

3998--B

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I N S E N A T E

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Introduced by Sens. BOYLE, ADDABBO, AVELLA, CARLUCCI, CROCI, DILAN, HAMILTON, PERALTA, ROBACH -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Consumer Protection in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to the sale of digital electronic equipment diagnostic and repair information

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "fair repair act".
3 S 2. The general business law is amended by adding a new section 399-
4 nn to read as follows:
5 S 399-NN. SALE OF DIGITAL ELECTRONIC EQUIPMENT DIAGNOSTIC AND REPAIR
6 INFORMATION. 1. DEFINITIONS. FOR THE PURPOSES OF THIS SECTION, THE
7 FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:
8 (A) "ORIGINAL EQUIPMENT MANUFACTURER" OR "OEM" MEANS ANY PERSON OR
9 BUSINESS WHO, IN THE ORDINARY COURSE OF ITS BUSINESS, IS ENGAGED IN THE
10 BUSINESS OF SELLING OR LEASING NEW DIGITAL ELECTRONIC EQUIPMENT OR PARTS
11 OF EQUIPMENT TO ANY PERSON OR BUSINESS AND IS ENGAGED IN THE DIAGNOSIS,
12 SERVICE, MAINTENANCE OR REPAIR OF DIGITAL ELECTRONIC EQUIPMENT OR PARTS
13 OF SUCH EQUIPMENT.
14 (B) "AUTHORIZED REPAIR PROVIDER" MEANS A PERSON OR BUSINESS THAT HAS
15 AN ARRANGEMENT FOR A DEFINITE OR INDEFINITE PERIOD IN WHICH AN OEM
16 GRANTS TO A SEPARATE BUSINESS ORGANIZATION OR INDIVIDUAL LICENSE TO USE
17 A TRADE NAME, SERVICE MARK OR RELATED CHARACTERISTIC FOR THE PURPOSES OF
18 OFFERING REPAIR SERVICES UNDER THE NAME OF THE OEM.

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

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(C) "INDEPENDENT REPAIR PROVIDER" MEANS A PERSON OR BUSINESS OPERATING IN THE STATE OF NEW YORK THAT IS NOT AFFILIATED WITH AN OEM OR AN OEM'S AUTHORIZED REPAIR PROVIDER, WHICH IS ENGAGED IN THE DIAGNOSIS, SERVICE, MAINTENANCE OR REPAIR OF EQUIPMENT; PROVIDED, HOWEVER, THAT, FOR THE PURPOSES OF THIS SECTION, AN OEM SHALL BE CONSIDERED AN INDEPENDENT REPAIR PROVIDER FOR THE PURPOSES OF THOSE INSTANCES WHEN SUCH OEM ENGAGES IN THE DIAGNOSIS, SERVICE, MAINTENANCE OR REPAIR OF DIGITAL EQUIPMENT THAT IS NOT AFFILIATED WITH THE OEM.

(D) "OWNER" MEANS A PERSON OR BUSINESS WHO OWNS OR LEASES A DIGITAL ELECTRONIC PRODUCT PURCHASED OR USED IN THE STATE OF NEW YORK.

(E) "DOCUMENTATION" MEANS ANY MANUALS, DIAGRAMS, REPORTING OUTPUT, OR SERVICE CODE DESCRIPTIONS PROVIDED TO THE AUTHORIZED REPAIR PROVIDER FOR THE PURPOSES OF EFFECTING REPAIR.

(F) "DIGITAL ELECTRONIC EQUIPMENT" OR "EQUIPMENT" MEANS A PART OR EQUIPMENT ORIGINALLY MANUFACTURED FOR DISTRIBUTION AND SALE IN THE UNITED STATES.

