

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

In the Matter of )  
 )  
Petition to Expand Marketing Opportunities )  
for Innovative Technologies )  
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 )

**CONSUMER TECHNOLOGY ASSOCIATION  
PETITION FOR RULEMAKING OR, IN THE ALTERNATIVE, WAIVER  
TO EXPAND MARKETING OPPORTUNITIES FOR INNOVATIVE TECHNOLOGIES**

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## EXECUTIVE SUMMARY

As innovators race to develop and deploy products and services for the 5G economy, companies sorely need greater flexibility to market and pre-sell devices to the public prior to obtaining FCC equipment authorization. The Administration and the Commission have made 5G global leadership a priority – yet the current prohibition on conditional sales to consumers and the very limited ability to import devices prior to authorization, even for activities to ready such devices for retail display, impede innovation in 5G, the Internet of Things, artificial intelligence, and more.

First, the decades-old prohibition on conditional sales fails to reflect today's tightly-timed development cycles, not to mention the fierce level of marketplace competition and new generations of key products typically released on an annual cycle. In addition to traditional brick and mortar retailers, consumers can now buy products by going to a manufacturer's online or physical store, or by pushing a button using an app. This ability to obtain devices through multiple alternative sales channels means that product and service launches – and competition for sales – are intense and global in nature. Modifying (or, in the alternative, waiving) Section 2.803(c)(2) to allow conditional, pre-authorization sales to the public is necessary to meet consumer and market demands and to further the policy priority of 5G global leadership.

Section 2.803, which has its origins in the 1970s, is outdated. For several years, CTA has urged the Commission to modernize its rules regarding the marketing of devices prior to authorization. Once products are developed, companies need to introduce their innovations to consumers, determine market demand, source supplies, arrange for appropriate manufacturing volumes, and anticipate and allocate proper inventory allotments for device launches. A failure or inability to calculate these factors accurately inevitably results in an inefficient launch that risks not meeting demand, producing too many devices, or imposing other wasteful costs. Companies today have compressed product cycles, and there is increased consumer demand for new devices with updated capabilities. Allowing conditional sales to consumers prior to the official grant of authorization would give manufacturers a better sense of end-user demand, help smaller manufacturers reserve factory space and attract investors, and reduce waste.

Second, the Commission's rules on the importation of radiofrequency devices are ill-suited for today's marketplace. Preparing for a global product launch is an intense, multistep process, yet the current rules offer only a limited ability to import devices prior to FCC authorization. Manufacturers are unable to undertake pre-marketing activity such as software imaging, packaging, and preparing devices for retail display, thus delaying the timeline for consumers to be able to physically examine devices. As soon as devices are available for purchase, consumers want to see and handle display devices in retail stores. However, manufacturers cannot import devices intended for display in retail environments until after approval, and there is often a lag after FCC authorization in getting the display devices shipped to numerous retail locations. The inability to front-load preparation of display devices unnecessarily delays consumers' ability to experience the devices once they are fully launched at retail. By modifying Section 2.1204 of the Commission's rules to permit importation of a limited number of devices for pre-marketing activity, the FCC will increase speed to market, give manufacturers more flexibility in structuring their supply chains, and enable devices to be on display upon authorization, ultimately benefiting American consumers and the U.S. economy.

Changes to these rules would advance important government interests and would not harm consumers or the marketplace. Radiofrequency devices that have not completed the equipment authorization process would not be prematurely delivered to end users. This would ensure that the Commission can continue to protect against harms from radiofrequency emissions and promote transparency in radiofrequency device labeling. Further, the FCC need not act as a general consumer protection agency; the Federal Trade Commission and state attorneys general have the authority and experience to address advertising, marketing, and promotions that are false or deceptive.

With this Petition, the Commission has an opportunity to advance United States leadership in the race to 5G and bring its equipment marketing and importation rules more closely in line with today's marketplace realities. CTA respectfully urges the Commission to grant the modification or, in the alternative, waiver requested herein.

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**CONSUMER TECHNOLOGY ASSOCIATION  
PETITION FOR RULEMAKING OR WAIVER**

With this Petition, the Federal Communications Commission (“FCC” or “Commission”) has an opportunity to bring its equipment marketing and importation rules more closely in line with today’s marketplace realities. There can be no doubt that the technology industry is racing to develop and deploy products to meet consumer demand in the 5G marketplace.<sup>1</sup> This is especially true in the rapid shift to working, learning, and receiving medical care from home during the current global health crisis.<sup>2</sup> Technology is providing a figurative and literal lifeline for many right now, and technology “will be a catalyst for America’s comeback.”<sup>3</sup> But with

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<sup>1</sup> For example, in September 2019, Samsung reported that it had already sold 2 million 5G smartphones and was predicting to sell 4 million of those phones by the end of 2019. Shara Tibken, *Samsung sells 2 million 5G smartphones so far, projects 4 million by year’s end*, CNET (Sept. 6, 2019), <https://www.cnet.com/news/samsung-has-sold-2m-5g-smartphones-so-far-should-sell-4m-by-year-end/>; see also Ajit Pai, Chairman, FCC, Remarks at the Information Technology and Innovation Foundation, Washington, DC (Feb. 6, 2020), <https://docs.fcc.gov/public/attachments/DOC-362334A1.pdf> (“5G will rapidly continue the transition from concept to reality. Last year, multiple carriers lit up 5G service in the United States, reaching dozens of cities, with one carrier now covering most of our nation’s population with 5G.”) (“Chairman Pai Feb. 6, 2020 Remarks”).

<sup>2</sup> See, e.g., Letter from René Quashie, VP Digital Health, CTA, to Ajit Pai, Chairman, FCC, WC Docket No. 20-89, at 3 (filed Apr. 17, 2020) (“The technologies and solutions developed and delivered by CTA’s members can help keep us healthy, informed, and connected, even as we maintain our physical distance to help fight the spread of COVID-19.”).

<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), <https://cta.tech/-Resources/Newsroom/Media-Releases/2020/April/Tech-Device-Sales-to-Decline-in-2020-Amid-Pandemic> (quoting Gary Shapiro) (“CTA April 2020 Press Release”).

access to new technologies more crucial than ever, the Commission’s rules still expressly prevent innovators from rolling out products as quickly as the market demands.

