

A08093 Memo:

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A8093A**SPONSOR:** Titone**TITLE OF BILL:** An act to amend the general business law, in relation to the manufacture and sale of smartphones that are capable of being decrypted and unlocked by the manufacturer**PURPOSE OR IDEA OF GENERAL BILL:**

Recent technological advances have the potential to greatly embolden online criminals, providing new methods for abusers to avoid detection. The United States Attorney General, the director of the Federal Bureau of Investigation, and others have severely criticized the efforts of smartphone manufacturers to keep evidence immune from lawful process. Criticism, however, is not enough.

In some cases, perpetrators take advantage of encryption and anonymizing technology to conceal contraband materials and disguise their locations. Andrew Weissmann, a former FBI general counsel, has publically called the use of such encryption technology outrageous. According to his analysis, even a judge's decision that there is probable cause to suspect a crime has been committed won't get Apple or Google to help retrieve potential evidence. In essence these companies are announcing to criminals, 'use this device.'

Justice Department officials have said that if the new systems work as advertised, they will make it virtually impossible to solve some cases, as the companies have promised customers the equivalent of a house that can't be searched, or a car trunk that could never be opened. Ronald Hosko, former head of the FBI Criminal Investigations Division has asserted that the level of privacy described by Apple and Google is "wonderful until it's your kid who is kidnapped and being abused, and because of the technology, we can't get to them. Who's going to get lost because of this, and we're not going to crack the case?"

Smartphone companies benefit immeasurably from the laws protecting intellectual property, as well as from extensive federal regulation. There is no reason criminals should also benefit, and they will, as people will be defrauded or threatened, and terrorists will use these encrypted devices to plot their next attack over FaceTime. The safety of the citizenry calls for a legislative solution, and a solution is easily at hand. Enacting this bill would penalize those who would sell smartphones that are beyond the reach of law enforcement. If enacted, this bill would provide a significant deterrent to such sellers, and therefore would discourage the companies from continuing to provide such smartphone software.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 amends the general business law by adding a new section 399-k

1. Provides definitions
2. Establishes that any smartphone manufactured after January 1, 2016 and sold or leased in New York must be capable of being decrypted by its manufacturer
3. Establishes the penalty to those who knowingly sell or lease smartphones that cannot be decrypted or unlocked by the manufacturer, and provides that sellers and lessors are prohibited from passing any portion of penalty costs on to customers.
4. Establishes parameters for degrees of liability contingent on manufacturer awareness and approval when a smartphone that has been sold or leased is encrypted by its owner or lessee.
5. Establishes that the power to enforce this legislation by civil suit rests only with the Attorney General and the district attorney representing the county in which such violation has occurred.

Section 2 establishes the effective date

JUSTIFICATION:

Digital evidence plays a crucial role in the vast majority of criminal cases across our state, and indeed, across the nation. Because so many people put extensive information on their smart-phones and hand-held devices, those devices may contain photos, texts, voice messages, or emails that will constitute relevant evidence in virtually every kind of case. Material from smartphones has been used as key evidence to prosecute murders, rapes, kidnappings, fraud, and larceny, among other crimes.

For law enforcement to access the contents of a smartphone or similar device, they typically need and obtain a search warrant. It should be noted that a search warrant cannot be issued unless the applicant demonstrates, to a judge, that there is both probable cause to believe a crime has been committed and probable cause to believe the device contains evidence of that crime. If a smartphone is protected by a passcode, however, then even though the search warrant gives the legal right to access the contents of the phone, the material on the phone cannot be reviewed, as law enforcement would be unable to get through the passcode.

Historically, in such instances law enforcement has been able to seek the aid of the mobile operating system providers. Upon our presentation to them of the warrant, these providers have been able to unlock the phones, and provide the information on the phone that was responsive to the warrants.

In the past few months, companies have deliberately designed software, entire operating systems, and mobile devices such that they cannot unlock passcode-protected phones. The companies have touted this development, explicitly advertising their inability to comply with lawful government requests. As a consequence, the search warrant becomes a nullity, because even law enforcement officers possessing valid search warrants or court orders cannot access the contents of passcode-protected smartphones. In other words, criminals using passcode-protected devices have been granted license to evade a lawful order of a court and are thus quite literally, protected in their criminal endeavors.

It is as if the police get a search warrant for a safe deposit box at a bank because they have reason to believe that the safe deposit box has evidence of a crime - but they cannot open the box because the bank has thrown away its own key. Indeed, this situation is even worse because whereas a safe deposit box can, ultimately, be opened by force, a

passcode-protected smartphone is virtually impregnable, unless the companies maintain the ability to open the phones that it manufactures.