(G) "EMBEDDED SOFTWARE" MEANS ANY PROGRAMMABLE INSTRUCTIONS PROVIDED ON FIRMWARE DELIVERED WITH THE EQUIPMENT OR PART FOR THE PURPOSES OF EQUIPMENT OPERATION, INCLUDING ALL RELEVANT PATCHES AND FIXES MADE BY THE MANUFACTURER FOR THIS PURPOSE, INCLUDING, BUT NOT LIMITED TO SYNONYMS "BASIC INTERNAL OPERATING SYSTEM", "INTERNAL OPERATING SYSTEM", "MACHINE CODE", "ASSEMBLY CODE", "ROOT CODE", AND "MICROCODE".

(H) "REMOTE DIAGNOSTICS" MEANS ANY REMOTE DATA TRANSFER FUNCTION BETWEEN EQUIPMENT AND THE PROVIDER OF REPAIR SERVICES INCLUDING FOR PURPOSES OF REMOTE DIAGNOSTICS, SETTING CONTROLS, OR LOCATION IDENTIFICATION.

(I) "SERVICE PARTS" OR "PARTS" MEANS ANY REPLACEMENT PARTS, EITHER NEW OR USED, MADE AVAILABLE BY THE OEM TO THE AUTHORIZED REPAIR PROVIDER FOR THE PURPOSES OF EFFECTING REPAIR.

(J) "FAIR AND REASONABLE TERMS" MEANS AN EQUITABLE PRICE IN LIGHT OF RELEVANT FACTORS, INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING:

(I) THE NET COST TO THE AUTHORIZED REPAIR PROVIDER FOR SIMILAR INFORMATION OBTAINED FROM AN OEM, LESS ANY DISCOUNTS, REBATES, OR OTHER INCENTIVE PROGRAMS;

(II) THE COST TO THE OEM FOR PREPARING AND DISTRIBUTING THE INFORMATION, EXCLUDING ANY RESEARCH AND DEVELOPMENT COSTS INCURRED IN DESIGNING AND IMPLEMENTING, UPGRADING OR ALTERING THE PRODUCT, BUT INCLUDING AMORTIZED CAPITAL COSTS FOR THE PREPARATION AND DISTRIBUTION OF THE INFORMATION;

(III) THE PRICE CHARGED BY OTHER OEMS FOR SIMILAR INFORMATION;

(IV) THE PRICE CHARGED BY OEMS FOR SIMILAR INFORMATION PRIOR TO THE LAUNCH OF OEM WEB SITES;

(V) THE ABILITY OF AFTERMARKET TECHNICIANS OR SHOPS TO AFFORD THE INFORMATION;

(VI) THE MEANS BY WHICH THE INFORMATION IS DISTRIBUTED;

(VII) THE EXTENT TO WHICH THE INFORMATION IS USED, WHICH INCLUDES THE NUMBER OF USERS, AND FREQUENCY, DURATION, AND VOLUME OF USE; AND

(VIII) INFLATION.

(K) "TRADE SECRET" MEANS ANYTHING TANGIBLE OR INTANGIBLE OR ELECTRONICALLY STORED OR KEPT WHICH CONSTITUTES, REPRESENTS, EVIDENCES OR RECORDS INTELLECTUAL PROPERTY INCLUDING SECRET OR CONFIDENTIALLY HELD DESIGNS, PROCESSES, PROCEDURES, FORMULAS, INVENTIONS OR IMPROVEMENTS, OR SECRET OR CONFIDENTIALLY HELD SCIENTIFIC, TECHNICAL, MERCHANDISING, PRODUCTION, FINANCIAL, BUSINESS OR MANAGEMENT INFORMATION, OR ANYTHING WITHIN THE DEFINITION OF PARAGRAPH THREE OF SECTION 1839 OF TITLE EIGHTEEN OF THE UNITED STATES CODE.

(L) "MOTOR VEHICLE" MEANS ANY VEHICLE THAT IS DESIGNED FOR TRANSPORTING PERSONS OR PROPERTY ON A STREET OR HIGHWAY AND THAT IS CERTIFIED BY THE MANUFACTURER UNDER ALL APPLICABLE FEDERAL SAFETY AND EMISSIONS STANDARDS AND REQUIREMENTS FOR DISTRIBUTION AND SALE IN THE UNITED STATES, BUT EXCLUDING (I) A MOTORCYCLE; OR (II) A RECREATIONAL VEHICLE OR AN AUTO HOME EQUIPPED FOR HABITATION.