While founded on a laudable goal – ensuring public safety – as a practical matter, certain provisions in the Commission’s equipment marketing and importation rules are now arcane and counterproductive. Most notably, even in this age of consumer pre-orders for everything from cars and household items to video games and formal attire, companies are not permitted to engage in presales of their not-yet-authorized technology products on a conditional basis to the general public, only to wholesalers and retailers. This constrains companies’ abilities to meet demand and inserts inefficiencies into the process – such as slowing manufacturing times, increasing costs, and increasing waste. In addition, the current restrictions on importing radiofrequency devices prior to FCC authorization impedes manufacturers’ ability to structure their supply chains flexibly, display devices immediately upon authorization, and bring emerging technologies to market in the fastest and most efficient manner.

If the U.S. is to be a global leader on 5G and technology verticals such as the Internet of Things (“IoT”) and artificial intelligence, our nation cannot afford these types of delays. When innovators sell their products and services, they reinvest in innovation; this cycle drives the race to 5G and ensures American leadership. Accordingly, the Consumer Technology Association (“CTA”)<sup>®,4</sup> hereby petitions the Commission to revise Sections 2.803(c)<sup>5</sup> and 2.1204(a)<sup>6</sup> of its

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<sup>4</sup> As North America’s largest technology trade association, CTA<sup>®</sup> is the tech sector. Our members are the world’s leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES<sup>®</sup> – the largest, most influential tech event on the planet.

<sup>5</sup> 47 C.F.R. § 2.803(c).

<sup>6</sup> *Id.* § 2.1204(a).

rules to afford additional flexibility in conditional sales and importation, while still protecting consumers.<sup>7</sup>

## I. INTRODUCTION

In 2017, CTA offered recommendations to the Commission’s Technological Advisory Committee (“TAC”).<sup>8</sup> CTA explained, “Given rapid and explosive growth, old timetables and burdens are inappropriate for today’s devices and components. Both consumers and the U.S. economy benefit when innovative new products can reach the market more quickly and with fewer regulatory obstacles.”<sup>9</sup> With respect to marketing, CTA noted that manufacturers face compressed timeframes for product development and are harmed by delays in marketing resulting from the existing FCC rules. CTA thus urged the TAC, among other things, to advise the FCC to “modernize rules regarding marketing and operation of [radiofrequency] devices prior to authorization.”<sup>10</sup> Specifically, once products are developed, high-tech companies need to introduce their innovations to consumers, determine market demand, source supplies, arrange for appropriate manufacturing volumes, and anticipate and allocate proper inventory allotments for device launches.<sup>11</sup>

CTA’s 2017 recommendations were based on real-world input from companies at the forefront of innovation and the U.S. economy. Through CES, the global stage showcasing

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<sup>7</sup> *Id.* § 1.401. In the alternative, or as an interim step, the Commission should waive the portions of Section 2.803(c) that prevent manufacturers from selling products to consumers on a conditional basis. *Id.* § 1.925.

<sup>8</sup> Comments of Consumer Technology Association, ET Docket No. 17-215 (filed Oct. 30, 2017) (“CTA TAC Comments”); *see also* Comments of Consumer Technology Association, GN Docket No. 19-285 (filed Dec. 19, 2019) (noting that the current marketing and importation rules can delay launch across the globe, putting American manufacturers at a disadvantage with respect to their international competitors).

<sup>9</sup> CTA TAC Comments at 2.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *See Ex Parte Notice* Consumer Technology Association, ET Docket Nos. 17-215 and 15-170 (filed Apr. 9, 2018) (“CTA April 2018 *Ex Parte*”).

innovation for more than 50 years, CTA has a front-row seat to the dynamic nature of today’s technology and the consumer benefits that are possible when manufacturers are permitted to operate in an environment that promotes creativity, flexibility, and efficiency. What we see at CES is a direct result of the Commission’s ongoing efforts to monitor technological and marketplace change and intervene as appropriate to provide manufacturers with greater clarity and flexibility.<sup>12</sup>

The Commission’s goal has been to “benefit the development of new technologies, expedite their introduction to the marketplace, and unleash the full power of innovators to keep the United States at the forefront of the communications industry.”<sup>13</sup> As next steps consistent with this goal, modifying the marketing rules to allow conditional sales to consumers subject to final FCC authorization and creating an exception to the importation rules to permit limited preparation for sales would reflect and directly promote the Administration’s and Commission’s priorities. The President has urged that the U.S. be first in 5G,<sup>14</sup> avowing that “[t]he security and prosperity of the United States depend on high-speed, reliable, and secure communication

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<sup>12</sup> The Commission’s rule changes over time have included the provision of greater flexibility for demonstrations at trade shows like CES. See, e.g., *Promoting Expanded Opportunities for Radio Experimentation and Market Trials under Part 5 of the Commission’s Rules and Streamlining Other Related Rules; 2006 Biennial Review of Telecommunications Regulations – Part 2 Administered by the Office of Engineering and Technology (OET)*, Report and Order, 28 FCC Rcd 758, 804 ¶ 127 (2013) (adding “Section 2.805(d)(2) to permit general operation of RF devices subject to certification that have not yet been certified without the need for an experimental license, provided that the devices are operated as part of a trade show demonstration and at or below the maximum power level permitted for unlicensed devices under our Part 15 rules”) (“*Part 5 Report and Order*”); *Amendment of Parts 0, 1, 2, 15 and 18 of the Commission’s Rules regarding Authorization of Radiofrequency Equipment*, First Report and Order, 32 FCC Rcd 8746, 8772 ¶ 61 (2017) (“permit[ing] the importation of up to 400 for devices of any type for demonstration purposes at trade shows”) (“*2017 Equipment and Labeling Order*”).

<sup>13</sup> *Part 5 Report and Order*, Report and Order, 28 FCC Rcd at 759 ¶ 1; see also *id.* (predicting that its rule changes will “permit[] institutions to move from concept to experiment to finished product more rapidly”).

