STATE OF NEW YORK

4104

2021-2022 Regular Sessions

IN SENATE

February 2, 2021

Introduced by Sen. BRESLIN -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to the sale of digital electronic equipment and providing 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 "digital 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) "Authorized repair provider" means an individual or business who is unaffiliated with an original equipment manufacturer and who has an arrangement with the original equipment manufacturer, for a definite or indefinite period, under which the original equipment manufacturer grants to the individual or business a license to use a trade name, service mark, or other proprietary identifier for the purposes of offering the services of diagnosis, maintenance, or repair of digital electronic equipment under the name of the original equipment manufacturer, or other arrangement with the original equipment manufacturer to offer such services on behalf of the original equipment manufacturer. An original equipment manufacturer who offers the services of diagnosis, maintenance, or repair of its own digital electronic equipment, and who does not have an arrangement described in this subdivision with an unaffiliated individual or business, shall be considered an authorized repair provider with respect to such equipment.

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

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(b) "Digital electronic equipment" or "equipment" means any product that depends for its functioning, in whole or in part, on digital electronics embedded in or attached to the product.

(c) "Documentation" means any manual, diagram, reporting output, service code description, schematic diagram, or similar kinds of information provided to an authorized repair provider for purposes of its effecting the services of diagnosis, maintenance, or repair of digital electronic equipment.

(d) "Embedded software" means any programmable instructions provided on firmware delivered with digital electronic equipment, or with a part for such equipment, for purposes of equipment operation, including all relevant patches and fixes made by the manufacturer of such equipment or part for these purposes.

(e) "Fair and reasonable terms" for obtaining a part or tool or documentation means at costs and terms, including convenience of delivery, and including rights of use, equivalent to what is offered by the original equipment manufacturer to an authorized repair provider, using the net costs that would be incurred by an authorized repair provider in obtaining an equivalent part or tool or documentation from the original equipment manufacturer, accounting for any discounts, rebates, or other incentive programs in arriving at the actual net costs. For documentation, including any relevant updates, "fair and reasonable terms" means at no charge, except that, when the documentation is requested in physical printed form, a charge may be included for the reasonable actual costs of preparing and sending the copy.

(f) "Firmware" means a software program or set of instructions programmed on digital electronic equipment, or on a part for such equipment, to allow the equipment or part to communicate with other computer hardware.

(g) "Independent repair provider" means an individual or business operating in this state, who does not have an arrangement described in paragraph (a) of this subdivision with an original equipment manufacturer, and who is not affiliated with any individual or business who has such an arrangement, and who is engaged in the services of diagnosis, maintenance, or repair of digital electronic equipment, except that an original equipment manufacturer or, with respect to that original equipment manufacturer, an individual or business who has such an arrangement with that original equipment manufacturer, or who is affiliated with an individual or business who has such an arrangement with that original equipment manufacturer, shall be considered an independent repair provider for purposes of those instances in which it engages in the services of diagnosis, maintenance, or repair of the digital electronic equipment that is not manufactured by or sold under the name of that original equipment manufacturer.

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

(i) "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.

(j) "Motor vehicle" means a vehicle that is designed for transporting persons or property on a street or highway and is certified by the

manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States. Motor vehicle does not include: (1) a motorcycle; or (2) a recreational vehicle or an auto home equipped for habitation.

(k) "Motor vehicle dealer" means an individual or business who, in the ordinary course of business, is engaged in the business of selling or leasing new motor vehicles to an individual or business pursuant to a franchise agreement, has obtained a license under the vehicle and traffic law, and is engaged in the services of diagnosis, maintenance, or repair of motor vehicles or motor vehicle engines pursuant to such franchise agreement.

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

(m) "Original equipment manufacturer" means a business engaged in the business of selling or leasing new digital electronic equipment manufactured by or on behalf of itself, to any individual or business.

(n) "Owner" means an individual or business who owns or leases digital electronic equipment purchased or used in this state.

(o) "Part" means any replacement part, either new or used, made available by an original equipment manufacturer for purposes of effecting the services of maintenance or repair of digital electronic equipment manufactured or sold by the original equipment manufacturer.

2. Requirements. (a) For digital electronic equipment, and parts for such equipment, sold or used in this state, an original equipment manufacturer shall make available, for purposes of diagnosis, maintenance, or repair, to any independent repair provider, or to the owner of digital electronic equipment manufactured by or on behalf of, or sold by, the original equipment manufacturer, on fair and reasonable terms, documentation, parts, and tools, inclusive of any updates to information or embedded software. Nothing in this section requires an original equipment manufacturer to make available a part if the part is no longer available to the original equipment manufacturer.

(b) For equipment that contains an electronic security lock or other security-related function, the original equipment manufacturer shall make available to the owner and to independent repair providers, on fair and reasonable terms, any special documentation, tools, and parts needed to reset the lock or function when disabled in the course of diagnosis, maintenance, or repair of the equipment. Such documentation, tools, and parts may be made available through appropriate secure release systems.

3. Limitations. (a) Nothing in this section shall be construed to require an original equipment manufacturer to divulge a trade secret to an owner or an independent service provider.

(b) No provision in this section shall be construed to alter the terms of any arrangement described in paragraph (a) of subdivision one of this section in force between an authorized repair provider and an original equipment manufacturer, including, but not limited to, the performance or provision of warranty or recall repair work by an authorized repair provider on behalf of an original equipment manufacturer pursuant to such arrangement, except that any provision in such terms that purports to waive, avoid, restrict, or limit the original equipment manufacturer's obligations to comply with this section shall be void and unenforceable.

(c) Nothing in this section shall be construed to require an original equipment manufacturer or an authorized repair provider to provide to an owner or independent repair provider access to information, other than documentation, that is provided by the original equipment manufacturer

to an authorized repair provider pursuant to the terms of an arrangement described in paragraph (a) of subdivision one of this section.

4. Exclusions. Nothing in this section shall apply to:

(a) a motor vehicle manufacturer, manufacturer of motor vehicle equipment, or motor vehicle dealer acting in such capacity, or to any product or service of a motor vehicle manufacturer, manufacturer of motor vehicle equipment, or motor vehicle dealer acting in such capacity.

(b) a medical device, as defined in this section, or a digital electronic product or embedded software found in a medical setting including diagnostic, monitoring, or control equipment or any product or service that they offer.

5. Enforcement by attorney general. (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 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 one hundred twentieth day after it shall have become a law and shall apply with respect to equipment sold or in use on or after such date.