

RESPONSE TO COMMENTS

“Regulation of Fireworks and Related Explosive Materials”

Title 103 Series 4

The West Virginia State Fire Marshal (SFM) responds to the comments received as follows:

COMMENTS RECEIVED FROM THE CHIEF INSPECTOR OF THE SFM

FIELD DEPUTY FIRE MARSHAL JOE LEAKE

COMMENT 1: An approved electrically supervised fire alarm system is required in all Permanent Consumer Fireworks Retail Facilities with a sales area, including storage area(s) within the same building, totaling 2500 square feet or more.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 5.3.a.5.

COMMENT 2: Fireworks tents/stands shall be located at least thirty-five (35) feet away from any federal/state/county/city highway or street.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 5.2.a.7.

COMMENT 3: Section 11.6 – Add “no fireworks retailer/operator/employee shall be under the influence of alcohol or any other drug or combined influence of alcohol and controlled substance or any other drug while engaged in the selling of fireworks”.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 11.6.f.

COMMENT 4. Section 11.4.e – Note that “offer for sale” means the person that is making the actual transaction of payment for the fireworks.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 11.4.e.1.

COMMENTS RECEIVED FROM THE DIRECTOR OF SFM SERVICES

FIELD DEPUTY FIRE MARSHAL ALLAN CASTO

COMMENT 1: All accidents involving display or consumer fireworks with personal injuries or death shall be reported to the State Fire Marshal Office immediately.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 13.

COMMENT 2: All healthcare providers shall report to the State Fire Marshal Office immediately upon treatment of any persons injured by display or consumer fireworks.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 13.

COMMENT 3: All accidents involving display fireworks without personal injuries or death shall be reported to the State Fire Marshal Office within 24 hours of the incident.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 13.

COMMENT 4: §103-4-5.4 Delegation of Authority. 5.4.b. This rule does not affect the authority of the governing body of a municipality (Add: or county) to prohibit or regulate the use of consumer fireworks within the boundaries.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 5.4.b.

COMMENT 5: §103-4-5.1 5.1.e. A retailer shall post the certificate in a conspicuous place at the location of the business. It shall be posted within five feet (5') from (Change From: every to the main) public entrance to any temporary or permanent structure.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 5.1.e.

COMMENT 6: §103-4-5. Consumer Fireworks Certification; Exemptions. 5.1 Consumer fireworks certificate required. 5.1.b.5. Provide other information as the State Fire Marshal may require in the applicator process; Require all operators of any Consumer Fireworks Retail Sales (CFRS) location to complete and pass an annual On-Line or

Traditional CFRS Operators Course given or approved by the West Virginia State Fire Marshal's Office. Certificate shall be submitted with the CFRS Facility Application to the Fire Marshal's Office.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 5.1.b.5.

COMMENT RECEIVED FROM THE LAW OFFICE OF PHILIP A. REALE, PLLC

COUNSEL FOR TNT FIREWORKS, INC.

COMMENT 1: First, §103-4-5.1.e, which provides as follows: "A retailer shall post the certificate in a conspicuous place at the location of the business. It shall be posted within five feet (5') from any public entrance to any temporary or permanent structure." It is noted that many larger establishments with multiple departments in their facilities (automotive, home and garden, grocery, pharmacy and others) will have many public entrances, although there is likely one or two main entrances for general shopping. For larger stores, such as a Walmart for example, the requirement of a posting at every public entrance, may be a bit impractical — particularly in terms of maintaining the posted status of the certificate throughout the term of the same, as well reducing the inspection effort by the State Fire Marshal. One suggestion may be to adopt language similar to that utilized in relation to the posting of evidence of registration of an establishment to sell sparkling devices and novelties as set forth in §103-4-10.1.d, wherein it is provided that "A person shall post the registration in a conspicuous place at the location of the business." Perhaps for larger retail establishments, use of the term

"main entrance or entrances for general shopping" could be incorporated as a means of modification.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 5.1.e. to be consistent with the industry request to provide consistency in the market.

COMMENT 2: Another area of practical concern is that of §103-4-5.1.m which reads as follows: "Novelties cannot be mixed for sale with consumer fireworks and shall be separated." As worded this prevents the use of a traditional packaging of a variety package containing a few novelties in combination with a predominance of consumer fireworks. It is understood that having a sampling of novelties in a combination package with consumer fireworks causes the identity of the product to be that of consumer fireworks and regulated and taxed as such. The effect of making such a product (combination of novelty fireworks and consumer fireworks in a single package) available to the consumer, should accrue to the benefit of the state. The inclusion of novelty items as a component of what would be a consumer firework product, results in more money being collected by the state for the beneficial purposes of military veterans and volunteer fire departments. Stand-alone novelty fireworks are not subject to the fees assessed for the benefit of veterans and volunteer fire departments. Including them as part of a consumer fireworks package causes the entirety of the price paid for the contents of the package to be subject to the fees and for the entirety of the contents to be regulated as consumer fireworks. Accordingly, it should not be objectionable for a

modification of 103-4-5.1.m to be made. By way of suggestion, the language which follows is offered.

