

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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| In the Matter of  | ) |                      |
|   | ) |                      |
| Allowing Earlier Equipment Marketing and<br>Importation Opportunities     | ) | ET Docket No. 20-382 |
|   | ) |                      |
| Petition to Expand Marketing Opportunities for<br>Innovative Technologies | ) | RM-11857             |
|   | ) |                      |

**COMMENTS OF INCOMPAS**

**SUMMARY**

INCOMPAS urges the Commission to adopt the proposed rule to expand marketing opportunities for new technologies and devices. This change will promote innovation, benefit consumers, and bring the FCC’s rules on new devices in line with those affecting virtually every other industry. INCOMPAS is the leading trade association advocating for competition policy across all networks. We represent internet, streaming, communications, and technology companies both large and small, advocating for laws and policies that promote competition, innovation, and economic development. Our members offer a wide array of broadband voice, video, Internet, and data offerings, using both wireline (copper/fiber) and wireless networks to reach their customers. Consequently, they have a keen interest in this proposed rule change.

Specifically, we support the Commission’s proposal to revise Sections 2.803(c) and 2.1204(a) of its rules to permit conditional sales to consumers and to create an exception to the

importation rules to permit limited preparation for sales.<sup>1</sup> These changes are essential to keep pace with evolving consumer demand, promote innovation, improve efficiencies in production, and drive economic growth. In order to fully realize the potential of this proposal, the Commission should adopt disclosure requirements that protect consumers without burdening businesses and permit manufacturers to import enough devices to conduct meaningful preparation for sales.

**I. Proposed Rules Are Needed to Keep Pace with Innovations in the Device Ecosystem and Demand for Rapid Change.**

The COVID-19 pandemic has had a devastating impact on the country’s economy over the past year. This massive economic and social disruption has triggered changes overnight—as some see it, we’ve lived through “a decade in a day” in terms of adoption of digital technologies.<sup>2</sup> The widespread shift to remote work and learning have established new norms that could shape our lives for years to come. Digital technologies hold the potential to serve as a “catalyst for America’s comeback from crisis,”<sup>3</sup> and this rulemaking provides an opportunity for the Commission to drive innovation and economic activity that will help pave the way for the country’s economic recovery.

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<sup>1</sup> See *Allowing Earlier Equipment Marketing and Importation Opportunities*, Notice of Proposed Rulemaking, ET Docket No. 20-382, RM- 11857 (rel. Dec. 10, 2020) (“NPRM”); 47 C.F.R. §§ 2.803(c), 2.1204(a).

<sup>2</sup> MCKINSEY & COMPANY, *HOW COVID-19 IS CHANGING CONSUMER BEHAVIOR--NOW AND FOREVER 1* (2020), available at <https://www.mckinsey.com/~media/mckinsey/industries/retail/our%20insights/how%20covid%2019%20is%20changing%20consumer%20behavior%20now%20and%20forever/how-covid-19-is-changing-consumer-behaviornow-and-forever.pdf>.

<sup>3</sup> Danielle Cassagnol, *Tech Device Sales to Decline in 2020 Amid Pandemic and Economic Downturn, Says CTA Revised Forecast*, CTA Press Release (Apr. 24, 2020) (quoting Gary Shapiro), available at <https://cta.tech/-Resources/Newsroom/Media-Releases/2020/April/Tech-Device-Sales-to-Decline-in-2020-Amid-Pandemic>.

The proposed revision of Section 2.803(c) to permit conditional sales to consumers has clear benefits to consumers and manufacturers. Consumers can express their preference (or not) for a new device—if consumer response is strong, then the product is manufactured and can be offered subject to FCC approval. If consumer response is tepid, then the time and resources will not be spent and instead will shift to some other product that consumers may want. Focus groups and consumer surveys try to gauge that interest today, but they are at best imperfect since it is hard to actually gauge interest without a specific product at a specific price point. This rule change thus would provide device manufacturers with measurements of demand that are critical to their ability to support the country’s path to economic recovery. Analysts predict that demand recovery after COVID-19 will be “unpredictable; uneven across geographies, sectors, product categories, and customer segments; and often slow to return to precrisis levels.”<sup>4</sup> Conducting conditional sales of new devices to consumers prior to authorization would enable device manufacturers to remain nimble and ready to adapt to measures of consumer demand during the development of their production processes. Conditional sales could also provide a valuable gauge of demand for entrepreneurs and a critical metric to evaluate proof of concept for potential investors. Furthermore, the authorization to conduct conditional sales would enable developers of radiofrequency devices to obtain investment early in their business development from crowd-funding, which, as the Commission notes, is a growing source of capital for new entrepreneurs.<sup>5</sup>