(M) "MOTOR VEHICLE MANUFACTURER" MEANS ANY PERSON OR BUSINESS ENGAGED IN THE BUSINESS OF MANUFACTURING OR ASSEMBLING NEW MOTOR VEHICLES.

(N) "MOTOR VEHICLE DEALER" MEANS ANY PERSON OR BUSINESS WHO, IN THE ORDINARY COURSE OF ITS BUSINESS, IS ENGAGED IN THE BUSINESS OF SELLING OR LEASING NEW MOTOR VEHICLES TO A PERSON OR BUSINESS PURSUANT TO A FRANCHISE AGREEMENT AND WHO HAS OBTAINED A LICENSE, AS REQUIRED UNDER APPLICABLE LAW, AND IS ENGAGED IN THE DIAGNOSIS, SERVICE, MAINTENANCE OR REPAIR OF MOTOR VEHICLES OR MOTOR VEHICLE ENGINES PURSUANT TO SAID FRANCHISE AGREEMENT.

2. (A) FOR EQUIPMENT AND PARTS SOLD OR USED IN THIS STATE, THE OEMS OF SUCH EQUIPMENT AND PARTS SHALL (I) MAKE AVAILABLE TO INDEPENDENT REPAIR PROVIDERS OR OWNERS OF PRODUCTS MANUFACTURED BY SUCH OEM DIAGNOSTIC AND REPAIR INFORMATION, INCLUDING REPAIR TECHNICAL UPDATES, UPDATES AND CORRECTIONS TO EMBEDDED SOFTWARE FOR NO CHARGE OR IN THE SAME MANNER SUCH OEM MAKES AVAILABLE TO ITS AUTHORIZED REPAIR PROVIDER; AND

(II) MAKE AVAILABLE FOR PURCHASE BY THE EQUIPMENT OWNER, HIS OR HER AUTHORIZED AGENT OR INDEPENDENT REPAIR PROVIDER, PARTS, INCLUSIVE OF ANY UPDATES TO THE EMBEDDED SOFTWARE OF THE PARTS, UPON FAIR AND REASONABLE TERMS. NOTHING IN THIS SUBDIVISION SHALL REQUIRE THE OEM TO SELL PARTS IF THE PARTS ARE NO LONGER AVAILABLE TO THE OEM OR THE AUTHORIZED REPAIR PROVIDER OF THE OEM.

(B) ANY OEM THAT SELLS ANY DIAGNOSTIC, SERVICE, OR REPAIR INFORMATION TO ANY INDEPENDENT REPAIR PROVIDER OR TO ANY OWNER IN A FORMAT THAT IS STANDARDIZED WITH OTHER OEMS, AND ON TERMS AND CONDITIONS MORE FAVORABLE THAN THE MANNER AND THE TERMS AND CONDITIONS PURSUANT TO WHICH THE AUTHORIZED REPAIR PROVIDER OBTAINS THE SAME DIAGNOSTIC, SERVICE OR REPAIR INFORMATION, SHALL BE PROHIBITED FROM REQUIRING ANY AUTHORIZED REPAIR PROVIDER TO CONTINUE PURCHASING DIAGNOSTIC, SERVICE, OR REPAIR INFORMATION IN A PROPRIETARY FORMAT, UNLESS SUCH PROPRIETARY FORMAT INCLUDES DIAGNOSTIC, SERVICE, OR REPAIR OPERATIONS INFORMATION OR FUNCTIONALITY THAT IS NOT AVAILABLE IN SUCH STANDARDIZED FORMAT.

