



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #145

Transfer of Housing-Related Regulations to Safety and Professional Services (Agriculture, Trade and Consumer Protection and Safety and Professional Services)

[LFB 2011-13 Budget Summary: Page 61, #20, and Page 383, #5 (part)]

CURRENT LAW

The Department of Agriculture, Trade and Consumer Protection (DATCP), in conjunction with the Department of Justice (DOJ), enforces the statutory prohibition on unfair trade practices. As part of these responsibilities, DATCP has promulgated rules pertaining to unfair practices and the obligations of contractors and landlords in the provision of housing or physical improvements to dwellings. The DATCP Bureau of Consumer Protection receives consumer contacts and written complaints about these areas, and the Department has authority to investigate suspected violations, promulgate administrative rules prohibiting or requiring specific conduct, issue special orders enjoining certain conduct, and refer cases for other enforcement or prosecution.

GOVERNOR

Provide that beginning on the effective date of the bill, DATCP may not issue any order, promulgate any rule, or enforce any order or rule relating to the following subjects (corresponding administrative rule is noted in brackets): (a) remodeling or otherwise improving residential or noncommercial property [ATCP 110]; (b) basement waterproofing [ATCP 111]; (c) real estate advertising [ATCP 114]; (d) renting of mobile-home sites and sales of mobile homes [ATCP 125]; and (e) renting of residential dwelling units and mobile homes [ATCP 134]. Specify that the Department of Safety and Professional Services (DSPS) may issue orders and promulgate rules on those subject matters beginning with the effective date of the bill. Further, specify that rules and orders in effect on the effective date of the bill remain in effect until their specified expiration, if any, or until DSPS modifies or repeals the rule or order.

DISCUSSION POINTS

1. The administration reported in a March 31, 2011, errata memorandum that this

provision was not intended to be included in the biennial budget bill presented to the Legislature. The Committee could delete the provision [Alternative 1].

2. Much of the content of the five administrative rules that would be transferred to DSPS under the bill pertain to communications between buyers and sellers. Specifically, many of the provisions in the rules for home improvements, basement waterproofing and real estate advertising describe prohibited misrepresentations about the quality of a product or service to be provided; the rules also identify circumstances and protocols under which contracts are to be created and executed. The rules pertaining to residential rental practices and mobile-home rentals also: (a) identify required disclosures a landlord is to make prior to or at the time a rental agreement is entered into, such as existing violations of building codes or conditions affecting a unit's habitability; (b) make specifications for terms of rental contracts and leases; (c) specify terms for accepting earnest money and security deposits; (d) specify actions a landlord may not take against a tenant, such as making an unauthorized entry or a retaliatory eviction; and (e) specify terms under which tenancy can be changed or terminated.

3. Landlord-tenant issues and alleged violations of home improvement contracts typically are among the top five subjects of formal, written complaints made each year by consumers to the DATCP Bureau of Consumer Protection. The table below shows where landlord-tenant issues and home improvement contract complaints have ranked in recent years, and Attachment 1 shows the number of contacts, complaints and investigations DATCP has opened since 2006 pursuant to complaints.

Annual Rankings of Complaints

	2010		2009		2008		2007	
	<u>Number</u>	<u>Rank</u>	<u>Number</u>	<u>Rank</u>	<u>Number</u>	<u>Rank</u>	<u>Number</u>	<u>Rank</u>
Landlord-Tenant	1,696	2	1,650	2	1,646	2	1,352	3
Home Improvement	858	4	909	5	1,163	4	892	4

4. On the basis of the departmental activities shown in Attachment 1, DATCP estimates the annual staffing required to process contacts and complaints, conduct investigations and mediate disputes is 3.3 FTE, with corresponding salary, fringe benefits and general supplies of \$218,800. Most of this staffing is concentrated in landlord-tenant issues and home improvement contracts.

5. The rules the bill would transfer to DSPS specify conduct and trade practices that may not be used by someone providing a good or service, such as a landlord, contractor or real estate seller. The current DATCP rules in some cases align with current provisions enforced by the Department of Regulation and Licensing (DRL); for example, administrative rule RL 24 (conduct and ethical practices for real estate licensees) contains provisions regulating advertising by real estate brokers licensed by the Real Estate Board. It could be argued that these rules are, therefore, appropriate to transfer to DSPS, which would be responsible for regulating conduct in certain professions and overseeing laws relating to building practices and safety. (DSPS is currently DRL and it would assume responsibilities currently assigned to the Division of Safety and Buildings in the Department of Commerce.)

