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

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### Comments of R Street Institute

Technological innovation often moves fast, leaving outdated regulations designed for different environments and markets in the proverbial dust. As a result, the Federal Communications Commission (FCC) must move quickly when it identifies regulations that no longer make sense, removing or updating the rules as they apply to new and innovative technologies. Indeed, the Commission has done just that over the years, ensuring the FCC does not erect unnecessary barriers to innovation. This notice of proposed rulemaking (NPRM) furthers this tradition, promising immense benefits to manufacturers, retailers and consumers alike.<sup>1</sup>

R Street offers a few brief comments to help guide the Commission as it considers expanding opportunities for pre-authorization marketing and importation. First, the benefits of allowing conditional sales significantly outweigh the costs. Second, the risk of harmful interference caused by

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<sup>1</sup> Federal Communications Commission, *In the Matter of Allowing Earlier Equipment Marketing and Importation Opportunities & Petition to Expand Marketing Opportunities for Innovative Technologies*, Notice of Proposed Rulemaking (hereinafter NPRM), ET Docket No. 20-382 & RM-11857, Dec. 10, 2020. <https://ecfsapi.fcc.gov/file/12101752515605/FCC-20-180A1.pdf>.



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importing devices soon to be authorized is relatively limited. Third, the Commission need not establish a strict test for whether a manufacturer has a “reasonable basis” to believe a device will be authorized within 30 days. Finally, while the Commission does not need to standardize the evaluation for “reasonable basis”, it should require manufacturers to document their internal analysis and provide that reasoning on request. The Commission has an opportunity to generate significant benefits by reducing unnecessary regulatory barriers, and it should act quickly to enact the proposed changes.

**I. The Commission should allow for pre-authorization conditional sales to the general public**

As the Commission considers expanding the rules allowing for conditional sales to cover sales to the general public, it is important for the Commission to evaluate the relative costs and benefits of allowing such transactions. As the comments highlighted in response to the petition, the benefits to such an approach are immense, as new and innovative device manufacturers can better gauge interest and demand in the device.<sup>2</sup> At the same time, the costs are relatively limited as these types of conditional sales agreements have become much more commonplace. However, if potential fraud or consumer harms still present challenges, existing regulatory tools and consumer protection agencies can provide an important backstop for the Commission to ensure that consumers remain protected.

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<sup>2</sup> See “Joint Reply Comments of Digital Liberty, R Street Institute and Americans for Prosperity,” RM-11857, July 24, 2020, p. 2. (hereafter Public Interest Joint Reply).  
<https://ecfsapi.fcc.gov/file/10724961504292/Final%20Joint%20Reply%20Comments%20Digital%20Liberty%20RSI%20AFP.pdf>; See also Reply Comments of Information Technology & Innovation Foundation (ITIF), RM-11857, July 24, 2020, p. 2.  
<https://ecfsapi.fcc.gov/file/107240596811685/ITIF%20letter%20CTA%20marketing%20RM-11857%20final.pdf>.



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**a. Conditional sales allow for significant benefits to both device manufacturers and consumers**

Conditional sales essentially boil down to a promise to purchase should some established conditions be met. When both parties know the parameters of the agreement, it allows for each to gain a benefit that they could not otherwise obtain.

The record clearly demonstrates the benefits for manufacturers. As Samsung explained, manufacturers currently “lack the luxury of time” as companies “race to the market as quickly as feasible without compromising the quality, functionality, or security of their devices.”<sup>3</sup> In this race to market, often manufacturers struggle to know how many devices to manufacture or what the overall interest may be.<sup>4</sup> Conditional sales present an opportunity to gauge that interest early in the manufacturing process, providing more information to the manufacturer and allowing them to make better decisions regarding capacity and expectations.