- 5.1.m Retail displays of items which are exclusively novelties must be segregated from displays of items which are exclusively consumer fireworks. Items which are a combination of novelties and consumer fireworks shall be classified and regulated as consumer fireworks and treated as such for all purposes.

RESPONSE: Upon review by the SFM, and in consultation with and approval by the State Fire Commission (SFC) on August 19, 2016, the recommendation is included in the revised Rule in Section 5.1.m. to provide greater clarity to retailers in how to display consumer fireworks and novelties for sale.

COMMENTS RECEIVED FROM LTC ROBERT H. FRANKENBERRY

LICENSED PYROTECHNICIAN

COMMENT 1: It has come to my attention that Title 103-4-8, Legislative Rule, West Virginia Fire Marshal has been changed to require that all those assisting in a public display of fireworks must now have a Pyrotechnician In-Training License and pay a fee of \$20.00 per year.

This will effectively put many of the 4th of July displays in the state that are voluntarily put off by unpaid persons from happening in Celebration of Our Nations Birthday.

I have been licensed for many years and pay my own license fee so that the public can enjoy the celebration. I have many dedicated helpers who have assisted for many

years. I will now only be able to supervise 5, if they have an In-Training License. To safely and properly do a display of our size(\$10,000), I require at least fifteen additional helpers, all volunteers. We will no longer be able to provide this volunteer service to the City of Martinsburg if they must pay a license fee.

I have been providing this service for over 45 years to both the Berkeley County Parks and Recreation and now the City of Martinsburg. What a shame that the same thing is going to happen to the many volunteer fire companies that provide this to their local communities.

I fully understand the need for safety but this appears to be just another way of charging volunteers for a service they provide. Another example of rules that only produce more fees but will not enhance safety. Who dreams up these rules? I am sure there are very few with the experience that I have and an absolute concern for safety.

This harkens to the time that the rule changed to charge us \$200.00 to renew our license. Fortunately someone recognized this and it was rescinded after I brought it to the attention of Mr. Sterling Lewis, WV State Fire Marshal.

RESPONSE: Upon review by the SFM, and in consultation with and rejection by the State Fire Commission (SFC) on August 19, 2016, the comment is rejected from inclusion in the revised Rule. Mr. Frankenberry essentially seeks to remove the "Pyrotechnician-in-training" (PIT) certification and remove the limitation of 5 PIT's per licensed Pyrotechnician.

As a matter of background, firework displays in West Virginia have been historically carried out by licensed Pyrotechnicians with up to dozens of unlicensed, untrained, and

unsupervised “helpers.” These helpers construct racks used for the mortar launch tubes, assemble the explosive materials in preparation for public displays, and assist in the ignition of 1.3g explosive materials. In response to the Legislature’s revision of Chapter 29, Article 3E, the SFM and SFC contends some limited regulation of those responsible for conducting an inherently dangerous activity is warranted. Certification of PIT’s provides a “span of control” of 5 persons who can be supervised by a licensed Pyrotechnician. Further, through regulation and self-reporting by PIT’s, the SFM can ensure that individuals who are prohibited persons from engaging in these activities are identified and potentially excluded from such conduct. To remove the regulation, as suggested by Mr. Frankenberry, is not good public policy and not in the best interest of public safety for West Virginians.



Department of Military Affairs and Public Safety

Earl Ray Tomblin, Governor
Joseph Thornton, Cabinet Secretary
Kenneth E. Tyree, State Fire Marshal

Administration

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OFFICE OF THE STATE FIRE MARSHAL

1207 Quarrier St, 2nd Floor
Charleston, WV 25301
www.firemarshal.wv.gov

June 13, 2016

Mr. Kenneth Tyree
State Fire Marshal
1207 Quarrier Street
Charleston, West Virginia 25301

Re: Comments to Consumer Fireworks Rule

Fire Marshal Tyree,

1. An approved electrically supervised fire alarm system is required in all Permanent Consumer Fireworks Retail Facilities with a sales area, including storage area(s) within the same building, totaling 2500 square feet or more.
2. Fireworks tents/stands shall be located at least thirty-five (35) feet away from any federal/state/county/city highway or street.
3. Section 11.6 – Add “no fireworks retailer/operator/employee shall be under the influence of alcohol or any other drug or combined influence of alcohol and controlled substance or any other drug while engaged in the selling of fireworks”.
4. Section 11.4.e – Note that “offer for sale” means the person that is making the actual transaction of payment for the fireworks.