<sup>14</sup> *Presidential Memorandum on Developing a Sustainable Spectrum Strategy for America’s Future*, Sect. 1 (issued Oct. 25, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-developing-sustainable-spectrum-strategy-americas-future>.



networks.”<sup>15</sup> and Commerce Secretary Wilbur Ross has said the U.S. “really need[s] to be the player in 5G”<sup>16</sup> cautioning that “[w]e cannot be complacent.”<sup>17</sup> At the Commission, Chairman Pai affirmed:

Whoever sets the pace globally will become the frontrunner in the development of the 5G ecosystem and attract the investment, talent, and innovation that come with that status. And I want the past to be prologue: I want America’s success in 5G to match our leadership in 4G.<sup>18</sup>

Commissioner Rosenworcel has observed that “we have problems to solve, resources that are constrained, and communities that need help navigating what is possible in the digital age. And I think 5G networks can help fuel the new services that address some of our biggest challenges.”<sup>19</sup> These clear priorities warrant prompt approval of this Petition to speed the delivery of 5G devices to market. In turn, 5G devices will support complementary technologies that depend on higher speeds, lower latencies, and more throughput, such as artificial intelligence, IoT, and automation.

As discussed in more detail below, the Commission should revise Section 2.803(c)(2)(i) and delete Section 2.803(c)(2)(ii) or, alternatively, waive both sections to allow for conditional sales of devices to consumers prior to receipt of regulatory authorization. Expanded conditional

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<sup>15</sup> *President Donald J. Trump Is Committed To Safeguarding America’s Vital Communications Networks And Securing 5G Technology*, Fact Sheet (Mar. 12, 2020), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-safeguarding-americas-vital-communications-networks-securing-5g-technology>.

<sup>16</sup> News Release, CNBC, *CNBC Transcript: U.S. Commerce Secretary Wilbur Ross Speaks with CNBC’s David Faber Today* (May 1, 2018), <https://www.cnbc.com/2018/05/01/cnbc-transcript-u-s-commerce-secretary-wilbur-ross-speaks-with-cnbc-david-faber-today.html> (unofficial transcript of interview on CNBC’s “Squawk on the Street”).

<sup>17</sup> Wilbur Ross, Secretary, Commerce Department, Remarks Before the National Telecommunications Information Administration Spectrum Policy Symposium, National Press Club, Washington, DC. (June 12, 2018), <https://www.ntia.doc.gov/spechtestimony/2018/commerce-secretary-wilbur-ross-remarks-june-12-2018-national-telecommunications>.

<sup>18</sup> Chairman Pai Feb. 6, 2020 Remarks.

<sup>19</sup> Jessica Rosenworcel, Commissioner, FCC, Remarks at Mobile World Congress Americas, Los Angeles, CA (Oct. 22, 2019), <https://docs.fcc.gov/public/attachments/DOC-360362A1.pdf>.

sales would give manufacturers a better sense of end-user demand, help smaller manufacturers reserve factory space and attract investors, and reduce waste. Among the FCC, the Federal Trade Commission (“FTC”), and state attorneys general, adequate safeguards exist to ensure that these regulatory changes will not result in sales of devices that defraud consumers or generate harmful interference.

In addition to expanding conditional sales to the general public, the Commission should modify Section 2.1204(a) to allow for the importation of a limited number of radiofrequency devices prior to equipment authorization. Specifically, the FCC should permit manufacturers to import, image, package, and deliver limited quantities of radiofrequency devices to retail locations prior to receiving FCC equipment authorization, subject to several conditions to protect against unlawful marketing or device operation. Among other things, the FCC could prohibit devices from being displayed or advertised at retail locations prior to equipment authorization and require temporary, removable labels to be attached to the device indicating the same. This relief could be made available only to radiofrequency devices that are expected to be authorized within 30 days of importation.

## **II. THE COMMISSION SHOULD REVISE SECTION 2.803(C) TO PROMOTE SPEEDIER INNOVATION IN THE 5G MARKETPLACE**

Section 2.803, which originated in the 1970s, has become outdated as the industry’s processes for developing and marketing new radiofrequency devices has evolved. When the Commission modified its rules in 1989 to permit conditional sales of equipment to wholesalers and retailers,<sup>20</sup> it declined to adopt a similar process allowing radiofrequency devices to be sold

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<sup>20</sup> See, e.g., *Revision of Part 15 of the Rules regarding the operation of radio frequency devices without an individual license*, First Report and Order, 4 FCC Rcd 3493, 3516 ¶ 127 (1989) (clarifying the scope of the conditional sales exception for digital devices subject to verification at that time) (“1989 Report and Order”).

(but not delivered) to the general public before authorization, citing concerns about interference.<sup>21</sup> Much has changed since then. To the extent that the Commission resisted past efforts to expand conditional sales based on fears of pressure from consumers not sufficiently patient to receive their devices,<sup>22</sup> modern consumer expectations have evolved. Such waits between product announcement and delivery are much more commonplace.<sup>23</sup> Further, the current rule allows some conditional sales to wholesalers, retailers, and other enterprise users, but in a world of “makers” and small distributors on larger online marketplaces, such distinctions are less meaningful.<sup>24</sup>

As “pre-launch orders and crowd-funding play a larger part in bringing innovations to market, companies need more flexibility to advertise and take orders prior to authorization without complicated disclosures, even if the devices are not available for delivery to end users.”<sup>25</sup> Product and service launches are global, with companies seeking to create an “opening weekend” feel around a new certified device.<sup>26</sup> And, even though consumers fully expect the

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<sup>21</sup> See *id.*; *Revision of Part 15 of the Rules regarding the operation of radio frequency devices without an individual license*, Memorandum Opinion and Order, 6 FCC Rcd 1683, 1685 ¶ 19 (1991) (“We continue to believe that permitting sale of large numbers of potentially non-complying devices to consumers poses an unnecessary risk of interference to radio communications.”) (emphasis added) (“1991 Marketing Order”).

<sup>22</sup> See *1991 Marketing Order*, 6 FCC Rcd at 1685 ¶ 19.

