

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of )
)
ABC Fulfillment Services LLC d/b/a HobbyKing ) File No.: EB-SED-17-00023762
USA LLC and HobbyKing.com; and Indubitably, ) NAL/Acct. No.: 201832100015
Inc. d/b/a HobbyKing Corp., HobbyKing USA ) FRN: 0027528975
LLC, HobbyKing, and HobbyKing.com

FORFEITURE ORDER

Adopted: July 22, 2020

Released: July 23, 2020

By the Commission: Commissioner O’Rielly issuing a statement.

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I. INTRODUCTION

1. The Commission’s equipment authorization and marketing rules are designed to ensure that equipment in the wireless ecosystem operates in a manner that minimizes the risks of harmful interference. Unauthorized radio frequency equipment poses a serious threat to any number of important uses of spectrum, including aviation safety, weather radar, and public safety communications, because unauthorized and untested devices may not adhere to the technical requirements we have developed to prevent interference to other devices and services.

2. In this Forfeiture Order, we issue a fine of \$2,861,128 against ABC Fulfillment Services LLC and Indubitably, Inc., d/b/a HobbyKing (collectively, HobbyKing or Company) for persistently violating the Commission’s rules intended to ensure that radio frequency devices are properly authorized, and for failing to respond to Commission orders in the investigation of the company’s practices. For years, HobbyKing advertised and sold on its website to U.S. consumers dozens of models of audio/video transmitters (AV transmitters) for use with unmanned aircraft systems (drones) without regard to whether those AV transmitters were compliant with the Communications Act of 1934, as amended (Act), or the Commission’s rules.<sup>1</sup> Several of these models were capable of operating in spectrum bands used by, and

<sup>1</sup> Any entity that is a “Small Business Concern” as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, “Oversight of Regulatory Enforcement,” in addition to other rights set forth herein.

causing interference to, important Federal government systems. Some of the device models operated at power levels above those permitted in the Commission's rules.

3. The Commission's Enforcement Bureau (Bureau) undertook an investigation of these devices and HobbyKing's marketing practices, and HobbyKing repeatedly failed to respond fully to the Commission's requests for information. On June 5, 2018, we issued a Notice of Apparent Liability for Forfeiture (*NAL*) against HobbyKing for these apparent violations.<sup>2</sup> In its response to the *NAL*, HobbyKing did not contest that it marketed devices without equipment certifications or that it failed to respond fully to the Bureau. Instead, HobbyKing raised several unpersuasive legal challenges. We find no reason to cancel, withdraw, or reduce the penalty we proposed in the *NAL*, and we therefore assess the full \$2,861,128 forfeiture.

4. We also warn HobbyKing that continued failure to comply with the equipment marketing requirements is likely to be met with additional sanctions. The Company's pledge to use "best efforts" not to market additional noncompliant products identified by the Bureau is not sufficient. Simply put, HobbyKing must comply with the equipment marketing requirements for all the radio frequency devices it markets.

## II. BACKGROUND

5. *Legal Framework.* The Act and the Commission's equipment marketing rules collectively require that marketers of radio frequency devices ensure, prior to advertising or selling such devices, that they will not cause harmful interference to authorized radio communication devices.<sup>3</sup> Specifically, section 302(b) of the Act provides that "[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section."<sup>4</sup> The Commission has long-standing regulations, including technical, authorization, and other requirements, designed to prevent interference from devices that emit radio frequency energy.

6. Most pertinent to this case, section 2.803(b) of the Commission's rules prohibits the marketing of radio frequency devices unless the device has first been properly authorized, identified, and labeled in accordance with the Commission's rules.<sup>5</sup> Electronic devices that intentionally emit radio frequency energy, called "intentional radiators," must be authorized through a certification procedure before they can be marketed to U.S. consumers.<sup>6</sup>

7. *Factual Background.* HobbyKing is the trade name of several affiliated companies that, through HobbyKing.com, market drone accessories, including audio/video transmitters.<sup>7</sup> HobbyKing has a New York Office and customer service operations in the United States.<sup>8</sup>

8. After receiving complaints about HobbyKing's equipment marketing, the Bureau's Spectrum Enforcement Division (Division) first investigated the Company practices in 2016. The Division issued a citation (*Marketing Citation*) against HobbyKing for marketing AV transmitters that

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<sup>2</sup> The *NAL* includes a more complete discussion of the facts and history of this case and is incorporated herein by reference. See *ABC Fulfillment Services LLC d/b/a HobbyKing USA LLC and HobbyKing.com, and Indubitably, Inc. d/b/a/ HobbyKing Corp., HobbyKing USA LLC, HobbyKing and HobbyKing.com*, Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 5530 (2018) (*NAL*).

<sup>3</sup> 47 U.S.C. § 302a(b); 47 CFR § 2.803(b)-(c).

<sup>4</sup> 47 U.S.C. § 302a(b).

<sup>5</sup> See 47 CFR § 2.803(b).

<sup>6</sup> *Id.* § 15.201(b).

<sup>7</sup> *NAL*, 33 FCC Rcd at 5530-31, paras. 2-3.

<sup>8</sup> *Id.* at 5530, para. 2 (citing HobbyKing's career website).

were noncompliant.<sup>9</sup> This *Marketing Citation* identified the equipment marketing rules to HobbyKing and warned the Company that, if it continued to market noncompliant radio frequency devices, it could face significant civil fines.<sup>10</sup>

9. Following further complaints that HobbyKing continued to market noncompliant radio frequency devices, the Division initiated a second investigation in 2017. HobbyKing did not respond in full to the Letter of Inquiry (LOI), providing information only on the four AV transmitters specifically identified in the LOI. The Company was silent, however, concerning the Division's questions about the other AV transmitters listed on HobbyKing's website, arguing instead that it was not marketing AV transmitters in the United States.<sup>11</sup> The Division issued another citation against HobbyKing (*Letter of Inquiry Citation*), this one for its refusal to fully respond to requests for information in the second investigation.<sup>12</sup>

10. On June 5, 2018, the Commission issued the *NAL*, proposing a \$2,861,128 forfeiture penalty against HobbyKing for its apparent willful and repeated violations of section 302 of the Act,<sup>13</sup> section 2.803 of the Commission's rules,<sup>14</sup> and two Commission orders<sup>15</sup> by marketing noncompliant radio frequency devices and by refusing to provide full responses to Commission inquiries in the investigation.<sup>16</sup> Despite HobbyKing's failure to respond fully to the LOI, the second investigation revealed that the Company apparently had continued to market many noncompliant AV transmitters after the Division issued the *Marketing Citation*.<sup>17</sup> Specifically, HobbyKing apparently continued to market 65

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<sup>9</sup> See *HobbyKing USA LLC*, Citation and Order, 31 FCC Rcd 12581 (EB 2016); see also *NAL*, 33 FCC Rcd at 5531, para. 4. The Act generally requires that the Commission first issue non-monetary citations to entities that have violated a statutory provision or rule but do not hold FCC licenses or authorizations. Only after the entity has received this form of a warning and yet persists in the conduct may the Commission pursue a monetary penalty. See 47 U.S.C. § 503(b)(5).

<sup>10</sup> See *Marketing Citation*, 31 FCC Rcd at 12581, para. 1 ("This CITATION AND ORDER (Citation) notifies HobbyKing USA LLC (HobbyKing) that it marketed radio frequency (RF) devices in the United States in violation of the Commission's equipment authorization and labeling requirements."); *id.* at 12581, para. 2 ("If HobbyKing subsequently engages in any conduct of the type this Citation describes — and specifically any violation of Section 302(b) of the Act and Sections 2.803 and 2.925 of the Rules — it may be subject to civil penalties, including but not limited to, substantial monetary forfeitures and/or seizures of equipment.").

<sup>11</sup> *NAL*, 33 FCC Rcd at 5532, para. 5 & n.13-14.

