DATCP Docket No. 12-R-08
Rules Clearinghouse No. _____

Preliminary Hearing Draft
June 25, 2013

PROPOSED ORDER
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION ADOPTING RULES

The Wisconsin department of agriculture, trade and consumer protection proposes the following rule ***to repeal*** ATCP 110.02 (6) (L) and (m), Ch. ATCP 111 Title and preamble notes, ATCP 111.01 (5), and 111.06; ***to renumber*** ATCP 111.01, 111.02 (intro) (1) to (4), (6), and (7), 111.03 (2) to (6), and (8) to (10), 111.04, and 111.05; ***to renumber and amend*** ATCP 110.02 (3) (d) and (7) (c), ATCP 111.03 (intro) (1) and (7); ***to amend*** ATCP 110.01 (2), 110.02 (6) (n), 110.025, 110.03 (1), 110.04 (1) and 110.05 (7); ***to create***, 110.01 (2m) 110.03 (3) and (4), 110.06 (1) Note, and 110.09 (title); ***relating to*** Home improvement practices and basement waterproofing practices, and affecting small businesses.

Analysis Prepared by the Department of Agriculture, Trade and Consumer Protection

This rule revises and updates current rule relating to home improvement practices.

Statutes Interpreted

Statutes Interpreted: s. 100.20, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1) and 100.20 (2), Stats.

Explanation of Statutory Authority

DATCP has broad general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction.

DATCP has authority under s. 100.20 (2) (a) to promulgate rules forbidding methods of competition in business or trade practices in business that are determined to be unfair. DATCP also has authority to promulgate rules prescribing methods of competition or trade practices that that DATCP determines to be fair.

Related Statutes and Rules

Some of the home improvement contractors regulated by ATCP 110 may also be regulated by Ch. 101 – Subchapter II, One and Two Family Dwelling Code, Wis. Stats., associated Department of Safety and Professional Services (DSPS) administrative rules, and building codes administered by local units of government.

Under statutes and rules administered by DSPS, persons who apply for building permits for one or two unit dwellings (and who are not an owner and resident), are required to have a Dwelling Unit Contractor Certification from DSPS. These statutes and rules do not distinguish between building permits for new construction and building permits for home repairs or improvement. Therefore, certified dwelling unit contractors who specialize in new home construction are not regulated by ATCP 110. And home improvement contractors who perform jobs that do not require building permits are not regulated by the dwelling unit contractor certification program.

Plain Language Analysis

Rule Content

ATCP 110 currently regulates home improvement practices. Pursuant to the definition of "home improvement," new residential construction is outside of the scope of the current rule and DATCP does not regulate trade practices in the construction of new homes.

Under this rule, the rights and duties contained in ATCP 110 would not apply to very large home improvement projects; those where the value of the project is more than 100% of the assessed value of the property. A typical example of this might be a contract to build a new structure on a preexisting foundation.

Under the current rule, home improvement contractors are required to obtain all required state or local building permits before work can begin under the contract. Under this proposed rule, if a home improvement contract consists of multiple subprojects, contractors may start work on the overall project before obtaining all building permits. However, they may not begin work on a subproject that requires a building permit until after they obtain the permit.

Under the current rule, sellers must provide manufacturers product warranties either at the time the buyer and seller enter into the contract or when the product is installed. Under this proposed rule, the seller has the option of providing written manufacturers' warranties at the completion of the project – as long as specified in the contract.

Under the current rule, if a home improvement contract contains liquidated damages that penalize a buyer for breaching the contract; the liquidated damages may not exceed 10% of the contract price or $100, whichever is less. This proposed rule maintains the 10% limit, but it

repeals the $100 maximum.

Under the current rule, the seller may not substitute products or materials from those specified in the home improvement contract, or for those which the seller represented would be used, without prior consent from the buyer. If the home improvement contract is in writing, the prior consent must also be in writing. Under this proposed rule, the seller may deviate from the written home improvement contract; but only under certain, limited conditions:

- The buyer verbally agrees to the deviation
- The seller maintains documentation of the deviation, and that the buyer agreed to the deviation.
- The deviation does not represent any additional cost to the buyer
- The deviation does not represent a decrease in the value of the finished product.

Under the current rule, the seller is required to provide the buyer with lien waivers before accepting final payment. Further, if the contract requires partial payments at various stages in the performance of the contract; the seller is required to provide lien waivers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time payment is made. This rule does not alter the current rule's treatment of lien waivers before final payment. However, it does allow the seller to forego proportionate lien waivers before partial payments as long as the seller take steps to educate the buyer about lien waivers and the buyer provides written consent to foregoing the partial waivers.

Under the current rule, sellers are required to give buyers timely notice of any impending delay in contract performance. If the home improvement contract is in writing (or required to be in writing), the buyer must agree in writing to the change in the schedule. This rule qualifies this requirement by specifying that, if the seller can show that the delay was caused by the buyer, the seller is not responsible for the delay.

