STATE OF NEW YORK

1320

2023-2024 Regular Sessions

IN SENATE

January 11, 2023

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

AN ACT to amend the general business law, in relation to the sale of digital electronic equipment and providing diagnostic and repair information; and to amend a chapter of the laws of 2022 amending the general business law relating to the sale of digital electronic equipment and providing diagnostic and repair information, as proposed in legislative bills numbers S. 4104-A and A. 7006-B, in relation to the effectiveness thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 399-nn of the general business law, as added by a chapter of the laws of 2022 amending the general business law relating to the sale of digital electronic equipment and providing diagnostic and repair information, as proposed in legislative bills numbers S. 4104-A and A. 7006-B, is amended 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 has an arrangement with the original equipment manufacturer 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~~

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

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~~considered an authorized repair provider with respect to such equipment.~~]

(b) "Digital electronic equipment" or "equipment" means any **hardware** product [~~with a value over ten dollars, adjusted annually by the rate of change in the consumer price index as reported by the bureau of labor statistics of the United States department of labor,~~] **manufactured for the first time, and first sold or used in New York on or after July first, two thousand twenty-three,** that depends for its functioning, in whole or in part, on digital electronics embedded in or attached to the product **for which the original equipment manufacturer makes available tools, parts, and documentation either through authorized repair providers, its own employees, or any authorized third-party providers. "Digital electronic equipment" or "equipment" does not include any product sold under a specific business-to-government or business-to-business contract, which is not otherwise offered for sale directly by a retail seller**.

(c) "Documentation" means any manual, diagram, reporting output, service code description, schematic diagram, [~~security codes, passwords,~~] or similar kinds of information [~~used in~~] **required for** effecting the services of diagnosis, maintenance, or repair of digital electronic equipment.

(d) "Fair and reasonable terms" means making available parts, tools, or documentation as follows:

(i) With respect to documentation **required for repair**, that such documentation is made available by the original equipment manufacturer 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.

(ii) With respect to tools, that such tools are made available by the original equipment manufacturer at no charge and without requiring authorization [~~or internet access~~] for use or operation of such tool, or imposing impediments to access or use of the tool to diagnose, maintain, or repair [~~and enable full functionality of~~] digital electronic equipment **using parts provided by the original equipment manufacturer in accordance with this section**, [~~or~~] **and** in a **reasonably timely** manner [~~that impairs the efficient and cost-effective performance of any such diagnosis, maintenance, or repair~~], except that, when such tool is requested in physical form, a charge may be included for the reasonable, actual costs of **procuring,** preparing and sending such tool.

(iii) With respect to parts, that such parts are made available by the original equipment manufacturer, either directly or **indirectly** through an authorized repair provider **or authorized third-party provider**, to independent repair providers and owners at **reasonable** costs and terms [~~that are equivalent to the most favorable costs and terms under which an original equipment manufacturer offers the part to an authorized repair provider~~] and which:

A. [~~accounts for any discount, rebate, convenient and timely means of delivery, means of enabling fully restored and updated functionality, rights of use, or other incentive or preference the original equipment manufacturer offers to an authorized repair provider, or any additional cost, burden, or impediment the original equipment manufacturer imposes on an owner or independent repair provider;~~

~~B. is~~] **are** not conditioned on or imposing a substantial obligation or restriction that is not reasonably necessary for enabling the owner or independent repair provider to engage in the diagnosis, maintenance, or

repair of digital electronic equipment made by or on behalf of the original equipment manufacturer; and

[~~C. is~~] **B. are** not conditioned on an arrangement described in paragraph (a) of this subdivision.

(iv) Such parts, tools, and documentation shall be made available to an authorized repair provider, and shall further be made available by an authorized repair provider to any independent repair provider or owner, provided that such authorized repair provider is contractually and practically permitted by the original equipment manufacturer to sell such parts, tools, and documentation to any independent repair provider or owner, and provided further that such original equipment manufacturer shall not:

A. retaliate against or hinder the ability of any authorized repair provider to sell such parts, tools, or documentation through any means, including advertising restrictions or product allocation limitations unrelated to legitimate product shortages; or

B. condition or impose a substantial obligation or restriction that is not reasonably necessary for enabling the owner or independent repair provider to engage in the diagnosis, maintenance, or repair of digital electronic equipment made by or on behalf of the original equipment manufacturer.

