

Legal Bulletin No. 219
2021 Forms Revisions

By Northwest Multiple Listing Service
Published February 8, 2021
Revised April 5, 2021

1. Introduction

This bulletin summarizes revisions to many NWMLS forms and introduces several new forms. There have been significant revisions to the Purchase and Sale Agreements, the Financing Addendum, the Inspection Addendum, and the Escalation Addendum. Other forms revisions are not substantive and include minor clarifications and updates to outdated vernacular.

The revised forms are currently available on NWMLS's website as SAMPLE forms for review purposes only. The forms will be published for use on Transaction Desk and Xpress Forms on March 3, 2021.

Subsequent revisions to the Increased Down Payment for Low Appraisal Addendum (Form 22AD), the Escalation Addendum (Form 35E), and the Escalation Addendum Notice (Form 35EN) will be published on April 12, 2021.

The forms that have substantive revisions include the following:

- Listing Agreements (Form 1A and 1B)
- Purchase and Sale Agreements (Form 20, 21, 23, 25, and 28)
- Financing Addendum (Form 22A)
- Increased Down Payment for Low Appraisal Addendum (Form 22AD)
- Notice for Increased Down Payment Addendum (Form 22ADN)
- Financing Contingency Notice (Form 22AR)
- Buyer's Sale of Property Contingency (Form 22B)
- Optional Clauses Addendum (Form 22D)
- Lead Based Paint Disclosure (Form 22J)
- Land and Acreage Addendum (Form 22LA)
- Septic Addendum and County Septic Forms (Form 22S, etc.)
- Title Contingency Addendum (Form 22T)
- Inspection Addendum (Form 35)
- Inspection Response Form (Form 35R)
- Escalation Addendum (Form 35E)
- Back-Up Addendum (Form 38A)

New forms include:

- Lead Based Paint Disclosure (Lease/Rentals) (Form 22J-Lease)
- Survey Contingency (Form 22TS)

- Notice of Seller Consent – Inspection Report (Form 35C)
- Escalation Addendum Notice (Form 35EN)
- Inspection Waiver Addendum (Form 35W)
- Termination of Buyer Representation Agreement (Form 53)
- Termination of Seller Representation Agreement (Form 54)
- Lease/Rental Notice (Form 68N)
- Notice of Termination for Form 22EF (Form 90EF)
- Buyer’s FIRPTA Notice (Form 90 FIRPTA)
- Notice of Termination for Form 22L (Form 90LR)

1. Buyer Broker and Buyer Brokerage Firm

All NWMLS forms will be revised to replace the terms “Selling Broker” and “Selling Firm” with “Buyer Broker” and “Buyer Brokerage Firm.” For consistency, “Listing Firm” will be changed to “Listing Brokerage Firm.”

The terms Selling Broker and Selling Firm are outdated and confusing for consumers (and many brokers). The new terms Buyer Broker and Buyer Brokerage Firm better describe the buyer broker’s role in the transaction.

NWMLS Rules will be updated to reflect this new terminology in due course.

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

The listing agreements have been updated to include a new paragraph regarding fair housing to ensure that the seller is aware of the applicable fair housing laws. The fair housing paragraph provides an acknowledgment from the seller that “fair housing laws prohibit discrimination based on sex, marital status, sexual orientation, gender identity, race, creed, color, national origin, citizenship or immigration status, families with children status, honorably discharged veteran or military status, the presence of any sensory, mental, or physical disability, or the use of a support or service animal by a person with a disability.”

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

There are several significant changes to the purchase and sale agreements.

a. Earnest Money

Specific Term 7 (Earnest Money) now allows the parties to negotiate when earnest money must be deposited. The new language provides “Delivery Date ___ days after mutual acceptance.” The default timeline for the Delivery Date in General Term b (Earnest Money) is two days.

In addition, General Term b has been simplified to include only one timeline for the deposit of earnest money, whether the buyer gives the earnest money to the buyer

broker or delivers the earnest money directly to the closing agent. Finally, General Term b provides that if the earnest money is sent by mail, it must arrive by the Delivery Date.