<sup>12</sup> See *ABC Fulfillment Services LLC d/b/a HobbyKing USA LLC and HobbyKing.com; and Indubitably, Inc. d/b/a HobbyKing Corp., HobbyKing USA LLC, HobbyKing, and HobbyKing.com*, Citation and Order, 32 FCC Rcd 7300 (EB 2017); *NAL*, 33 FCC Rcd at 5531-33, paras. 4-6.

<sup>13</sup> 47 U.S.C. § 302a.

<sup>14</sup> 47 CFR § 2.803.

<sup>15</sup> See generally *Marketing Citation; Letter of Inquiry Citation*. Section 4(i) authorizes the Commission to "issue such orders, not inconsistent with this Act as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 4(j) states that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). Section 403 grants the Commission both the authority to institute inquiries and "the power to make and enforce any order or orders" relating to its inquiries into compliance with the Act. 47 U.S.C. § 403. Section 0.111(a)(17) of the Commission's rules delegates this authority to the Bureau. 47 CFR § 0.111(a)(17) (granting the Enforcement Bureau the authority to "[i]dentify and analyze complaint information, conduct investigations, conduct external audits and collect information, including pursuant to sections 218, 220, 308(b), 403 and 409(e) through (k) of the Communications Act, in connection with complaints, on its own initiative or upon request of another Bureau or Office.").

<sup>16</sup> *NAL*, 33 FCC Rcd at 5537-38, para. 15 & n.54-55.

<sup>17</sup> *Id.* at 5532, para. 6.

uncertified AV transmitter models on its website.<sup>18</sup> Twelve of those models operated in restricted frequency bands that are reserved for federal uses and threatened to interfere with critical Federal Aviation Administration (FAA) systems and other important federal operations.<sup>19</sup> Three models operated at power levels exceeding Commission limits and could interfere with FAA terminal doppler weather radar.<sup>20</sup> We upwardly adjusted the proposed base forfeiture amount for the marketing violations because HobbyKing apparently had: (a) long marketed noncompliant devices; (b) intentionally marketed devices which could not be certified because of their operating frequencies; and (c) for some of the devices, advertised and sold equipment that presented an egregious threat to public safety.<sup>21</sup> In addition, we upwardly adjusted the proposed forfeiture amount for HobbyKing's apparent violations that related to its failure to fully respond to the LOI based on HobbyKing's egregious behavior in refusing to cooperate in the investigation after being given numerous opportunities to cure its failure to respond.<sup>22</sup> In sum, HobbyKing's apparent violations and accompanying conduct justified a significant proposed forfeiture in the *NAL*.

11. On July 5, 2018, HobbyKing filed a response to the *NAL*, making a number of arguments as to why the *NAL* should be canceled or the forfeiture amount reduced.<sup>23</sup> *First*, HobbyKing claims that the Commission does not have marketing rules that specifically address so-called "versatile" drone equipment that can operate on both amateur and non-amateur frequencies.<sup>24</sup> *Second*, the Company claims that it had no notice that marketing AV transmitters that could operate on unauthorized frequencies was unlawful.<sup>25</sup> *Third*, HobbyKing claims that the requirement to fully respond to the LOI violated the Company's Fifth Amendment right against self-incrimination.<sup>26</sup> *Fourth*, HobbyKing asserts that the forfeiture amount should be reduced based on various downward adjustment factors, including inability to pay.<sup>27</sup> In response to the directive in the *NAL* to cease marketing noncompliant devices, HobbyKing claims that it no longer sells the 65 models identified in the *NAL*. The Company also stated that it will use "best efforts" to avoid marketing other noncompliant devices that the Bureau identified in an enforcement advisory issued the same day as the *NAL*.<sup>28</sup>

### III. DISCUSSION

12. In this Forfeiture Order, we find that HobbyKing violated the Act and the Commission's rules by marketing 65 models of noncompliant radio frequency accessories on its website and by failing to respond to Commission orders issued during the investigation. The Commission proposed a forfeiture

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<sup>18</sup> *Id.*; *see also id.* at 5541-42, para. 23.

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.* at 5540-42, paras. 22-24.

<sup>22</sup> *Id.* at 5542, para. 25.

<sup>23</sup> ABC Fulfillment Services LLC and Indubitably, Inc., Response to Notice of Apparent Liability (July 5, 2018) (on file in EB-SED-17-00023762) (NAL Response).

<sup>24</sup> NAL Response at 6-7.

<sup>25</sup> *See id.* at 9.

<sup>26</sup> *See id.* at 13.

<sup>27</sup> *See id.* at 18.

<sup>28</sup> *Id.* at 23; *see also Drone Audio/Video Transmitter Accessories Must Comply with the Commission's Rules to be Marketed to U.S. Customers*, Enforcement Advisory, 33 FCC Rcd 5321 (EB 2018) (*AV Transmitter Enforcement Advisory*).

in this case in accordance with section 503(b) of the Act,<sup>29</sup> section 1.80 of the Commission's rules,<sup>30</sup> and the Commission's *Forfeiture Policy Statement*.<sup>31</sup> When we assess forfeitures, section 503(b)(2)(E) requires that we take into account the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>32</sup> We have fully considered HobbyKing's response to the *NAL*, which does not contest any facts and includes only a variety of legal arguments, none of which we find persuasive. We therefore adopt the \$2,861,128 forfeiture penalty proposed in the *NAL*.

#### A. HobbyKing Marketed Unauthorized Equipment

13. AV transmitters, such as the 65 models of AV transmitters marketed by HobbyKing, are radio frequency devices subject to the Commission's equipment marketing rules. These AV transmitters are radio frequency devices because they are "capable of emitting radiofrequency energy by radiation, conduction, or other means."<sup>33</sup> More specifically, the AV transmitters are intentional radiators because they "intentionally generate[] and emit[] radio frequency energy by radiation or induction."<sup>34</sup> Intentional radiators must be certified before they can be marketed to U.S. consumers.<sup>35</sup> HobbyKing marketed each of the 65 equipment models at issue to United States consumers.<sup>36</sup> No certification exists for the 65 AV transmitter models at issue and HobbyKing does not argue otherwise.<sup>37</sup>

14. The Commission has consistently stated that devices that do not operate solely on amateur frequencies require authorization. Sixteen years ago, in *Pilot Travel*, the Commission fined a marketer that offered for sale non-certified transmitters because, although the transmitters operated in the amateur band, they were "equipped with rotary, toggle, or pushbutton switches mounted externally on the unit, which allow[ed] operation in the [Citizens Band] bands after completion of minor and trivial internal modifications to the equipment."<sup>38</sup> Because the transmitters could easily operate off the amateur bands, the transmitters required certification under the Commission's general marketing and CB rules.<sup>39</sup> Even before that time, the Commission publicly explained that "[d]evices used in the Amateur Radio Service do not require authorization prior to being imported into the United States, *but devices for other services*,

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<sup>29</sup> 47 U.S.C. § 503(b).

<sup>30</sup> 47 CFR § 1.80.

<sup>31</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

<sup>32</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>33</sup> 47 CFR § 2.801.

<sup>34</sup> *Id.* § 15.3(o).

<sup>35</sup> *Id.* § 15.201.

<sup>36</sup> *See NAL*, 33 FCC Rcd at 5536, para. 12. Notably, HobbyKing did not claim in its *NAL* Response, as it previously had, that it was not marketing AV transmitters in the United States.

<sup>37</sup> To the extent that the manufacturer, not HobbyKing, may be the party responsible for obtaining the equipment certification, the Commission provided notice to HobbyKing of its responsibilities to comply with the equipment marketing laws when the Bureau issued the *Marketing Citation* to HobbyKing. We address HobbyKing's lack of notice arguments below. *See* Section III.B.

<sup>38</sup> *Pilot Travel Centers, LLC*, Notice of Apparent Liability, 19 FCC Rcd 23113, 23114, paras. 3-4 (2004) (*Pilot Travel NAL*), Order and Consent Decree, 21 FCC Rcd 5308 (2006); *see also NAL*, 33 FCC Rcd at 5534-35, paras. 8-9 (collecting cases that state devices operating both on and off amateur frequencies require authorization).

