

ALERT

New FCC Equipment Marketing Rules Allow Pre-Sale of Radio Frequency Devices to Consumers

April 20, 2022

On April 12, 2022, new rules adopted by the Federal Communications Commission (FCC or Commission) took effect that will expand innovators' ability to market, import, and pre-sell radio frequency (RF) devices that are still under FCC equipment authorization review. Under the new rules, manufacturers and others may now conditionally sell RF devices to consumers and import RF devices for certain pre-sale activities (e.g., packaging and delivering devices to retail locations, loading devices with software to demonstrate device capabilities for displays, etc.) prior to completing the equipment authorization process. While the new rules present a significant opportunity to help bring innovative new devices to consumers quickly, as discussed below, industry must take care to comply with certain conditions if they wish to engage in pre-sale activities.

The new rules take effect amidst a paradigm shift in the Commission's approach to equipment regulation. In June 2021, the Commission released a Notice of Proposed Rulemaking and Notice of Inquiry proposing significant changes to the FCC's equipment authorization regime and competitive bidding certification rules to further its goals of protecting the nation's communications networks and supply chains from equipment and services that pose an unacceptable risk to national security. More recently, the Commission has announced plans to launch an inquiry to explore receiver standards and performance, which could have ripple effects throughout the wireless economy.

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New Marketing Rules

The Commission's prior rules broadly prohibited marketing RF devices before FCC equipment authorization. The 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, shipment or distribution for the purpose of selling or leasing or offering for sale or lease." 47 C.F.R. § 2.803(a). The new rules aim to ease the broad reach of this marketing prohibition, which the private sector indicated was onerous and stifled innovation.

The new rules permit conditional sales contracts with and advertising to the general public for RF devices prior to equipment authorization. (Report & Order, ¶ 21). To prevent harm to consumers or other radio operations, the Commission will continue to require that equipment successfully complete the equipment authorization process before delivery. (¶ 27). Sellers are 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. (¶ 37). They must also make clear that FCC rules do not address the applicability of consumer protection, contractual, or other provisions under federal or state law, and notify the prospective buyer of any responsibility it has to the buyer in the event that the applicable equipment authorization process is not successfully completed, including notification of any refund policy. (¶ 40).

New Importation and Device Delivery and Possession Rules

The Commission's old framework generally prohibited importation of unauthorized equipment, except in limited circumstances, such as for compliance testing, repair, exhibition at trade shows, or federal government use. The physical transfer of unauthorized equipment to distribution centers or retailers for pre-sale activities was also prohibited.

RF devices subject to equipment authorization via the Certification process may now be imported into the U.S. prior to equipment authorization for pre-sale activities, including imaging (that is, loading devices with specific software to demonstrate device features when displayed in a retail location), packaging, and delivery of devices to retail locations. (¶ 9). Specifically, up to 12,000 RF devices—or more with prior written approval from the Chief of the FCC's Office of Engineering and Technology—may be imported for pre-sale activities (¶¶ 9, 12-13). Pre-sale activity does *not* include display or demonstration of devices to consumers, however. (¶ 10).

This new rule applies only to devices subject to the Certification procedure, which requires testing by an accredited test lab recognized by the FCC, approval by a Telecommunications Certification Body (TCB), and device listing in an FCC database—not the Supplier's Declaration of Conformity (SDoC) procedure, which is a self-certification process. (¶ 31). Additionally, importation for pre-sale activities prior to Certification can occur only after compliance testing has been completed and an application for Certification has been submitted to the TCB. (¶ 17).

RF devices manufactured in the U.S. that are subject to the Certification procedure may also be physically transferred to distributors and retailers for pre-sale activities upon completion of compliance testing and submission of the Certification application. (¶¶ 31-32). Physical transfer of devices subject to the SDoC

procedure is not allowed pre-authorization for pre-sale activities.

While devices may be physically transferred to distribution centers and retailers, legal ownership must remain with the device manufacturer, developer, importer or ultimate consignee, or their designated customs broker until they have been fully authorized. (§ 35).

Labeling, Tracking and Retrieval, and Record-Keeping Requirements

The new rules also include labeling, tracking and retrieval, and recordkeeping requirements. Devices requiring authorization under the Certification procedure must prominently display on the device itself or on its package a temporary label stating that the device cannot be delivered to end users, displayed, or operated until it receives Certification from the FCC. (§ 42).

The device manufacturer, developer, importer or ultimate consignee, or their designated customs broker must also have a process in place to track and retrieve equipment if Certification cannot be completed. (§ 44).

Finally, records identifying the devices conditionally sold or imported for pre-sale activities must be maintained for a five-year period. Among other things, these records must include the device name and product identifier, the quantity conditionally sold or shipped, the date on which the device authorization was sought, the expected FCC ID number, and the identity of the conditional buyer or recipient, including contact information. (§ 48). These records must be made available to the Commission upon request. (*Id.*).

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Please contact any of the authors listed on this alert for more information on the FCC's new rules, how they may apply to your business, or analysis of the Commission's proposed approach to equipment regulation generally. 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.