

Legal Bulletin 204
July 24, 2015 Forms Revisions

By Northwest Multiple Listing Service
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1. Introduction

This bulletin reviews upcoming revisions to NWMLS forms, including:

- Listing agreements (Form 1A and 1B);
- Seller disclosure statements (Form 17, 17C, and 17 Commercial);
- Purchase and sale agreements (Form 20, 21, 23, 25, and 28);
- Buyer's Sale of Property Contingency (Form 22B);
- Optional Clauses Addendum (Form 22D);
- Title Contingency Addendum (Form 22T);
- Homeowners Insurance Addendum (Form 22VV);
- Cooperative Apartment Addendum (Form 33);
- Inspection Addendum (Form 35);
- Escalation Addendum (Form 35E);
- Second Buyer's Addendum (Form 39);
- Selling Firm's Commission (Form 41C);
- Bump Notice (Form 44);
- Bump Response (Form 46);
- Buyer Occupancy Prior to Closing (Form 65A);
- Seller Occupancy After Closing (Form 65B);
- Lease Rental Agreement (Form 68);
- Buyer's Contingency Property Notice (Form 90K);
- Form 150 (Interpleader Summons); and
- Form 151 (Interpleader Complaint).

The bulletin also introduces two new forms – Form 90T (Title Contingency Notice) and Form 90W (Notice of Termination - Homeowners' Association Review Notice).

These revised and new forms are currently available on NWMLS's website as SAMPLE forms for review purposes only, but are not for use in any transaction. The forms will be published on Xpress Forms and Transaction Desk for use on July 24, 2015. Please review this bulletin and the revised forms carefully.

2. Listing Agreements (Form 1A and 1B)

The listing agreements have been revised to address the following issues:

a. Seller Photographs

Paragraph 7 (Seller's Warranties and Representations) includes a warranty that Seller has all the necessary rights in any photographs that Seller gives to the listing firm to use in marketing the property. This provision will help protect the listing firm from copyright claims if Seller provides photos to the listing firm that are owned by a third party.

b. Foreign Investment in Real Property Tax Act ("FIRPTA")

Paragraph 8 (Closing) includes a new provision requiring Seller to prepare and execute a FIRPTA certification at closing. The disposition of a U.S. real property interest by a foreign person (Seller) is subject to income tax withholding. With the recent rise in foreign property owners, the use of the FIRPTA Certificate (Form 22E) has become increasingly important. Under FIRPTA, Buyer is responsible for determining if Seller is a foreign person and if Buyer fails to do so, Buyer could be liable for the tax. Accordingly, this new provision in the listing agreement requires Seller to prepare and execute Form 22E at closing and, in conjunction with revisions to the purchase and sale agreement (discussed below), brings this issue to Seller's attention early in the sale process.

c. Property Condition

Paragraph 10 (Property Condition and Insurance) has been revised to address two separate issues. The first is to make clear that the listing firm, the MLS, and MLS members are not responsible for personal injury resulting from the condition of the property. The second is to alert Seller that intercepting or recording conversations of persons in the property without their consent violates state law (RCW 9.73.030). This latter issue has become more prevalent with the increase of security systems and cameras in homes.

3. Seller Disclosure Statement (Form 17, Form 17C, and Form 17 Commercial)

Effective July 24th, the Seller Disclosure Act (RCW 64.06) will be revised to add four new checkboxes to Section 4(F) of Form 17 (Seller Disclosure Statement – Improved Residential Real Property). The new checkboxes require Seller to disclose defects with elevators, incline elevators, stairway chair lifts, and wheelchair lifts. Note that the revision to RCW 64.06 does not affect Form 17C (Unimproved Property) or Form 17 Commercial.

If Seller is required to provide a Form 17 to Buyer, you should make certain that Seller delivers the proper version of Form 17. If Seller delivers the wrong version of the form, there may be a question as to whether Buyer retains a right of rescission until closing.

If the parties reach mutual acceptance on or after July 24, 2015, Seller must provide the new 2015 version of Form 17 to Buyer. If the parties reach mutual acceptance before July 24, 2015, Seller should provide the current version (rev. 6/12) of Form 17 to Buyer.

If Seller has already filled out Form 17 and the listing is still on the market on July 24, 2015, Seller should fill out a new 2015 Form 17 to provide to a future Buyer. If Seller or Buyer has questions about whether to give or ask for a new Form 17, refer them to an attorney.

A new column for “N/A” (not applicable) answers has been added to Form 17, Form 17C (Unimproved Property), and Form 17 Commercial. This new column will allow Seller to more easily fill out the form electronically. The formatting of the forms has also been updated and the forms are now six pages, instead of five.