<sup>39</sup> *Pilot Travel NAL*, 19 FCC Rcd at 23116, para. 11.

*including the CB service, require Commission approval.*<sup>40</sup> These Commission actions provided long-standing notice to entities like HobbyKing that, if a radio frequency device operates both on and off amateur frequencies, the device requires Commission approval.<sup>41</sup> Thus, pursuant to the Act, the Commission's rules, and FCC precedent, the AV transmitters models at issue required certification. Yet they had none, making them noncompliant. Accordingly, HobbyKing could not market them in the United States.

15. HobbyKing mistakenly claims the Commission needed to adopt equipment marketing rules that specifically address equipment designed to operate as drone accessories, both within the amateur radio service bands and outside of them (which the Company dubs "versatile" equipment) in order to take enforcement action against HobbyKing.<sup>42</sup> Contrary to HobbyKing's assertion, the requirement that AV transmitters obtain equipment authorization applies to *all* intentional radiators. The Commission's rules explicitly state that, "[u]nless specifically exempted, the . . . marketing of an intentional or unintentional radiator that is not in compliance with the administrative and technical provisions in this part, including prior equipment authorization . . . is prohibited under section 302 of the Communications Act of 1934, as amended, and subpart I of part 2 of this chapter."<sup>43</sup> Moreover, although devices that operate purely in amateur radio service bands are exempt from the authorization requirement,<sup>44</sup> it is well established that no similar exemption extends to devices that can operate on both amateur and non-amateur frequencies, whether described as "versatile" or not. Taken to its logical extreme, HobbyKing's argument would allow any intentional radiator to avoid the authorization steps by simply including the capability to operate on amateur frequencies. That result would render meaningless the Commission's regulations.

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<sup>40</sup> Letter from Christopher Wright, General Counsel, FCC to John Atwood, Chief, Intellectual Property Rights, U.S. Customs Service, 14 FCC Rcd 7797 (OGC 1999) (emphasis added).

<sup>41</sup> NAL Response at 11. The 1999 letter is focused on CB radios, but also states generally applicable principles regarding radio frequency devices that require Commission approval.

<sup>42</sup> NAL Response at 6-7.

<sup>43</sup> 47 CFR § 15.1(c). Section 2.803 of the Commission's rules is in subpart I of part 2 of chapter I of Title 47 of the Code of Federal Regulations. *See also* 47 CFR § 2.901(a) ("The technical standards applicable to individual types of equipment are found in that part of the rules governing the service wherein the equipment is to be operated. In addition to the technical standards provided, the rules governing the service may require that such equipment . . . receive a grant of certification from a Telecommunication Certification Body.").

HobbyKing also argues that a rulemaking on small drone operation by the Federal Aviation Administration (FAA) shows that the Commission should similarly initiate a rulemaking on drone equipment authorization, and by implication, the failure of the Commission to do so means that drone equipment is unregulated. NAL Response at 6. Congress directed the Secretary of Transportation to initiate a rulemaking on small drone operation in the FAA Modernization and Reform Act of 2012. Pub. L. 112-95, § 332(b), 126 Stat. 11, 74 (codified at 49 U.S.C. § 40101 note). In contrast, Congress has not directed the Commission to initiate a rulemaking on the authorization of drone equipment. Such argument also ignores the Commission's long-standing existing general rules on radio frequency equipment authorization that already cover devices intentionally emitting radio frequency energy like the AV transmitters.

<sup>44</sup> *See* 47 CFR § 97.301(a) (listing amateur frequency bands). *WTB, PSHSB, & OET Provide Reminder of Jan. 1, 2013 Deadline for Transition to Narrowband Operations in the 150-174 Mhz & 421-470 Mhz Bands*, Public Notice, 27 FCC Rcd 14896, 14900 n.18 (2012) ("Equipment approval generally is not required for Part 97 equipment."); *Facilitating Opportunities for Flexible, Efficient, and Reliable Spectrum Use Employing Cognitive Radio Technologies*, Memorandum Opinion and Order, 22 FCC Rcd 8053, 8058 para. 16 (2007) (amateur equipment is exempt from certification); *Pilot Travel NAL*, 19 FCC Rcd at 23114, paras. 3-4 ("[R]adio transmitting equipment that transmits *solely* on Amateur Radio Service ('ARS') frequencies is not subject to equipment authorization requirements prior to manufacture or marketing.") (emphasis added).

16. In its NAL Response, HobbyKing claims that it has ceased marketing the 65 models identified in the *NAL*, but promises only to make “best efforts” not to market other noncompliant radio frequency devices identified in the *AV Transmitter Enforcement Advisory*.<sup>45</sup> Despite the Company’s claims to the contrary, the Commission is not required to identify for HobbyKing each individual model that requires authorization. Rather, HobbyKing has a continuing obligation to market only radio frequency equipment that is properly authorized. We therefore remind HobbyKing that continuing to market noncompliant radio frequency devices could result in further significant forfeitures.

**B. HobbyKing Had Notice of the Authorization Requirements**

17. We reject HobbyKing’s assertion that it lacked fair notice of its legal obligations.<sup>46</sup> Generally, regulatory requirements must be reasonably ascertainable before they can be enforced.<sup>47</sup> In this instance, HobbyKing had ample notice that the Commission’s long-standing equipment authorization regulations apply to a radio frequency device that intentionally emits radio frequency energy and can operate on both amateur and non-amateur frequencies. These requirements have been clear and consistent for decades, and the Bureau twice put HobbyKing on notice by serving citations warning about the very same requirements.

18. The plain language of section 302 of the Act and the implementing sections of the Commission’s rules provide sufficient notice that radio frequency devices are subject to regulation by the Commission, including authorization requirements.<sup>48</sup> Section 302 of the Act states that the Commission may issue rules on radio frequency devices and that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.”<sup>49</sup> In turn, the Commission has promulgated a number of rules in part 2 and part 15 in Title 47 of the Code of Federal Regulations regulating radio frequency devices, including a prohibition on marketing radio frequency devices unless they comply with the specific administrative requirements.<sup>50</sup>

19. Commission precedent on equipment authorization requirements for devices that operate on both amateur and other frequencies dates as far back as 1999, and has not changed in any material way since then.<sup>51</sup> HobbyKing argues that the *NAL* did not provide sufficient notice of any such regulation,

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<sup>45</sup> NAL Response at 23-24, Attach. A, para. 2; *see also AV Transmitter Enforcement Advisory*.

<sup>46</sup> *See* NAL Response at 9 (claiming the forfeiture should be canceled because the Company did not have fair notice that it was prohibited from marketing noncompliant AV transmitters).

<sup>47</sup> *See FCC v. Fox Tel. Stations, Inc.*, 567 U.S. 239, 253 (2012) (identifying two due process concerns: “first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way”) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)); *see also Keeffe v. Library of Congress*, 777 F.2d 1573, 1581 (D.C. Cir. 1985); *United States v. Lachman*, 387 F.3d 42, 58 (1st Cir. 2004) (“These [‘ascertainable certainty’] cases, however, do not stand for the proposition that any ambiguity in a regulation bars punishment.”); *see also Suburban Air Freight, Inc. v. Transp. Sec. Admin.*, 716 F.3d 679, 684 (D.C. Cir. 2013) (fair warning cases are a “very limited set of cases”).

<sup>48</sup> *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (“If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.”); *see, e.g., Keeffe v. Library of Cong.*, 777 F.2d 1573, 1581 (D.C. Cir. 1985).

<sup>49</sup> 47 U.S.C. §§ 302a(a)-(b).

<sup>50</sup> 47 CFR §§ 2.803, 15.201.