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<sup>4</sup> MCKINSEY & COMPANY, *THE NEXT NORMAL: THE RECOVERY WILL BE DIGITAL* 21 (2020), available at <https://www.mckinsey.com/~media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/How%20six%20companies%20are%20using%20technology%20and%20data%20to%20transform%20themselves/The-next-normal-the-recovery-will-be-digital.pdf>.

<sup>5</sup> NPRM, at ¶ 15. According to one estimate, companies seeking certification for intentional radiators can expect to pay about \$10,000, which could be a significant cost to entrepreneurs. *See*

## **II. The Proposed Rule Changes Will Generate Efficiencies and Promote Innovation.**

The proposed revisions to the Commission’s rules would promote efficiency by reducing electronic waste from surplus production. Overproduction of radiofrequency devices leads to the waste of rare earth metals,<sup>6</sup> and because many radiofrequency devices are produced overseas, additional costs in terms of transportation and energy.<sup>7</sup> Likewise, underproduction of devices requires manufacturing at a higher velocity to meet the demand, which can also lead to waste. Accurate measures of demand from conditional sales, however, could minimize these losses.

In addition, the proposed revisions to the Commission’s rules could eliminate waste during the process of delivering devices to consumers or preparing devices for retail display. For example, a manufacturer could better target bulk device shipments by being able to gauge demand in specific geographic regions. Likewise, manufacturers could streamline the process of imaging, packaging, and delivering devices to retail locations (which often takes up to two weeks)<sup>8</sup> through the revision to Section 2.1204(a).

## **III. The Commission Should Revise Its Importation Rules to Allow for More Efficient Preparation of Devices for Retail Display and Sales, but a 4,000 Device Threshold is Too Low.**

The limited importation of radiofrequency devices for preparatory activities related to retail sales and display would result in meaningful efficiencies for manufacturers and expedited opportunities for consumers to interact with devices. Limiting the number of radiofrequency

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Linx Technologies, *How much does FCC certification cost?*, available at <https://linxtechnologies.com/wp/ufaqs/how-much-does-fcc-certification-cost/>.

<sup>6</sup> *Id.* at 19.

<sup>7</sup> *Id.*

<sup>8</sup> Petition for Rulemaking or Waiver, Consumer Technology Association, RM-11857, at 12-13 (filed June 2, 2020) (“CTA Petition”).

devices that can be imported for retail preparation to only 4,000 units, however, would constrain the benefits of the proposed rule change and fail to meet the needs of manufacturers and consumers. As Samsung points out, it has more than 4,000 retail locations in the U.S.,<sup>9</sup> and it is likely not alone.<sup>10</sup> A limit of at least 12,000 devices would better enable companies to enjoy the intended benefits of the proposed rule change.

Indeed, the Commission correctly predicts that the 4,000-device limit would be insufficient because it proposes that the Chief Engineer may provide written approval to exceed this number in some circumstances.<sup>11</sup> However, it is not clear what criteria the Chief Engineer would use to evaluate requests and what measures the Commission would adopt to ensure that exceptions are approved in a non-discriminatory and timely manner. The Commission should retain the waiver process but reduce uncertainty by adopting a higher device threshold that is more realistic with how consumer markets operate.

In addition, the Commission asks whether manufacturers must have a reasonable basis to believe that authorization will be granted within 30 days of importation and whether that length of time is appropriate.<sup>12</sup> INCOMPAS believes that a timeframe of 90 days would better take into account the long lead times for the approval of new technologies, thereby giving manufacturers requisite levels of flexibility.

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<sup>9</sup> Comments of Samsung Elecs. Am., RM-11857, at 8-9 (July 9, 2020).

<sup>10</sup> AT&T has 5,658 stores in the U.S. *See* AT&T, 5658 AT&T stores in the U.S., available at <https://www.att.com/stores/us>.