4. Purchase and Sale Agreements (Form 20, 21, 23, 25, and 28)

a. Formatting Change and Clarification

The Offer Expiration Date field now appears on the top line of the purchase and sale agreements, the Earnest Money provision was consolidated from two lines to one, and the Closing and Possession dates were also consolidated into one line. In addition, renumbered Specific Term 13 (Charges and Assessments) was revised to clarify that the provision, which is explained in General Term “h”, applies to charges and assessments that are levied before closing, but not due until after closing.

b. FIRPTA

New Specific Term 14 (Seller Citizenship) requires Seller to warrant that Seller is either a U.S. citizen or a foreign person for purposes of U.S. taxation. Revised General Term “j” (Seller Citizenship and FIRPTA) requires Seller to prepare, execute, and deliver to the Closing Agent at closing the FIRPTA certification (Form 22E). As explained above, under FIRPTA, Buyer is responsible for determining if Seller is a foreign person and if Buyer fails to do so, Buyer could held liable for the tax. This revised provision calls the parties’ attention to this issue and requires Seller to make the necessary certification for tax purposes.

Please note that when Buyer is writing the offer, Buyer likely will not know if Seller is a U.S. resident or a foreign person. Accordingly, Buyer may leave this term blank to allow Seller to make the appropriate selection. General Term “s” has been revised to state that, just like the insertion of Seller’s name, Seller’s warranty and selection of citizenship status is not considered a counteroffer.

c. Firm and Broker License Numbers

The last line of page one of the purchase and sale agreements contains a new field for the license numbers (issued by the Washington State Department of Licensing) for the listing/selling firm and the listing/selling broker. The reason for this change relates to new federal rules promulgated by the Consumer Financial Protection Bureau (“CFPB”). Beginning October 3, 2015, new rules will require lenders to insert broker’s license numbers into the “Closing Disclosure” provided to Buyer three days before consummation (i.e. the date the Buyer is contractually obligated for the loan). In order to avoid any delay in the lender obtaining those numbers and providing the disclosure, NWMLS has added a field for the licensee numbers to the purchase and sale agreement. In addition, the Department of Licensing is considering requiring brokers to include license numbers on all documents prepared by the broker.

Please note that NWMLS is developing a process to “auto-fill” all member’s and subscriber’s license numbers into the purchase and sale agreements through Xpress Forms and Transaction Desk. Like any other information that is auto-filled into the forms, brokers remain responsible for reviewing and ensuring that the information filled into the form is correct. If the auto-filled license number is incorrect, contact NWMLS to correct the information.

d. Earnest Money

A new chapter of RCW 64.04, effective July 24, 2015, governs how earnest money must be handled by the party holding the money (the “holder”) when a transaction is terminated. The statute provides that if a holder receives a written demand for the earnest money from a party, the holder must either disburse the earnest money, commence an interpleader action, or notify all other parties to the transaction of the demand within 15 days.

If holder elects to notify all other parties of the demand (as opposed to disbursing the earnest money or commencing an interpleader action) and the other parties do not object to the demand within 20 days of the holder sending the notice, then the holder must release the earnest money to the party making the demand. If the holder follows this process, it will not be liable to any party for releasing the earnest money to the demanding party.

If the party receiving the notice objects to the holder releasing the earnest money, then the holder must commence an interpleader action within 60 days, unless otherwise instructed by the parties. The statute contains a form of summons and complaint for the holder to file the interpleader action and provides for the holder's reasonable attorneys' fees and costs associated with the action. The statute also allows the holder to serve the parties in an interpleader action by mail, significantly reducing the expense.

General Term "b" has been revised to alert the parties and the Closing Agent to the requirements of the new statute.

e. Computation of Time – Possession Date

General Term "l" (Computation of Time) provides that any specified period of five days or less shall not include Saturdays, Sundays, or legal holidays. Although re-numbered Specific Term 11 contemplates brokers using a date certain for the Possession Date (e.g. August 3, 2015), many brokers continue to use terminology such as "3 days after Closing." Due to this continued practice, the custom in the industry, and the parties' expectations, the computation of time provision has been revised to provide that "any specified period of five days or less, except for any time period related to Possession Date, shall not include Saturdays, Sundays, or legal holidays." In other words, in the revised form, any time period related to the Possession Date, no matter the length of time, will mean calendar days, not business days.

f. E-mail Delivery – Direct Links

General Term "m" (Facsimile and E-mail Transmission) has been revised to allow for delivery of signed documents by e-mailing documents to the firm and broker; or *e-mailing a direct link to the document* to the firm and broker. The link to the document must be a direct link, meaning that when the recipient clicks on the link – the document will open, similar to when a recipient double clicks on an attachment. If there are problems with the link (similar to forgetting to attach a document), there may be an issue regarding whether the document was properly delivered. Just like with attachments, the link should open in a generally accepted file format.