Submitted by

Joe Leake
Field Deputy Fire Marshal



Department of Military Affairs and Public Safety

Earl Ray Tomblin, Governor
Joseph Thornton, Cabinet Secretary
Kenneth E. Tyree, State Fire Marshal

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June 13, 2016

Mr. Kenneth Tyree
State Fire Marshal
1207 Quarrier Street
Charleston, West Virginia 25301

Re: Comments to Consumer Fireworks Rule

Fire Marshal Tyree,

1. All accidents involving display or consumer fireworks with personal injuries or death shall be reported to the State Fire Marshal Office immediately.
2. All healthcare providers shall report to the State Fire Marshal Office immediately upon treatment of any persons injured by display or consumer fireworks.
3. All accidents involving display fireworks without personal injuries or death shall be reported to the State Fire Marshal Office within 24 hours of the incident.
4. **§103-4-5.4. Delegation of Authority.**
5.4.b. This rule does not affect the authority of the governing body of a municipality (Add: or county) to prohibit or regulate the use of consumer fireworks within its boundaries.
5. **§103-4-5.1**
5.1.e. A retailer shall post the certificate in a conspicuous place at the location of the business. It shall be posted within five feet (5') from (Change From: **every** to the main) public entrance to any temporary or permanent structure.
6. **§103-4-5. Consumer Fireworks Certification; Exemptions.**
5.1. Consumer fireworks certificate required.
5.1.b.5. Provide other information as the State Fire Marshal may require in the application process; Require all operators of any Consumer Fireworks Retail Sales (CFRS) location to complete and pass an annual On-Line or Traditional CFRS Operators Course given or approved by the West Virginia State Fire Marshal's Office. Certificate shall be submitted with the CFRS Facility Application to the Fire Marshal's Office.

Submitted by


Allan Casto

Field Deputy Fire Marshal

Law Office of
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June 9, 2016

Kenneth E. Tyree, Jr.
State Fire Marshal
1207 Quarrier Street
Charleston, WV 25301

RE: TNT Fireworks Inc. comments on Title 103, Series 4, "Regulation of
Fireworks and Related Explosive Materials"

Dear Fire Marshal Tyree:

The following comments are filed in behalf of American Promotional Events, d.b.a. TNT Fireworks, a corporate entity specializing in the supply and retail sale of novelty and consumer fireworks. TNT Fireworks, hereinafter referred to as TNT, is headquartered in Florence, Alabama, but serves over 400 WV retailers with novelty fireworks such as sparklers. With the passage and implementation of House Bill 2852 by a unanimous vote of the legislature, West Virginia consumers will now be afforded the opportunity to purchase what are specifically defined as consumer fireworks.

TNT is especially appreciative of the openness of process by which West Virginia's Fire Marshal and his staff approached the development of Title 103, Legislative Rule. All interested parties were afforded great latitude and opportunity to review drafts of the proposed rule, offer valuable comments and suggestions to reflect practical considerations based on experience for improvement of the same and, to generally have an open dialogue among all stakeholders with the Fire Marshal and his staff. All who participated are to be commended for the collaborative effort in development of the rule, even though, as with any novation in policy, there may still be imperfections discovered through implementation of the identical or nearly identical emergency rule which has just recently been filed.

Fundamental to an appreciation of fireworks regulation is the understanding of the various types (grades) of fireworks and the historic determination thereof within the National Fire Protection Association Standard 1124. Novelties, sparkling devices, toy caps and model

rockets, are exempt from the pending rule and will be sold in commerce just as they have been in West Virginia historically, with the exception that permits will now be issued by the WV Fire Marshal and not the State Tax Department as was formerly the case. It is estimated that there are in excess of 400 retail outlets in West Virginia where novelty and sparkling devices have been being sold.

Consumer fireworks, which will now be permitted for sale in West Virginia (classified by the U.S. Department of Transportation as 1.4G), contain limited amounts of explosive composition based on federal standards by the U.S. Department of Transportation and other applicable nationally recognized National Fireworks Protection Association (NFPA) standards. It is this grade of fireworks which will, with the passage of recent legislation, be available to consumers in West Virginia. Previous to passage of House Bill 2852 during the 2016 Regular Session of the West Virginia Legislature and subsequently signed into law by Governor Tomblin, such grade of fireworks were not permitted for sale in West Virginia. It is known that permits for approximately 65 temporary sites for the sale of consumer fireworks are being applied, along with another 40 or more permanent locations (buildings affixed to foundations and with fixed utility connections).

Certainly the commercial value represented by the sale of both novelty, sparkling devices and consumer fireworks will realize an increase in 2016 going forward and generate revenue for the noble purposes of benefitting military veterans and volunteer fire departments.