<sup>11</sup> NPRM, at ¶ 41.

<sup>12</sup> *Id.* at ¶ 42.

#### **IV. Proposed Disclosure Requirements Would Offer Robust Consumer Protections, but Extensive Labeling and Recordkeeping Requirements Would be Unduly Burdensome and Confuse Consumers.**

As a baseline, the Commission should adopt rules that ensure (i) consumers are adequately informed about the nature of conditional sales, and (ii) consumers and retailers are adequately informed about the status of a device’s authorization. In crafting such rules, the Commission should weigh the costs of such measures against their potential benefits, seeking a balance between keeping consumers informed with the right amount of information while bearing in mind the benefits of this rulemaking to accelerate innovation, efficiency, and economic recovery.

The Commission proposes several measures to protect consumers from using pre-authorization devices. The first of these rules would require that companies advise prospective buyers “at the time of marketing that the equipment is subject to the FCC’s rules and delivery to the buyer is contingent upon compliance with the applicable authorization and technical requirements.”<sup>13</sup> This proposal provides consumers critical information about the conditional nature of their purchase at the moment it is most necessary, before the transaction has occurred. As TechFreedom has suggested,<sup>14</sup> the Commission should adopt standard language for these disclosures to make it easier for consumers to grasp and recognize the notice and easier for market entrants to comply with the regulation. Under the proposed rules, this is the only scenario in which a consumer is likely to encounter information about a device prior to authorization; this rule should suffice in protecting consumers from the risk of potential harms.

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<sup>13</sup> *Id.* at ¶ 20.

<sup>14</sup> *Id.*

Where the device cannot be authorized, the Commission should require that the consumer be notified and refunded by the entity who received the pre-order payment.

The Commission also has proposed a number of requirements for labeling devices prior to authorization<sup>15</sup> and maintaining records of conditional sales and imports. These proposals are unnecessary.<sup>16</sup> The risk that consumers would encounter any such pre-authorization device is low, and the labor required to produce, affix, and timely remove temporary labels would require substantial coordination by manufacturers who already possess legal and economic incentives to alert retailers about whether or not a device has been approved by the Commission. This process would create waste and inefficiency, cutting against the regulatory benefit. Furthermore, while the Commission suggests that a consumer could come into contact with devices prior to authorization if they fell into the hands of a bad actor, in the unlikely case that this occurs, there is no reason to believe that such distributors would not simply remove or conceal a temporary label.

The recordkeeping requirements for conditional sales proposed by the Commission are likewise unnecessary because manufacturers and online marketplaces already possess sufficient legal and economic incentives to prevent the sale of devices that have not been authorized. Moreover, from an operational perspective, these entities likely already maintain records of where particular devices have been distributed, such as in financial records for accounting and tax purposes. The Commission has also proposed a requirement that online marketplaces display contact information about manufacturers to consumers,<sup>17</sup> but many online marketplaces provide

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<sup>15</sup> See, e.g., *id.* at ¶ 22.

<sup>16</sup> See, e.g., *id.* at ¶¶ 23, 48.

<sup>17</sup> *Id.* at ¶ 23.

consumers a direct process for reporting sellers who violate the law or the marketplace policies<sup>18</sup> and have demonstrated their willingness to remove bad actors from their platforms.<sup>19</sup> In addition, there are other consumer protection safeguards already in place, including rules and enforcement actions at the federal and state level, such as through the FCC, FTC, and similar state agencies/entities.

## V. Conclusion

INCOMPAS urges the Commission to move forward expeditiously in this proceeding that will promote innovation and opportunity for radiofrequency device manufacturers and benefit consumers. In particular, the Commission should consider the importance of this rulemaking in the immediate future, as the country recovers from the economic impacts of COVID-19 and expands the adoption of 5G technology, and promptly issue a final rule.

Respectfully submitted,

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<sup>18</sup> See, e.g., Ebay, *Report an Issue With a Seller*, available at <https://www.ebay.com/help/buying/working-sellers/report-seller-listing?id=4022>.

<sup>19</sup> See, e.g., Amazon, *Price Gouging Has No Place In Our Stores* (Mar. 23, 2020), available at <https://www.aboutamazon.com/news/company-news/price-gouging-has-no-place-in-our-stores>.