In short, no matter how the earnest money is delivered, it must be delivered to the party holding the earnest money by the Delivery Date.

b. Agency Disclosure

Specific Term 15 (Agency Disclosure) has been simplified as follows:

Buyer represented by:

Buyer Broker; Buyer/Listing Broker (dual agent); unrepresented

Seller represented by:

Listing Broker; Listing/Buyer Broker (dual agent); unrepresented

Note that if the listing broker procures the buyer, but does not represent the buyer as a dual agent – the buyer would be “unrepresented” and the buyer broker and buyer brokerage firm section of the purchase and sale agreement should be left blank – as there is no buyer broker. As a reminder, in order to be a dual agent under RCW 18.86.020, a broker must have a written agency agreement with the seller (e.g. listing agreement) and a written agency agreement with the buyer (e.g. buyer agency agreement).

c. FIRPTA

General Term j (Seller Citizenship and FIRPTA) has been revised to require the seller to deliver the Foreign Investment in Real Property Tax Act (“FIRPTA”) certification (Form 22E or equivalent) to the closing agent within 10 days of mutual acceptance. The seller can fill out and provide the form to the closing agent directly and the listing firm and buyer brokerage firm can confirm with the closing agent that the seller has done so.

If the seller fails to timely provide the FIRPTA certification to the closing agent, the buyer may give notice that if the seller does not provide the certification to the closing agent within three days, the buyer may terminate the agreement. If three days pass and the seller has still not provided the FIRPTA certification to the closing agent, the buyer may terminate the agreement and the earnest money will be refunded to the buyer.

This change incentivizes the seller to provide the FIRPTA certification to the closing agent early in the transaction so that the parties and the closing agent have time to address any issues with FIRTPA if the seller is subject to the tax.

A new notice form, Buyer’s FIRPTA Notice (Form 90 FIRPTA), should be used to send the above notices.

d. Computation of Time

There are several forms that require action a certain amount of time before closing (e.g. the seller must complete repairs three days prior to the closing date). General Term l (Computation of Time) was revised to clarify how to calculate time when counting backwards from closing. The new provision states: “When counting backwards from Closing, any period of time measured in days shall start on the day prior to Closing and if the last day is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, the specific period of time shall expire on the next day, moving forward, that is not a Saturday, Sunday or legal holiday (e.g. Monday or Tuesday).”

e. Property Condition Disclaimer

General Term x (Property Condition Disclaimer) was revised to include notice to the buyer that there may be soil or other contamination on the property that may not be readily apparent and may be hazardous. Like all other potential issues, the purchase and sale agreement advises the buyer to conduct a thorough inspection of the property to identify such issues.

f. Vacant Land Purchase and Sale Agreement

The Vacant Land Purchase and Sale Agreement (Form 25) was revised to clarify that if the Feasibility Contingency Addendum (Form 35F) is included in the agreement, Form 35F supersedes the feasibility contingency in Specific Term No. 15 and General Term u.

2. Financing Addendum

The Financing Addendum (Form 22A) has been significantly revised.

a. Loan Information

To simplify the form, the paragraph regarding loan information has been removed. Of course, the seller and listing broker can periodically inquire about the status of buyer’s loan with the buyer, the buyer broker, and with the lender. To that end, in Paragraph 1(b), the buyer authorizes the seller and the listing broker to inquire about the status of buyer’s loan with the lender.

The Request for Loan Information (Form 22AL) and the Loan Information Notice (Form 22AP) will be removed from publication in due course.

b. Financing Contingency

The revised form provides two options for the financing contingency in new Paragraph 2. The first, entitled “Seller’s Notice to Perform,” is similar to the current form. After the agreed upon time-period (the new default is 21 days), the seller may give

a “Notice to Perform” to the buyer – requesting that the buyer waive the financing contingency. If the buyer does not waive the financing contingency, then after three days, the seller may terminate the agreement and the earnest money will be refunded to the buyer. This is the same process, with slightly different terminology and default timelines, that has been used in Form 22A for many years.

