FCC Codifies Post-Market Surveillance of RF Equipment – Manufacturers Must Give FCC Vouchers to Inspect Their Own Devices; Testing Labs Rules Also Revised

By Ronald E. Quirk, Jr., Esq.

The FCC recently adopted stringent new radiofrequency ("RF") equipment authorization rules that will significantly impact the regulatory and operating practices of RF equipment manufacturers, importers, marketers, and testing labs.[1] Among the most critical of these rules is the FCC's codification of post-market surveillance of RF devices that have been certified for sale in the U.S. The FCC also "de-authorized" an entire class of testing labs. The new rules will likely spur increased FCC enforcement action against non-compliant manufacturers. Consequently, an in-depth understanding of these rules by manufacturers and other parties responsible for equipment authorization is critical.

TCB Equipment Surveillance & Costs to Providers

With limited exceptions, virtually all RF equipment must be authorized as compliant with the FCC's technical requirements before it is marketed or imported into the US.[2] RF devices that contain transmitters or otherwise have substantial potential to cause harmful interference to other RF devices are authorized by the certification process.[3]

Under the previous certification rules, a responsible party (usually the manufacturer) submitted the equipment to a testing lab and then supplied the test results and other materials to the FCC or a Telecommunications Certification Body ("TCB") for review and determination as to whether certification will be granted. The new rules require that all certifications be granted exclusively by TCBs.[4]

The FCC previously provided some guidelines regarding TCBs conducting post-market surveillance of equipment they had certified.[5] This surveillance is intended to ensure that marketed RF equipment conforms to the technical parameters of the equipment that was tested and certified. TCBs typically conduct surveillance by purchasing RF devices on the market, measuring the characteristics, and comparing them to the characteristics of the prototypes they certified.

The new rules mandate that TCBs conduct market surveillance.[6] TCBs are now required to conduct surveillance at a rate of at least five percent of all the RF devices they certify each year.[7] Responsible parties whose RF devices are under surveillance must provide the investigating TCB with vouchers to purchase any sample device it wishes in order to conduct the surveillance.[8] And, if special software or

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[1] *See Authorization of Radiofrequency Equipment*, *Final Rule*, 80 Fed Reg. 33425 (June 12, 2015).
[2] *See* 47 C.F.R. §2.803.
[3] See 47 C.F.R. §15.201. Other types of RF equipment are authorized by different procedures. Unintentional radiators (*e.g.*, non-transmitting RF devices) such as computers, most peripherals, microwave ovens, and radio receivers are authorized via a Declaration of Conformity ("DoC"). DoC entails testing by an FCC-approved laboratory, but no FCC filing is required. The sections in this alert concerning FCC-accredited test labs apply to the DoC process. Other types of unintentional radiators are authorized via Verification, which entails lab testing for FCC compliance. But, FCC-accredited labs are not required for Verification. *See* 47 C.F.R. §15.101.
[4] *See* 47 C.F.R. §2.911.
[5] *See Authorization of Radiofrequency Equipment* at ¶ 15.
[6] *See* 47 C.F.R. §2.962(g).
[7] *See Authorization of Radiofrequency Equipment* at ¶¶ 15-19.
[8] *Id.* at ¶ 23.

specialized mechanisms are required to test marketed devices, the responsible party must provide them to the TCB at no charge.[9]

Results of Post-Market Surveillance & FCC Enforcement

Under the new rules, if a TCB determines that sample device is non-compliant, the TCB will be required to immediately inform the FCC and the responsible party. The responsible party will have 30 days to inform the TCB in detail as how it will resolve the non-compliance issue. If the TCB is not satisfied with the information provided, the FCC will conduct arbitration between the TCB and the responsible party to resolve the matter.[10] If willful non-compliance is suspected, the FCC will conduct an enforcement proceeding, which could result in the responsible party being subject to steep monetary fines, FCC confiscation of equipment, and removal of equipment from the marketplace.[11] Moreover, if an enforcement proceeding is settled via a consent decree with the FCC, the responsible party must publicly admit that it violated the FCC's rules, which could negatively affect the party's business reputation.[12]