<sup>23</sup> See, e.g., Todd Haselton, *Samsung just announced four pricey new Galaxy phones to take on the iPhone*, CNBC (Feb. 20, 2019), <https://www.cnbc.com/2019/02/20/samsung-galaxy-s10-price-specs-release-date.html> (Samsung announced a lineup of Galaxy S10 phones on Feb. 20, 2019 to launch on March 8, 2019); Press Release, Apple, *iPhone 11 Pro and iPhone 11 Pro Max: the most powerful and advanced smartphones* (Sept. 10, 2019), <https://www.apple.com/newsroom/2019/09/iphone-11-pro-and-iphone-11-pro-max-the-most-powerful-and-advanced-smartphones/> (Apple announced the iPhone 11 Pro and iPhone 11 Pro Max to officially launch on September 20, 2019); Annie Palmer & Todd Haselton, *Here’s everything Google announced at its big product event*, CNBC (Oct. 15, 2019), <https://www.cnbc.com/2019/10/15/google-pixel-4-announcement.html> (On October 15, 2019, Google announced its new video game streaming service called Stadia launched on November 19, 2019).

<sup>24</sup> See Appendix A (proposing to eliminate distinctions in Sections 2.803(c)(3)(i)-(ii) that allow some sales to wholesalers and retailers, on the one hand, and business, commercial, industrial, scientific, or medical users, on the other).

<sup>25</sup> CTA TAC Comments at 5.

<sup>26</sup> News Release, *SKYWORTH Holds First-ever Global Product Launch Event in U.S. at CES 2020*, Cision PR Newswire (Jan. 6, 2020), <https://www.prnewswire.com/news-releases/skyworth-holds-first-ever-global-product->

ability to pre-order products and services, technology companies cannot meet their expectations before a device is certified – even if it has been announced – due to the lack of flexibility in the Commission’s rules.

Six years ago, the Commission recognized that competition is spurring shorter “development cycles” by creating exciting new opportunities for “test[ing] devices for both function and user acceptability.”<sup>27</sup> The trends underlying that 2013 decision have only accelerated. Now, to facilitate companies’ development and deployment of 5G products and services, the Commission should take another incremental step to modernize its marketing rules and allow conditional sales directly to consumers. In particular, consumer devices – not only smartphones operating on new bands but also IoT,<sup>28</sup> wearables,<sup>29</sup> PCs/routers,<sup>30</sup> and cars<sup>31</sup> – will be key users, and in turn drivers, of 5G connectivity. Just as the demand for downstream video and other innovative uses drove 4G deployment, consumer demand for upstream data flows (for

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[launch-event-in-us-at-ces-2020-300981365.html](https://www.lenovo.com/pressroom/press-releases/lenovo-breaks-barriers-with-new-consumer-technology-unveiled-at-ces-2020-2) (launching two new premium TV series that will be available in the U.S. and globally).

<sup>27</sup> *Part 5 Report and Order*, 28 FCC Rcd at 761 ¶ 6.

<sup>28</sup> See CTA, *5G: Impact on Industries*, at 6 (Aug. 2019) (noting that there are four broad areas of 5G use cases including “Massive IoT” (which will include smart cities, energy and smart grid, among other things) and “Critical IoT” (which will include remote healthcare, industrial applications, and robotics and controls, and transportation management)).

<sup>29</sup> Jamie Carter, *How 5G on wearables will make the smartphone era look like a warm-up*, *Wearable* (Apr. 8, 2017), <https://www.wearable.com/wearable-tech/how-5g-is-going-to-change-wearables-5445>.

<sup>30</sup> For example, at CES 2020, Lenovo introduced the first commercial PC to support both millimeter wave full-band and sub-6GHz 5G networks. Press Release, Lenovo, *Lenovo Breaks Barriers with New Consumer Technology Unveiled at CES 2020* (Jan. 6, 2020), <https://news.lenovo.com/pressroom/press-releases/lenovo-breaks-barriers-with-new-consumer-technology-unveiled-at-ces-2020-2>; see also Lori Grunin, *Razer unveils the first 5G gaming router: Gamers, meet the Sila 5G Home Router*, CNET (Jan. 8, 2020), <https://www.cnet.com/news/razer-unveils-first-5g-gaming-router-gamers-meet-sila-5g-home-router>.

<sup>31</sup> See, e.g., Ralf Llanasas, *5G’s Important Role in Autonomous Car Technology*, *MachineDesign* (Mar. 11, 2019), <https://www.machinedesign.com/mechanical-motion-systems/article/21837614/5gs-important-role-in-autonomous-car-technology> (“For autonomous car technology to be unlocked, many experts agree that large-scale adoption of 5G—the next-generation wireless technology—is required.”); Chris Paukert, *BMW iNext to be first 5G luxury vehicle, automaker claims*, *Road Show* by CNET (Jan. 7, 2020), <https://www.cnet.com/roadshow/news/bmw-inext-5g-first-luxury-suv-ev>.

telehealth, livestreaming, or computing in the cloud rather than on the device), ultralow latency, personalized experiences, and other new use cases will drive 5G deployment.

Allowing pre-orders is important to generating efficiencies and meeting business challenges. Once products are developed and introduced to consumers, high-tech companies need to gauge market demand, source supplies, arrange for appropriate manufacturing volumes, and anticipate and allocate proper inventory allotments for device launches.<sup>32</sup> A failure or inability to calculate launch-related factors accurately inevitably results in inefficiency, additional costs, and waste. Manufacturers lack the luxury of time; competition compels a race to market as quickly as feasible without compromising the quality, functionality, or security of their devices.<sup>33</sup> These factors are exacerbated in the current pandemic, as factory work and other related in-person activities may be only intermittently available. In addition, the need to physically distance personnel for required in-person tasks is slowing necessary testing and certification activities.<sup>34</sup>

Modifying the Commission's rules to allow pre-authorization conditional sales to consumers would also permit manufacturers to gather more accurate information about consumers' intent to purchase. This would be more representative and reliable than the data available through market trials or market research. That information, in turn, would provide a more accurate measurement of demand and enable the manufacturer to allocate supplies more

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<sup>32</sup> See CTA April 2018 *Ex Parte*.