At the same time, this benefits consumers. Often, when a manufacturer releases a new product in which demand drastically exceeds expectations, consumers who may want the new device cannot obtain one.<sup>5</sup> Clearly, allowing conditional sales will not eliminate the challenge of gauging consumer

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<sup>3</sup> “Comments of Samsung,” RM-11857, July 9, 2020, p. 5.  
[https://ecfsapi.fcc.gov/file/107091810114326/Comments%20-%20Samsung%20\(July%209\)%20final.pdf](https://ecfsapi.fcc.gov/file/107091810114326/Comments%20-%20Samsung%20(July%209)%20final.pdf).

<sup>4</sup> “GeForce RTX 3080 Launch: What Happened? You Asked, We Answered” NVIDIA, Sept. 21, 2020.  
<https://www.nvidia.com/en-us/geforce/news/rtx-3080-qa/>.

<sup>5</sup> Ben Gilbert, “Some PlayStation 5 resellers are getting wild threats from angry buyers on Facebook and Craigslist,” *Business Insider*, Dec. 1, 2020. <https://www.businessinsider.com/playstation-5-ps5-resellers-receiving-wild-threats-on-facebook-craigslist-2020-12>.



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demand and providing enough devices to meet that demand.<sup>6</sup> But by taking the steps proposed in the NPRM, consumers will more often get the devices that they want as stock will more accurately meet demand.

Further, even beyond the immediate benefits of meeting consumer demand, allowing conditional sales also allows start-ups and innovators to develop new and interesting products. For example, fans of Banjo-Kazooie essentially funded the development of Yooka-Laylee, a similar game developed by the creators of the iconic N64 classic.<sup>7</sup> Without the Kickstarter campaign, it is unlikely that the fully realized game would have been released.<sup>8</sup> Unfortunately, Commission rules prevent wireless device manufacturers from leveraging these tools for radiofrequency devices.<sup>9</sup> Considering that a significant amount of new devices and products incorporate wireless functionality, this limitation arbitrarily limits the ability for new innovations.<sup>10</sup> By relaxing this restriction, the Commission can help enable this venue for funding, allowing additional devices to reach the market and give consumers additional choice.

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<sup>6</sup> Tom Warren, “Sony apologizes for PS5 preorders mess, promises more stock over ‘next few days’,” *The Verge*, Sept. 19, 2020. <https://www.theverge.com/2020/9/19/21446782/sony-ps5-preorders-apology-more-consoles-preorder>.

<sup>7</sup> Playtonic Games, “Yooka-Laylee – A 3D Platformer Rare-vival!” Kickstarter, Last Updated Jan. 22, 2021. <https://www.kickstarter.com/projects/playtonic/yooka-laylee-a-3d-platformer-rare-vival>.

<sup>8</sup> Andrew Webster, “Banjo-Kazooie is a spiritual successor thanks to Kickstarter,” *The Verge*, May 1, 2015. <https://www.theverge.com/2015/5/1/8530351/yooka-laylee-banjo-kazooie-kickstarter>.

<sup>9</sup> 47 CFR § 2.803.

<sup>10</sup> “Wireless Connectivity Market by Connectivity Technology (Wi-Fi, Bluetooth, NFC, ZigBee, GNSS, LTE CAT-M1, NB-IoT, LoRa, SigFox), Type (WLAN, WPAN, LPWAN), End-use (Wearables, Consumer Electronics, Healthcare), and Region - Global Forecast to 2025,” MarketsandMarkets, October 2020. <https://www.marketsandmarkets.com/Market-Reports/wireless-connectivity-market-192605963.html>.



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**b. Conditional sales present limited risk to consumers**

The record clearly demonstrates the benefits that allowing conditional sales will generate, but the Commission must also consider potential costs.