(C) EACH OEM OF EQUIPMENT SOLD OR USED IN THE STATE OF NEW YORK SHALL MAKE AVAILABLE FOR PURCHASE BY OWNERS AND INDEPENDENT REPAIR FACILITIES ALL DIAGNOSTIC REPAIR TOOLS INCORPORATING THE SAME DIAGNOSTIC, REPAIR AND REMOTE COMMUNICATIONS CAPABILITIES THAT SUCH OEM MAKES AVAILABLE TO ITS OWN REPAIR OR ENGINEERING STAFF OR ANY AUTHORIZED REPAIR PROVIDER. EACH OEM SHALL OFFER SUCH TOOLS FOR SALE TO OWNERS AND TO INDEPENDENT REPAIR FACILITIES UPON FAIR AND REASONABLE TERMS.

EACH OEM THAT PROVIDES DIAGNOSTIC REPAIR INFORMATION TO AFTERMARKET TOOL, DIAGNOSTICS, OR THIRD PARTY SERVICE INFORMATION PUBLICATIONS AND SYSTEMS SHALL HAVE FULLY SATISFIED ITS OBLIGATIONS UNDER THIS SECTION AND THEREAFTER NOT BE RESPONSIBLE FOR THE CONTENT AND FUNCTIONALITY OF AFTERMARKET DIAGNOSTIC TOOLS OR SERVICE INFORMATION SYSTEMS.

(D) OEM EQUIPMENT OR PARTS SOLD OR USED IN THE STATE OF NEW YORK FOR THE PURPOSE OF PROVIDING SECURITY-RELATED FUNCTIONS MAY NOT EXCLUDE DIAGNOSTIC, SERVICE AND REPAIR INFORMATION NECESSARY TO RESET A SECURITY-RELATED ELECTRONIC FUNCTION FROM INFORMATION PROVIDED TO OWNERS AND INDEPENDENT REPAIR FACILITIES. IF EXCLUDED UNDER THIS PARAGRAPH, THE INFORMATION NECESSARY TO RESET AN IMMOBILIZER SYSTEM OR SECURITY-RELATED

1 ELECTRONIC MODULE SHALL BE OBTAINED BY OWNERS AND INDEPENDENT REPAIR
2 FACILITIES THROUGH THE APPROPRIATE SECURE DATA RELEASE SYSTEMS.

3 3. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO REQUIRE AN OEM TO
4 DIVULGE A TRADE SECRET.

5 4. NOTWITHSTANDING ANY LAW, RULE OR REGULATION TO THE CONTRARY, NO
6 PROVISION IN THIS SECTION SHALL BE READ, INTERPRETED OR CONSTRUED TO
7 ABROGATE, INTERFERE WITH, CONTRADICT OR ALTER THE TERMS OF ANY AGREEMENT
8 EXECUTED AND IN FORCE BETWEEN AN AUTHORIZED REPAIR PROVIDER AND AN OEM
9 INCLUDING, BUT NOT LIMITED TO, THE PERFORMANCE OR PROVISION OF WARRANTY
10 OR RECALL REPAIR WORK BY AN AUTHORIZED REPAIR PROVIDER ON BEHALF OF AN
11 OEM PURSUANT TO SUCH AUTHORIZED REPAIR AGREEMENT; PROVIDED, HOWEVER,
12 THAT ANY PROVISION IN SUCH AN AUTHORIZED REPAIR AGREEMENT THAT PURPORTS
13 TO WAIVE, AVOID, RESTRICT OR LIMIT AN OEM'S COMPLIANCE WITH THIS SECTION
14 SHALL BE VOID AND UNENFORCEABLE.

15 5. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO REQUIRE OEMS OR
16 AUTHORIZED REPAIR PROVIDERS TO PROVIDE AN OWNER OR INDEPENDENT REPAIR
17 PROVIDER ACCESS TO NON-DIAGNOSTIC AND REPAIR INFORMATION PROVIDED BY AN
18 OEM TO AN AUTHORIZED REPAIR PROVIDER PURSUANT TO THE TERMS OF AN AUTHOR-
19 IZING AGREEMENT.

