

ALERT

FCC Proposes to Ease Equipment Marketing and Importation Rules

December 14, 2020

On December 10, 2020, the Federal Communications Commission (FCC or Commission) adopted a Notice of Proposed Rulemaking (NPRM) proposing to ease certain restrictions on marketing and importation of radiofrequency (RF) devices. The NPRM represents a significant opportunity to modernize the Commission’s product marketing and import rules to help bring innovative new devices to consumers quickly. To “keep pace with developments in the modern device ecosystem,” the Commission proposes to allow (1) manufacturers to conditionally sell RF devices to consumers before receiving equipment authorization, on the condition that equipment has been authorized prior to delivery, and (2) importation of RF devices for certain pre-sale activities (*i.e.*, packaging and delivering devices to retail locations, as well as loading devices with software to demonstrate device capabilities for displays) prior to receiving equipment authorization. The Commission has been taking increasing interest, as a policy and enforcement matter, in compliance with equipment authorization rules by manufacturers and retailers.

Comments will be due 30 days after the date of publication in the Federal Register and reply comments will be due 15 days thereafter.

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1. Marketing Rules

Existing rules generally prohibit marketing RF devices before FCC authorization, which can be obtained through Certification or a Supplier’s Declaration of Conformity (SDoC). FCC rules define “marketing” broadly to include the “sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation,

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shipment or distribution for the purpose of selling or leasing or offering for sale or lease.” 47 C.F.R. § 2.803(a). The NPRM proposes targeted enhancements to these rules to ease the broad reach of this marketing prohibition, which the private sector has indicated are onerous and stifle innovation.

Specifically, the Commission proposes to allow manufacturers to conduct conditional sales of RF devices with the general public prior to authorization. (¶ 12). To prevent harm to consumers or other radio operations, the Commission proposes to continue to require that equipment receive authorization before delivery. (¶ 14). Sellers would be required to inform the prospective buyer at the time of marketing that the equipment is subject to the FCC’s rules and that delivery to the buyer is contingent upon compliance with applicable technical and equipment authorization requirements. (¶ 20). Sellers would be required to prominently display language explaining the terms of the conditional sale. (*Id.*).

The FCC seeks comment on the benefits and risks of its proposal to allow conditional sales of RF devices to consumers, as well as on possible alternatives. (¶ 17). It also seeks comment on whether to adopt additional safeguards to mitigate the risk of harmful interference or harm to consumers. (¶ 19). This could include, for example, prohibiting the marketing of certain classes of devices or devices operating on certain frequencies. (*Id.*).

The Commission also seeks comment on several related issues, including:

- Whether to require disclosures to consumers, in addition to the proposed required disclosure that the device will not be delivered if the seller is unable to obtain authorization, (¶ 21)
- How sellers should notify and reimburse buyers in the event equipment is not authorized, and the government’s role in such situations, (¶¶ 21, 25)
- Whether to require online marketplaces to ensure that all advertisements to consumers of RF device conditional sales comply with disclosure requirements, (¶ 21)
- Whether to require manufacturers to include a label on device packaging stating that the device must not be delivered to consumers until equipment has been authorized and, if so, what information the label should include, (¶ 22)
- Whether to impose recordkeeping requirements, (¶¶ 21, 23)
- How to structure enforcement, including appropriate sanctions and base forfeitures for delivery of unauthorized devices to consumers, (¶ 24)
- Whether to allow conditional sales by sellers other than manufacturers, (¶ 27) and
- The costs and benefits of the Commission’s proposal. (¶ 30).

B. Importation

The Commission proposes to allow importation of a limited number of RF devices that would generally be subject to Certification procedures for certain pre-sale activities prior to equipment authorization. (¶ 31). The proposed rule would permit importation for pre-sale packaging and delivery of devices to retail locations and to load software for capability demonstrations, for example, but prohibit marketing or operation of RF devices

before authorization. (¶ 34). Existing rules generally prohibit importation of unauthorized equipment, except in limited circumstances, such as for compliance testing, repair, exhibition at trade shows, or federal government use.

Notably, the FCC would limit its proposal to RF devices subject to Certification—the authorization process requiring review by a Telecommunication Certification Body (TCB) and listing in the FCC’s database—and not subject to the SDoC self-certification process. (¶ 38).

The Commission further proposes to limit the total number of RF devices imported for pre-sale activities to 4,000, unless written approval for additional devices is provided by the Commission’s Chief Engineer. (¶ 41).

The Commission seeks comment on whether to impose additional conditions on its importation proposal. It asks whether it should adopt and, if so, how to apply the following four conditions proposed by the Consumer Technology Association:

1. “Manufacturers must have a reasonable basis to believe authorization will be granted within 30 days of importation,”
2. “Devices must have temporary labels indicating that they cannot be displayed or advertised prior to authorization,”
3. “Devices must remain under the ownership of the manufacturers and possession, alone, would be transferred prior to authorization,” and
4. “Manufacturers must have processes in place to retrieve the equipment from retailers in the event that authorization is denied.” (¶ 40, ¶¶ 42-50).

The Commission further requests comment on other parts of its importation proposal, including: the scope of permissible pre-sale activities, (¶ 38); the total number of RF devices that may be imported for pre-sale activities, whether to exempt certain classes of devices, and mechanisms to enforce this limit, (¶¶ 41, 50); whether to require a “remote-shutdown feature” for all RF devices for pre-sale activities, (¶ 51); whether to restrict where imported devices may be stored, (¶ 52); how manufacturers propose to comply with FCC labeling and disclosure requirements following authorization, (¶ 53); how to structure enforcement, including appropriate penalties for violation of the proposed rule, (¶ 54); and the costs and benefits of its importation proposal. (¶ 55).

Finally, the FCC acknowledges that other agencies, including the Customs and Border Protection agency, have a role in importation matters. It seeks comment on actions it should take to coordinate with these agencies. (¶ 57).

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It has been a while since the FCC has made substantial changes to its marketing rules and the equipment authorization program. This rulemaking presents an opportunity to present challenges and issues to the Commission related to innovative devices and products that companies domestically and overseas may want

to create or market in the United States.

Wiley has a wealth of expertise on equipment authorization issues, having long counseled a diverse array of clients, from retailers to manufacturers, to importers, and beyond. Our team of engineers and attorneys include former FCC officials that are deeply involved with all aspects of the FCC's equipment authorization regime, including marketing and importation issues. A recent WileyConnected podcast discussed some of the key equipment issues arising in 5G. Contact any of the authors listed on this alert with questions or requests for further assistance.