Although the companies tout their new software as a boon for their users' privacy, users' privacy is adequately protected by the Fourth Amendment, specifically the requirement that a judge or magistrate that is a neutral party - issue a search warrant only upon a showing of probable cause that the phone will contain evidence of a crime.

The fact is that, although the new software may enhance privacy for some users, it severely hampers law enforcement's ability to aid victims. All of the evidence contained in smartphones and similar devices will be lost to law enforcement, so long as the criminals take the precaution of protecting their devices with passcodes. Of course they will do so. Simply stated, passcode-protected devices render lawful court orders meaningless and encourage criminals to act with impunity.

New York can and should lead the nation in protecting its citizens, and in responding to the misguided and dangerous attempts by digital device manufacturers to turn digital devices into virtual safes that, being beyond the reach of law enforcement, are havens for criminals. Revelations in the recent past about NSA surveillance and similar government intrusions on privacy have made people acutely aware of threats to their privacy. The goal of this bill is not to limit peoples' privacy. Peoples' privacy is protected by the warrant requirement, as it always has been. This bill would help to protect all New Yorkers.

PRIOR LEGISLATIVE HISTORY:

New Legislation

FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

This act shall take effect immediately.

A08093 Text:

STATE OF NEW YORK

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2015-2016 Regular Sessions

IN ASSEMBLY

June 8, 2015

Introduced by M. of A. TITONE, MOSLEY -- read once and referred to the Committee on Consumer Affairs and Protection -- recommitted to the Committee on Consumer Affairs and Protection in accordance with Assembly Rule 3, sec. 2 -- 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 manufacture and sale of smartphones that are capable of being decrypted and unlocked by the manufacturer

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

- 1 Section 1. The general business law is amended by adding a new section
2 399-k to read as follows:
3 § 399-k. Smartphones. 1. For the purposes of this section, the follow-
4 ing terms shall have the following meanings:
5 (a) "Smartphone" means a cellular radio telephone or other mobile
6 voice communications handset device that includes the following
7 features:
8 i. Utilizes a mobile operating system.
9 ii. Possesses the capability to utilize mobile software applications,
10 access and browse the Internet, utilize text messaging, utilize digital
11 voice service, and send and receive email.
12 iii. Has wireless network connectivity.
13 iv. Is capable of operating on a long-term evolution network or
14 successor wireless data network communication standards.
15 (b) "Sold in New York," or any variation thereof, means that the
16 smartphone is sold at retail from a location within the state, or the
17 smartphone is sold and shipped to an end-use consumer at an address
18 within the state. "Sold in New York" does not include a smartphone that
19 is resold in the state on the secondhand market or that is consigned and
20 held as collateral on a loan.

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

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1 (c) "Leased in New York," or any variation thereof, means that the
2 smartphone is contracted for a specified period of time to an end-use
3 consumer at an address within the state.

4 2. Any smartphone that is manufactured on or after January first, two
5 thousand seventeen, and sold or leased in New York, shall be capable of
6 being decrypted and unlocked by its manufacturer or its operating system
7 provider.

8 3. The sale or lease in New York of a smartphone manufactured on or
9 after January first, two thousand seventeen that is not capable of being
10 decrypted and unlocked by its manufacturer or its operating system
11 provider shall subject the seller or lessor to a civil penalty of two
12 thousand five hundred dollars for each smartphone sold or leased if it
13 is demonstrated that the seller or lessor of the smartphone knew at the
14 time of the sale or lease that the smartphone was not capable of being
15 decrypted and unlocked by its manufacturer or its operating system
16 provider. No seller or lessor who pays the civil penalty may pass any
17 portion of that penalty on to any purchaser of smartphones by raising
18 the sales or lease price of smartphones.

19 4. The retail sale or lease of a smartphone manufactured on or after
20 January first, two thousand seventeen that is not capable of being
21 decrypted and unlocked by its manufacturer or its operating system
22 provider shall not result in liability to the seller or lessor if the
23 inability of the manufacturer and operating system provider to decrypt
24 and unlock the smartphone is the result of actions taken by any person
25 or entity other than the manufacturer, the operating system provider,
26 the seller, or the lessor so long as such actions were unauthorized by
27 the manufacturer, the operating system provider, the seller, or the
28 lessor unless at the time of sale or lease the seller or lessor had
29 received notification that the manufacturer and operating system provid-
30 er were unable to decrypt and unlock smartphones that had been acted
31 upon in the manner described above.

32 5. A civil suit to enforce this section may be brought by the follow-
33 ing parties and none others: (a) the Attorney General, for any sale or
34 lease of a smartphone in New York, and (b) the district attorney for any
35 sale or lease of a smartphone in the county represented by the district
36 attorney, provided, however that the seller or lessor may be subject to
37 not more than a single penalty for each sale or lease of a smartphone.

38 § 2. This act shall take effect immediately.