

# STATE OF NEW YORK

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## IN SENATE

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Introduced by Sens. BOYLE, ADDABBO, AKSHAR, AVELLA, BAILEY, CARLUCCI, CROCI, DILAN, HAMILTON, KAMINSKY, MURPHY, PERALTA, PERSAUD, 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 -- 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 § 2. The general business law is amended by adding a new section 399-  
4 nn to read as follows:

5 § 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 (i) a person or business that  
15 has an arrangement with an OEM for a definite or indefinite period in  
16 which the OEM grants to a person or business license to use a trade  
17 name, service mark or related characteristic for the purposes of offer-  
18 ing repair services under the name of the OEM, or (ii) a person or busi-  
19 ness retained by the OEM to provide refurbishing services for the OEM's  
20 product or products.

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

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1 (c) "Independent repair provider" means a person or business operating  
2 in the state of New York that is not affiliated with an OEM or an OEM's  
3 authorized repair provider, which is engaged in the diagnosis, service,  
4 maintenance or repair of equipment; provided, however, that, for the  
5 purposes of this section, an OEM shall be considered an independent  
6 repair provider for the purposes of those instances when such OEM  
7 engages in the diagnosis, service, maintenance or repair of digital  
8 equipment that is not affiliated with the OEM.

9 (d) "Owner" means a person or business who owns or leases a digital  
10 electronic product purchased or used in the state of New York.

11 (e) "Documentation" means any manuals, diagrams, reporting output, or  
12 service code descriptions provided to the authorized repair provider for  
13 the purposes of effecting repair.

14 (f) "Digital electronic equipment" or "equipment" means a part or  
15 equipment originally manufactured for distribution and sale in the  
16 United States.

17 (g) "Embedded software" means any programmable instructions provided  
18 on firmware delivered with the equipment or part for the purposes of  
19 equipment operation, including all relevant patches and fixes made by  
20 the manufacturer for this purpose, including, but not limited to syno-  
21 nyms "basic internal operating system", "internal operating system",  
22 "machine code", "assembly code", "root code", and "microcode".

23 (h) "Remote diagnostics" means any remote data transfer function  
24 between equipment and the provider of repair services including for  
25 purposes of remote diagnostics, setting controls, or location identifi-  
26 cation.

27 (i) "Service parts" or "parts" means any replacement parts, either new  
28 or used, made available by the OEM to the authorized repair provider for  
29 the purposes of effecting repair.

30 (j) "Fair and reasonable terms" means an equitable price in light of  
31 relevant factors, including, but not limited to, the following:

32 (i) the net cost to the authorized repair provider for similar infor-  
33 mation obtained from an OEM, less any discounts, rebates, or other  
34 incentive programs;

35 (ii) the cost to the OEM for preparing and distributing the informa-  
36 tion, excluding any research and development costs incurred in designing  
37 and implementing, upgrading or altering the product, but including amor-  
38 tized capital costs for the preparation and distribution of the informa-  
39 tion;

40 (iii) the price charged by other OEMs for similar information;

41 (iv) the price charged by OEMs for similar information prior to the  
42 launch of OEM web sites;

43 (v) the ability of aftermarket technicians or shops to afford the  
44 information;

45 (vi) the means by which the information is distributed;

46 (vii) the extent to which the information is used, which includes the  
47 number of users, and frequency, duration, and volume of use; and

48 (viii) inflation.

49 (k) "Motor vehicle" means any vehicle that is designed for transport-  
50 ing persons or property on a street or highway and that is certified by  
51 the manufacturer under all applicable federal safety and emissions stan-  
52 dards and requirements for distribution and sale in the United States,  
53 but excluding (i) a motorcycle; or (ii) a recreational vehicle or an  
54 auto home equipped for habitation.

55 (l) "Motor vehicle manufacturer" means any person or business engaged  
56 in the business of manufacturing or assembling new motor vehicles.

1 (m) "Motor vehicle dealer" means any person or business who, in the  
2 ordinary course of its business, is engaged in the business of selling  
3 or leasing new motor vehicles to a person or business pursuant to a  
4 franchise agreement and who has obtained a license, as required under  
5 applicable law, and is engaged in the diagnosis, service, maintenance or  
6 repair of motor vehicles or motor vehicle engines pursuant to said fran-  
7 chise agreement.