<sup>51</sup> *See supra* para. 14 (describing a 1999 Commission letter that stated that a device that could operate both on and off amateur frequencies required certification).

because section 2.803 of the Commission’s rules “says nothing” about authorization for devices that operate on both amateur and other frequencies.<sup>52</sup> This argument is misplaced. The Commission’s rules are clear that any intentional radiator is subject to equipment-authorization requirements unless an exception applies. The Commission has excepted only devices that operate *solely* on amateur frequencies. Moreover, the Commission has given manufacturers and marketers no reason to believe that a device that is capable of operating on non-amateur frequencies would be exempt. Rather, our rules state that radio frequency devices that operate in multiple bands must meet the rules for each band.<sup>53</sup> And our precedent is consistent: the Bureau has investigated and taken action against companies for marketing similar equipment that can operate both on and off amateur frequency bands.<sup>54</sup>

20. In addition, the *Marketing Citation* issued to HobbyKing in 2016 put HobbyKing on notice that it must seek authorization for the AV transmitters and stop marketing those that had no authorization.<sup>55</sup> A citation is intended to put an entity that “does not hold a license, permit, certificate, or other authorization issued by the Commission” on notice that its actions have violated the Act or the Commission’s rules.<sup>56</sup> The *Marketing Citation* found that two models of AV transmitters marketed by HobbyKing required certification and labeling, and it warned HobbyKing that the Commission might impose future sanctions on the Company if it continued its practices.<sup>57</sup> Yet HobbyKing continued to market one of the AV transmitters, and so that model was included in the *NAL*.<sup>58</sup> More broadly, as stated in the *Marketing Citation*, “HobbyKing is hereby on notice that it must comply with Section 302(b) of the Act and Sections 2.803 and 2.925 of the Commission’s rules (Rules).”<sup>59</sup> The *Marketing Citation* further warned that “[i]f HobbyKing subsequently engages in any conduct of the type this Citation describes—and specifically any violation of Section 302(b) of the Act and Sections 2.803 and 2.925 of the Rules—it may be subject to civil penalties, including but not limited to, substantial monetary forfeitures and/or seizures of equipment.”<sup>60</sup> Despite this clear notice, HobbyKing continued to market noncompliant radio

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<sup>52</sup> NAL Response at 10.

<sup>53</sup> See 47 CFR § 2.947(f); see also OET Knowledge Database Publication Number 149672, *Transmitter Devices Certified Under Multiple Rule Parts* (Dec. 8, 2017), <https://apps.fcc.gov/oetcf/kdb/forms/FTSSearchResultPage.cfm?switch=P&id=20643>.

<sup>54</sup> See *Iftron Techs., Inc.*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 8802, 8804, para. 5 (EB 2009) (*Iftron*) (paid); *New Generation Hobbies*, Citation, 26 FCC Rcd 9468, 9471 n.23 (EB 2011) (*New Generation Hobbies*); *Pilot Travel NAL*, 19 FCC Rcd at 23114, para. 2.

<sup>55</sup> See *Marketing Citation*. HobbyKing claims the Marketing Citation has the same notice issues as the *NAL* because it did not identify a regulation. NAL Response at 13. We reject that argument again because section 302 of the Act and the related Commission rules provide appropriate notice. Moreover, HobbyKing did not raise that issue at the time in its response to the Marketing Citation.

<sup>56</sup> 47 U.S.C. § 503(b)(5); see also *Pilot Travel NAL*, 19 FCC Rcd at 23117, para. 17 (“These Citations put Pilot on actual notice that marketing of this equipment is unlawful, yet Pilot intentionally continued to market the unlawful equipment.”).

<sup>57</sup> *Marketing Citation*, 31 FCC Rcd at 12582-83, paras. 6, 15.

<sup>58</sup> HobbyKing continued to market the AV transmitter listed as the OrangeRX DSMX DSM2 Compatible 2.4Ghz Transmitter Module V1.2 (JR/Turnigy/Taranis compatible). See *Marketing Citation*, 31 FCC Rcd at 12581, para. 2; *NAL*, Appendix A.

<sup>59</sup> *Marketing Citation*, 31 FCC Rcd at 12581, para. 2 (citing 47 U.S.C. § 302a(b); 47 CFR §§ 2.803, 2.925).

<sup>60</sup> *Id.*

frequency devices, including one of the AV transmitters that was identified as noncompliant in the *Marketing Citation*, and is now subject to sanction.<sup>61</sup>

21. Contrary to HobbyKing's assertion, the Commission is not required to elaborate on every type of radio frequency device that, without the appropriate authorization, could violate section 302 of the Act or the Commission's rules before enforcing the statute and the rules.<sup>62</sup> As the D.C. Circuit has said, "[t]he fair notice doctrine, which is couched in terms of due process, provides redress only if an agency's interpretation is 'so far from a reasonable person's understanding of the regulations that they could not have fairly informed the regulated party of the agency's perspective.'"<sup>63</sup> Here, the many years of Commission regulation of radio frequency devices generally, including intentional radiators like the AV transmitters, and specific enforcement actions involving similar devices, fairly informed HobbyKing that it must seek certification before marketing the AV transmitters in the United States.<sup>64</sup>

22. We further disagree with HobbyKing's claim that bureau-level enforcement actions cannot provide notice.<sup>65</sup> Putting aside that the plain language of the Commission's rules provided adequate notice, courts have found fair notice in a variety of agency documents regardless of the level of authority within the agency, as where an agency takes a consistent position regarding an issue in documents like guidance memoranda, a "question-and-answer booklet," and opinion letters.<sup>66</sup> Here, the

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<sup>61</sup> 47 U.S.C. § 503(b)(5) ("Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.").

<sup>62</sup> HobbyKing argues that section 302 of the Act requires a regulation to provide notice to a company about whether a particular device is compliant or noncompliant, NAL Response at 10. As noted above, the Commission's rules expressly apply to *all* devices that constitute intentional radiators, except where expressly excepted. HobbyKing's argument is tantamount to a claim that agencies have no authority to issue rules of "general . . . applicability," which is flatly at odds with the Administrative Procedure Act. *See* 5 U.S.C. §§ 551(4), 553. In any event, however, absolute specificity is not a prerequisite for enforcing a statute or regulation. *See, e.g., Lachman*, 387 F.3d at 56-57 (stating the "mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague," and that case law "do[es] not stand for the proposition that any ambiguity in a regulation bars punishment").

<sup>63</sup> *Mississippi Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138, 186 (D.C. Cir. 2015) (quoting *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998)); *see also United States v. Thomas*, 864 F.2d 188, 195 (D.C. Cir. 1988) ("statutes cannot, in reason, define proscribed behavior exhaustively or with consummate precision").

<sup>64</sup> *NAL*, 33 FCC Rcd at 5534-35, paras. 8-9 (collecting cases that state devices operating both on and off amateur frequencies require authorization). HobbyKing claims that bureau-level cases cannot provide notice. To the contrary, courts have found fair notice where an agency is publicly consistent regarding the disputed interpretation in documents like guidance memorandum, a "question-and-answer booklet," and opinion letters. *See e.g., Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1183 (D.C. Cir. 2014) (plain language of regulation and guidance in the form of a Memorandum to Regional Administrators from Thomas Galassi, Director, Directorate of Enforcement Programs, OSHA provided sufficient notice); *Sekula v. FDIC*, 39 F.3d 448, 455-57 (3d Cir. 1994) (fact that interpretation of ambiguous regulation was disseminated to public in "question-and-answer booklet" was "particularly significant" in finding adequate notice); *Sec'y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 202 (3d Cir. 2008) (opinion letter issued by OSHA's Director of Compliance Programs was sufficient to satisfy fair notice); *Gen. Elec.*, 53 F.3d at 1329 (stating that notice can come from "regulations and other public statements issued by the agency") (emphasis added). Here, the Commission has been consistent that radio frequency devices that operate on both amateur and other frequencies require an authorization, and HobbyKing was on notice. *See NAL*, 33 FCC Rcd at 5534-35, paras. 8-9 (collecting cases that state devices operating both on and off amateur frequencies require authorization).

