

## An Ounce of Prevention

By David H. Solomon and Bryan Tramont

The Federal Communications Commission has been ramping up enforcement against companies that violate its equipment authorization and marketing rules. In February, it proposed a record \$1 million penalty for equipment violations. More recently, the Commission had consent decrees with four different equipment companies (including one RFID company) for payments of between \$25,000 and \$90,000 to settle FCC investigations.

In case after case before the FCC, companies argue that there shouldn't be enforcement action against them, or that any enforcement action should be less stringent, because they fixed the problem as soon as the FCC told them about it. And, in case after case, they lose this argument. The FCC's view is that compliance is required before the agency finds out about a violation, not after.

So what's the best way for an RFID manufacturer, importer or retailer to ensure compliance in advance, or at least maximize the likelihood of compliance? Simply giving employees a summary of the FCC's Part 2 and Part 15 equipment rules will not do the trick. Rather, companies should have a compliance plan and follow it. A strong and well-implemented plan increases the likelihood of compliance. In addition, if a glitch in implementation occurs, the existence of such a compliance plan should help discourage or mitigate any FCC enforcement action.

Effective compliance begins with setting a strong tone that compliance "matters" to the company, that the company takes its regulatory obligations seriously. Such an *ethic of compliance* can then be implemented through the details of the compliance plan.

A compliance plan need not be elaborate. What it should cover in any particular instance will vary depending on the nature, size and internal dynamics of the company. An effective equipment certification/marketing compliance plan should focus on topics such as the following:

*Locus of Responsibility.* A single person should hold ultimate responsibility for the company's equipment compliance. Recent FCC consent decrees involving the equipment certification and marketing rules have assigned responsibility to a compliance officer, a compliance engineer, an engineering compliance manager, and the director of marketing. In any event, the person should be senior enough to be empowered to take the necessary steps to make sure the compliance plan is followed carefully. Whoever is chosen, that person should, of course, have expertise regarding the FCC's rules.

*Overview of FCC Requirements and Company Policies.* A compliance plan should include a "plain language" summary of the FCC's equipment certification and marketing requirements and the company's policies implementing them. This will provide relevant employees with a handy reference source of what they must do (or not do).

*Compliance Procedures.* These procedures are really the guts of any compliance plan. They should do more than just summarize the rules and tell people to follow them. Rather, the procedures should lay out in a practical way who is supposed to do what, how they should do it, and when. The procedures should address such areas as equipment authorization, importation, advertising/display/demonstration/operation, labeling, user manuals, sale and shipment.

*Record-Keeping.* In addition to keeping records required by the rules (for example, copies of FCC certifications or documentation of Class I permissive changes), it may be helpful to keep internal records to track compliance and, if questioned by the FCC, to demonstrate compliance. For example, the company may want to keep records of internal approval for specific equipment marketing initiatives and the basis for the determination that they complied with FCC rules.

*Training and Re-Training.* A compliance plan can only work if the people who implement it know what they are doing. Relevant employees should be trained (and periodically re-trained) on FCC requirements and the company's compliance procedures. Given employee turnover, the lack of training for new employees is often a significant cause of non-compliance. Thus, for example, new employees charged with responsibility for making decisions about whether to import or sell new RFID devices should be promptly trained on FCC requirements.

*Oversight.* A few proactive steps can help ensure that a compliance plan is working and is up to date. For example, a company could consider periodic compliance reviews or audits of whether the plan is being followed. It can also facilitate complaints or suggestions from within the company. When problems arise or are identified, a company should take appropriate steps to minimize the risk of similar problems arising in the future, for example, through remedial training for the employees involved. A process should be established for periodically re-evaluating and revising the compliance plan based on problems that arise, changes in the rules, or simply new and improved thinking by people within the company about how best to achieve compliance.

The world's greatest compliance plan will not be worth the paper it is written on if it is not actively and effectively implemented by management, consistent with the kind of overall ethic of compliance discussed above. A compliance plan is not itself an end but rather is a potentially important means for equipment companies to achieve more important ends – avoidance of FCC enforcement.

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