6. However, it could also be argued that the current DATCP rules specify fraudulent or coercive practices that could directly and adversely affect consumers in the course of transactions. On the other hand, most of the DRL rules that regulate professions, while having the effect of providing additional protection for consumers of a professional's services, specify requirements that are independent of any particular transaction and general expectations of a person in a given profession. From this perspective, it may be appropriate that the housing-related rules for unfair trade practices are enforced by DATCP under its consumer protection programs [Alternative 1].

7. Some may contend that the rules for basement waterproofing, home improvement contracts and real estate advertising are more appropriate to transfer, in that they pertain to services that are more often rendered to consumers on a one-time basis by licensed contractors or professionals. Conversely, landlord-tenant and mobile-home rental issues in many instances may be more associated with ongoing relationships between consumers and a purveyor of their housing. Landlord-tenant disputes are typically: (a) resolved privately by the parties based on information provided by DATCP describing the rights and responsibilities of persons involved; (b) mediated by the Department; or (c) if serious violations are found, referred for enforcement actions and possible penalties. Enforcement actions may consist of DATCP warning letters or assurances of compliance by the alleged violator, or prosecution by DOJ or a district attorney. It could be argued that DATCP's experience in mediating disputes between landlords and tenants is desirable to maintain.

8. If the Committee wished to assign administration of some administrative rules to DSPS, it could transfer ATCP 110 (home improvement), ATCP 111 (basement waterproofing) and ATCP 114 (real estate advertising) [Alternative 2]. These would be associated with regulation of typically one-time or short-term business relationships. Additionally, if the Committee wished to transfer ATCP 110, 111 and 114, it may wish to transfer a portion of the funding and positions currently associated with administration of these rules. DATCP estimates that although ATCP 111 and 114 require little staffing on an annual basis, home improvement complaints and investigations typically require approximately 1.7 GPR positions and associated funding of \$112,700 annually from DATCP's consumer protection general operations [Alternative 2a].

9. Enforcement actions authorized under s. 100.20 (unfair trade practices) currently allow DATCP to: (a) following a public hearing, issue general orders forbidding certain methods of competition or unfair trade practices; (b) following a public hearing, issue special orders enjoining specific persons from using unfair methods of competition or trade practices; (c) pursuant to complaints alleged by DOJ, administer contested case hearings on alleged unfair methods of competition or unfair trade practices; or (d) commence court actions to enjoin unfair methods of competition or unfair trade practices, and seek court orders to restore losses incurred by parties affected by unfair trade practices. Although the bill would authorize DSPS to promulgate rules and issue orders, the authority to administer contested case hearings or seek injunctions would not transfer to DSPS. This is because references in Chapter 100 to 'department' refer only to DATCP; authorities granted to DOJ under Chapter 100 directly reference the Department of Justice.

10. Further, certain penalties prescribed in Chapter 100 for violations of prohibitions on unfair trade practices may not be applicable under the bill. For example, under DATCP's authority to seek injunctions of unfair trade practices, anyone violating such an injunction may be subject to a forfeiture of \$100 to \$10,000. If no authority is granted to DSPS to seek injunctions, it is likely that

these penalties also would not apply. The bill would not affect the ability of an affected party to seek, through a court action, double the amount of any pecuniary loss incurred due to violation of an order prohibiting an unfair trade practice or unfair method of competition.

11. If the Committee wished to transfer all or a portion of the program responsibilities identified by the Governor, it may wish to specify that regulatory and enforcement authorities provided to DATCP would be concurrently provided to DSPS for the housing-related matters transferred under the bill [Alternative 3].

12. It could be argued that removing certain regulatory authority from DATCP would make its current program responsibilities more commensurate with staffing levels. Previous budgets have reduced consumer protection staffing in DATCP, although the statutory provisions the program has responsibility to enforce were not reduced. DATCP's consumer protection staffing is shown in Attachment 2. The rules identified for transfer could be viewed as consolidating housing-related regulations in DSPS. DRL/DSPS staff is also experienced with regulation of professions under the agency's present responsibilities. If the Committee took no action, the provision would remain in the bill [Alternative 4].

ALTERNATIVES

1. Delete the provision. (This would adopt the administration's recommended correction and maintain current law.)

2. Transfer authority for rules related to remodeling or otherwise improving residential or noncommercial property (ATCP 110), basement waterproofing (ATCP 111), and real estate advertising improvements (ATCP 114). Delete bill language that would transfer administration of rules and orders pertaining to rental of mobile homes and mobile-home sites, and to landlord-tenant issues. In addition, specify one of the following:

a. Transfer \$112,700 GPR annually with 1.7 positions; or

ALT 2a	Change to DATCP		Change to DSPS		Net Change	
	Funding	Positions	Funding	Positions	Funding	Positions
GPR	-\$225,400	- 1.70	\$225,400	1.70	\$0	0.00

b. Transfer statutory authority only.

