

# State of South Dakota

NINETY-FOURTH SESSION  
LEGISLATIVE ASSEMBLY, 2019

963B0431

## HOUSE BILL NO. 1102

Introduced by: Representatives Pischke and Brunner and Senator Nelson

1 FOR AN ACT ENTITLED, An Act to establish certain provisions regarding fairness in repairs  
2 of equipment sold or used in this state.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That the code be amended by adding a NEW SECTION to read:

5 Terms used in this chapter mean:

6 (1) "Authorized repair provider," a person who has an arrangement for a definite or  
7 indefinite period in which an original equipment manufacturer grants to a separate  
8 person a license to use a trade name, service mark, or related characteristic for the  
9 purposes of offering repair services under the name of the original equipment  
10 manufacturer;

11 (2) "Embedded software," any programmable instructions provided on firmware  
12 delivered with the equipment for the purposes of equipment operation, including all  
13 relevant patches and fixes made by the original equipment manufacturer for this  
14 purpose, including a basic internal operating system, an internal operating system, a  
15 machine code, an assembly code, a root code, and a microcode;



- 1 (3) "Equipment," digital electronic equipment or a part for such equipment originally  
2 manufactured for distribution and sale in the United States;
- 3 (4) "Fair and reasonable terms," an equitable price in light of relevant factors, including:  
4 (a) The net cost to the authorized repair provider for similar information obtained  
5 from an original equipment manufacturer, less any discounts, rebates, or other  
6 incentive programs;  
7 (b) The cost to the original equipment manufacturer for preparing and distributing  
8 the information, excluding any research and development costs incurred in  
9 designing and implementing, upgrading, or altering the product, but including  
10 amortized capital costs for the preparation and distribution of the information;  
11 (c) The price charged by other original equipment manufacturers for similar  
12 information;  
13 (d) The price charged by original equipment manufacturers for similar  
14 information prior to the launch of original equipment manufacturer web sites;  
15 (e) The ability of aftermarket technicians or shops to afford the information;  
16 (f) The means by which the information is distributed;  
17 (g) The extent to which the information is used, which includes the number of  
18 users, and frequency, duration, and volume of use; and  
19 (h) Inflation.
- 20 (5) "Firmware," a software program or set of instructions programmed on a hardware  
21 device to allow the device to communicate with other computer hardware;
- 22 (6) "Independent repair provider," a person operating in this state which is not affiliated  
23 with an original equipment manufacturer or an original equipment manufacturer's  
24 authorized repair provider, which is engaged in the diagnosis, service, maintenance,

1 or repair of equipment, except that an original equipment manufacturer is an  
2 independent repair provider for purposes of those instances when such original  
3 equipment manufacturer engages in the diagnosis, service, maintenance, or repair of  
4 equipment that is not affiliated with the original equipment manufacturer;

5 (7) "Motor vehicle," any vehicle that is designed for transporting persons or property on  
6 a street or highway and is certified by the motor vehicle manufacturer under all  
7 applicable federal safety and emissions standards and requirements for distribution  
8 and sale in the United States. The term does not include:

9 (a) A motorcycle; or

10 (b) A recreational vehicle or manufactured home equipped for habitation.

11 (8) "Motor vehicle dealer," any person who, in the ordinary course of business, is  
12 engaged in the business of selling or leasing new motor vehicles to a person pursuant  
13 to a franchise agreement, who has obtained a license pursuant to § 32-6B-12,  
14 32-6C-5, or 32-7B-3, and who is engaged in the diagnosis, service, maintenance, or  
15 repair of motor vehicles or motor vehicle engines pursuant to such franchise  
16 agreement;

17 (9) "Motor vehicle manufacturer," any person engaged in the business of manufacturing  
18 or assembling new motor vehicles;

19 (10) "Original equipment manufacturer," any person who, in the ordinary course of its  
20 business, is engaged in the business of selling or leasing new equipment to any  
21 person and is engaged in the diagnosis, service, maintenance, or repair of equipment;

22 (11) "Owner," a person who owns or leases a digital electronic product purchased or used  
23 in this state;

24 (12) "Part," any replacement part, either new or used, made available by the original

1 equipment manufacturer to the authorized repair provider for purposes of effecting  
2 repair;

3 (13) "Trade secret," anything tangible or intangible or electronically stored or kept which  
4 constitutes, represents, evidences, or records intellectual property, including secret  
5 or confidentially held designs, processes, procedures, formulas, inventions,  
6 improvements, or secret or confidentially held scientific, technical, merchandising,  
7 production, financial, business, or management information, or any other trade secret  
8 as defined in 18 U.S.C. 1839, as of January 1, 2016.