<sup>33</sup> See, e.g., Rita Gunther McGrath, *The Pace of Technology Adoption is Speeding Up*, Harvard Business Review (Nov. 25, 2013), <https://hbr.org/2013/11/the-pace-of-technology-adoption-is-speeding-up>.

<sup>34</sup> See, e.g., GE Healthcare Petition for Limited, Expedited Waiver of the Commission's Part 2 Rules for Certain Part 15, 18, and 95 Medical Devices, at 1 (filed Apr. 17, 2020) (“[T]he impact of the pandemic on Telecommunications Certification Bodies (“TCBs”), other laboratories, and manufacturing facilities has impaired GEHC’s ability to increase production capacity and maintain a robust supply chain to meet this pressing demand.”).

efficiently. Indeed, avoiding overproduction is especially important because radiofrequency devices incorporate rare earth metals, and manufacturers work hard to exclude “conflict minerals” when sourcing raw metals used in radiofrequency devices.<sup>35</sup> In addition, with most radiofrequency devices made overseas, potential waste from a misalignment between supply and demand does not only manifest itself in the raw materials used for a device but also in the transportation and related energy expenditures and money to move devices over vast distances. Waste can lead to unnecessary shipping of devices or components or use of less economical or efficient shipping methods to make up for unanticipated market demand. Moreover, in an uncertain economic environment, technology companies are even more conscious now of controlling costs, and consumers are more thoughtful about their purchases.<sup>36</sup> For smaller companies in need of capital, paid preorders can demonstrate interest in a device to potential funders.

The Commission can accomplish the above goals by adopting limited revisions to Section 2.803(c)(2)(i) as follows:

Conditional sales contracts (including agreements to produce new devices manufactured in accordance with designated specifications), and advertisements for such sales, are permitted between manufacturers [[or, in the alternative, “responsible parties, as defined in Section 2.909”]] and ~~wholesalers or retailers~~ potential customers provided that the prospective buyer is advised at the time

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<sup>35</sup> See, e.g., Keith Kirkpatrick, *Electronics Need Rare Earths*, *Communications of the ACM*, Vol. 62 No. 3, Communications of the ACM, 17-18 (Mar. 2019), <https://cacm.acm.org/magazines/2019/3/234917-electronics-need-rare-earths/fulltext>; Enough Project, Progress and Challenges on Conflict Minerals, <https://enoughproject.org/special-topics/progress-and-challenges-conflict-minerals-facts-dodd-frank-1502> (reporting that “[a]s of June 7, 2018, 78 percent of smelters/refiners worldwide (253 out of 324 total) for the four conflict minerals have passed independent, third-party audits ... and an additional 11 smelters/refiners are ... are in the process of being audited”) (last visited May 27, 2020). Despite the efforts of industry, see, e.g., CTA, Greener Gadgets, <https://www.cta.tech/SearchResults?search=greener+gadgets> (last visited May 31, 2020), electronics also are not as widely recycled as they could be, Rick Leblanc, *E-Waste Recycling Facts and Figures*, The Balance Small Business (updated Jan. 14, 2020), <https://www.thebalancesmb.com/e-waste-recycling-facts-and-figures-2878189>.

<sup>36</sup> See CTA April 2020 Press Release.

of the offer for sale that the equipment is subject to the FCC rules and delivery to the buyer or to centers of distribution is made contingent upon compliance with the applicable equipment authorization and technical requirements.

Along with the above revisions, the Commission should delete Section 2.803(c)(2)(ii), which allows conditional sales to a smaller class of prospective buyers than wholesalers or retailers.<sup>37</sup>

These changes would modernize the rules to match up with consumer expectations as well as common practices in the marketplace today. The concept of pre-ordering, only nascent when the Commission previously considered the conditional sale exception, has become commonplace. Customers pre-order everything from Kickstarter initiatives to playoff tickets, fully aware that they will need to await delivery, and fully prepared for the consequences if a necessary contingency – meeting a Kickstarter goal, or a playoff win – does not occur. Further, technology products and radiofrequency devices are common on popular crowdfunding sites.<sup>38</sup>

In addition, the conditional sales exception as applied to online retailers is less applicable, as direct sales from manufacturers have increased. For example, consumer technology companies Bose, Microsoft, and Apple offer devices that they manufacture – as well as third-party products – directly to consumers through company-branded retail locations, applications, and websites.<sup>39</sup> The assumption in the FCC’s rules that consumers will always use a retailer or

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<sup>37</sup> See Appendix A (describing the changes to Section 2.803(c)).

<sup>38</sup> See, e.g., Kickstarter, Technology - Gadgets, [https://www.kickstarter.com/discover/advanced?category\\_id=337&ref=section-design-tech-explore-module-gadgets&sort=magic](https://www.kickstarter.com/discover/advanced?category_id=337&ref=section-design-tech-explore-module-gadgets&sort=magic) (last visited May 27, 2020); Kickstarter, Technology – Wearables, [https://www.kickstarter.com/discover/advanced?category\\_id=341-&sort=magic&seed=2583327&page=1](https://www.kickstarter.com/discover/advanced?category_id=341-&sort=magic&seed=2583327&page=1) (last visited May 27, 2020); Indiegogo, Tech & Innovation, [https://www.indiegogo.com/explore/tech-innovation?project\\_type=all&project\\_timing=all&sort=trending](https://www.indiegogo.com/explore/tech-innovation?project_type=all&project_timing=all&sort=trending) (last visited May 27, 2020).

<sup>39</sup> Bose, Store locator, [https://www.bose.com/en\\_us/locations/](https://www.bose.com/en_us/locations/) (last visited May 27, 2020); Microsoft, Find a store, <https://www.microsoft.com/en-us/store/locations/find-a-store> (last visited May 27, 2020); Stephen Silver, *Apple Store seen growing to 600 locations worldwide by 2023*, Apple Insider (Aug. 16, 2018), <https://appleinsider.com/articles/18/08/16/apple-store-seen-growing-to-600-locations-worldwide-by-2023>.

other intermediary when acquiring radiofrequency devices no longer holds.<sup>40</sup> By allowing pre-orders from manufacturers, the FCC's rules would better reflect that consumers use multiple channels – both retail and direct-from-manufacturers – to purchase radiofrequency devices.