The Commission's main concern in limiting conditional sales rules is preventing potential harmful interference, but these concerns are limited by the fact that allowing conditional sales does not mean that consumers will actually get their hands on the devices.<sup>11</sup> And as R Street explained in previous comments, the risks of harmful interference from these devices remain relatively low.<sup>12</sup>

Likewise, concerns about consumer harms weigh less today than even a few years ago because consumers engage in conditional sales more often than in the past. Websites like Kickstarter, for example, have led to the development of numerous products and devices.<sup>13</sup> With the increase of these conditional funding opportunities, conditional sales no longer seem foreign to many consumers.

However, the Commission could take additional safeguards, namely in the form of specific language, prior to allowing the conditional sale, that clearly lays out the details of the agreement.<sup>14</sup> This language would, most importantly, convey to the consumer that the device has yet to be certified by the

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<sup>11</sup> NPRM at ¶18. <https://ecfsapi.fcc.gov/file/12101752515605/FCC-20-180A1.pdf>.

<sup>12</sup> Public Interest Joint Reply at p. 4.

<https://ecfsapi.fcc.gov/file/10724961504292/Final%20Joint%20Reply%20Comments%20Digital%20Liberty%20RSI%20AFP.pdf>.

<sup>13</sup> NPRM at ¶20. <https://ecfsapi.fcc.gov/file/12101752515605/FCC-20-180A1.pdf>.

<sup>14</sup> *Id.* See also "Comments of TechFreedom in Support of the Consumer Technology Association's Petition for Rulemaking," RM-11857, July 9, 2020, p. 5.

<https://ecfsapi.fcc.gov/file/10709098442573/TechFreedom%20Comments%20RM11857%207%209%2020.pdf>.



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FCC and may ultimately never reach the market. With this understanding, and the general awareness of conditional sales, potential harms can be adequately alleviated.

Further, the Federal Trade Commission (FTC) and state attorneys general can enforce the promises made, as well as target any deceptive behavior that could have a material impact on the decision to purchase the device.<sup>15</sup> This is the role of consumer protection agencies, and they have the experience to ensure that these conditional sales have limited negative impacts on consumers, if any.

**II. The Commission should allow manufacturers to import a limited number of devices prior to approval by the Commission**

The Commission also rightly proposes to allow the importation of radiofrequency devices when (1) the manufacturer has a reasonable basis to believe authorization will be granted within 30 days; (2) devices have a temporary label; (3) manufacturers retain ownership (though not necessarily possession); and (4) manufacturers must have processes in place in the event authorization is denied.<sup>16</sup> These are sensible restrictions on importing devices, as well as a numerical limit. R Street offers a few brief comments on this issue.

**a. Allowing preauthorization device importation presents a relatively limited risk of harmful interference**

As explained above, the Commission restricts radiofrequency device importation because of the concern of harmful interference. Until authorized, the Commission lacks certainty that the devices will

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<sup>15</sup> 15 U.S.C. § 45(a).

<sup>16</sup> NPRM at ¶40. <https://ecfsapi.fcc.gov/file/12101752515605/FCC-20-180A1.pdf>.



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operate within Commission rules and without interrupting the radio operations of others. The Commission is therefore right to propose restrictions on importation, limiting the risk of harmful interference.

As we explained in response to the Consumer Technology Association (CTA) petition, however, the risk of harmful interference is limited by the nature of the importation.<sup>17</sup> Companies want to import devices so they can begin to show devices to consumers and begin to make stock available when the device receives the necessary approval.<sup>18</sup> Manufacturers, therefore, will not want to import devices that will never receive approval and instead likely limit importation to devices that pose relatively limited risk of harmful interference.

But even beyond the incentive only to import devices that will likely receive approval, devices will remain in the control of the retailer or manufacturer and not the consumer, limiting the potential for harmful interference. While it is possible that a device may be stolen or accidentally enter the hands of a consumer, these scenarios remain unlikely as the owners do not want these devices out in the public domain. Additional steps such as labeling requirements can further limit these risks.

This is not to say there is no risk of harmful interference, but the benefits of allowing importation clearly out-weigh any potential harms.

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<sup>17</sup> Public Interest Joint Reply at p. 4.