3. In addition, specify that DSPS is provided, for subject matters transferred by the bill, enforcement authority granted to DATCP under s. 100.20 of the statutes for violations of that section, or rules or orders issued under that section. This would include the ability to: (a) conduct contested case hearings pursuant to complaints made by DOJ; (b) seek injunctions against persons for violation of orders prohibiting unfair trade practices, and to investigate suspected violations of orders; and (c) issue, after public hearing, general orders prohibiting unfair methods of competition or special orders against persons enjoining unfair methods of competition.

4. Take no action. (The Department of Safety and Professional Services would be transferred regulatory authority for home improvement practices, basement waterproofing, real estate advertising, mobile-home renting and renting of residential dwelling units and mobile homes.)

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Attachment

ATTACHMENT 1

DATCP Activity for Housing-Related Unfair Trade Practices

<u>Rule and Subject</u>	<u>Contacts</u>	<u>Complaints</u>	<u>Investigations</u>
2010			
ATCP 134 - Landlord-Tenant	11,704	1,696	5
ATCP 110 - Home Improvement	2,558	858	11
ATCP 125 - Mobile-Home Parks	167	46	0
ATCP 111 - Basement Waterproofing	0	3	0
ATCP 114 - Real Estate Advertising	<u>0</u>	<u>0</u>	<u>0</u>
Subtotal	14,429	2,603	16
2009			
ATCP 134 - Landlord-Tenant	13,532	1,650	2
ATCP 110 - Home Improvement	2,643	909	22
ATCP 125 - Mobile-Home Parks	265	68	1
ATCP 111 - Basement Waterproofing	0	0	0
ATCP 114 - Real Estate Advertising	<u>0</u>	<u>0</u>	<u>0</u>
Subtotal	16,440	2,627	25
2008			
ATCP 134 - Landlord-Tenant	15,095	1,646	1
ATCP 110 - Home Improvement	3,216	1,163	22
ATCP 125 - Mobile-Home Parks	265	68	1
ATCP 111 - Basement Waterproofing	0	0	0
ATCP 114 - Real Estate Advertising	<u>0</u>	<u>0</u>	<u>0</u>
Subtotal	18,576	2,877	24
2007			
ATCP 134 - Landlord-Tenant	14,984	1,352	3
ATCP 110 - Home Improvement	2,750	892	24
ATCP 125 - Mobile-Home Parks	246	37	0
ATCP 111 - Basement Waterproofing	0	0	0
ATCP 114 - Real Estate Advertising	<u>0</u>	<u>0</u>	<u>0</u>
Subtotal	17,980	2,281	27
2006			
ATCP 134 - Landlord-Tenant	15,725	1,357	10
ATCP 110 - Home Improvement	2,545	738	20
ATCP 125 - Mobile-Home Parks	232	21	0
ATCP 111 - Basement Waterproofing	0	2	0
ATCP 114 - Real Estate Advertising	<u>0</u>	<u>0</u>	<u>0</u>
Subtotal	18,502	2,118	30

ATTACHMENT 2

Consumer Protection Positions by Appropriation

<u>Appropriation</u>	<u>Fund Source</u>	<u>2002-03</u>	<u>2004-05</u>	<u>2006-07</u>	<u>2008-09</u>	<u>2010-11</u>	<u>2012-13</u>
Auto Repair Regulation		--	--	--	--	--	--
General Consumer Protection		40.35	31.00	31.50	31.50	15.50	15.50
Weights and Measures		6.50	2.50	2.00	2.00	2.00	2.00
Office of Privacy Protection		--	--	--	1.50	1.50	1.50
GPR Subtotal	GPR	<u>46.85</u>	<u>33.50</u>	<u>33.50</u>	<u>35.00</u>	<u>19.00</u>	<u>19.00</u>
Mobile Air Conditioner/Ozone	PR	5.90	5.90	5.90	6.05	6.05	6.05
Weights & Measures	PR	11.55	11.55	12.70	13.05	13.05	13.05
Telecommunications Utility Trade Practices	PR	--	--	--	--	6.00	6.00
General Consumer Protection – No-Call Registration	PR	--	--	--	--	4.20	4.20
No-Call Administration	PR	5.50	5.50	6.50	7.00	7.20	7.20
Office of Privacy Protection	PR	--	--	3.00	1.50	1.50	1.50
Weights & Measures – Petroleum Inspection Fund	SEG	<u>6.00</u>	<u>6.00</u>	<u>6.00</u>	<u>6.00</u>	<u>6.00</u>	<u>6.00</u>
Total - Bureau of Consumer Protection		75.80	62.45	64.60	68.60	63.00	63.00