8 (n) "Manufacturer of motor vehicle equipment" means a person or busi-  
9 ness engaged in the business of manufacturing or supplying components  
10 that are used in the manufacture, servicing or repair of a motor vehi-  
11 cle.

12 (o) "Medical device" means an instrument, apparatus, implement,  
13 machine, contrivance, implant, or other similar or related article,  
14 including a component part, or accessory, as defined in the federal  
15 Food, Drug and Cosmetic Act, 21 USC, Section 321 (h) as amended from  
16 time to time, which is intended for use in the diagnosis of disease or  
17 other conditions, or in the cure, mitigation, treatment, or prevention  
18 of disease, in man or other animals.

19 2. (a) For equipment and parts sold or used in this state, the OEMs of  
20 such equipment and parts shall (i) make available to independent repair  
21 providers or owners of products manufactured by such OEM diagnostic and  
22 repair information, including repair technical updates, schematic  
23 diagrams, updates, corrections to embedded software and safety and secu-  
24 rity patches timely, and for no charge or for the same charge and in the  
25 same format such OEM makes available to its authorized repair provider;  
26 and

27 (ii) make available for purchase by the equipment owner, his or her  
28 authorized agent or independent repair provider, parts, inclusive of any  
29 updates to the embedded software of the parts, upon fair and reasonable  
30 terms. Nothing in this subdivision shall require the OEM to sell parts  
31 if the parts are no longer available to the OEM or the authorized repair  
32 provider of the OEM.

33 (b) Any OEM that sells any diagnostic, service, or repair information  
34 to any independent repair provider or to any owner in a format that is  
35 standardized with other OEMs, and on terms and conditions more favorable  
36 than the terms and conditions pursuant to which the authorized repair  
37 provider obtains the same diagnostic, service or repair information,  
38 shall be prohibited from requiring any authorized repair provider to  
39 continue purchasing diagnostic, service, or repair information in a  
40 proprietary format, unless such proprietary format includes diagnostic,  
41 service, or repair operations information or functionality that is not  
42 available in such standardized format.

43 (c) Each OEM of equipment sold or used in the state of New York shall  
44 make available for purchase by owners and independent repair facilities  
45 all diagnostic repair tools incorporating the same diagnostic, repair  
46 and remote communications capabilities that such OEM makes available to  
47 its own repair or engineering staff or any authorized repair provider.  
48 Each OEM shall offer such tools for sale to owners and to independent  
49 repair facilities upon fair and reasonable terms.

50 Each OEM that provides diagnostic repair information to aftermarket  
51 tool, diagnostics, or third party service information publications and  
52 systems shall have fully satisfied its obligations under this section  
53 and thereafter not be responsible for the content and functionality of  
54 aftermarket diagnostic tools or service information systems.

55 (d) OEM equipment or parts sold or used in the state of New York for  
56 the purpose of providing security-related functions may not exclude

1 diagnostic, service and repair information necessary to reset a securi-  
2 ty-related electronic function from information provided to owners and  
3 independent repair facilities. If excluded under this paragraph, the  
4 information necessary to reset an immobilizer system or security-related  
5 electronic module shall be obtained by owners and independent repair  
6 facilities through the appropriate secure data release systems.

7 3. Nothing in this section shall be construed to require an OEM to  
8 divulge a trade secret.

9 4. Notwithstanding any law, rule or regulation to the contrary, no  
10 provision in this section shall be read, interpreted or construed to  
11 abrogate, interfere with, contradict or alter the terms of any agreement  
12 executed and in force between an authorized repair provider and an OEM  
13 including, but not limited to, the performance or provision of warranty  
14 or recall repair work by an authorized repair provider on behalf of an  
15 OEM pursuant to such authorized repair agreement; provided, however,  
16 that any provision in such an authorized repair agreement that purports  
17 to waive, avoid, restrict or limit an OEM's compliance with this section  
18 shall be void and unenforceable.

19 5. Nothing in this section shall be construed to require OEMs or  
20 authorized repair providers to provide an owner or independent repair  
21 provider access to non-diagnostic and repair information provided by an  
22 OEM to an authorized repair provider pursuant to the terms of an author-  
23 izing agreement.

24 6. Nothing in this section shall apply to motor vehicle manufacturers,  
25 any product or service of a motor vehicle manufacturer, manufacturer of  
26 motor vehicle equipment, or motor vehicle dealers as defined in this  
27 section.