(e) "Independent repair provider" means an individual or business operating in this state, that does not have an arrangement described in paragraph (a) of this subdivision with an original equipment manufacturer, and who is engaged in the services of diagnosis, maintenance, or repair of digital electronic equipment.

(f) "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.

(g) "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.

(h) "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.

(i) "Motor vehicle dealer" means an individual or business who, in the ordinary course of business, is engaged in the business of selling or leasing 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.

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

(k) "Original equipment manufacturer" means any individual or business that, in the normal course of business, is engaged in the business of selling or leasing digital electronic equipment manufactured by or on behalf of itself, to any individual or business.

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

(m) "Part" **or "parts"** means any replacement part **or assembly of parts**, 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. **Part does not include printed board assemblies that may allow device cloning in violation of 18 U.S.C. Section 1029 or other applicable law.**

(n) "Tool" means any software program, hardware implement, or other apparatus used for diagnosis, maintenance, or repair of digital electronic equipment, including software or other mechanisms that provide, program, [~~or~~] pair a part, calibrate functionality, or perform any other function required to [~~bring~~] **repair or update** the **original** equipment or part back to fully functional condition[~~, including any updates~~].

(o) "Repair" means any act needed to restore digital electronic equipment or equipment to fully working order.

(p) "Maintenance" means any act necessary to keep currently working digital electronic equipment or equipment in fully working order.

(q) "Diagnosis" means the process of identifying the issue or issues that cause digital electronic equipment or equipment to not be in fully working order.

(r) "Modifications" or "modify" means any alteration to digital electronic equipment that is not maintenance and not a repair.

2. Requirements. [~~(a) For digital electronic equipment and parts for such equipment that are sold or used in this state, an~~] **An** original equipment manufacturer shall make available to any independent repair provider and owner of digital electronic equipment manufactured by or on behalf of or sold by such original equipment manufacturer, on fair and reasonable terms, any documentation, parts, and tools required for the diagnosis, maintenance, or repair of such digital electronic equipment and parts [~~for such equipment~~] **that are manufactured for the first time, and first sold or used in New York on or after July first, two thousand twenty-three**. Such documentation, parts, and tools shall be made available either directly by [~~such~~] **an** original equipment manufacturer or via an authorized repair provider. **An original equipment manufacturer who, in the regular course of business, offers to an owner the services of diagnosis, maintenance or repair of its own digital electronic equipment, and who does not have an arrangement described in paragraph (a) of subdivision one of this section with an unaffiliated individual or business, shall be considered an authorized repair provider with respect to such equipment.**

[~~(b) For equipment that contains an electronic security lock or other security-related function, the original equipment manufacturer shall make available to any owner and independent repair provider, on fair and reasonable terms, any special documentation, tools, and parts needed to access and reset the lock or function when disabled in the course of diagnosis, maintenance, or repair of such 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 any trade secret **or license any intellectual property** to any owner or independent service provider.

(b) Nothing 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.

(d) Nothing in this section shall be construed to require an original equipment manufacturer or authorized repair provider to make available any parts, tools or documentation for the purposes of modifying or making modifications to any digital electronic equipment.

(e) Nothing in this section shall be construed to require an original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of public safety communications equipment, the intended use of which is for emergency response or prevention purposes by an emergency service organization such as a police, fire or emergency medical services agency.

(f) Nothing in this section shall be construed to require any original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of digital electronic equipment in a manner that is inconsistent with or in violation of any federal law, such as gaming and entertainment consoles, related software and components.

(g) Nothing in this section shall be construed to require any original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of any home appliance that has a digital electronic product embedded within it, including, but not limited to, refrigerators, ovens, microwaves, air conditioning [~~and~~], heating units, and security devices or alarm systems including any related software and components.

(h) Nothing in this section shall prevent an original equipment manufacturer from establishing reasonable training and certification programs for independent repair providers, however, no independent repair provider shall be required to complete any such training or certification program as a condition to be covered by the rights granted under this chapter.