g. Manufactured Home Purchase and Sale Agreement (Home on Leased Land)

The Manufactured Home Purchase and Sale Agreement (Form 23) has been updated to include the property's tax parcel identification number on page one. In addition, a new provision in General Term "d" (Condition of Title to Manufactured Home) provides: "If applicable, Seller shall convey the vehicle title to the Manufactured Home to Buyer."

h. Vacant Land Purchase and Sale Agreement

In addition to the above revisions, two changes were made to General Term “v” (Feasibility Contingency) of the Vacant Land Purchase and Sale Agreement (Form 25). The first change is to allow Buyer access to the property during “and after” the feasibility contingency to conduct tests or studies related to Buyer’s intended use of the property. The second change requires Seller to cooperate with Buyer in obtaining permits or other approvals that Buyer may reasonably require, as long as Seller is not required to incur any liability or expense in doing so.

5. Contingency Forms (Form 22B, 39, 44, 46, and 90k)

a. Buyer’s Sale of Property Contingency Addendum (Form 22B)

Buyer’s Sale of Property Contingency Addendum (Form 22B) has been significantly updated and modernized. This form should be used when Buyer wants to make an offer contingent on the sale of Buyer’s property – where Buyer has yet to accept an offer to sell Buyer’s property. Please note that Buyer’s Pending Sale of Property Contingency (Form 22Q) should be used for situations when Buyer has already accepted an offer to sell Buyer’s property.

The vast majority of the revisions to Form 22B are non-substantive and were made to make the form more user friendly. Some of the more noteworthy revisions include:

- Moving the definition of sell, selling, and sold to the first paragraph.
- Moving and reorganizing the paragraphs relating to required notices related to the sale (or failure of sale) of Buyer’s property.
- Deleting the provision related to giving notice that the sale of Buyer’s property failed to close by telephone and revising the requirement to give written notice within two days.

b. Second Buyer’s Addendum (Form 39)

Similar to Form 22B, the Second Buyer’s Addendum (Form 39) has been updated and modernized. This form must be used when a Seller, who has already accepted an offer from a Buyer subject to a Form 22B contingency, wants to accept a second offer to “bump” the first Buyer. The substantive revisions to Form 39 include:

- Adding a provision to the first paragraph to prohibit Seller from amending the terms of the agreement with the first Buyer during the life of the second sale agreement.

- Adding a new paragraph that provides, other than the timelines in Form 39, the timelines in the agreement do not begin until Seller has given notice to the second Buyer that the first sale has been terminated.

c. Bump Notice (Form 44) and Bump Response (Form 46)

The Bump Notice (Form 44) and the Bump Response (Form 46) have also been significantly updated and modernized. The instructions have been removed from the forms and relocated into the forms manual.

Form 44 should be used for Seller to give notice to the first Buyer that Seller has accepted another offer. Buyer can then use Form 46 to respond to Seller's "bump notice" by giving Seller notice that (i) Buyer has sold Buyer's property and satisfied the contingency; (ii) Buyer has not sold Buyer's property, but waives the contingency; or (iii) Buyer has not sold Buyer's property and terminates to the agreement.

d. Contingency Property Notice (Form 90K)

A new notice provision has been added to the Contingency Property Notice (Form 90K). The form now includes a notice that Buyer has accepted an offer to sell Buyer's property. This notice is not given in response to Seller's bump notice, rather this notice should be given when Buyer accepts an offer to sell Buyer's property before receiving a bump notice. Form 90K has also been updated and modernized.

Please note that there are certain circumstances in Form 22B where Buyer needs Seller's consent before accepting an offer to sell Buyer's property. Consent can be sought and given using Buyer's Request for Seller's Consent – Contingent Sale (Form 90L).

6. Other Form Revisions

a. Optional Clauses Addendum (Form 22D)

The Optional Clauses Addendum (Form 22D) has been revised in two regards. The first change is to revise Paragraph 3 so it relates only to systems and appliances and not to the general maintenance of the property. Revised Paragraph 3 requires Seller to repair or replace any system or appliance that becomes inoperative or malfunctions prior to closing (not possession). General Term "f" of the purchase and sale agreement requires Seller to maintain the property in its present condition, normal wear and tear excepted, until Buyer is entitled to possession.