The new second option, entitled “Automatic Waiver of Financing Contingency,” provides that, similar to other contingencies in the purchase and sale agreement, the financing contingency is automatically waived after a certain number of days (21 days is the default).

The buyer may elect to terminate the agreement at any time before the contingency is automatically waived, but in order to be entitled to the earnest money, the buyer must provide written confirmation from the lender showing: (i) the date the buyer’s loan application for the property was made, including a copy of the loan estimate; (ii) that the buyer possessed sufficient funds to close; and (iii) the reasons the buyer was unable to obtain financing by closing. This is the same requirement for the return of earnest money that has been in Form 22A for many years, should the buyer not be able to qualify for financing.

Note that the “automatic waiver” option contains significant risks for a buyer. If a buyer agrees to an automatic waiver, the buyer should make sure to carefully select a lender and make complete and thorough loan application as early in the process as possible. The buyer will need to know before the automatic waiver date whether buyer will be able to obtain financing.

Both financing contingency options allow the parties to negotiate whether a waiver of the contingency constitutes a waiver of the appraisal provision. The default is that a waiver of the financing contingency does not also waive the appraisal less than sales price provision. For the automatic waiver option, this provision is important, as a buyer has no control with regard to whether the appraisal will be conducted before the automatic waiver date.

On April 12th, NWMLS will discontinue the publication of the Limited Waiver of Financing Contingency Addendum (Form 22AW). This form is not necessary as the parties negotiate in Form 22A whether a waiver of the financing contingency constitutes a waiver of the appraisal provision.

c. VA Amendatory Clause

Form 22A now incorporates the language from the VA Escape Clause Addendum (Form 22VA). While similar language has been included in Form 22A for years, some lenders require that the exact language from the Department of Veteran Affairs be included in the agreement.

d. Financing Contingency Notice (Form 22AR)

The Financing Contingency Notice (Form 22AR) will be revised to reflect the changes made in Form 22A.

Please note that the current version of the Financing Contingency Notice (Form 22AR) (rev. 7/15), the Request for Loan Information (Form 22AL) (rev. 7/15), and the Loan Information Notice (Form 22AP) (rev. 7/15) will continue to be published on Xpress Forms for several weeks after the revised forms are published. Brokers who have pending sales with the current Financing Addendum (Form 22A) (rev. 7/19) may need these forms to deliver notices in those transactions.

3. Increased Down Payment for Low Appraisal Addendum

The Increased Down Payment for Low Appraisal Addendum (22AD) has been modified to include an option for transactions where: (a) the buyer is obtaining a loan; (b) the agreement is not contingent on the buyer obtaining the loan (i.e. there is no Form 22A); and (c) the agreement includes an Appraisal Addendum (Form 22AA).

The new provision requires buyer to disclose that buyer is obtaining a loan to purchase the property, including the amount of the down payment. Similar to the current form, the form states that if the appraised value is less than the purchase price, the buyer shall pay additional funds toward the down payment. If the buyer's appraised value, plus the additional funds are equal or greater than the purchase price, the buyer may not terminate the agreement under Form 22AA.

If the appraised value and buyer's additional funds are less than the purchase price, the buyer gives notice to the seller and the seller can reduce the purchase price or terminate the agreement.

Additional revisions will be made to Form 22AD on April 12th. The revisions include the following:

- Providing the buyer the option to give notice that the appraised value and buyer's additional funds are less than the purchase price. If the buyer still wants to purchase the property for the purchase price, the buyer should consider not providing notice, as doing so will give the seller the right to terminate.
- Requiring the seller to respond to the buyer's notice that the appraised value and buyer's additional funds are less than the purchase price – and if the seller fails to timely respond, the agreement will terminate.
- Clarifying that if the buyer waives Paragraph 5 (Appraisal Less Than Sales Price) in the Financing Addendum (Form 22A), the buyer is obligated to purchase the property for the purchase price.

