

FCC Enforcement On The Rise

What Every RF Device Manufacturer and
EMC Test House Should Know

Forfeitures on the rise

- In 2006 there was increased number of forfeitures for Part 2 and Part 15 violations

Why is this happening?

- TCB program maturing
 - FCC Lab audits uncovering mistakes, inconsistencies, lack of follow-up
- Spectrum Demand
- Policies of “Martin” Commission
 - Parts 2 and 15 taken more seriously
 - Penalties for non-compliance no longer a “cost of doing business”

What does it mean for test labs?

- More business
- Greater involvement in the enforcement process – up front and on audit
- Might be asked to do testing during an FCC investigation
 - Work will be particularly scrutinized by FCC staff
 - Run the risk of becoming an advocate
- Might be asked to author or review a compliance plan as part of enforcement action or settlement process
- Can prevent violations by explaining rules and urging good practice (companies go to labs first, not lawyers)
- Might be blamed by customer/manufacturer for a violation
 - What you tell a client can come back to haunt you

Enforcement Models

- Old – OET took lead in enforcement of rules involving violation of technical standards, equipment authorization rules, or marketing violations
 - OET more interested in compliance than punishment
 - OET generally flexible
 - Rarely referred voluntary disclosure or accidental occurrence of non-compliance for enforcement action
- New – Enforcement Bureau takes the lead on all non-compliance matters
 - EB's goal is punishment (“cleaning the spectrum”)
 - EB not flexible; voluntary disclosures punished; public consent decrees mandated
 - OET now used largely as investigative arm for EB and will only be deferred to on technical, not policy, issues

FCC Enforcement Options

- Letter of reprimand or admonishment
 - Usually done when the statute of limitations on a forfeiture has expired
- Revocation of authorization
 - Rarely done because it takes a lot of work
 - Can be used where a licensee (or one who holds an equipment authorization) fails to reply to FCC correspondence
 - Takes a year or more, except in cases of failure to reply to correspondence
- Notice of apparent liability to monetary forfeiture – most common
- Consent Decree – negotiated

How does an Enforcement Action begin?

- FCC Lab can request sample of equipment to make sure production models continues to comply with data on file (Section 2.945)
 - Because of budgetary constraints, this random sampling almost never happens
- Complaint from a competitor (most common)
- Interference complaint (least common)
- FCC Inspection (trade shows, trade journals)

- Confession of error

- Upon discovery of non-compliance as attempt to ward off future enforcement activity
 - Used to be common
 - Now, inevitably leads to enforcement sanctions
 - Will be considered in determining a forfeiture amount
- In order to obtain a waiver or favorable rule interpretation

Enforcement Process

■ Citation

- Used to advise of a possible violation, gather information
- After citation, subsequent violations can be called “repeated” and thus a forfeiture can be increased
- Can be sent to those who do not hold an FCC authorization
 - e.g. distributors or retail stores selling non-compliant equipment
- Sampling of equipment
 - Equipment must be delivered to FCC Lab to determine extent of non-compliance
 - During sampling process FCC Lab can uncover measurement errors including those that were not the subject of the original inquiry

- Letter of Inquiry from Enforcement Bureau
 - Often first step toward a forfeiture
 - Asks detailed questions to build a case
 - Failure to respond truthfully is violation of federal law
 - Lack of candor in responses weighs against target of investigation and is particularly dangerous for FCC licensees
 - There can be further LOIs until EB is satisfied they have enough information
 - Failure to respond is violation and leads to forfeiture and (for license holder) revocation of license
 - Manufacturer's first line of defense – blame the EMC Lab or the TCB

- Notice of apparent liability to monetary forfeiture (NAL)
 - Often preceded by LOI unless EB believes it has sufficient information
 - Violation(s) explained and a forfeiture amount announced
 - Opportunity is given to reply and explain

Factors in determining forfeitures

- FCC rules list base amounts of forfeitures depending on type of violation
 - Base forfeiture for marketing unauthorized equipment is \$7,000 per violation or each day of a violation
 - Using “upward adjustment criteria” (egregious conduct, whether violation was intentional, ability to pay, substantial harm, etc.) the forfeiture can be raised as high as \$11,000 per violation or each day of a violation
 - Using “downward adjustment criteria” (whether violation is minor, good faith or voluntary disclosure, inability to pay, etc.), the forfeiture amount can be lowered
 - Maximum forfeiture amount per violation is \$97,500

Case Study – Hawking Technologies, Inc.