### **III. THE COMMISSION SHOULD EXPAND SECTION 2.1204(A) TO EXPEDITE THE DELIVERY OF INNOVATIVE 5G DEVICES TO CONSUMERS**

Despite the growing utilization of online pre-ordering, many consumers value holding and examining a device in-person prior to making a purchasing decision. However, ensuring timely delivery to key retail locations presents challenges as devices become more sophisticated and necessarily require a back-and-forth during the authorization process with the FCC. The Commission should permit manufacturers to import a limited number of radiofrequency devices prior to authorization for the purpose of preparing the devices for marketing in a retail setting. This is consistent with the agency's policies that allow for limited importation of radiofrequency devices prior to equipment authorization for trade shows, testing and evaluation to determine compliance with FCC rules, product development, and suitability for marketing.<sup>41</sup>

Pre-authorization activities to prepare for retail sales would ensure that devices are display-ready upon authorization, and they include imaging,<sup>42</sup> packaging,<sup>43</sup> and delivering limited quantities of radiofrequency devices to retail locations prior to equipment authorization.<sup>44</sup> Manufacturers typically complete imaging and packaging at either their own domestic facilities

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<sup>40</sup> To the extent entities become responsible for a device's FCC compliance, those "responsible parties" also should be permitted to engage in conditional sales with consumers. 47 C.F.R. § 2.909 (defining "responsible party" for the purposes of the FCC's equipment authorization regime, including marketing rules).

<sup>41</sup> *Id.* § 2.1204(a)(3), (4).

<sup>42</sup> As used here, imaging means loading the devices with specific software to demonstrate specific features of the devices when displayed in a retail location.

<sup>43</sup> As used here, packaging means the box and the entire contents of a package in which the device is delivered for distribution, including in-box material.

<sup>44</sup> Pre-marketing activities exclude the displaying of the device to consumers prior to equipment authorization.



or at bonded warehouses/free trade zones within the U.S. to prepare the devices for in-store display. Then, manufacturers arrange for the shipment of the devices to retail locations. This process typically takes two weeks to complete for a flagship device launch. However, delays result when device importation is held up pending FCC equipment authorization, and even after that process is completed. Manufacturers need time to ready and ship devices for display. The inability to front-load this activity unnecessarily delays consumers' ability to experience products immediately at full retail launch.

The timelines to test and certify radiofrequency devices create challenges for manufacturers because they are uncertain and increasing.<sup>45</sup> The combination is, in turn, squeezing the time to complete necessary activities to enable full retail launch. Accordingly, it is ever more difficult to plan and ensure that the most innovative and in-demand devices are in the stockrooms of flagship retail locations so that the devices can be unboxed, displayed, and provide consumers valuable hands-on or in-person experience at authorization. In an era where retailers are competing with online ordering, retailers need to have the latest devices in their showrooms as soon as possible.

To provide needed certainty for manufacturers and retailers alike, the Commission could permit limited importation of devices for preparatory activities related to post-authorization retail

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<sup>45</sup> For example, many features of a modern flagship smartphone require Pre-Approval Guidance (“PAG”). *See* FCC, OET, Pre-Approval Guidance Procedure, KDB Publication 388624 D01 v11 r03 (Apr. 6, 2020); FCC, OET, Pre-Approval Guidance List, KDB Publication 388624 D02 v16 r06 (Apr. 6, 2020) (setting forth the types of equipment subject to PAG”). As an example, the launch of a flagship smartphone can now take three to four months to test due to the increasing complexity of the devices, which can contain multiple operating bands for 4G, 5G, and unlicensed services. While consumers expect annual refreshes to a company’s flagship phone, a month’s variation in testing creates great uncertainty for not only manufacturers, but also their retail partners.

sale with several key safeguards to ensure that devices do not cause harmful interference or otherwise fall into end users' hands.<sup>46</sup> For example:

- Manufacturers would only be able to import radiofrequency devices for which they have a reasonable basis to believe authorization will be granted within 30 days of importation.
- These devices would not be displayed or advertised at retail locations prior to equipment authorization and would have labels attached indicating the same.
- The radiofrequency devices would remain under the ownership of the device manufacturer and possession, alone, would be transferred prior to authorization.
- Manufacturers would be required to have processes in place to retrieve the equipment from retailers in the event that equipment authorization was denied.
- Manufacturers would only be permitted to import a maximum of 4,000 devices for preparatory pre-sale activities, except with the express permission of the Chief of the FCC's Office of Engineering and Technology ("OET").

These safeguards are consistent with previous Commission actions that provided additional opportunities for acquainting the public with radiofrequency devices without compromising the equipment authorization regime or increasing the risk of harmful interference, including the recent waiver granted by the Commission.<sup>47</sup> Specifically, the ability to import 4,000 or fewer radiofrequency devices for testing and evaluation prior to equipment authorization (with higher quantities permitted subject to the discretion of OET), has provided useful testing opportunities for manufacturers while preventing the unlimited importation of unauthorized devices.<sup>48</sup> In 2017, the FCC implemented a temporary labeling requirement for

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<sup>46</sup> See Appendix A (describing the changes to Section 2.1204, as well as a corresponding exception in Section 2.803 to allow manufacturers to engage in contracts for pre-authorization, pre-sale activities).

<sup>47</sup> *GE Healthcare Petition for Waiver of the Commission's Part 2 Rules for Certain Part 15, 18, and 95 Medical Devices*, Order, DA 20-489 (OET, WTB rel. May 11, 2020) (adopting conditions for the marketing of not-yet-authorized RF devices such as restricting the premises where the devices could be distributed, requiring an equipment authorization application for each device covered by the waiver, requiring special labeling, and requiring that devices must be retrieved or rendered inoperable if authorization is not successfully obtained).