<https://ecfsapi.fcc.gov/file/10724961504292/Final%20Joint%20Reply%20Comments%20Digital%20Liberty%20RSI%20AFP.pdf>.

<sup>18</sup> Petition of Consumer Technology Association to Expand Marketing Opportunities for Innovative Technologies, RM-11857, June 2, 2020, 12 (CTA Petition).

[https://ecfsapi.fcc.gov/file/1060263543654/CTA\\_Petition\\_to\\_Expand\\_Marketing\\_Opportunities\\_for\\_Innovative\\_Technologies.pdf](https://ecfsapi.fcc.gov/file/1060263543654/CTA_Petition_to_Expand_Marketing_Opportunities_for_Innovative_Technologies.pdf).



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**b. The Commission should not too narrowly define “reasonable basis”**

As a condition to importing a device, the Commission proposes that a manufacturer have a “reasonable basis” to believe authorization will be granted within 30 days. Understandably, the Commission has concerns about the definition of “reasonable basis,” and asks what elements must make up that determination.<sup>19</sup>

The Commission should ensure that device manufacturers actually believe the Commission will grant authorization, but they need not establish specific criteria that defines “reasonable belief.” A reasonableness standard is inherently case-dependent; meaning standardizing a narrow definition of “reasonable belief” could unnecessarily limit the ability for manufacturers to import devices. While general elements can guide the Commission as it evaluates different cases, the underlying logic and analysis that develops via the adjudicatory process will establish the guidelines and standards for what a “reasonable basis” is.

However, to aid this evaluation, the Commission should require manufacturers to provide documentation explaining their belief and the assumptions that underlie this belief.<sup>20</sup> This will allow the Commission to make a more informed decision at the outset, preventing devices that manufacturers know will fail to receive approval from entering the country. While for the most part, manufacturers will not want to waste resources importing a device they know will not receive approval, there may be cases when some manufacturers may want to import devices as a way of generating a reliance interest in an

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<sup>19</sup> NPRM at ¶¶40, ¶¶42-44. <https://ecfsapi.fcc.gov/file/12101752515605/FCC-20-180A1.pdf>.

<sup>20</sup> *Id.*





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attempt to sway the Commission on ultimate authorization. Requiring manufacturers to create a document demonstrating their internal logic regarding authorization, and requiring submission of the document upon request, would sufficiently limit this risk while only imposing a relatively slight burden on manufacturers.

**c. While the risk of harmful interference is limited, the Commission should require manufacturers to establish a plan for recalling devices**

As explained above, the risk of potential harmful interference remains relatively low. However, the possibility exists. To further limit the risk, the Commission should require device manufacturers to submit formal plans to the Commission processes to retrieve imported devices. This will limit the ability for bad actors to let devices simply remain in the public sphere rather than bear the cost of retrieving the devices. As suggested in initial reply comments, these risks could be further limited by features such as a remote shutdown requirement on the imported devices, though the benefits of such an approach may be limited by the costs of implementation.<sup>21</sup>

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R Street appreciates the Commission's ongoing efforts to promote innovation and efficiency in device manufacturing by limiting regulatory barriers. While limiting harmful interference remains a key priority for the Commission, it must be careful not to let worst-case scenarios drive policymaking. Here, with the risk of harmful interference and consumer harms remaining low and significant benefits out-

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<sup>21</sup> Public Interest Joint Reply at p. 7.

<https://ecfsapi.fcc.gov/file/10724961504292/Final%20Joint%20Reply%20Comments%20Digital%20Liberty%20RSI%20AFP.pdf>.



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weighing any potential costs, the Commission should move forward with an order expanding opportunities to increase flexibility for manufacturers to advertise and import devices prior to authorization.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
A horizontal line with the text "/s/" centered above it, indicating a signature.

Jeff Westling  
*Technology and Innovation Resident Fellow*

Feb. 11, 2021