Finally, there are Display Fireworks classified as explosives (1.3G) by the U.S. Department of Transportation, which are the pyrotechnics with an explosive composition in excess of that which qualifies under national standards as a consumer firework. Such Display Fireworks are strictly regulated by the State Fire Marshal. These are normally associated with a public fireworks display such as one might experience at a fair, festival or major holiday event under special permit from the office of the State Fire Marshal to do so and regulated by the U.S. Department of Alcohol, Tobacco and Firearms under strict certified professional deployment. Display fireworks are not eligible under the law for direct to consumer sales.

The objective of 103CSR4 is to address the regulation of the sale of consumer fireworks through established rules and regulations by which such products shall be sold in West Virginia. TNT comments that the draft rule as submitted to the Secretary of State is remarkably complete and thorough. The precedent efforts of the State Fire Marshal in convening interested stakeholders and conducting exhaustive reviews in order to achieve a practical understanding of the implication of initial drafts of the rules and modifying the same prior to filing the current rule that is before the Legislative Rulemaking Review Process is quite remarkable. The effect has been to capture most all concerns expressed by the stakeholder group.

Nevertheless, there are two provisions in the rule which, even though not fatal flaws at all, warrant further comment for the general good of retailers, suppliers and perhaps even the staff of the State Fire Marshal. First, §103-4-5.1.e, which provides as follows: "A retailer shall

post the certificate in a conspicuous place at the location of the business. It shall be posted within five feet (5') from any public entrance to any temporary or permanent structure." It is noted that many larger establishments with multiple departments in their facilities (automotive, home and garden, grocery, pharmacy and others) will have many public entrances, although there is likely one or two main entrances for general shopping. For larger stores, such as a Walmart for example, the requirement of a posting at *every* public entrance, may be a bit impractical – particularly in terms of maintaining the posted status of the certificate throughout the term of the same, as well reducing the inspection effort by the State Fire Marshal. One suggestion may be to adopt language similar to that utilized in relation to the posting of evidence of registration of an establishment to sell sparkling devices and novelties as set forth in §103-4-10.1.d, wherein it is provided that "A person shall post the registration in a conspicuous place at the location of the business." Perhaps for larger retail establishments, use of the term "main entrance or entrances for general shopping" could be incorporated as a means of modification.

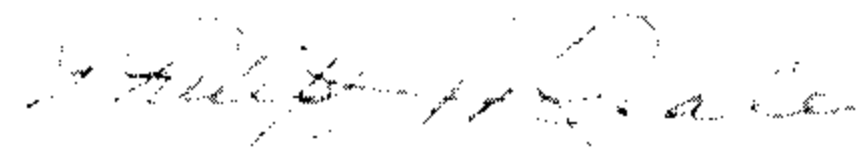
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- 5.1.m Retail displays of items which are exclusively novelties must be segregated from displays of items which are exclusively consumer fireworks. Items which are a combination of novelties and consumer fireworks shall be classified and regulated as consumer fireworks and treated as such for all purposes.

In conclusion, expresses its appreciation for being allowed to participate in the stakeholder process facilitated by the State Fire Marshal and commends the State of West Virginia for its deliberate rulemaking process allowing for stakeholder involvement and comment. TNT Fireworks has had a longstanding history of doing business in West Virginia and looks forward to working with and for the consumers of West Virginia, the retailers of West

Virginia and, most importantly, the State Fire Marshal to provide consumers the opportunity to purchase consumer fireworks in a safe environment under the oversight of a competent body of regulation such as that being proposed in Series 4 of Title 103 of the Code of State Regulations.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Philip A. Reale, Sr.", written in black ink.

Philip A. Reale, Sr.
Counsel for TNT Fireworks, Inc.
WV State Bar I.D. No. 3029

PAR:tlb

Cc: Charles Walker

LTC Robert H. Frankenberg, USAFR, Retired
Licensed Pyrotechnician
79 Ye Olde McDonald Orchard Lane
Inwood, WV 25428-5311

WV State Fire Marshal's Office
Attn: Fireworks Rule Comment
1207 Quarrier Street, Suite 200
Charleston, WV 25301

10 June 2016

Re: Fireworks Rule Comment

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This harkens to the time that the rule changed to charge us \$200.00 to renew our license. Fortunately someone recognized this and it was rescinded after I brought it to the attention of Mr. Sterling Lewis, WV State Fire Marshal.

Sincerely,

Robert H. Frankenberg

Robert H. Frankenberg, LTC, USAFR Ret.

cc: Mr. Mark Baldwin, Administrator, City of Martinsburg
Chief Paul Bragg, Martinsburg Fire Department