The current rule contains protections for buyers in the event that the seller fails to complete the project, but also assigns the rights to collect payment to a third party. This rule does not alter this provision; but it does insert an explanatory note that includes an example of how it might be applied.

Under current rules, sellers who provide basement waterproofing services are regulated both as home improvement contractors under Ch. ATCP 110 and also under Ch. ATCP 111 – Basement Waterproofing Practices. This rule consolidates the content of Ch. ATCP 111 into a section of ATCP 110, without making any substantial changes.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations.

The federal government does not, in general, regulate home improvement practices.

Comparison with Rules in Adjacent States

Most states, including all of Wisconsin's neighbors have home improvement practices laws. Many of the provisions in ATCP 110 are common in these other states as well.

Illinois regulates home improvement practices through its Home Repair and Remodeling Act and its Home Repair Fraud Act. These provisions are generally similar to Wisconsin's Home Improvement Practices rule.

Iowa grants consumers a private right of action, which enables consumers to sue businesses that engage in deceptive or unfair practices, misrepresentation, or failure to disclose material facts. This law covers home improvement practices, among other areas.

Contractor who do home improvement work in Minnesota and Michigan are required to obtain a license from the state (there are some exceptions). In Minnesota, licensed contractors are required to pay into the Minnesota Contractor's Recovery Fund. This fund compensates people who have suffered losses due to a licensed contractor's fraudulent, deceptive or dishonest practices, misuse of funds, or failure to do the work the contractor was hired to do.

Summary of Factual Data and Analytical Methodologies

We do not have statistics specific to Wisconsin, but fixr.com (a web-based contractor referral service) has reported the extent of the home improvement industry on a national basis.

United States Annual Averages 1995 - 2009

	Number of Projects	Total Expenditure	Average Cost Per Project
Room additions and alterations	1,156,018	$ 23,141,745,151	$ 20,019
Systems and equipment	9,462,782	$ 15,061,419,820	$ 1,592
Outside attachments	549,917	$ 3,560,131,931	$ 6,474
Kitchen remodels	1,052,211	$ 10,638,971,786	$ 10,111
Other property additions and replacements	3,758,351	$ 19,767,613,249	$ 5,260
Exterior additions and replacements	5,636,949	$ 23,734,265,908	$ 4,210
Interior additions and replacements	5,186,460	$ 13,211,085,021	$ 2,547
Bath remodels	1,030,736	$ 6,475,917,156	$ 6,283
Disaster repairs	528,062	$ 6,448,663,562	$ 12,212

http://www.fixr.com/infographics/us-home-improvement-industry-at-a-glance.html

Complaints against home improvement contractors are consistently ranked in the top ten complaint categories received by The Bureau of Consumer Protection. In 2012, DATCP received 391 written complaints against home improvement contractors.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP has consulted with the Wisconsin Builders Association and the National Association of Remodelers – Milwaukee Chapter on the economic impact and the small business impact of this rule.

Effect on Small Business

The existing ATCP 110 regulates businesses that provide home improvement services. Many of these businesses are "small businesses." They include general contractors, landscapers, plumbers, roofers, window installers, cabinet makers, electricians, and many more. Some of changes to ATCP 110 proposed in this rule will have an effect on some of these businesses. However, DATCP anticipates that the majority of those effects will be beneficial. The rule streamlines existing regulations to make them easier for home improvement providers to comply. But the rule does not eliminate these regulations, thereby preserving important protections for consumers. This rule may benefit home improvement contractors in the following ways:

- General contractors working on significant reconstruction projects would no longer be regulated under this proposed rule. Currently, Ch. ATCP 110 does not regulate new home construction but it does regulate home improvement projects. Under this proposal, major reconstructions – those projects where the price of the contract is greater than the assessed property value -- would be treated like new home construction.
- For all home improvement contractors, this rule provides some additional flexibility (as long as certain conditions are met). Including:
    - Building permits need only be obtained before work on that portion of the project concerning the building permit. Otherwise, all required building permits must be obtained before any work is completed.
    - Sellers can provide written manufacturers' warranties at the conclusion of the work. Otherwise, written manufacturers' warranties must be provided at the time the product is installed.
    - Under very limited circumstances, sellers can deviate from the written contract based on verbal agreements between the buyer and the seller.
    - The seller cannot be held responsible for delays in contract performance if the seller can demonstrate that delay was caused by actions or inactions of the buyer.

Environmental Impact

This rule does not have an environmental impact.

DATCP Contact

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Place Where Comments can be Submitted and Deadline for Submission

Questions and comments related to this rule may be directed to:

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Rule comments will be accepted up to two weeks after the last public hearing is held on this rule. Hearing dates will be scheduled after this rule is approved by the Board of Agriculture, Trade and Consumer Protection.

