STATE OF NEW YORK

618--C

2017-2018 Regular Sessions

IN SENATE

January 4, 2017

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 -- 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:

Section 1. Short title. This act shall be known and may be cited as the "fair repair act".

§ 2. The general business law is amended by adding a new section 399-nn to read as follows:

§ 399-nn. Sale of digital electronic equipment diagnostic and repair information. 1. Definitions. For the purposes of this section, the following terms shall have the following meanings:

(a) "Original equipment manufacturer" or "OEM" means any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new digital electronic equipment or parts of equipment to any person or business and is engaged in the diagnosis, service, maintenance or repair of digital electronic equipment or parts of such equipment.

(b) "Authorized repair provider" means (i) a person or business that has an arrangement with an OEM for a definite or indefinite period in which the OEM grants to a person or business license to use a trade name, service mark or related characteristic for the purposes of offer-

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

LBD05441-12-8

ing repair services under the name of the OEM, or (ii) a person or business retained by the OEM to provide refurbishing services for the OEM's product or products.

(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) "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.

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

(m) "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.

(n) "Manufacturer of motor vehicle equipment" means a person or business engaged in the business of manufacturing or supplying components that are used in the manufacture, servicing or repair of a motor vehicle.

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

(p) "Aftermarket" means any entity that provides service parts, accessories, second-hand equipment, tools, or diagnostic support for the care or enhancement of original equipment.

2. For equipment and parts sold or used in this state in or after calendar year two thousand twelve, the OEMs of such equipment and parts shall make available to independent repair providers or owners of products manufactured by such OEM in a timely manner:

(a) (1) documentation, diagnostic and repair information, including repair technical updates, schematic diagrams, updates, corrections to embedded software and safety and security patches at no cost or for the same cost and in the same format such OEM makes such information and material available to its authorized repair provider; and

(2) 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 shall not require an authorized repair provider to purchase documentation, diagnostic, service, or repair information in proprietary format if such information is sold or provided to any independent repair provider or to any owner in a format that is standardized with other OEMs, on terms and conditions more favorable than the terms and conditions pursuant to which the authorized repair provider obtains the same diagnostic, service or repair information, unless such proprietary format includes documentation, 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 unless the information necessary to reset an immobilizer system or security-related electronic module shall be made available to owners and independent repair facilities through the appropriate secure data release systems.

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

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

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

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

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

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

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

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

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

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

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

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

(b) Except as provided herein, before any violation of this section is sought to be enjoined, the attorney general shall give the person against whom such proceeding is contemplated notice and an opportunity to show in writing, within five business days after the delivery of such notice, why a proceeding should not be instituted against such person. Such notice by the attorney general shall be delivered by certified mail and by first-class mail with proof of mailing. In a proceeding in which the attorney general seeks preliminary relief, such notice shall not be required upon a finding by the attorney general that such notice is not in the public interest.

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

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

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

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

§ 3. This act shall take effect on the sixtieth day after it shall have become a law.