20 6. NOTHING IN THIS SECTION SHALL APPLY TO MOTOR VEHICLE MANUFACTURERS,
21 ANY PRODUCT OR SERVICE OF A MOTOR VEHICLE MANUFACTURER OR MOTOR VEHICLE
22 DEALERS AS DEFINED IN THIS SECTION.

23 7. ANY INDEPENDENT REPAIR PROVIDER THAT PURCHASES OR ACQUIRES EMBEDDED
24 SOFTWARE OR SERVICE PARTS SHALL, PRIOR TO PERFORMING ANY SERVICES ON
25 DIGITAL ELECTRONIC EQUIPMENT, NOTIFY THE OWNER OF SUCH EQUIPMENT IN
26 WRITING THAT:

27 (A) CONSUMERS SHOULD REVIEW THE TERMS AND CONDITIONS OF THE WARRANTY
28 FOR SUCH DIGITAL ELECTRONIC EQUIPMENT AS REPAIRS NOT PERFORMED BY AN
29 AUTHORIZED REPAIR PROVIDER COULD AFFECT THE TERMS AND CONDITIONS OF THE
30 WARRANTY;

31 (B) WARRANTORS CANNOT REQUIRE THAT ONLY BRANDED PARTS BE USED WITH THE
32 PRODUCT IN ORDER TO RETAIN THE WARRANTY;

33 (C) WARRANTORS SHALL DEMONSTRATE THAT A DEFECT OR DAMAGE WAS CAUSED BY
34 INDEPENDENT REPAIR TO AFFECT THE WARRANTY;

35 (D) WARRANTIES ARE GOVERNED BY THE FEDERAL MAGNUSON-MOSS WARRANTY ACT;
36 AND

37 (E) SUCH INDEPENDENT REPAIR PROVIDER IS NOT AN AUTHORIZED REPAIR
38 PROVIDER FOR SUCH DIGITAL ELECTRONIC EQUIPMENT.

39 8. THE CONSUMER PROTECTION DIVISION SHALL DEVELOP, ESTABLISH AND
40 IMPLEMENT A PUBLIC OUTREACH PROGRAM DIRECTED AT INDEPENDENT REPAIR
41 PROVIDERS, CONSUMERS AND DIGITAL ELECTRONIC ORIGINAL EQUIPMENT MANUFAC-
42 TURERS TO INFORM THEM OF THEIR RIGHTS AND RESPONSIBILITIES PURSUANT TO
43 THIS SECTION. SUCH PUBLIC OUTREACH SHALL INCLUDE BROCHURES, CONSUMER
44 GUIDES, POSTERS OR ANY COMBINATION THEREOF AND MADE AVAILABLE TO CONSUM-
45 ERS AND OTHER STAKEHOLDERS BY ANY MEANS DEEMED APPROPRIATE BY SUCH DIVI-
46 SION AND MAY INCLUDE INTERNET, RADIO, AND PRINT ADVERTISING. THE PUBLIC
47 OUTREACH MAY ALSO IDENTIFY AND RECRUIT INDIVIDUALS OR TRADE ORGANIZA-
48 TIONS TO ASSIST IN DISTRIBUTING THIS INFORMATION AND MATERIALS. THE
49 PUBLIC OUTREACH SHALL BEGIN NO LATER THAN THE THIRTIETH DAY AFTER THE
50 EFFECTIVE DATE OF THIS SECTION.