<sup>65</sup> NAL Response at 12.

<sup>66</sup> *See e.g., Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1183 (D.C. Cir. 2014) (plain language of regulation and guidance in the form of a Memorandum to Regional Administrators from Thomas Galassi, Director, Directorate of Enforcement Programs, OSHA provided sufficient notice); *Sekula v. FDIC*, 39 F.3d 448, 455-57 (3d Cir. 1994) (fact that interpretation of ambiguous regulation was disseminated to public in "question-and-answer booklet" was "particularly significant" in finding adequate notice); *Sec'y of Labor v.*

Bureau-level enforcement actions have been consistent with the Commission's rules, all of which provided fair notice to HobbyKing.

23. Finally, we note that the principal case cited by HobbyKing regarding fair notice, *Fox Television*, is inapposite. In that case, the court concluded that the Commission had provided conflicting or changing interpretations of the statute and regulation at issue.<sup>67</sup> Not so here.

### C. The Fifth Amendment Did Not Relieve HobbyKing of its Duty to Respond to the LOI

24. We reject HobbyKing's assertion that requiring it to respond fully to the Letter of Inquiry violated its constitutional right against self-incrimination.<sup>68</sup> The Commission's authority to conduct investigations and to compel entities to provide information and documents sought during investigations is well-settled.<sup>69</sup> The Commission has delegated to the Bureau authority to "conduct investigations . . . on its own initiative" of potential violations of the Act or the Commission's rules.<sup>70</sup> HobbyKing refused to provide a full response to the LOI. Although HobbyKing supplied information on the four AV transmitters specifically identified in the LOI, it provided nothing regarding any of the other AV transmitters listed on HobbyKing's website, despite being directed to do so in the LOI.<sup>71</sup>

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*Beverly Healthcare–Hillview*, 541 F.3d 193, 202 (3d Cir. 2008) (opinion letter issued by OSHA's Director of Compliance Programs was sufficient to satisfy fair notice); *Gen. Elec.*, 53 F.3d at 1329 (stating that notice can come from "regulations and other public statements issued by the agency").

<sup>67</sup> *Fox Tel.*, 567 U.S. at 254 (FCC "changed course and held that fleeting expletives could be a statutory violation"); see also *Gen. Elec.*, 53 F.3d at 1332 (different divisions of the EPA disagreed about the meaning of the regulation at issue); see also *Lachman*, 387 F.3d at 58 ("ascertainable certainty" line of cases applicable where "the agency had given conflicting public interpretations of the regulation"); see also *Suburban Air Freight, Inc. v. Transp. Sec. Admin.*, 716 F.3d 679, 684 (D.C. Cir. 2013) (rejecting "fair notice" argument against penalty, where "Suburban makes no argument that TSA previously interpreted those provisions differently, let alone that the company relied on any such interpretation."); *Otis Elevator Co. v. Sec'y of Labor*, 762 F.3d 116, 125 (D.C. Cir. 2014) (rejecting "fair notice" argument where "Otis Elevator has not identified any pattern of contrary practice by the Secretary or contrary interpretations by the Commission.").

<sup>68</sup> HobbyKing claims the assessment of a forfeiture for its failure to fully respond to the Letter of Inquiry contravenes the Fifth Amendment's protection against self-incrimination. NAL Response at 13-14. HobbyKing argues that the threat of imprisonment in the Letter of Inquiry and the *Letter of Inquiry Citation* means that the monetary penalty assessed in the NAL for HobbyKing's failure to fully respond to the Letter of Inquiry should be canceled. *Id.* at 15, 18.

<sup>69</sup> Section 4(i) authorizes the Commission to "issue such orders, not inconsistent with this Act as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 4(j) states that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). Section 403 grants the Commission both the authority to institute inquiries and "the power to make and enforce any order or orders" relating to its inquiries into compliance with the Act. 47 U.S.C. § 403. Section 0.111(a)(17) of the Commission's rules delegates this authority to the Bureau. 47 CFR § 0.111(a)(17) (granting the Enforcement Bureau the authority to "[i]dentify and analyze complaint information, conduct investigations, conduct external audits and collect information, including pursuant to sections 218, 220, 308(b), 403 and 409(e) through (k) of the Communications Act, in connection with complaints, on its own initiative or upon request of another Bureau or Office.").

<sup>70</sup> 47 CFR § 0.111(a)(17); see 47 U.S.C. § 155(c)(3) ("Any order . . . or action made or taken pursuant to any [ ] delegation . . . shall have the same force and effect . . . and [be] enforced in the same manner, as orders . . . of the Commission.").

<sup>71</sup> NAL, 33 FCC Rcd at 5532, para. 5 & n.13-14.

25. The Fifth Amendment of the Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>72</sup> It is well established that corporations and other collective entities are not protected by the Fifth Amendment privilege against self-incrimination.<sup>73</sup> HobbyKing admits that “Fifth Amendment rights are held by individuals, not corporations.”<sup>74</sup>

26. No HobbyKing principal has ever asserted a Fifth Amendment right against self-incrimination in this investigation at any time. Even if they had, an individual in possession of the records of a collective entity cannot assert a Fifth Amendment privilege against producing them, even if production might tend to incriminate the individual personally.<sup>75</sup>

#### **D. The Proposed Forfeiture Amount Is Appropriate**

27. After considering the relevant statutory factors and the Commission’s *Forfeiture Policy Statement*, we find that HobbyKing is liable for a total forfeiture of \$2,861,128. As explained in the *NAL*, this total results from applying a \$7,000 base forfeiture for the 65 models of noncompliant equipment marketed by HobbyKing. For 50 of these models, we upwardly adjusted that base forfeiture for the marketing violations because HobbyKing apparently had long marketed noncompliant devices and intentionally marketed devices that could not be certified because of their operating frequencies. For fifteen of the models, we further upwardly adjusted the forfeiture to the statutory maximum because those models presented an egregious threat to public safety.<sup>76</sup> The base forfeiture for HobbyKing’s apparent violations related to its failure to fully respond to the Letter of Inquiry and the *LOI Citations* is \$4,000 for each violation, and we upwardly adjusted the base forfeiture to the statutory maximum based on HobbyKing’s egregious behavior in refusing to cooperate in the investigation after being given numerous opportunities to cure its failure to respond.<sup>77</sup>

28. We reject HobbyKing’s arguments that the proposed forfeiture should be reduced due to its alleged inability to pay, its alleged history of compliance with the Commission’s rules, or because the proposed fine treats HobbyKing differently from similarly situated entities.<sup>78</sup> None of these arguments has merit. We therefore find no basis to reduce or cancel the forfeiture.

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<sup>72</sup> U.S. CONST. amend. V.

<sup>73</sup> *Braswell v. United States*, 487 U.S. 99, 104-10 (1988); see also *LPFM Mx Group 37*, Memorandum Opinion and Order, 31 FCC Rcd 7512, 7516, para. 11 & n.33 (2016) (“As a corporation, SFI generally cannot assert a Fifth Amendment right against self-incrimination.”) (citing *Hale v. Henkel*, 201 U.S. 43 (1906)); see also *United States v. White*, 322 U.S. 694, 699 (1944) (“Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.”).

<sup>74</sup> *NAL* Response at 15, n.26.

<sup>75</sup> *Braswell*, 487 U.S. at 106-07 (discussing *Wilson v. United States*, 221 U.S. 361 (1911), and *Dreier v. United States*, 221 U.S. 394 (1911)).

<sup>76</sup> *NAL*, 33 FCC Rcd at 5540-42, paras. 22-24. At the time of the *NAL*, the statutory maximum was \$19,639 for each violation or each day of a continuing violation and \$147,290 for any single act or failure to act. See 47 U.S.C. § 503(b)(2)(D); 47 CFR § 1.80(b)(7), (b)(9); *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 33 FCC Rcd 46 (EB 2018); see also *Adjustment of Civil Monetary Penalties to Reflect Inflation*, 83 Fed. Reg. 4600 (Feb. 1, 2018). The resulting calculation is 50 models x \$12,250 (\$7,000 base + \$5,250 upward adjustment) = \$612,500; and 15 models x \$147,290 (statutory maximum) = \$2,209,350; for a total forfeiture for the equipment marketing violations of \$2,821,850.