The Notice for Increased Down Payment for Low Appraisal Addendum (22ADN) has been updated to be consistent with the revised Form 22AD.

4. Buyer's Sale of Property Contingency

The Buyer's Sale of Property Contingency (Form 22B) has been updated to clarify issues related to the buyer's waiver of the contingency. The revisions to Form 22B are clarifications – not substantive revisions.

Revised Paragraph 4 provides, if in response to seller's bump notice, buyer decides to waive the contingency, the waiver of the contingency also waives all other contingencies in the agreement.

Paragraph 6 has been clarified to provide that if the buyer's property fails to close, buyer must provide notice to seller within two days, and depending on the circumstances, buyer may: (a) reinstate the contingency, if it is not yet expired; (b) terminate the agreement; or (c) waive the contingency.

5. Optional Clauses Addendum

Paragraph 5 (Utilities) of the Optional Clauses Addendum (Form 22D) has been updated to include a checkbox for cable and internet – including the identity of the provider of those services.

6. Lead Based Paint Disclosure

The Lead Based Paint Disclosure (Form 22J), which previously was a combined form for both purchase and sale agreements and lease agreements, has been separated into two forms. Form 22J must be used for purchase and sale agreements for dwellings built prior to 1978. The new Form 22J Lease must be used for lease/rental agreements for dwellings built prior to 1978.

Other revisions to the form include additional buyer initial requirements in the buyer acknowledgment section adjacent to the statements that buyer has received certain information and the pamphlet "Protect Your Family from Lead in Your Home."

The revisions to Form 22J and the creation of Form 22J Lease were made at the request of the Environmental Protection Agency ("EPA").

7. Septic Forms

The Septic Addendum (Form 22S) has been clarified to provide that, similar to the Inspection Addendum (Form 35), the agreement is conditioned on the buyer's subjective satisfaction of the inspection report. This same clarification has been made to several of the county septic forms, including the King County Septic Addendum (Form 22S King),

Thurston County Septic Addendum (Form 22S Thurston), and the septic provision in the Land and Acreage Addendum (Form 22L&A).

In addition, the Kitsap County Septic Addendum (Form 22UU) and the Kitsap County Water Supply Addendum (Form 22UUU) have been revised to set forth exemptions to the county inspection requirements for certain properties.

8. Title Contingency Addendum

The Title Contingency Addendum (Form 22T) was clarified to provide that if the buyer receives the preliminary commitment before mutual acceptance, the buyer's time to review begins on mutual acceptance.

9. Inspection Addendum

The Inspection Addendum (Form 35) has been significantly revised and reformatted.

a. Inspection Contingency.

Paragraph 1 (Inspection Contingency) has been revised to clarify that, in addition to the general home inspection conducted by the buyer or a licensed inspector, the buyer may engage specialists (e.g. plumbers, electricians, roofers, etc.) to inspect the property during the initial inspection period.

In a related change, Paragraph 5 (Additional Time for Inspections) has been clarified to state that, if an inspector so recommends, a buyer shall have additional *time* to obtain further evaluation of the property. In order to take advantage of the additional time, the buyer must provide timely notice to the seller, which notice must include the inspector's recommendation.

b. Inspection Report.

Consistent with the prior form, Paragraph 4 (Inspection Report) provides that the buyer shall not provide the inspection report to the seller without the seller's prior written consent.

There are two significant revisions related to the inspection report. A new provision, Paragraph 4(a) (Waiver of Contingency by Buyer) states that if the buyer provides any portion of the inspection report to the seller without the seller's prior written consent, the inspection contingency shall be deemed waived. Another new provision, Paragraph 4(b) (Seller Consent) allows a seller to request: (i) the buyer provide the full inspection report to the seller; or (ii) the buyer provide the portion of the inspection report related to any requested repairs or modifications to the agreement. The seller's selection of either one of those checkboxes is not considered a counteroffer.

