohibits a state from banning the sale of traditional airguns. The federal statute reads, “*no State shall . . .*

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)(ii).

History of California Legislation

A few years ago, the State of California considered its own legislation to address the perceived confusion among law enforcement officers caused by the improper and careless use of some air-powered products which officers may not easily distinguish from firearms. The industry responded swiftly, sympathetically, and efficiently and expressed its willingness to work toward a solution. Toward that end, a working group was formed. Industry representatives conferred with representatives of the California Department of Justice Firearms Division and various local law enforcement representatives to address the issue by developing appropriate legislation. These good faith efforts resulted in much of the current statutory scheme.

Part of the challenge in drafting the legislation was defining its terms. Given the legitimate uses of these products, certain product characteristics, and federal law preemption issues, all involved recognized the importance of distinguishing between toys, props, imitation firearms, BB devices, and firearms.

Early on it was recognized the underlying issue is created by consumers who allow potentially dangerous situations to develop. A prime example is the December 2010 incident that apparently prompted SB 798. As reported in the Los Angeles Times, police wounded a teenager when he failed to comply with police commands to “surrender.” Instead, the young man produced a pellet gun. Expectedly, a police officer feared for his and his partner’s safety. He fired his gun and wounded the young man. Noteworthy is that the young man’s two companions, who complied with the officers’ commands to drop their guns, were not injured.

Addressing consumer ignorance of the law enforcement perspective (the ignorance owing its existence to a complete lack of common sense) was identified as a goal of the legislation then under consideration. Toward that end, the industry volunteered to add advisories to product packaging that reinforce the obvious – that these products may be mistaken for a firearm by law enforcement officers or others; that altering the coloration or markings required by law so as to make the product look more like a firearm is dangerous, and may be a crime; and that brandishing or displaying the product in public may cause confusion and may be a crime. Those advisories and other warnings appear on the current packaging of traditional airguns and airsoft guns.

The end result was legislation that addressed the identified problem, while simultaneously protecting the statewide recreational and sporting uses of these products in which so many Californians enjoy participating.

Federal Law Preempts SB 798

But for excluding “BB devices” from the definition of “imitation firearm” for purposes of section 12555 (sections 20165 and 16700), traditional airguns would likely be deemed imitation firearms under this statute. SB 798 would eliminate the exclusion, and traditional airguns would be considered imitation firearms under this statute. Therefore, SB 798 would ban traditional airguns. Federal law preempts any state from banning the sale of traditional airguns and, therefore, preempts SB 798.

SB 798 would endanger public welfare and the safety of the police.

Section 12555 (section 20165) bans imitation firearms, because of the possibility of confusing them with firearms. A situation may arise, for example, when a police officer believes he needs to protect himself or others from someone brandishing what appears to be a firearm. The federal statute was enacted more than 20 years ago to address this situation. California has addressed this situation in its statutory scheme, including the banning of imitation firearms.

Both federal law and California law have wisely *not* considered traditional airguns imitation firearms for most purposes³ and with good reason. If a person misuses or carelessly uses a traditional airgun, including intentionally shooting at another person such as a police officer, that person can cause serious injury and perhaps death. A police officer must be allowed to defend himself against a person illegally brandishing and threatening him or others with a traditional airgun. That is the reason Congress long ago exempted traditional airguns from the marking requirements required for imitation and look-alike guns.

Crosman and virtually all of the airgun industry obey federal law, and their airsoft guns have a blaze orange muzzle. Crosman’s experience is that the orange muzzle has been effective in distinguishing airsoft guns from firearms. California makes it a crime for anyone to alter those markings. Cal.PenalCode §12553.

Because airsoft guns are “BB devices,” they are also exempt from the prohibition of imitation firearms. SB 798 would ban such airsoft products, although they comply with federal law, and would require sellers to change drastically the appearance of airsoft guns in order to sell them.

SB 798 obviously presumes that a “bright pink” airsoft gun, for example, would distinguish it from a firearm, thus providing a police officer with an immediate sense of security that he was not being threatened with a firearm. That assumption, however, might prove deadly to the officers or innocent bystanders.

³ California does consider traditional airguns as imitation firearms for purposes of requiring the advisories or warnings under Cal.PenalCode §12554.

There *are* firearms sold that *are*, indeed, bright pink and other bright colors. Coloring an airsoft gun bright pink, therefore, would *not* distinguish it from firearms. A law enforcement officer should and would never assume a pink or other colored gun is harmless. On the other hand, an orange muzzle on an airsoft gun does distinguish it from firearms.⁴

The confusion issue is not a product issue – it is a human behavior issue,

It is not airsoft guns, or other so-called imitation firearms, that have resulted in a police officer's confusion about what a person or suspect is holding. For many years, police have been misled by persons holding other objects, such as combs, tools, and even cell phones. The problem does not arise by what the person is holding. Rather, the problem arises by the person's or suspect's behavior.

It is common sense to follow a police officer's commands to drop whatever the person is holding and to raise his hands. It is common sense not to brandish any gun in public. It is common sense not to gesture threateningly to any police officer, with or without an object in ones hands. All of this is brought home by the facts of the December 2010 incident discussed above. The young men who obeyed the police officers were not injured. The young man who ignored the police commands, instead producing a gun, was shot by a police officer who believed the young man presented an imminent safety risk to that officer and his partner.⁵ Whether a suspect is brazenly brandishing a traditional airgun, a brightly colored airsoft gun or firearm, or any other object, a police officer must exercise quick judgment to address that situation, especially when that suspect ignores the police officer's commands.

Conclusion

While Crosman does not question the good faith behind SB 798, Crosman strongly opposes it. This bill would require the appearance of airsoft guns to change, but this change would not clear up the confusion issue. To the contrary, it would likely have the opposite effect. The change in appearance would render it more similar in appearance to some firearms. It is the simple, and in Crosman's experience, effective placement of orange at the muzzle that distinguishes an airsoft gun from firearm. Furthermore, federal law preempts SB798, because the bill would ban the sale of traditional airguns.

⁴ It is also illegal in California to change, alter, remove or obliterate the orange on the muzzle of any airsoft gun. *See* Cal.PenalCode §12553.

⁵ This incident occurred at night when the appearance of any object, regardless of color, brandished in a threatening manner would, of course, provoke a serious response by a police officer.

SWANSON MARTIN & BELL, LLP

The Honorable Kevin de Leon
2011 April 25
Page 6

We appreciate and thank you for your consideration. We welcome your questions and comments.

Sincerely,

SWANSON MARTIN & BELL, LLP
On Behalf of and as Legal Counsel for
Crosman Corporation

s/ *Steven E. Danekas*

Steven E. Danekas