



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary

DATE: December 10, 2013

TO: The Honorable Mike Ellis
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The Honorable Robin Voss
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FROM: Ben Brancel, Secretary
Department of Agriculture, Trade and Consumer Protection

SUBJECT: Home Improvement Practices (Clearinghouse Rule #13-066)

Introduction

The Department of Agriculture, Trade and Consumer Protection (“DATCP”) is transmitting this rule for legislative committee review, as provided in s. 227.19 (2) and (3), Stats. DATCP will publish notice of this referral in the Wisconsin Administrative Register, as provided in s. 227.19 (2), Stats.

This rule makes some updates and revisions to existing ATCP 110, Adm. Code.

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 proposed rule, the rights and duties contained in ATCP 110 would not apply to very large home improvement projects, defined as those where the value of the project is more than the assessed value of the existing structure. 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 must obtain all required state or local

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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, where a midpoint or final inspection is required by state law or local ordinance, the seller must provide the inspection certificate to the buyer. This proposed rule retains this provision, but in the event the inspector does not physically issue a certificate, the seller may provide a summary of inspection information to the buyer instead of a copy of the certificate.

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 the option is 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.

The proposed rule maintains the same procedure for altering written contracts as contained in the current rule. However, the proposed rule also allows for buyer authorized verbal alterations to the contract, but only if the following conditions are met:

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

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 partial payment is made. Under the proposed rule, the seller is required to provide the lien waivers if the buyer requests them. Under the proposed rule, the seller is required to provide notice to the buyer that the buyer has a right to request the lien waivers, and retain evidence that the buyer acknowledged receipt of the notice.

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 proposed rule provides that sellers are not responsible for delays caused by action or inaction of the buyer, destructive acts of nature, or disruptive civil disorder.

Under the current rule, if a seller represents that insurance or some other form of protection is provided, the contract must clearly state the terms, conditions and limitations, as well as the name and address of the insurer. Further, the seller is required to furnish a copy of the insuring or protection agreement to the buyer before final payment is made. This proposed rule does not substantially change this requirement, except that it allows the contractor to provide a proof of insurance document rather than the entire policy or agreement.

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 proposed rule does not alter this provision, but it inserts an explanatory note.

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

Public Hearings

DATCP held four public hearings on the original rule proposal as listed below:

- September 24, 2013 in Madison
- September 26, 2013 in Eau Claire
- October 1, 2013 in Milwaukee
- October 2, 2013 in Green Bay

There were no attendees at three of the hearings, but six individuals attended the Milwaukee hearing. One of the six provided both oral and written testimony. This testimony mirrored the NARI letter discussed below.

DATCP accepted written comments until October 16, 2013. The Milwaukee Chapter of the National Association of Remodelers (NARI) submitted a letter that generally supported the proposed hearing draft, but also requested several changes. In addition, DATCP received letters from 118 individuals (nearly all of them home improvement contractors) in support of the NARI letter. A summary of the comments is attached in Appendix A.

***DATCP's Rule Changes in Response to
Public Hearings and Rules Clearinghouse Comments***

DATCP made a number of changes in response to comments received from the public and from Legislative Council Rules Clearinghouse.

Deregulating major renovations

The hearing draft limited the scope of Ch. ATCP 110 by excluding “major renovations to an existing structure” from the definition of home improvement. The hearing draft defined “major renovation” to be a project the price of which is equal to or greater than the assessed value of the property. The proposed final draft rule revises the definition of “major renovation” to be greater than the assessed value of the existing structure.

Technical changes

The proposed final draft incorporates a number of technical changes based on Rules Clearinghouse suggestions.

Change orders

Both the hearing draft and the proposed final draft allow deviations from the written contract under limited circumstances. The proposed final draft inserts a note that makes clear text messages, e-mails and other forms of electronic communication satisfy requirements for communications to be in writing. The proposed final draft revises the provisions related to verbal change order to make the provisions more readable, without making substantive changes.

Lien waivers

Under the current rule, sellers must provide written lien waivers from all contractors, subcontractors, and material suppliers before accepting payment. This is true for both final payments at the conclusion of the project and any partial payments that occur while work is in progress. The hearing draft modified this requirement for partial lien waivers by allowing buyers to waive their right to receive partial lien waivers. The proposed final draft requires lien waivers (either partial during the contract or final at the end) only if the buyer requests them. The proposed final draft also requires sellers to provide buyers with a statement describing the purpose of lien waivers and that the buyer may request them.

Delays in contract performance

The current rule requires that, if there is a delay in the performance of the contract, the seller must provide notice to the buyer. The notice must specify the reason for the delay and propose new deadline dates. If the contract is in writing, no change in deadlines is effective unless the buyer agrees in writing to the change. Both the hearing draft and the final draft maintain this provision. However, the hearing draft specifies that the seller is not responsible for delays in contract performance that are caused by the buyer. The proposed final draft also provides that the seller is not responsible for delays caused by destructive acts of nature or disruptive civil disorder.

Building Inspection Certificates

The current rule requires that, in the case where building inspections are required, the seller furnish a copy of the inspection certificate to the buyer. This is still true under the hearing draft, but in the event the building inspector did not issue a paper certificate, the seller can, instead, provide certain information about the inspection to the buyer. The proposed final draft retains this provision, but revises the exact wording for better clarity.

Insurance Documents

The current rule requires when a representation is made that insurance or some other form of protection will be provided, the seller must provide the buyer a copy of the insurance or protection agreement. The proposed final draft provides that a declarations page or other evidence of insurance document is sufficient to meet this requirement.

Preservation of buyer's claims and defenses

The current rule specifies that a buyer retains claims and defenses even if the seller assigns the contract to a third party. The hearing draft does not alter this provision, but contains an explanatory note. The proposed final draft revises the note to improve clarity.

Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not issue a report on this rule.

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.

Contractors 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

The Wisconsin Builders Association estimates that this proposed rule would result in cost savings of roughly \$1 million per year for remodelers and homeowners. This estimate is based on a projection that the proposed rule simplifies compliance and reduces paperwork by about 2 hours per job. Based on an average wage-plus-overhead amount of \$50 dollars per hour, and that there are roughly 10,000 remodeling projects per year in Wisconsin, the total savings is \$1 million.

On a national basis, 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

DATCP anticipates that this rule would affect 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 those effects will be beneficial. The proposed 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 value of the preexisting structure -- 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, destructive acts of nature, or disruptive civil disorder.

Environmental Impact

This rule does not have an environmental impact.