In addition, a new form, Notice of Seller Consent – Inspection Report (Form 35C), can also be used to secure seller’s written consent to deliver the inspection report or portions of the inspection report to the seller.

The Form 35R (Inspection Response) has been updated to include a reminder that the buyer may not provide any portions of the inspection report to the seller without the seller’s prior written consent. A buyer broker needs to make sure to have the seller’s consent before sending the inspection report (or portions of the report) to the seller, as doing so without consent will waive the buyer’s inspection contingency.

c. Inspection Waiver Addendum

The provisions in Form 35 regarding waiver of inspection and pre-inspection have been moved into a new form – Inspection Waiver Addendum (Form 35W). There are multiple options in the new form

Paragraph 1 (Waiver of Inspection) provides that the buyer has been advised to obtain an inspection and has elected to waive that right.

Paragraph 2 (Pre-Inspection Conducted) states that the buyer conducted inspections of the property prior to mutual acceptance and that the purchase and sale agreement is not conditioned on the results of such inspections.

Paragraph 3 (Modifications/Repairs) allows the buyer to request repairs to the property based upon the buyer’s pre-inspection of the property. The language in this paragraph regarding seller’s obligation to make the repairs is similar to the requirements in the Inspection Addendum (Form 35).

Paragraph 4 (On-Site Sewer Disposal Systems Advisory) advises the buyer to conduct an inspection of the on-site sewage system.

10. Escalation Addendum

The Escalation Addendum (Form 35E) has been significantly revised. Please note that there continue to be many risks and challenges associated with using Form 35E. For example, in the form the buyer reveals the maximum price the buyer is willing to pay for the property. That is information that a buyer would not usually willingly disclose to the seller. Many listing brokers elect to remove Form 35E from the offer and use the Counteroffer Addendum (Form 36) to simplify the agreement. That practice is perfectly acceptable. For those who choose to use Form 35E, the form has been updated to address several issues that have caused disputes in the past.

a. Net Price

The definition of “Net Price” has been revised to include any credits to the seller that may be included in the agreement. The revised definition provides: “The term ‘Net

Price' means the stated Purchase Price (or the maximum price if the Competing Offer contains a price escalation clause) including any price adjustments such as credits to Buyer for closing costs or credits to Seller." An example of a credit to the seller could be the buyer's broker crediting a portion of the broker's commission to the seller to improve the buyer's offer.

b. Competing Offer

Form 35E provides that the escalation of the offer shall not be effective unless it is accompanied by a complete copy of any "Competing Offer." Accordingly, it is critical that the listing broker include a copy of the Competing Offer with the seller's acceptance.

On April 12th, the form will be revised to provide that if the seller fails to provide a Competing Offer at mutual acceptance, the buyer has ___ days (3 days if not filled in) to provide notice to the seller of that fact. If the buyer fails to timely provide such notice, the buyer is obligated to purchase at the new purchase price as stated in Form 35E. If the buyer gives such notice, the seller has ___ (1 day if not filled in) to provide the buyer with the Competing Offer. If the seller fails to do so, the buyer is entitled to purchase the property at the non-escalated price.

To qualify as a Competing Offer, the offer must be "a complete copy of a bona fide, arm's length, written offer on NWMLS or similar forms, containing all material terms necessary for an enforceable agreement which (a) requires the full Purchase Price to be paid in cash at closing; (b) provides for closing no later than ___ days (60 days if not filled in) from the date of this offer; and (c) is not contingent on the sale of the buyer's property (i.e. no NWMLS Form 22B or equivalent)."

There have been instances when the Competing Offer that the seller included with the seller's acceptance did not qualify as a Competing Offer because the closing date fell outside of the time-period in the offer, or it contained a Form 22B. The revisions to Form 35E address this issue.

In new Paragraph 3(b), the buyer has ___ days (3 days if not filled in) from mutual acceptance to provide notice to the seller that the Competing Offer does not meet the requirements for a Competing Offer.