28 7. Nothing in this section shall require a manufacturer of a medical  
29 device as defined in this section to implement any provision of this  
30 section that is not permitted under the federal Food, Drug and Cosmetic  
31 Act or any other federal law, rule or regulation that supersedes this  
32 section.

33 8. Any independent repair provider that purchases or acquires embedded  
34 software or service parts shall, prior to performing any services on  
35 digital electronic equipment, notify the owner of such equipment in  
36 writing that:

37 (a) consumers should review the terms and conditions of the warranty  
38 for such digital electronic equipment as repairs not performed by an  
39 authorized repair provider could affect the terms and conditions of the  
40 warranty;

41 (b) warrantors cannot require that only branded parts be used with the  
42 product in order to retain the warranty;

43 (c) warrantors shall demonstrate that a defect or damage was caused by  
44 independent repair to affect the warranty;

45 (d) warranties are governed by the federal Magnuson-Moss Warranty Act;  
46 and

47 (e) such independent repair provider is not an authorized repair  
48 provider for such digital electronic equipment.

49 9. Beginning in calendar year two thousand twelve, and unless other-  
50 wise specified, the provisions of subdivision two of this section shall  
51 apply to any equipment and parts sold or used in this state for not less  
52 than five years following the last date such equipment and parts were  
53 manufactured.

54 10. The consumer protection division shall develop, establish and  
55 implement a public outreach program directed at independent repair  
56 providers, consumers and digital electronic original equipment manufac-

1 turers to inform them of their rights and responsibilities pursuant to  
2 this section. Such public outreach shall include brochures, consumer  
3 guides, posters or any combination thereof and made available to consum-  
4 ers and other stakeholders by any means deemed appropriate by such divi-  
5 sion and may include internet, radio, and print advertising. The public  
6 outreach may also identify and recruit individuals or trade organiza-  
7 tions to assist in distributing this information and materials. The  
8 public outreach shall begin no later than the thirtieth day after the  
9 effective date of this section.

10 11. (a) Whenever the attorney general shall believe from evidence  
11 satisfactory to him that any person, firm, corporation or association or  
12 agent or employee thereof has engaged in or is about to engage in any of  
13 the acts or practices in violation of this section he may bring an  
14 action in the name and on behalf of the people of the state of New York  
15 to enjoin such unlawful acts or practices and to obtain restitution of  
16 any moneys or property obtained directly or indirectly by any such acts  
17 or practices in violation of this section. In such action preliminary  
18 relief may be granted under article sixty-three of the civil practice  
19 law and rules.

20 (b) Before any violation of this section is sought to be enjoined, the  
21 attorney general shall be required to give the person against whom such  
22 proceeding is contemplated notice by certified mail and an opportunity  
23 to show in writing within five business days after receipt of notice why  
24 proceedings should not be instituted against him, unless the attorney  
25 general shall find, in any case in which he seeks preliminary relief,  
26 that to give such notice and opportunity is not in the public interest.

27 (c) In connection with any proposed proceeding under this section, the  
28 attorney general is authorized to take proof and make a determination of  
29 the relevant facts, and to issue subpoenas in accordance with the civil  
30 practice law and rules.

31 (d) This subdivision shall apply to all acts or practices declared to  
32 be in violation of this section, whether or not subject to any other law  
33 of this state, and shall not supersede, amend or repeal any other law of  
34 this state under which the attorney general is authorized to take any  
35 action or conduct any inquiry.

36 (e) Any person, firm, corporation or association or agent or employee  
37 thereof who engages in any of the acts or practices to be in violation  
38 of this section shall be liable to a civil penalty of not more than five  
39 hundred dollars for each violation, which shall accrue to the state of  
40 New York and may be recovered in a civil action brought by the attorney  
41 general.

42 (f) Except in the instance of a dispute arising between an original  
43 equipment manufacturer and its authorized repair provider related to  
44 either party's compliance with an existing authorized repair agreement,  
45 an authorized repair provider shall have all the rights and remedies  
46 provided in this section.

47 § 3. This act shall take effect on the sixtieth day after it shall  
48 have become a law; provided, however, that subdivision 8 of section  
49 399-nn of the general business law, as added by section two of this act  
50 shall take effect on the ninetieth day after it shall have become a law.