<sup>77</sup> *NAL*, 33 FCC Rcd at 5542, para. 25. The resulting calculation for the two failure to respond violations at \$19,639 each results in a total forfeiture of \$39,278. Thus, the overall forfeiture is \$2,861,128 (\$2,821,850 for equipment marketing violations + \$39,278 for failure to respond violations).

<sup>78</sup> *NAL* Response at 18-23.

## 1. Inability to Pay

29. HobbyKing has failed to meet the burden of showing an inability to pay the proposed forfeiture.<sup>79</sup> Even if it had, we would decline to reduce the forfeiture due to the egregious, intentional, and repeated and continuous nature of the violations.

30. *First*, HobbyKing did not provide complete financial information to support its inability to pay claim. The *NAL* stated that the Commission would not consider reducing the forfeiture in response to a claim of inability to pay unless HobbyKing submitted supporting financial information, including “(1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status.”<sup>80</sup> The *NAL* found two related companies doing business as HobbyKing, ABC Fulfillment Services LLC and Indubitably, Inc., apparently liable for the violations, yet HobbyKing provided three years of tax returns for only one, Indubitably, Inc.<sup>81</sup> HobbyKing did not provide tax returns, financial statements, or, indeed, any financial information, for ABC Fulfillment Services LLC, and we therefore have no basis to reduce its forfeiture amount. We find that HobbyKing’s claim that ABC Fulfillment Services LLC was involved in fulfillment services only until the end of 2015 too vague to rule the company out as a source of payment.<sup>82</sup> Even if true, that would not absolve that company from failing to provide financial information for at least 2015, the first year of the relevant three-year period.<sup>83</sup> In addition, HobbyKing’s financial information is incomplete because it did not provide any financial information involving its related Hong Kong company, Hextronik LTD, without which we are unable to judge HobbyKing’s ability to pay.<sup>84</sup> In sum, although HobbyKing provided tax returns for one affiliated company in support of its inability to pay request, it failed to

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<sup>79</sup> *Id.* at 18.

<sup>80</sup> *See NAL*, 33 FCC Rcd at 5544, para. 34.

<sup>81</sup> *NAL* Response at 18. HobbyKing also relied upon Indubitably, Inc.’s taxable income to support its inability to pay request instead of gross revenue, which the Commission has determined, as a general matter, is the appropriate metric for analyzing inability to pay. *See Net One Int’l, Inc.*, Forfeiture Order, 31 FCC Rcd 2367, 2380, para. 38 (2016) (“With regard to an individual’s or entity’s inability to pay claim, the Commission has determined that, in general, gross income or revenues are the best indicator of an ability to pay a forfeiture.”) (footnote omitted).

<sup>82</sup> Letter and attachments from Rebecca Larson, Esq., Davies Pearson, P.C., Attorney for HobbyKing, to Jason Koslofsky, Attorney Advisor, Spectrum Enforcement Division, FCC Enforcement Bureau at 1 (May 24, 2017) (LOI Response) (on file in EB-SED-17-000223762).

<sup>83</sup> *See NAL*, 33 FCC Rcd at 5544, para. 34. Upon the release of the *NAL* in 2018, three years of tax returns would have covered 2015, 2016, and 2017. Thus, HobbyKing should have provided ABC Fulfillment Services LLC’s 2015 tax return to provide a complete picture of HobbyKing’s financial status. Further, it appears that ABC Fulfillment Services LLC was active until 2017. According to filings in the Washington corporate records database, ABC Fulfillment Services LLC was only administratively dissolved in 2018 after failing to file an annual report in 2018, but the company filed an annual report, signed by Anthony J. Hand, as recently as 2017. *See* Washington Corporations and Charities Filing System, <https://ccfs.sos.wa.gov/#/> (last visited July 9, 2019) (searching Business Name: ABC FULFILLMENT SERVICES LLC or UBI Number: 603 026 042). Anthony J. Hand is associated with Indubitably, Inc., ABC Fulfillment Services LLC, and Hextronik LTD. LOI Response at 1. Thus, tax returns for ABC Fulfillment Services LLC through 2017 would have been necessary to fully support an inability to pay claim. To the extent HobbyKing has other affiliated companies, subsidiaries, or parents not addressed in the *NAL*, complete financial information related to those companies should have been included as well.

<sup>84</sup> LOI Response at 1 (Hextronik LTD is part HobbyKing’s marketing setup); *A-O Broad. Corp.*, Forfeiture Order, 2003 WL 23018131, 31 Communications Reg. (P&F) 411, para. 24 (2003) (rejecting inability to pay claim where company did not provide information on lines of credit, liquid assets, or the assets and income of the company’s owner).

provide the complete financial information required by the *NAL* that would allow us to find an inability to pay.<sup>85</sup>

31. *Second*, even had HobbyKing provided sufficient documentation to support a claim of inability to pay, we would decline to reduce the forfeiture because of the nature of HobbyKing's violations. A claimed inability to pay a forfeiture amount is one of several factors the Commission must consider when determining an appropriate forfeiture under section 503 of the Act and our forfeiture guidelines. We must also consider "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, . . . and such other matters as justice may require."<sup>86</sup> As noted in the *NAL* and undisputed in HobbyKing's *NAL* Response, HobbyKing has a long history of marketing noncompliant radio frequency devices, some of which threaten public safety, even after receiving warnings from the Commission to stop its illegal behavior.<sup>87</sup> Given these actions by HobbyKing, a reduction for inability to pay would be inappropriate when compared to the other circumstances of the case.<sup>88</sup> Accordingly, we decline to downwardly adjust the monetary forfeiture, notwithstanding HobbyKing's claimed inability to pay. Rather, we find that factor to be greatly outweighed by the other balancing factors that militate in favor of a large forfeiture.

## 2. Other Downward Adjustment Factors

32. We reject HobbyKing's argument that the forfeiture should be reduced due to an alleged history of compliance with the Commission's rules and several other downward adjustment factors.<sup>89</sup> The

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<sup>85</sup> See *NAL*, 33 FCC Rcd at 5544, para. 34 (stating that documentation of inability to pay must be supported by "reliable and objective documentation that accurately reflects the petitioner's current financial status"). As noted by the Commission:

Although the Commission has looked at the prior three years of tax returns as one way to benchmark an ability to pay, we also recognize that income may represent only a small fraction of a wrongdoer's wealth. Thus, the tax returns in themselves may not fully address whether the wrongdoer is able to pay the proposed forfeiture. We note, too, that when the Department of Justice pursues collections on the Commission's behalf, it looks at a wide range of resources, beyond tax returns, in evaluating a person or entity's ability to pay a claim or judgment. If we limit our analysis to tax returns, the Commission would be ignoring relevant assets that the Department of Justice would consider in its ability to pay determination, potentially reducing the pool of assets that could factor into the determination.

*Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc.*, Forfeiture Order, 33 FCC Rcd 4663, 4678-79, para. 44 (2018) (*Abramovich Forfeiture Order*) (footnotes omitted).

<sup>86</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>87</sup> See *NAL*, 33 FCC Rcd at 5541, para. 23; *Fabrice Polynice, N. Miami, FL*, Forfeiture Order, 33 FCC Rcd 6852, para. 23 (2018) (declining an inability to pay request where the target's "illegal actions were egregious and deliberate" and could "interfere with licensed communications, including authorized broadcasts and public safety transmissions"); *Abramovich Forfeiture Order*, 33 FCC Rcd at 4679, para. 45 (ability to pay is one of several factors to be considered in determining the appropriate forfeiture and can be outweighed by other factors to result in a large forfeiture).

