

FCC Proposes Maximum Penalties for “Egregious” Marketing Recreational RF Devices Able To Operate In Restricted Radio Bands

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On June 5, 2018, the Federal Communications Commission’s (“FCC’s” or the “Commission’s”) Enforcement Bureau (“Bureau”) issued a [Notice of Apparent Liability](#) against a manufacturer and retailer for marketing non-compliant RF devices, a dozen models of which were capable of operating in restricted spectrum bands. The FCC proposes to assess a total fine of \$2,861,128.00 against ABC Fulfillment Services LLC and Indubitably, Inc. (collectively, “HobbyKing”) for equipment authorization rule violations involving 65 models of recreational audio/video transmitters (“AV Transmitters”) used with model airplanes drones. But more than \$2.2 million of that resulted from the fact that twelve models apparently operates in restricted radio bands and three at higher powers than authorized in other bands. The restricted bands are those in which unlicensed transmitters are not allowed to operate because of potential interference to sensitive radio communications. In the case of HobbyKing’s the Commission found that its AV transmitters operated in bands where important government and public safety operations, such as those of the Federal Aviation Administration managing commercial and passenger flight traffic, doppler weather radar, flight testing, and other activities the FCC has determined are particularly worthy of heightened interference protection take place. In other words, the moral is that marketing devices that do not have proper equipment authorization is bad, but doing so when the devices operate within restricted bands is quite simply “egregious,” as the NAL put it.

HobbyKing markets its devices on its website, HobbyKing.com. The devices in question operate in various amateur bands between 12450 and 5925 MHz, but the troubles for HobbyKing emerged because the devices also operate on other bands, including several restricted bands, and some models operate at higher powers than permitted under the FCC rules. In 2015, the Bureau received several complaints against HobbyKing, which resulted in a Marketing Citation for violations of Section 302 of the Communications Act as well as Sections 2.803 and 2.925 of the FCC Rules for illegal marketing of two noncompliant AV transmitters. Further complaints surfaced in 2017, which led to a Bureau Letter of Inquiry (“LOI”). Apparently, HobbyKing received the LOI, but failed to respond fully, which led to another Citation – this time for failure to respond to the LOI (the “LOI Citation”) – and the Bureau ordered a response, but the company did not respond fully, according to the NAL. But the response was enough for the Bureau to determine that HobbyKing continued to market transmitters that required, but did not have, equipment authorization. The devices operated on both amateur as well as non-amateur frequencies, which negated HobbyKing’s ability to rely on an exemption from equipment authorization that operate *only on amateur frequencies* (and adhere to otherwise

applicable technical requirements). Three of the 65 models in question also operated at power level that exceeded the limits the Commission established for amateur commend of model aircraft.

(The Commission explained in the NAL: “The Commission generally has not required amateur equipment to be certified, but such equipment must be designed to operate only in frequency bands allocated for amateur use. If such equipment can operate in amateur and non-amateur frequencies, it must be certified prior to marketing and operation.” To reinforce these points, on the day of the NAL, the Bureau issued an [Enforcement Advisory](#), which we covered in an earlier blog post.)

In addition to erroneously thinking (at one time, at least) that its devices qualified for the exemption applicable to devices that operate only on amateur frequencies, the company also claimed that it does not market its devices to U.S. customers. But apparently there is substantial evidence to the contrary, including the fact that their website says they ship worldwide and HobbyKing has a New York office and customer service operations in the United States. Also worthy of note, on July 3, 2017, they posted on their Instagram account, “Wishing our US customers a very happy Independence Day!”

Taking into account the totality of the circumstances, the Bureau proposed a forfeiture of almost \$2.9 million. Providing a window into its thinking, the Bureau started with a base penalty amount of \$7,000 for 65 models, a total of \$455,000. For the fifty models that were operated without equipment authorization, the Bureau adjusted each penalty by \$5,250 for repeated and continuous violations, namely engaging in the same type of marketing misconduct that led to the Marketing Citation HobbyKing after that Citation was issued. For those fifty models, the total proposed penalty is \$612,500.

For the remaining fifteen models, the Bureau proposes the Commission issue the statutory maximum penalty of \$147,290. Twelve of these devices, as noted above, operate in restricted bands in addition to amateur bands, and three of the AV transmitters exceed the power limits in the amateur bands in which they operate. Consequently, none of these fifteen devices could have received an equipment authorization. Under any circumstances, they could not be marketed in the United States. For these, the Commission issued a proposed penalty of \$2,209,350.

Finally, the Commission tacked on an additional penalty of \$39,278 for HobbyKing’s failure to respond to the LOI in the first instance and then to the LOI Citation, despite repeated opportunities to answer. The Bureau’s NAL treated HobbyKing’s failure to respond to the LOI and LOI Citation as individual, non-continuing violations and proposes to apply the statutory maximum of \$19,639 for such violations in each case.

This NAL and the reasons for the aggravation of the penalty from base amounts reflects a number of lessons. Several of the key ones are: One, parties receiving inquiries or follow-up from the Commission should respond. Two, when parties don’t respond at first and are reminded of their obligation to respond to Commission inquiries or LOIs, they should respond. Three, companies marketing devices under their own brand name (or not), even if they do not manufacture them, are responsible for ensuring that they are marketing complaint devices. Four, parties should understand the rules that apply to the devices they market to ensure whether they have the proper authorization or are even eligible for authorization. Five, if companies think the devices they manufacture or market qualify for an exemption from the FCC’s equipment authorization rules, they should double check to be sure they meet all of the conditions for the exemption. Six, unlicensed devices that operate in one or more restricted bands cannot be authorized (absent an affirmative FCC waiver) and therefore cannot imported, marketed, or operated in the United States. Seven,

companies that market RF devices only over the web must be mindful of what countries they are marketing to and what the regulatory requirements are in those countries.

The two significant equipment authorization enforcement actions in recent days – we direct you also to our post on the [Pure Enrichment](#) NAL released in late May -- rightfully makes one wonder if there are more to come in short order.