SECTION 1. ATCP 110.01 (2) is amended to read:

(2) "Home Improvement" means the remodeling, altering, repairing, painting, or modernizing of residential or non-commercial property, or the making of additions thereto, and includes, but is not limited to, the construction, installation, replacement, improvement or repair of driveways, sidewalks, swimming pools, terraces, patios, landscaping, fences, porches, garages, basements and basement waterproofing, fire protection devices, heating and air conditioning equipment, water softeners, heaters and purifiers, wall-to-wall carpeting or attached or inlaid floor coverings, and other changes, repairs or improvements made in or on, attached to or forming a part of the residential or non-commercial property~~, but does not include the construction of a new residence~~. The term extends to the conversion of existing commercial

structures into residential or non-commercial property. "Home improvement" does not include the construction of a new residence or the major renovation of an existing structure.

SECTION 2. ATCP 110.01 (2m) is created to read:

ATCP 110.01 (2m) "Major renovation" means a renovation or reconstruction contract where the total cost of the contract is equal to or greater than the assessed value of the property at the time the contract is initiated. In this subsection, "assessed value of the property" means the value of the land and any attached buildings or structures assigned by a local unit of government for property tax purposes.

SECTION 3. ATCP 110.02 (3) (d) is renumbered to ATCP 110.023 and amended to read:

ATCP 110.023. **Substituting products or materials; deviating from written contract.** (1) No seller shall ~~Substitute~~ substitute products or materials for those specified in the home improvement contract, or for those which the seller represented would be used in the home improvement, without the prior consent of the buyer. ~~If~~ Except as provided in sub. (2), if a written home improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract, the buyer's consent under this paragraph shall also be in writing.

(2) The seller may continue with home improvement work that deviates from the requirement in sub (1) if all the following conditions are met:

(a) The buyer authorizes the deviation, either verbally or in writing, before the seller proceeds.

(b) The seller must maintain documentation of:

1. The manner in which the buyer communicated the authorization for the deviation. In this subd., "manner" means an e-mail, face-to-face discussion, phone call, or some other method of communicating.

2. The name of the buyer who authorized the deviation.

3. The date and time that the buyer authorized the deviation.

4. A description of the deviation.

(c) The deviation does not represent any additional cost to the buyer.

(d) The deviation does not represent a decrease in the value of the materials used or the services provided.

(e) If a written home improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract, the seller must report any deviations documented pursuant to subd. (b), to the buyer before final payment is accepted.

SECTION 4. ATCP 110.02 (6) (L) and (m) are repealed.

SECTION 5. ATCP 110.02 (6) (n) is amended to read:

(n) Fail to disclose to a buyer, before the buyer enters into a home improvement contract, that the buyer is entitled to receive written lien waivers according to ~~pars. (L) and (m)~~ s. ATCP 110.025.

SECTION 6. ATCP 110.02 (7) (c) is renumbered to ATCP 110.027 and amended to read:

ATCP 110.027 **Delay in contract performance (1)** ~~Fail to~~ A seller must give the buyer timely notice of any impending delay in the home improvement contract performance, if performance will be delayed beyond a deadline specified in the home improvement contract. The notice shall specify the reason or reasons for the delay, and shall specify new proposed deadlines by which the seller will begin and complete the work. If a written home improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract, no change in performance deadlines is effective unless the buyer agrees in writing to the change.

(2) Notwithstanding sub. (1) a seller shall not be responsible for delays in contract performance if the seller can demonstrate that the delay was caused by actions or inactions of the buyer.

SECTION 7. ATCP 110.025 is created to read

ATCP 110.025 **Lien Waivers.** (1) A Seller must provide to the buyer lien waivers in writing from all contractors, subcontractors, and material suppliers at or prior to the time final payment is made on the home improvement contract.

(2) If partial payments are required at various stages in the performance of the contract, a seller must comply with either par. (a) or par. (b).

(a) Provide the buyer lien waivers in writing from all contractors, subcontractors and material suppliers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time partial payment is made.

(b) Obtain consent from the buyer that the seller is not required to provide the lien waivers. The consent shall be in the form of the following written statement and release, clearly and conspicuously inserted in the contract or a separate writing, and separately signed by the buyer:

Buyer's release of partial lien waivers requirement

I understand that contractors, subcontractors, and materials suppliers may have a right to file a lien against my property if they are not paid for their products or services. I further understand that lien waivers prevent the filing of such liens. Wisconsin law (ATCP 110, Wis. Adm. Code) requires sellers of home improvement services to provide the buyer with lien waivers from all contractors, subcontractors and material suppliers before accepting final payment from the buyer. In addition, if the home improvement contract requires partial payments at various stages in the performance of the contract, the seller is required to provide lien waivers for the proportionate value of labor, service and products or materials furnished or delivered as of the time the partial payment is made -- unless the buyer specifically waives this requirement by signing in the space below. If I do not sign the release, the seller is required to provide partial lien waivers before each partial payment.