<sup>88</sup> See, e.g., *Purple Communications, Inc.*, Forfeiture Order, 30 FCC Rcd 14892, 14903-904, paras. 32-33 (2015) (acknowledging that "standing alone, Purple's financial documents might support a reduction" but finding after applying the balancing factors no reduction was warranted); *TV Max, Inc., et al.*, Forfeiture Order, 29 FCC Rcd 8648, 8661, para. 25 (2014) (noting that the Commission "has previously rejected inability to pay claims in cases of repeated or otherwise egregious violations"); *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840, 7844-45, para. 16 (EB 2011) (violator's repeated intentional and malicious violations outweighed evidence of inability to pay), *recon. dismissed*, Memorandum Opinion and Order, 28 FCC Rcd 1170 (EB 2013); *Whisler Fleurinor*, Forfeiture Order, 28 FCC Rcd 1087, 1090, para. 9 (EB 2013) (violator's demonstrated inability to pay outweighed by gravity of repeated violations).

<sup>89</sup> *NAL* Response at 19-20. In addition to the arguments addressed in this section, HobbyKing argues the "overall mix of factors" warrants a reduction in the forfeiture, citing back to earlier arguments about lack of notice and its

record—including the *Marketing Citation* in which the Bureau found earlier equipment marketing violations—shows HobbyKing has a long history of prior noncompliance.<sup>90</sup>

33. We also reject HobbyKing’s argument that the forfeiture should be reduced because any harm from noncompliant marketing is *de minimis* because the Company claims its sales were low.<sup>91</sup> The Commission is not required to calculate a forfeiture based on the revenue earned (or lack thereof) by the violations in question.<sup>92</sup> The Commission generally will not reduce a forfeiture based on the lack of sales in an equipment marketing case.<sup>93</sup>

34. HobbyKing’s claim that the equipment at issue has not caused actual interference (or complaints thereof) similarly does not warrant a downward adjustment.<sup>94</sup> The Commission long ago rejected any notion of “no harm, no foul,” where a violation did not lead to a documented case of interference.<sup>95</sup> The potential for harmful interference to critical Federal Aviation Administration systems and other federal operations by the products at issue here is, in fact, sufficiently egregious to cause us to upwardly adjust the forfeiture.<sup>96</sup>

35. We reject HobbyKing’s argument that, because the AV transmitters might have been used by amateur license holders that were responsible for their own FCC rule compliance, HobbyKing’s marketing violations were somehow less serious.<sup>97</sup> While amateur license holders must comply with the rules for operating in the Amateur Radio Service, HobbyKing, not the amateur operators that may have purchased the equipment, is responsible for complying with the equipment marketing rules.<sup>98</sup> Further, as

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purported Fifth Amendment rights. NAL Response at 19. We rejected those arguments above in Sections III.B. and III.C. and, thus, reject them as the basis of a downward adjustment here.

<sup>90</sup> The history of noncompliant marketing going back to 2016 documented in the *Marketing Citation* precludes a downward adjustment for a history of compliance. See *Indigo Wireless, Inc.*, Forfeiture Order, 29 FCC Rcd 7404, 7408, para. 8 (EB 2014) (“In light of the fact that Indigo Wireless failed to offer to consumers the requisite number of digital wireless hearing aid-compatible handset models for nine months of the reporting period, we do not believe that Indigo Wireless can be said to have a history of overall compliance with the Commission’s rules and, therefore, no reduction of the forfeiture based on this factor is warranted.”); *Lawmate Tech. Co., Ltd.*, Forfeiture Order, 27 FCC Rcd 15159, 15162, para. 8 (EB 2012) (“When evaluating a petitioner’s compliance history, we take into account both concurrent and prior violations, including violations occurring outside the statute of limitations as well as the duration of each such violation.”).

<sup>91</sup> NAL Response at 19.

<sup>92</sup> See *Liab. of Altavista Broad. Corp., Licensee of Station Wkde, Altavista, Va., for Forfeiture*, Memorandum Opinion and Order, 2 FCC 2d 445, 446, para. 8 (1966) (“that the licensee allegedly did not benefit from the violations is irrelevant to this proceeding”).

<sup>93</sup> See e.g., *Vitec Grp. Commc'ns Ltd. Cambridge, United Kingdom*, Order on Review, 24 FCC Rcd 14823, 14826, para. 9 (2009) (“We also concur with the Bureau’s finding that the lack of availability of the CellCom 10 at the time of the pre-certification advertising is not material.”).

<sup>94</sup> NAL Response at 19.

<sup>95</sup> *Pacific Western Broadcasters, Inc.*, Memorandum Opinion and Order, 50 FCC 2d 819, para. 4 (1975) (rejecting a broadcaster’s claim that the forfeiture should be downwardly adjusted because its operations at excessive power levels did not cause public harm or complaint, stating that “[t]he Commission not only is concerned with actual interference, but is concerned with the potential for interference”); see also *Bureau Delectronique Appliquee, Inc.*, Forfeiture Order, 20 FCC Rcd 17893, 17898, para. 16 (EB 2005) (“It is well established that the absence of public harm (i.e., the lack of interference caused by operation of Wizard and Falcon units) is not considered a mitigating factor and thus does not warrant a downward adjustment of an assessed forfeiture.”).

<sup>96</sup> NAL, 33 FCC Rcd at 5541-42, para. 23.

<sup>97</sup> NAL Response at 19-20.

<sup>98</sup> See *supra* Section III.A.

stated in the *NAL*, the Company's marketing was not limited to amateur license holders; anyone could purchase the AV transmitters at issue.<sup>99</sup> Overall, the fact that a buyer might use a noncompliant device in a compliant manner does not nullify HobbyKing's marketing violations or lessen their impact. Nonetheless, we again warn consumers who own unauthorized HobbyKing devices that they should cease using them immediately or risk enforcement action for operating equipment in violation of the Commission's rules.<sup>100</sup>

36. HobbyKing also argues that it should receive a reduced penalty because it complies with FAA regulations on drones.<sup>101</sup> FAA regulations are not germane here and bear no weight in whether HobbyKing violated FCC regulations. Similarly, compliance with FAA regulations is irrelevant in deciding whether the proposed forfeiture penalty should be reduced.

37. Finally, we find that HobbyKing is the marketer of the devices and is liable as such. Accordingly, we reject HobbyKing's argument that only the parties responsible for obtaining the equipment authorizations would be responsible for complying with the equipment marketing rules.<sup>102</sup> The Act and Commission's rules prohibit anyone from marketing noncompliant devices, including companies like HobbyKing who may or may not be responsible for the authorization of the device.<sup>103</sup> Even if HobbyKing had any doubt about this, the *Marketing Citation* provided HobbyKing notice of the rules and warned the Company to market only compliant devices.<sup>104</sup>

### 3. Comparison to Other Forfeitures

38. The forfeiture amount in this case is consistent with other prior actions.<sup>105</sup> The Bureau has, in fact, pursued and settled several recent investigations related to drone accessories.<sup>106</sup> Prior to that, the Bureau had engaged in several investigations involving similar equipment going back 10 years.<sup>107</sup>

39. The Commission has treated HobbyKing similarly to other targets of enforcement for equipment marketing violations when it calculated the proposed forfeiture in the *NAL*. The Commission calculated the proposed forfeiture by first assessing a \$7,000 base forfeiture for each model (65 models

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<sup>99</sup> *NAL*, 33 FCC Rcd at 5536-37, paras. 12-13.

<sup>100</sup> *Id.* at 5537, para. 13 n.50; *see also AV Transmitter Enforcement Advisory*.

<sup>101</sup> *NAL* Response at 20.

<sup>102</sup> *NAL*, 33 FCC Rcd at 5533, para. 7, n.26. HobbyKing claims it is not the responsible party and that we should therefore lower the forfeiture amount. *NAL* Response at 20.