<sup>48</sup> 47 C.F.R. § 2.1204(a)(3).

devices with electronic labeling information that “cannot reasonably be expected to be viewable when devices are packaged and encased in shipping materials and are uncharged or powered down.”<sup>49</sup> A temporary label here would similarly provide notice of the Commission’s rules – namely, that devices cannot be displayed, operated, or sold prior to FCC authorization. By requiring that manufacturers have a reasonable belief that the device will be authorized within 30 days of importation, the Commission can be assured that the devices will very likely meet the FCC’s technical requirements, such as those with respect to harmful interference and safety. In the event a device is not authorized, manufacturers will be held accountable because they will have retained title to the devices and are required to have processes in place to retrieve the devices.<sup>50</sup> By implementing the above conditions, the Commission may expand its importation rules with confidence that devices will not be marketed to and operated by the public and end users until after a device has received a grant of authorization.

#### **IV. EXISTING FCC AND FTC SAFEGUARDS WILL ENSURE THAT THE PROPOSED CHANGES WILL NOT GENERATE HARMFUL INTERFERENCE, CAUSE SAFETY RISKS, OR DEFRAUD CONSUMERS**

Under current FCC rules, no device may be delivered to consumers until the FCC’s equipment authorization process is complete – nothing about this Petition would change that. CTA respects and values the Commission’s role in protecting against harm from radiofrequency emissions and promoting transparency in labeling.<sup>51</sup> That said, the Commission has recognized

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<sup>49</sup> *2017 Equipment and Labeling Order*, 32 FCC Rcd at 8765-66 ¶ 46 (citation omitted).

<sup>50</sup> Both the Commission’s general device operating rules and the market trial rules include a similar requirement. 47 C.F.R. § 2.805(d), (e); *id.* § 5.602.

<sup>51</sup> *See* 47 U.S.C. § 302a(a) (empowering the FCC to make “reasonable regulations” to prevent harmful interference and to establish minimum performance standards for home electronic equipment systems); *2017 Equipment and Labeling Order*, 32 FCC Rcd at 8747 ¶ 2 (discussing that the FCC “generally implements [its § 302a] authority by establishing technical rules for RF devices” (citation omitted)); Enhance Labeling, Accessing, and Branding of Electronic Licenses Act of 2014, Pub. L. No. 113-197, 128 Stat. 2055 (codified at 47 U.S.C. § 622).

that devices not yet able to be sold to or operated by consumers pose no cognizable threat of interference or other radiofrequency-related consumer harm.<sup>52</sup>

Given that nearly all radiofrequency devices manufactured at scale are imported, prematurely shipping devices to consumers would flagrantly violate multiple FCC rules.<sup>53</sup> First, by retaining the existing ban on the delivery of radiofrequency devices to customers prior to authorization, the FCC can protect against safety risks to consumers and harmful interference.<sup>54</sup> Similarly, while the proposed revisions to section 2.1204(a) would permit a limited set of pre-sale activities to increase speed to market, no device would be displayed until FCC authorization is obtained. Additionally, the rule changes proposed here do not disturb Section 2.805, which requires the authorization of radiofrequency devices prior to operation, unless a limited exception applies.<sup>55</sup> Finally, the Commission's authority to take enforcement action against devices delivered and operated unlawfully will remain intact.<sup>56</sup>

To further protect consumers entering into conditional sales, manufacturers could advise customers that the device is subject to the FCC's rules and will not be delivered until it has received its regulatory authorization.<sup>57</sup> The Commission has recognized the value of clear

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<sup>52</sup> See *1991 Marketing Order*, 6 FCC Rcd at 1685 ¶ 19 (“In the adoption of the marketing rules in 1970, the Commission emphasized that its actions were designed to stop mass marketed devices *from reaching the public* before a grant of equipment authorization.”) (emphasis added) (citation omitted).

<sup>53</sup> Jeffrey Bartash, *Why the U.S.-China trade deficit is so huge: Here's all the stuff America imports*, MarketWatch (June 27, 2019), <https://www.marketwatch.com/story/heres-all-the-stuff-the-us-imports-from-china-thats-causing-a-huge-trade-deficit-2018-03-23> (“The U.S. imported a record \$539.5 billion in goods from China in 2018. The U.S. is a net importer from China in most market segments such as consumer electronics, apparel, furniture and industrial supplies.”); Katie Lobosco, *US imports from Vietnam and other countries rise amid China trade war*, CNN (June 6, 2019), <https://www.cnn.com/2019/06/06/politics/tariffs-us-manufacturing-vietnam/index.html> (most manufacturing remains outside of the U.S.).

<sup>54</sup> See 47 C.F.R. § 2.803(b).

<sup>55</sup> *Id.* at § 2.805.

<sup>56</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

<sup>57</sup> See Appendix A.

disclosures time and again to convey important information about both the agency's rules and the devices themselves.<sup>58</sup> The proposed disclosure here is consistent with that precedent.

Finally, if a manufacturer does not deliver a device where a customer remitted some consideration, the FTC and state consumer protection agencies are experts in redressing such harms. For example, the FTC has a longstanding rule to address mail, internet, and telephone sales, as well as extensive experience enforcing this rule.<sup>59</sup> More generally, the FTC has authority to address advertising, marketing, and promotions that are false or deceptive.<sup>60</sup> Likewise, state attorneys general are aggressive in protecting their citizens against unscrupulous sellers who take payment from their citizens but fail to deliver the sold products.<sup>61</sup> Consumers are also likely to pre-order devices using electronic payments, which provide relatively easy self-help remedies such as stop-payments and other dispute resolution methods in the event of premature or false payments by any manufacturers who fail to live up the conditional sales contract. Accordingly, the Commission may permit wider conditional sales without risking

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<sup>58</sup> See, e.g., *Revisions to Reporting Requirements Governing Hearing Aid-Compatible Mobile Handsets*, Report and Order, 33 FCC Rcd 11549 (2018) (replacing a reporting requirement with, among other things, website disclosures about both hearing-aid compatible ("HAC") rated and non-HAC rated handsets and leaving unchanged packaging and other consumer disclosures); *2017 Equipment and Labeling Order*, 32 FCC Rcd 8746 (modifying labeling requirements for small devices and devices previously subject to verification, and codifying the Commission's e-labeling rules).