The second change is to provide Buyer with time to review any lease agreement that Buyer will assume as part of the sale (e.g. lease for a propane tank, security system,

satellite dish, etc.) Buyer will have “____ days (5 days if not filled in) of receipt of the lease(s) or the date that the lease(s) are due” to review the lease(s) and decide whether to proceed with the purchase of the property. If Buyer does not timely give notice of termination, Buyer automatically waives the contingency.

The new form Notice of Termination - Homeowners' Association Review (Form 90W) is for use with the Homeowners' Association Review Period in the Optional Clauses Addendum (Form 22D). Buyer can use Form 90W to terminate the purchase and sale agreement by disapproving the association documents provided to Buyer.

b. Title Contingency Addendum (Form 22T)

The Title Contingency Addendum (Form 22T) has been updated and revised to provide for an automatic extension of closing to accommodate the time period and procedures for notice, correction, and termination for supplemental title reports that disclose new exceptions to title. In addition, the default trigger starting Buyer's review period has been changed from mutual acceptance to the date of Buyer's receipt of the preliminary commitment.

The new Title Contingency Notice (Form 90T) is a notice form that the parties can use for the notice requirements in Form 22T. Please note that old Form 90T (Buyer's Notice of Termination – Homeowner Insurance is Unavailable) has been renumbered as Form 90VV.

c. Homeowner Insurance Addendum (Form 22VV)

The Homeowner Insurance Addendum (Form 22VV) has been updated and revised to include a contingency for Buyer obtaining a binder for a standard policy of homeowners insurance “together with any other property insurance required by Buyer's lender.” This new language was added to address lender requirements for additional insurance in special circumstances (e.g. flood insurance).

d. Cooperative Apartment Addendum (Form 33)

The Cooperative Apartment Addendum (Form 33) is used for the sale of cooperative apartments, where the residents own shares in a co-operative, which owns the building, and each resident has a lease for their individual unit. Co-ops are not very common in Washington and are much more prevalent in other parts of the country.

Form 33 has been modernized and revised to add a contingency for Buyer's review of the co-op's articles of incorporation, bylaws, and rules. Like other contingencies, Buyer has a certain amount of time to review the documents and decide

whether to proceed with the purchase. If Buyer does not timely give notice of termination, Buyer automatically waives the contingency.

e. Inspection Addendum (Form 35)

The Inspection Addendum (Form 35) has been revised to require Seller to complete any agreed upon repairs “at least _____ days (3 days if not filled in) prior to the Closing Date.” This revision gives Buyer time, if Buyer so chooses, to have the inspector who recommended those repairs re-inspect to make sure the repairs were done properly.

f. Escalation Addendum (Form 35E)

The Escalation Addendum (Form 35E) has been revised to clarify that the form applies to situations where Seller receives “an equal” or higher offer from another Buyer.

g. Selling Firm’s Commission (Form 41C)

The Selling Firm’s Commission (Form 41C) form can be used as an addendum to the purchase and sale agreement when a Buyer is buying an unlisted property. Form 41C provides that Seller will pay the selling firm a commission as agreed upon by the parties in the form. The form has been revised to add a “tail provision” to provide for a commission for the selling firm if the agreement is terminated and Seller sells the property to Buyer within six months.

h. Rental Agreements (Form 65A and 65B)

Rental Agreement (Buyer Occupancy Prior to Closing – Form 65A) and Rental Agreement (Seller Occupancy After Closing – Form 65B) have been updated and revised as follows:

- The rent provision has been simplified;
- A provision advising the tenant about the availability of renter’s insurance has been added; and
- A paragraph related to carbon dioxide alarms has been included.

Please note Form 65A and 65B are intended for short-term rental scenarios associated with a purchase and sale agreement where possession occurs shortly before, or shortly after closing.

i. Lease/Rental Agreement (Form 68)

The Lease/Rental Agreement (Form 68) now includes an option in Paragraph 12 (Renter’s Insurance) that requires the tenant to obtain renter’s insurance to provide

coverage for liability, bodily injury, property damage, and for the theft, loss, or damage to tenant's personal property. If selected, the tenant is required to provide the lessor with a copy of the renter's insurance policy.

j. Interpleader Summons/Complaint (Form 150)

The Interpleader Summons (Form 150) and the Interpleader Complaint (Form 151) have been revised to be consistent with the new chapter of RCW 64.04 discussed above, effective July 24, 2015.

7. Availability of Revised Forms

SAMPLE copies (including both clean and redline copies) of the revised forms are available on NWMLS's website for your review. Please note that you should not use the SAMPLE copies of the forms for any transactions.

The revised forms are currently available for order in hard-copy and will be available for use on Xpress Forms and Transaction Desk on July 24, 2015. NWMLS will remove the old version of the forms at the same time. You should recycle your old forms to prevent any inadvertent use.