<sup>103</sup> 47 U.S.C. § 302a(b); 47 CFR § 2.803. As detailed in the *NAL*, HobbyKing received a Citation warning that continued marketing could subject the Company to penalties and it continued to market noncompliant AV transmitters anyway. *NAL*, 33 FCC Rcd at 5531-32, paras. 4-5.

<sup>104</sup> *NAL*, 33 FCC Rcd at 5531-32, paras. 4-5. HobbyKing may also be the manufacturer of some of the devices in question and thus, also responsible for the device certification. *See NAL*, 33 FCC Rcd at 5533, para. 7, n.26.

<sup>105</sup> HobbyKing argues other cases show its forfeiture should be reduced. *NAL* Response at 20-21.

<sup>106</sup> *Lumenier Holdco LLC, formerly known as FPV Manuals LLC*, Order and Consent Decree, 32 FCC Rcd 10291 (EB 2017) (settling investigation into noncompliant drone AV transmitters); *Horizon Hobby, LLC*, Order and Consent Decree, 33 FCC Rcd 7982 (EB 2018) (same).

<sup>107</sup> *See Iftron*, 24 FCC Rcd at 8804, para. 5 (notice of apparent liability for marketing an audio/video transmitter that operates on a restricted frequency and therefore is not eligible for a grant of equipment certification); *New Generation Hobbies*, 26 FCC Rcd at 9471, n.23 (citation for marketing unauthorized video transmitters that operate on restricted frequencies).

total),<sup>108</sup> which it has long done in many equipment marketing cases.<sup>109</sup> Next, the Commission evaluated whether any upward or downward adjustment factors were applicable, as it is obligated to do by the Act and the Commission's rules,<sup>110</sup> and found that certain upward adjustment factors were present.<sup>111</sup> In its NAL Response, HobbyKing offered no legitimate reason why those upward adjustment factors should not be assessed, nor why any downward adjustment factors should have been considered.<sup>112</sup> Although the forfeiture amount is significant, the Commission has previously assessed large fines for equipment marketing violations based on the specific facts of the investigation where upward adjustments were appropriate.<sup>113</sup>

#### IV. CONCLUSION

40. Based on the record before us and in light of the applicable statutory factors, we conclude that HobbyKing willfully and repeatedly violated section 302 of the Act,<sup>114</sup> section 2.803 of the Commission's rules,<sup>115</sup> and Commission orders<sup>116</sup> by marketing noncompliant radio frequency devices and refusing to fully respond to the LOI. We adopt the \$2,861,128 forfeiture proposed in the NAL.

#### V. ORDERING CLAUSES

41. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act,<sup>117</sup> and section 1.80 of the Commission's rules,<sup>118</sup> ABC Fulfillment Services LLC and Indubitably, Inc. d/b/a HobbyKing **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of two million eight hundred sixty-one thousand one hundred and twenty-eight dollars (\$2,861,128) for willfully and

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<sup>108</sup> NAL, 33 FCC Rcd at 5540, para. 21.

<sup>109</sup> 47 CFR § 1.80(b). See e.g., *Behringer USA, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 21 FCC Rcd 1820 (2006), *forfeiture ordered*, 22 FCC Rcd 10451 (2007) (forfeiture paid) (*Behringer*).

<sup>110</sup> 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(8), Note to paragraph (b)(8); see also *Forfeiture Policy Statement*.

<sup>111</sup> NAL, 33 FCC Rcd at 5540-41, para. 22. Although the forfeiture amount is significant, an assessment for each model at the statutory maximum at the time would have resulted in a forfeiture amount of \$9,573,850 (65 models x \$147,290).

<sup>112</sup> See *supra* Sections III.D.1. and III.D.2.

<sup>113</sup> See e.g., *Bear Down Brands, LLC DBA Pure Enrichment*, Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 5449, 5457-59, paras. 23-26 (May 30, 2018) (proposing a total forfeiture of \$590,380 for 14 models of noncompliant radio frequency device models) (forfeiture paid); *Behringer*, 22 FCC Rcd at 10458, para. 17 (affirming \$1,000,000 forfeiture for 50 noncompliant radio frequency device models). Additionally, HobbyKing mischaracterizes the nature of several cases in arguing that the Commission is assessing higher upward adjustments in this case than in prior cases involving actual interference to public safety. NAL Response at 22, n.46. To start, the *Ravi Import Warehouse* case did not involve interference to public safety, yet still had a 30% upward adjustment based on the target's behavior in the investigation. See e.g., *Ravi's Import Warehouse Inc.*, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 5606 (EB 2017) (interference to AT&T's base station). The unique facts of the other cases cited by HobbyKing involving interference to public safety do not warrant a reduction here, and HobbyKing makes no attempt to compare the circumstances in those cases involving operation violations to its own equipment marketing violations.

<sup>114</sup> 47 U.S.C. § 302a(b).

<sup>115</sup> 47 CFR § 2.803.

<sup>116</sup> See *supra* note 15.

<sup>117</sup> 47 U.S.C. § 503(b).

<sup>118</sup> 47 CFR § 1.80.

repeatedly violating section 302 of the Act,<sup>119</sup> section 2.803 of the Commission's rules,<sup>120</sup> and Commission orders.

42. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) calendar days after the release of this Forfeiture Order.<sup>121</sup> ABC Fulfillment Services LLC and Indubitably, Inc. d/b/a HobbyKing shall send electronic notification of payment to Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, at EB-SED-Response@fcc.gov on the date said payment is made. If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to section 504(a) of the Act.<sup>122</sup>

43. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),<sup>123</sup> or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:<sup>124</sup>

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN). For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log-in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the "Pay by Credit Card" option. Please note that there is a \$24,999.99 limit on credit card transactions.
- Payment by ACH must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu and then select the bill number associated to the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and choose the "Pay from Bank Account" option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct

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<sup>119</sup> 47 U.S.C. § 302a(b).

<sup>120</sup> 47 CFR § 2.803.

<sup>121</sup> *Id.* § 1.80.

<sup>122</sup> 47 U.S.C. § 504(a).

<sup>123</sup> Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

<sup>124</sup> For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

44. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.<sup>125</sup> Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

45. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to Mr. Anthony Hand, Owner and Director, ABC Fulfillment Services LLC, via registered agent Davies Pearson, P.C., 920 Fawcett Ave, Tacoma, WA 98401-1657; and to Mr. Anthony Hand, Owner and Director, Indubitably, Inc. via Corporation Service Company, Registered Agent, 2711 Centerville Rd., Suite 400, Wilmington, DE 19808-1645; and to Dennis P. Corbett, Esq., Telecommunications Law Professionals PLLC, Counsel to HobbyKing, 1025 Connecticut Avenue, NW, Suite 1011, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>125</sup> See 47 CFR § 1.1914.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

*Re: ABC Fulfillment Services LLC d/b/a HobbyKing USA LLC and HobbyKing.com; and Indubitably, Inc. d/b/a HobbyKing Corp., HobbyKing USA LLC, HobbyKing, and HobbyKing.com, File No.: EB-SED-17-00023762, NAL/Acct. No.: 201832100015, FRN: 0027528975*

The Commission's equipment authorization rules and processes provide a necessary safeguard to help ensure that the Commission's rules are followed and that harmful interference does not occur because of faulty equipment. In this instance, HobbyKing marketed and sold drone equipment to consumers that did not go through the required process and receive the necessary approvals, in violation of FCC rules. I am, therefore, fully supportive of today's forfeiture order.

Further, HobbyKing's actions are in no way analogous to the equipment authorization rule changes I have proposed. In today's world where people are used to Kickstarter campaigns and ordering handsets weeks before they are delivered into consumers' eager hands, I have suggested commonsense updates to permit the pre-sale of devices and the importation of products for advertising and retail display purposes prior to their receiving FCC sign off. In both instances, the equipment would not get into the hands of consumers without the manufacturer receiving the requisite FCC approvals. While these rule changes can be effectively implemented without causing any harm to consumers or risk to our nation's communications networks, the same cannot be said of HobbyKing's actions.