- \$50,000 NAL for marketing amplifier for use under Part 15 for Wi-Fi range extending
- Failed to limit use of amplifier to specific TXs
- Hawking claimed it had “checked out certification issues with the TCB...”
- FCC said Hawking was responsible

Case Study – San Jose Navigation, Inc.

- \$75,000 NAL for marketing GPS re-radiator kits
- San Jose submitted “FCC Class B Declaration Reports” from Taiwanese test lab
- FCC said even if device was eligible for authorization, it would be for certification, not a declaration
- DOC showed measurement at wrong frequency
- Lab not only helped get customer in trouble, but gave itself a bad name

Case study – Bureau D'Electronique Appliquee, Inc.

- \$17,000 forfeiture for marketing motion detector under the wrong ID
- Complaint followed by LOI from EB
- Manufacturer claimed it thought permissive change rules permitted sale under old ID, but had already discovered problem itself and had applied for certification
- Certification received 9 days after LOI sent
- All self-corrective action and confessing error accomplished was to reduce the forfeiture from \$25,000 to \$17,000

Case Study – Trimble Navigation, Ltd.

- Trimble made Class I Permissive Change
- Later it determined that the change had cause device to exceed peak power limits by 1.4 dB
- Ceased production, corrected design and told FCC
- Matter referred to EB – Consent decree with “contribution” of \$4,000

Case Study – Behringer, USA

- 50 models of Class B digital audio music devices imported to US (\$1.17M in sales)
- Failure to: verify, properly label, include user instructions and file customs forms
- Behringer said compliance measures were taken; EB discovered otherwise (93K more imports)
- NAL for \$1M (2/06)
- Forfeiture Order 6/1/07: \$350K base violation; \$650K upward adjustment
- CE compliance not sufficient; remedial actions do not reduce forfeiture

Case Study – Syntax-Brilliant Corp.

- Importation and sale of TVs w/o DTV reception capability
- Fee reviewed customs importation data 1/07; LOI to Syntax on 3/07
- Syntax admits 1,861 importations/shipments; 72,487 non-compliant TVs
- Small business, <300 employees; only 22K TVs imported/shipped w/in 1 year statute of limitations
- NAL and forfeiture 5/30/07: \$2,899,575
- Per unit fines rather than traditional per model because of “seriousness of violation”
- Tiered penalty – from \$50/unit to \$250/unit – based on “ability to pay”

Consent Decrees

- Consent decree is a contract between the FCC and one accused of violating the rules
- Without admitting guilt, violator promises not to do it again and, in some cases, explains steps to remedy what has already occurred
- Violator promises to institute program to make sure rules are obeyed
 - EMC Lab issues (e.g. audits) are almost always involved
- Violator makes “voluntary contribution” to U.S. Treasury, almost always an amount less than a proposed forfeiture

Compliance Programs

- Standard feature of consent decrees
- Company will usually construct a program to be followed by its staff to ensure that future FCC violations will not occur
- EMC test labs may be asked to review or help construct such a program
 - If this is done, great care must be taken to explain FCC obligations accurately
 - The compliance plan is not reviewed by the FCC and mistakes leading to future violations can be blamed on the test lab

Avoiding Enforcement – What should test labs do?

- If a device cannot meet FCC rules, the lab should report to the applicant in writing to avoid any future misunderstanding
- Measurement issues
 - For new devices, test labs should check proposed test procedures with FCC lab
 - Lab has been known to disavow statements in KDB
- Permissive changes
 - A defense to an FCC enforcement action may be that the variance from what was originally tested is permitted
 - Test labs will do well to explain whether any test performed on already authorized equipment represents a Class I or Class II change

Avoiding Enforcement – What should test labs recommend?

- STA
- Beta testing exemptions
- Experimental Licensing
- Audits