9 Section 2. That the code be amended by adding a NEW SECTION to read:

10 For equipment sold and used in this state, the original equipment manufacturer of the  
11 equipment shall:

12 (1) Make available to any independent repair provider or owner of equipment  
13 manufactured by such original equipment manufacturer, the same diagnostic and  
14 repair documentation, including schematic diagrams, repair technical updates and  
15 updates and corrections to embedded software, for no charge or in the same manner  
16 and in the same time frame as the original equipment manufacturer makes the  
17 diagnostic and repair documentation, including repair technical updates and updates  
18 and corrections to embedded software, available to its authorized repair providers and  
19 subcontract repair or refurbishment facilities; and

20 (2) Make available for purchase by the owner, the owner's authorized agent, or any  
21 independent repair provider, equipment or service parts, inclusive of any updates to  
22 the embedded software of the equipment, upon fair and reasonable terms.

23 Nothing in this section requires the original equipment manufacturer to sell equipment or  
24 service parts if the parts are no longer available to the original equipment manufacturer or the

1 authorized repair provider of the original equipment manufacturer.

2 Section 3. That the code be amended by adding a NEW SECTION to read:

3 Any original equipment manufacturer that sells any diagnostic, service, or repair  
4 documentation to any independent repair provider or to any owner in a format that is  
5 standardized with other original equipment manufacturers, and on terms and conditions more  
6 favorable than the manner and the terms and conditions pursuant to which the authorized repair  
7 provider obtains the same diagnostic, service, or repair documentation, shall be prohibited from  
8 requiring any authorized repair provider to continue purchasing diagnostic, service, or repair  
9 documentation in a proprietary format, unless the proprietary format includes diagnostic,  
10 service, or repair documentation or functionality that is not available in a standardized format.

11 Section 4. That the code be amended by adding a NEW SECTION to read:

12 Each original equipment manufacturer of equipment sold or used in this state shall make  
13 available for purchase by owners and independent repair providers all diagnostic repair tools  
14 incorporating the same diagnostic, repair, and remote communications capabilities that the  
15 original equipment manufacturer makes available to the manufacturer's own repair or  
16 engineering staff or any authorized repair provider. Each original equipment manufacturer shall  
17 offer the aforementioned tools for sale to any owner and independent repair provider upon fair  
18 and reasonable terms. Each original equipment manufacturer that provides diagnostic repair  
19 documentation to aftermarket diagnostic tool manufacturers, diagnostics providers, or service  
20 information publications and systems has fully satisfied the manufacturer's obligations under  
21 this section. Thereafter, the manufacturer is not responsible for the content and functionality of  
22 such aftermarket diagnostic tools, diagnostics, or service information systems.

23 Section 5. That the code be amended by adding a NEW SECTION to read:

24 Original equipment manufacturer equipment sold or used in this state for the purpose of

1 providing security-related functions may not exclude diagnostic, service, and repair  
2 documentation necessary to reset a security-related electronic function from information  
3 provided to an owner or independent repair provider. If excluded under this Act, the  
4 documentation necessary to reset an immobilizer system or security-related electronic module  
5 shall be obtained by an owner or independent repair provider through the appropriate secure data  
6 release systems.

7 Section 6. That the code be amended by adding a NEW SECTION to read:

8 Nothing in this Act requires an original equipment manufacturer to divulge a trade secret.

9 Section 7. That the code be amended by adding a NEW SECTION to read:

10 Nothing in this Act requires original equipment manufacturers or authorized repair providers  
11 to provide an owner or independent repair provider access to non-diagnostic and repair  
12 documentation provided by an original equipment manufacturer to an authorized repair provider  
13 pursuant to the terms of an authorizing agreement.

14 Section 8. That the code be amended by adding a NEW SECTION to read:

15 No provision in this Act may be read, interpreted, or construed to abrogate, interfere with,  
16 contradict, or alter the terms of any agreement executed and in force between an authorized  
17 repair provider and an original equipment manufacturer, including the performance or provision  
18 of warranty or recall repair work by an authorized repair provider on behalf of an original  
19 equipment manufacturer pursuant to the authorized repair agreement. However, any provision  
20 in an authorized repair agreement that purports to waive, avoid, restrict, or limit an original  
21 equipment manufacturer's compliance with this section is void and unenforceable.

22 Section 9. That the code be amended by adding a NEW SECTION to read:

23 Nothing in this Act applies to motor vehicle manufacturers, any product or service of a  
24 motor vehicle manufacturer, or motor vehicle dealers.

1 Section 10. That the code be amended by adding a NEW SECTION to read:

2 The attorney general may bring a civil action against any original equipment manufacturer  
3 found in violation of this Act. The court may assess a civil penalty of no greater than five  
4 hundred dollars for each violation. The civil penalty shall be deposited in the state general fund.

5 Section 11. That the code be amended by adding a NEW SECTION to read:

6 The requirements of this Act apply to equipment already sold or in use on or before July 1,  
7 2016.