I agree to release the seller from the requirement of providing lien waivers before accepting partial payments. [Sign or initial] _____

SECTION 8. ATCP 110.03 (1) is amended to read:

ATCP 110.03 (1) Before a buyer enters into a home improvement contract, the seller shall inform the buyer of all building or construction permits that are required for the home improvement. ~~No~~ Except as provided in sub. (4), no seller may start work under a home improvement contract until all required state and local permits have been issued.

SECTION 9. ATCP 110.03 (3) and (4) are created to read:

ATCP 110.03 (3) Pursuant to sub. (2), if the state or local inspector who completed the inspection does not issue an inspection document; the seller may provide a summary of the inspection to the buyer, including the inspector's name, the date of the inspection, and inspection number or some other way to identify the inspection in the state or local building inspection database.

ATCP 110.03 (4) Notwithstanding sub. (1), if the home improvement contract includes subprojects, no seller may start work on any subproject of a home improvement contract that requires state or local permits until all permits required for that subproject have been issued.

SECTION 10. ATCP 110.04 (1) is amended:

ATCP 110.04 (1) A seller shall give a buyer a copy of every written warranty made with respect to labor, services, products or materials furnished in connection with a home improvement. If a seller makes any oral warranty, the seller shall document that warranty in writing and give a copy to the buyer. The seller shall provide all warranty documents to the buyer at the time the buyer enters into a home improvement contract, except that a manufacturer's product warranty may be provided ~~when that product is installed.~~ at any of the following times:

(a) At the time the buyer enters into a home improvement contract.

(b) At the time the product is installed.

(c) At the conclusion of the project, if specified in the contract.

SECTION 11. ATCP 110.05 (7) is amended:

ATCP 110.05 (7) Liquidated damages for breach of contract by the buyer if made a part of the contract shall not exceed 10% of the contract price ~~and in no event more than $100~~.

SECTION 12. ATCP 110.06 (1) **Note** is created to read:

ATCP 110.06 (1) Note *For example: A buyer and seller agree that the buyer will pay for home improvement work at a later date, and the seller subsequently assigns the debt to a finance company. Then the seller fails to complete the home improvement contract. Under this subsection, the finance company is subject to the buyer's claims and defenses under the contract – even though it was not the finance company that failed to complete the work.*

SECTION 13. ATCP 110.09 (title) is created to read:

ATCP 110.09 Basement waterproofing practices.

SECTION 14. ATCP 111 Title and preamble notes are repealed.

SECTION 15. ATCP 111.01 is renumbered to ATCP 110.09 (1).

SECTION 16. ATCP 111.02 (intro) and (1) to (4) are renumbered to ATCP 110.09 (2) (a) to (d).

SECTION 17. ATCP 111.02 (5) is repealed.

SECTION 18. ATCP 111.02 (6) and (7) are renumbered to ATCP 110.09 (2) (e) and (f).

SECTION 19. ATCP 111.03 (intro) and (1) are renumbered to ATCP 110.09 (3) (intro) and (a) and amended to read:

ATCP 110.09 (3) PROHIBITED PRACTICES. No seller of basement waterproofing services, products or materials shall engage in the following unfair trade practices or unfair methods of competition:

(a) Make or offer to make any guarantee with respect to basement waterproofing services unless the guarantee meets the requirements of s. ~~ATCP 111.04~~ ATCP 110.09 (4), and is furnished to the buyer in writing with a seller's analysis prior to final execution of any contract.

SECTION 20. ATCP 111.03 (2) to (6) are renumbered to ATCP 110.09 (3) (b) to (f).

SECTION 21. ATCP 111.03 (7) is renumbered to ATCP 110.09 (3) (g) and amended to read:

ATCP 110.09 (3) (g) Sell basement waterproofing services using the pressure pumping method unless the need or effectiveness of such method is established in a seller's analysis verified by an engineer's analysis furnished to the buyer prior to the sale, and the work is guaranteed as provided under ~~ATCP 111.04~~ ATCP 110.09 (4).

SECTION 22. ATCP 111.03 (8) to (10) are renumbered to ATCP 110.09 (3) (h) to (j).

SECTION 23. ATCP 111.04 (intro) and (1) to (3) are renumbered to ATCP 110.09 (4) (intro) and (a) to (c).

SECTION 24. ATCP 111.05 is renumbered to ATCP 110.09 (5).

SECTION 25. ATCP 111.06 is repealed.

SECTION 26. EFFECTIVE DATE: This rule takes effect on the third day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By:_____
Ben Brancel
Secretary