(i) Nothing in this section shall prevent an original equipment manufacturer from offering parts, such as integrated batteries, to independent repair providers or owners pre-assembled with other parts rather than as individual components, where the individual components may pose a heightened safety risk if installed improperly.

(j) Nothing in this section shall require an original equipment manufacturer to make available special documentation, tools, and parts that would disable or override anti-theft security measures set by the owner of the equipment without the owner's authorization.

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 found in a medical setting including diagnostic, monitoring, or control equipment or any product or service that they offer; or

(c) a manufacturer, distributor, importer, or dealer of any off-road (non-road) equipment, including but not limited to, farm and utility tractors, farm implements, farm machinery, forestry equipment, industrial equipment, utility equipment, construction equipment, compact construction equipment, mining equipment, turf, yard and garden equipment, outdoor power equipment (including portable generators), marine, all-terrain sports and recreational vehicles (including racing vehicles), stand-alone or integrated stationary or mobile internal combustion engines, other power sources, (including without limitation, generator sets, electric/battery and fuel cell power), power tools, and any tools, technology, attachments, accessories, components and repair parts for any of the foregoing.

(d) commercial and industrial electrical equipment (including power distribution equipment, such as medium/low voltage switchgear and transformers, power control equipment, such as medium/low voltage motor control and drives, power quality equipment, such as uninterruptable power supplies, remote power panels, power distribution units and static/transfer switches) and any tools, technology, attachments, accessories, components and repair parts for any of the foregoing.

(e) an electronic bicycle manufacturer, distributor, importer, retailer or dealer.

5. No original equipment manufacturer or authorized repair provider shall be liable for any damage or injury caused to any digital electronic equipment [~~by an independent repair provider or owner~~], **person, or property** which occurs [~~during the course~~] **as a result** of repair, diagnosis, maintenance, or modification **performed by an independent repair provider or owner**, including but not limited to, any indirect, incidental, special or consequential damages; any loss of data, privacy or profits; or any inability to use, or reduced functionality of, the digital electronic equipment.

6. **Before repairing digital electronic equipment, independent repair providers shall provide to any customer, and publish on their website and the place of business, a written notice that contains the following information:**

(a) The independent repair provider is not an authorized repair provider for the equipment;

(b) The consumer should review the terms and conditions of any warranty for the equipment, as repairs not performed by an authorized repair provider may affect the warranty;

(c) Warranties for consumer products are governed by the federal Magnuson-Moss Warranty Act (15 U.S.C. ch. 50 § 2301), which gives consumers rights and protections that apply over conflicting provisions in the warranty;

(d) Under the Magnuson-Moss Warranty Act, a warranty cannot require that maintenance and repairs be performed only by an authorized repair provider; and

(e) Under the Magnuson-Moss Warranty Act, if damage to equipment is shown to be caused by equipment not offered or sold by the original equipment manufacturer or by faulty repair performed by a non-authorized repair provider, that damage may not be covered by the warranty, but the warranty may otherwise remain in effect.

7. Enforcement by the attorney general. (a) Whenever the attorney general shall believe from evidence satisfactory to the attorney general that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any acts or practices in violation of this section, the attorney general may bring an action 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 such person, firm, corporation, or association 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 proceedings should not be instituted against such person, firm, corporation, or association. Such notice by the attorney general shall be delivered by certified mail and by first-class mail with proof of mailing. In any 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 and opportunity 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 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 an 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.

§ 2. Section 3 of a chapter of the laws of 2022 amending the general business law relating to the sale of digital electronic equipment and providing diagnostic and repair information, as proposed in legislative bills numbers S. 4104-A and A. 7006-B is amended to read as follows:

§ 3. This act shall take effect one year after it shall have become a law **and shall apply to digital electronic equipment, manufactured for the first time, and first sold or used in New York on or after July 1, 2023**.

§ 3. This act shall take effect immediately; provided, however that section one of this act shall take effect on the same date and in the same manner as a chapter of the laws of 2022 amending the general business law relating to the sale of digital electronic equipment and providing diagnostic and repair information, as proposed in legislative bills numbers S. 4104-A and A. 7006-B, takes effect.