<sup>59</sup> See, e.g., FTC, Mail or Telephone Order Merchandise Rule, 16 C.F.R. part 435 (prohibiting sellers from soliciting mail, Internet, or telephone order sales unless they have a reasonable basis to expect that they can ship the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days); Press Release, FTC, *Mattel To Pay Penalty for Violating Federal Rule* (Dec. 23, 1996), <https://www.ftc.gov/news-events/press-releases/1996/12/mattel-pay-penalty-violating-federal-rule>; Press Release, FTC, *Staples, Inc. to Pay \$850,000 Penalty For Alleged Mail Order Rule Violations* (May 22, 2003), <https://www.ftc.gov/news-events/press-releases/2003/05/staples-inc-pay-850000-penalty-alleged-mail-order-rule-violations>.

<sup>60</sup> See, e.g., Federal Trade Commission Act § 5, as amended, (codified at 15 U.S.C. § 45) (declaring unfair or deceptive acts unlawful and empowering the FTC to prevent such unfair or deceptive acts); see also *id.* §§ 12-15 (addressing false advertising); FTC Statement on Deception, 103 F.T.C. 174 (1984).

<sup>61</sup> See, e.g., Press Release, New York State Office of the Attorney General, *A.G. Schneiderman Sues Buffalo Auto Dealer For Scamming Consumers* (June 8, 2011) <https://ag.ny.gov/press-release/ag-schneiderman-sues-buffalo-auto-dealer-scamming-consumers> (suing a car dealer that, among other deceptive business practices, had taken down-payments from consumers but failed to deliver the cars).

fraud-related consumer harm; introducing rules to address non-delivery of devices would be duplicative.

**V. CONCLUSION**

For the reasons set forth above, CTA respectfully urges the Commission to take this opportunity to advance the race to 5G by bringing its equipment marketing and importation rules more closely in line with marketplace realities.

Respectfully submitted,

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## Appendix A –PROPOSED FCC RULE REVISIONS

### PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

#### Subpart I—Marketing of Radio-frequency Devices

##### §2.803 Marketing of radio frequency devices prior to equipment authorization.

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(c) *Exceptions.* The following marketing activities are permitted prior to equipment authorization:

(1) Activities under market trials conducted pursuant to subpart H of part 5.

(2) Limited marketing is permitted, as described in the following text, for devices that could be authorized under the current rules; could be authorized under waivers of such rules that are in effect at the time of marketing; or could be authorized under rules that have been adopted by the Commission but that have not yet become effective. These devices may not be operated unless permitted by §2.805.

(i) Conditional sales contracts (including agreements to produce new devices manufactured in accordance with designated specifications), and advertisements for such sales, are permitted between manufacturers [[or, in the alternative, “responsible parties, as defined in Section 2.909”]] and ~~wholesalers or retailers~~ potential customers provided that the prospective buyer is advised at the time of the offer for sale that the equipment is subject to the FCC rules and delivery to the buyer or to centers of distribution is made contingent upon compliance with the applicable equipment authorization and technical requirements.

(ii) Manufacturers are permitted to enter into contracts for importation and preparatory activities prior to sale allowed pursuant to Section 2.1204(a)(11) ~~A radio frequency device that is in the conceptual, developmental, design or pre-production stage may be offered for sale solely to business, commercial, industrial, scientific or medical users (but not an offer for sale to other parties or to end-users located in a residential environment) if the prospective buyer is advised in writing at the time of the offer for sale that the equipment is subject to the FCC rules and that the equipment will comply with the appropriate rules before delivery to the buyer or to centers of distribution.~~

(iii)

(A) A radio frequency device may be advertised or displayed, (e.g., at a trade show or exhibition) if accompanied by a conspicuous notice containing this language:

This device has not been authorized as required by the rules of the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased, until authorization is obtained.

(B) If the device being displayed is a prototype of a device that has been properly authorized and the prototype, itself, is not authorized due to differences between the prototype and the authorized device, this language may be used instead: Prototype. Not for Sale.

- (iv) An evaluation kit as defined in §2.1 may be sold provided that:
- (A) Sales are limited to product developers, software developers, and system integrators;
  - (B) The following notice is included with the kit:  
FCC NOTICE: This kit is designed to allow:
    - (1) Product developers to evaluate electronic components, circuitry, or software associated with the kit to determine whether to incorporate such items in a finished product and
    - (2) Software developers to write software applications for use with the end product. This kit is not a finished product and when assembled may not be resold or otherwise marketed unless all required FCC equipment authorizations are first obtained. Operation is subject to the condition that this product not cause harmful interference to licensed radio stations and that this product accept harmful interference. Unless the assembled kit is designed to operate under part 15, part 18 or part 95 of this chapter, the operator of the kit must operate under the authority of an FCC license holder or must secure an experimental authorization under part 5 of this chapter.
  - (C) The kit is labeled with the following legend: For evaluation only; not FCC approved for resale; and
  - (D) Any radiofrequency transmitter employed as part of an evaluation kit shall be designed to comply with all applicable FCC technical rules, including frequency use, spurious and out-of-band emission limits, and maximum power or field strength ratings applicable to final products that would employ the components or circuitry to be evaluated.

#### **§2.1204 Import conditions**

- (a) Radio frequency devices may be imported only if one or more of these conditions are met:

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(11) The radio frequency device is being imported in quantities of 4,000 or fewer units for pre-sale activity (e.g., as imaging, packaging, and delivery to retail locations). The devices will not be displayed, offered for sale, marketed to consumers, or sold until the FCC grant has been issued.

(i) Prior to importation of a greater number of units than shown in paragraph (a)(11) of this section, written approval must be obtained from the Chief, Office of Engineering and Technology, FCC;

(ii) This exception is only available to manufacturers for radiofrequency devices that have a reasonable belief that authorization will be granted within 30 days of importation;

(iii) Each device imported under this exception must contain a temporary removable label stating:

“This device cannot be displayed, offered for sale, marketed to consumers, or sold until an FCC grant has been issued. This label may not be removed prior to the grant of FCC authorization.”



Notwithstanding Section 2.926, radiofrequency devices imported pursuant to this Section 2.1204(a)(11) may include the expected FCC ID if obscured by the temporary label described in this section.

(iv) Manufacturers must have processes in place to retrieve the equipment in the event that authorization is not received.