- If the buyer fails to timely provide notice, then the Competing Offer is deemed to meet the requirements.
- If the buyer provides timely notice to the seller, the seller has ___ days (2 days if not filled in) to terminate the agreement and the earnest money shall be refunded to the buyer.
- If the seller does not timely terminate the agreement, then the buyer is entitled to purchase the property at the non-escalated price.

The parties should use the new Escalation Addendum Notice (Form 35EN) to provide the above notices.

c. New Purchase Price

There have been many disputes over the calculation of the escalated purchase price. The new purchase price section of Form 35E provides a method for addressing such disputes.

First, Paragraph 4(a) must be used by the listing broker and seller to calculate the escalated purchase price. This section is no longer a “worksheet” and is the recitation of the new purchase price.

In new Paragraph 4(b), the buyer has ___ days (3 days if not filled in) from mutual acceptance to provide notice to the seller that the new purchase price is incorrect. The buyer’s notice must include the buyer’s calculation of the new purchase price.

- If the buyer fails to timely provide notice, then the new purchase price calculated by the seller in Paragraph 4(a) of Form 35E is deemed to be correct.
- If the buyer provides timely notice to the seller, the seller has ___ days (2 days if not filled in) to terminate the agreement and the earnest money shall be refunded to the buyer.
- If the seller does not timely terminate the agreement, then the buyer’s calculated new purchase price in Form 35EN is deemed to be correct.

Again, there are risks associated with using Form 35E. If you choose to use the form, you should be aware of the potential challenges associated with the form and discuss those issues with your client. The parties should use the new Escalation Addendum Notice (Form 35EN) to provide the above notices.

11. Back-Up Addendum

The Back-Up Addendum (Form 38A) has been revised to require the seller to give notice to the buyer within two days (as opposed to three days) of learning that the first sale failed to close.

12. Other Form Revisions and New Forms

There have been slight clarifications made to a number of forms, including:

- Referral Agreement (Form 11) – clarify that the form must be signed by the designated broker or branch manager of each firm.
- Commission Disbursement (Form 40) – modernize the form and update vernacular.
- Rental Agreement – Early Occupancy (Form 65A) – simplify rent provision and clarify when the tenant is entitled to possession.
- Rental Agreement – Delayed Occupancy (Form 65B) – simplify rent provision.

- Contingency Property Notice (Form 90k) – add notice option for failure to close and waiver.

The new forms that were not mentioned above include:

- Survey Contingency (Form 22TS) – an addendum to the purchase and sale agreement that makes the agreement contingent on the buyer’s survey of the property.
- Termination of Buyer Representation Agreement (Form 53) – an agreement between the buyer and the firm to terminate the Buyer Representation Agreement.
- Termination of Seller Representation Agreement (Form 54) - an agreement between the seller and the firm to terminate the Seller Representation Agreement (Form 47).
- Lease/Rental Notice (Form 68N) – a blank notice form to be used with the Lease/Rental Agreement (Form 68).
- Notice of Termination for Form 22EF (Form 90EF) – a notice of termination form to be used with the Evidence of Funds Addendum (Form 22EF).
- Notice of Termination for Form 22L (Form 90LR) - a notice of termination form to be used with the Lease Review Addendum (Form 22L).

Many other forms were revised to replace the terms “Selling Broker” and “Selling Firm” with “Buyer Broker” and “Buyer Brokerage Firm.”

13. Availability of Revised and New Forms

SAMPLE copies (including both clean and redline copies) of the revised and new 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 and new forms will be available for order in hard-copy on February 23, 2021 and will be available for use on TransactionDesk and Xpress Forms on March 3, 2021. NWMLS will remove the old version of the forms at the same time. You should recycle your old forms to prevent any inadvertent use.

Subsequent revisions to the Increased Down Payment for Low Appraisal Addendum (Form 22AD), the Escalation Addendum (Form 35E), and the Escalation Addendum Notice (Form 35EN) will be available for use on TransactionDesk and Xpress Forms on April 12, 2021.