New Testing Lab Requirements

Under the old rules, the FCC permitted applicants for unlicensed RF equipment certification to submit the required test results from either an FCC-accredited lab or a "2.948-listed" lab.[13] The main difference between the two is that an accredited lab must meet the General Requirements of the International Organization for Standardization/International Electrotechnical Commission ("ISO/IEC") in accordance with certain FCC rules, whereas a 2.948-listed lab is accepted and listed as such if it submits certain information to the FCC, such as: description of the test site, testing structures, measuring equipment used, and data showing that the lab meets the accepted standard for measuring RF emissions.[14]

The new rules do away with 2.948-listed labs; only FCC-accredited labs will be permitted to conduct testing for certifying RF equipment.[15] FCC recognition of 2.948-listed labs will be phased out during the year following the effective date of the new rules. Testing done by a 2.948-listed lab will be accepted in a Certification application if it submitted to the EAS within 15 months of the effective date of the new rules.[16]

The new testing lab rules are currently under review, pursuant to petitions for reconsideration that were recently filed.[17] Nonetheless, responsible parties should begin submitting RF equipment for testing only to FCC-accredited labs. Unless the FCC grants the petitions for reconsideration, a number of 2.948-listed labs' listings will expire during the next year, and the FCC will not renew their listings during the phase-out period, unless they apply for accreditation. A responsible party will be held liable for violation of the FCC's rules if compliance testing was done by a lab with an expired authorization.

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[9] *Id.*
[10] *See* 47 C.F.R. §2.962(g).
[11] *See* 47 C.F.R. §§1.80, 2.803.
[12] *See FCC Enforcement Chief Outlines New Focus: Consumers, Prevention, Efficiency,* BNA News (July 23, 2014).
[13] This refers to the FCC rule that listed the requirements for these types of testing labs. 47 C.F.R. §2.948.
[14] *Id.*
[15] *See Authorization of Radiofrequency Equipment* at ¶ 37.
[16] *Id.*
[17] *See Petitions for Reconsideration of Action in Rulemaking Proceeding, Public Notice*, FCC Report No. 3030 (Oct. 22, 2015).

Foreign Test Lab Challenges

The new test lab accreditation rules also apply to foreign labs.[18] Foreign labs are also subject to additional restrictions. For example, FCC recognition of foreign 2.948-listed labs will be subject to the same phase-out period as their US counterparts.[19] But, unlike their US counterparts, many of the foreign 2.948-listed labs will not be eligible for FCC-recognized accreditation.[20]

Under the old rules, the accreditation of a foreign lab was accepted by the FCC if the lab has been approved by a foreign lab designation authority recognized by the FCC under the terms of a Mutual Recognition Agreement ("MRA"). The new rules also allow for recognition of foreign accredited labs in counties with no MRA with the US, but there is no established process for this.[21]

Under the new rules, foreign 2.948-listed labs located in countries that do not have an MRA with the US will not be eligible to be recognized by the FCC (even if they become accredited in their own countries) until such time as procedures for recognizing accredited labs in non-MRA countries are established.[22] The FCC is not required to recognize accrediting bodies in non-MRA countries. If such recognition procedures are developed, they will be subject to a different FCC proceeding.[23]

Accordingly, it is advisable that responsible parties seeking to test RF equipment by a foreign lab should ensure that the testing is done by an accredited lab in a country that has an operational MRA with the US. Those countries include: Australia, Austria, Belgium, Canada, Chinese Taipei, Finland, France, Germany, Hong Kong, Iceland, Ireland, Israel, Italy, Japan, Liechtenstein, Netherlands, Norway, Slovenia, South Korea, Sweden, Spain, United Kingdom, and Vietnam.

Conclusion

The regulatory challenges facing RF equipment manufacturers varied and are complex, and new issues are arising as the FCC continues to revise its RF equipment regulations. Consultation with knowledgeable consultants or counsel would be helpful to any manufacturer looking to avail itself of the opportunities in the emerging global Internet of Things marketplace. If you would like additional information concerning the issues covered herein, or to obtain a copy of a new Global RF Equipment Regulatory Guide, please contact the author.

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[18] The new rules regarding foreign labs are also being reviewed by the FCC pursuant to the pending petitions for reconsideration.
[19] *See Authorization of Radiofrequency Equipment* at ¶ 34.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*