51 9. (A) WHENEVER THE ATTORNEY GENERAL SHALL BELIEVE FROM EVIDENCE
52 SATISFACTORY TO HIM THAT ANY PERSON, FIRM, CORPORATION OR ASSOCIATION OR
53 AGENT OR EMPLOYEE THEREOF HAS ENGAGED IN OR IS ABOUT TO ENGAGE IN ANY OF
54 THE ACTS OR PRACTICES IN VIOLATION OF THIS SECTION HE MAY BRING AN
55 ACTION IN THE NAME AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK
56 TO ENJOIN SUCH UNLAWFUL ACTS OR PRACTICES AND TO OBTAIN RESTITUTION OF

1 ANY MONEYS OR PROPERTY OBTAINED DIRECTLY OR INDIRECTLY BY ANY SUCH ACTS
2 OR PRACTICES IN VIOLATION OF THIS SECTION. IN SUCH ACTION PRELIMINARY
3 RELIEF MAY BE GRANTED UNDER ARTICLE SIXTY-THREE OF THE CIVIL PRACTICE
4 LAW AND RULES.

5 (B) BEFORE ANY VIOLATION OF THIS SECTION IS SOUGHT TO BE ENJOINED, THE
6 ATTORNEY GENERAL SHALL BE REQUIRED TO GIVE THE PERSON AGAINST WHOM SUCH
7 PROCEEDING IS CONTEMPLATED NOTICE BY CERTIFIED MAIL AND AN OPPORTUNITY
8 TO SHOW IN WRITING WITHIN FIVE BUSINESS DAYS AFTER RECEIPT OF NOTICE WHY
9 PROCEEDINGS SHOULD NOT BE INSTITUTED AGAINST HIM, UNLESS THE ATTORNEY
10 GENERAL SHALL FIND, IN ANY CASE IN WHICH HE SEEKS PRELIMINARY RELIEF,
11 THAT TO GIVE SUCH NOTICE AND OPPORTUNITY IS NOT IN THE PUBLIC INTEREST.

12 (C) IN CONNECTION WITH ANY PROPOSED PROCEEDING UNDER THIS SECTION, THE
13 ATTORNEY GENERAL IS AUTHORIZED TO TAKE PROOF AND MAKE A DETERMINATION OF
14 THE RELEVANT FACTS, AND TO ISSUE SUBPOENAS IN ACCORDANCE WITH THE CIVIL
15 PRACTICE LAW AND RULES.

16 (D) THIS SUBDIVISION SHALL APPLY TO ALL ACTS OR PRACTICES DECLARED TO
17 BE IN VIOLATION OF THIS SECTION, WHETHER OR NOT SUBJECT TO ANY OTHER LAW
18 OF THIS STATE, AND SHALL NOT SUPERSEDE, AMEND OR REPEAL ANY OTHER LAW OF
19 THIS STATE UNDER WHICH THE ATTORNEY GENERAL IS AUTHORIZED TO TAKE ANY
20 ACTION OR CONDUCT ANY INQUIRY.

21 (E) ANY PERSON, FIRM, CORPORATION OR ASSOCIATION OR AGENT OR EMPLOYEE
22 THEREOF WHO ENGAGES IN ANY OF THE ACTS OR PRACTICES TO BE IN VIOLATION
23 OF THIS SECTION SHALL BE LIABLE TO A CIVIL PENALTY OF NOT MORE THAN FIVE
24 HUNDRED DOLLARS FOR EACH VIOLATION, WHICH SHALL ACCRUE TO THE STATE OF
25 NEW YORK AND MAY BE RECOVERED IN A CIVIL ACTION BROUGHT BY THE ATTORNEY
26 GENERAL.

27 (F) EXCEPT IN THE INSTANCE OF A DISPUTE ARISING BETWEEN AN ORIGINAL
28 EQUIPMENT MANUFACTURER AND ITS AUTHORIZED REPAIR PROVIDER RELATED TO
29 EITHER PARTY'S COMPLIANCE WITH AN EXISTING AUTHORIZED REPAIR AGREEMENT,
30 AN AUTHORIZED REPAIR PROVIDER SHALL HAVE ALL THE RIGHTS AND REMEDIES
31 PROVIDED IN THIS SECTION.

32 S 3. This act shall take effect on the sixtieth day after it shall
33 have become a law; provided, however, that subdivision 7 of section
34 399-nn of the general business law, as added by section two of this act
35 shall take effect on the ninetieth day after it shall have become a law.