

STATEWIDE PURCHASE & SALE AGREEMENT AND ALL THOSE ADDENDA!

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This is a 7½ hour course focusing on the Purchase and Sale Agreement which is the foundation of the transaction between the buyers and sellers of real estate. It covers such topics as material terms and requirements of a contract, all the provisions of the statewide Purchase and Sale Agreement and the addenda that compliment the Purchase and Sale Agreement.

Course Certification Number C20107476

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COURSE SCHEDULE

8:30 - 10:15	Introduction and discussion of intentions, goals and purposes in properly completing the Purchase and Sale Agreement ("PSA") and begin Specific Terms of the PSA (page 1)
10:15 - 10:30	Break
10:30 - 12:00	Complete Specific Terms of the PSA (page 1)
12:00 - 1:00	Lunch Break
1:00 - 2:45	Begin General terms of the PSA (pages 2-5)
2:45 - 3:00	Break
3:00 - 4:45	Complete General terms of the PSA (pages 2-5)

I. INTRODUCTION

1. Forms List and PSA Transaction Forms Cheat Sheet

- 2. The general purpose of the Purchase and Sale Agreement (PSA) is to create a predictable agreement that will end in one of two ways - closing or terminate.**

Race Track Analogy: A real estate transaction is like a hurdles race on a race track. Mutual acceptance is the transaction coming out of the starting blocks and closing is the finish line. There will be hurdles as you go down the track, some of which you placed on the race track when you drafted the PSA (the home inspection contingency, the financing contingency, the title insurance contingency, etc.). When a situation comes up (i.e., a hurdle) you will either be able to clear that hurdle and the transaction will move one step closer to closing or you will not be able to clear that hurdle ("SMACK") and the transaction will terminate at which point the only issue to work out usually is distribution of earnest money.

To assist in clearing all the hurdles, there should be something in every blank (n/a, 0, or line through it). A contract with blank blanks may be a void contract. Also, make sure to work through the entire agreement making sure the appropriate boxes are checked invoking certain provisions. As a matter of policy, always check boxes and fill in the blanks even if the parties would agree to the parenthetical default so it is clear that the licensee and the client talked about it.

As a licensee, you do not want to be in the situation where the client asks, "What happens now?", and you are forced to say, "I don't know!" (the infamous "broker in the headlights" syndrome).

3. Focus of the PSA:

- 1) Not as much on getting the deal to closing, but how to allocate responsibilities, risk and damages if the transaction fails to close.
- 2) Avoiding trouble for the parties and licensees – a well drafted PSA will help attorneys get licensees out of trouble if it is used as it was intended.

- 4. Almost universal truth:** Problems will arise (hurdles will appear) when the buyer complains that something is not as it was represented.

What are some examples of hurdles you might face in a transaction while you are going down the race track? _____

What are some examples of hurdles you might face in a transaction after you have crossed the finish line (post closing hurdles)? _____

What can you do when a client calls you with a post closing hurdle? _____

Reference Annie Fitzsimmon's Legal Hotline and Friday Videos from Washington REALTORS®.

Once in a while our clients will look for an out (buyer's and seller's remorse). Failure to fill out the PSA completely may give the party loophole to get out of the deal. Therefore, fill in all the blanks!

5. Alternative property types Purchase and Sale Agreements:

MULTI-FAMILY PSA – Form 20: general term z addressing books, records, leases and agreements being made available for inspection to the buyer no later than 10 days after mutual acceptance, buyer shall have 10 days upon receipt to review and approve, buyer to assume and seller to transfer all such leases, etc.

MANUFACTURED HOME PSA – Form 23: includes information about the manufacturer, serial number and year of the manufactured home, the space number of the rented lot, lot lease information, that the manufactured home is personal property being transferred and how, included items include existing expansion/add-on, buyer review of park rules and regulations, assumption of lease contingency, etc. The licensee will use Form 23 for manufactured homes on leased land where title has not been eliminated (i.e., in a manufactured home park). If the manufactured home sits on its own land, the licensee should use Form 21. The licensee should also include the **MANUFACTURED HOME ADDENDUM – Form 22MH** which deals with the issues of title elimination and Labor & Industries inspections. As a practical matter, the Form 22MH should be used anytime the property includes a manufactured home whether title has been eliminated or not.

Note: The closing agent on a manufactured home on leased land would likely appreciate receiving a copy of the title to the manufactured home if title has not yet been eliminated.

VACANT LAND PSA – Form 25: includes information about the subdivision (specific term 14 and general term u) and feasibility contingency expiration date (on the face of the PSA).

CONDOMINIUM PSA – Form 28: includes information about the unit number, residential condo development name, condo declaration recording number, parking space number, storage space number, new construction or conversion (for which the licensee will need to attach the **NEW CONSTRUCTION / CONVERSION ADDENDUM – Form 29**), public offering statement, resale certificate (for which the licensee may use the **CONDOMINIUM RESALE CERTIFICATE – Form 27** dealing with issues unique to condos and as required for the Condominium Act of the State of Washington), and condominium assessment.

However, on the average residential real estate transaction, the licensees will use the **RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT - Form 21.**

II. SPOKANE FORMS

But first . . . a couple of Spokane “home grown” forms that can be found in the Spokane folder in Transaction Desk.

SPOKANE ADDENDUM – Form SAR-SA: Use on all transactions – all property types – listing broker should execute with listing and load into Associated Docs with the Exhibit A, LBP & 22K, etc.

This addendum seeks to reconfirm the broker’s responsibilities per the agency law which is to advise the client to see expert advice on matters related to the transaction that are beyond the broker’s expertise. Accordingly, the form suggests the parties seek expert advice and to not use the services of anyone not licensed to perform any service where a license is required by law. For example, the parties are advised to seek expert advice in the following areas (and are given online resources): legal issues, accounting or tax issues, inspections including home inspectors and following up on recommendations by inspectors, contractors, etc., on site sewage disposal systems, wells, soil conditions and archeological resources.

The parties are also advised of important matters to be considered and of other matters that can adversely affect a property including: smoke detectors, carbon monoxide detectors, mold, wood destroying organisms, radon, asbestos, other indoor organic compounds and potential archeological sites on a property.

By initialing the form, Seller acknowledges they have the sole responsibility for disclosing to the Buyer in writing any known conditions. Buyer acknowledges Buyer is solely responsible for determining whether to inspect for such adverse matters.

Finally, the form authorized the Buyer's lender to release the Closing Disclosure Statement and other consumer disclosures to the firms, brokers and the closing agent.

SPOKANE BUYER REPRESENTATION AGREEMENT – Form SAR-BR:

should use with all buyers, but **MUST** use when in a dual agency situation.

What are the two potential dual agency situations?

1) _____

2) _____

This form spells out the commitment from the buyer to their buyer's representative (firm and broker). The agreement spells out the term of the agreement, when the firm is entitled to receive compensation and how much that compensation will be in specific types of situations. It also addresses the ethical situation of not stepping on other licensee's toes by having a buyer confirm they are not in a relationship with another firm or broker. The parties may also negotiate a retainer fee. This form contains provisions with regard to VA transactions and distressed sales, as well as acknowledgements concerning facts affecting the property and acknowledgement regarding advice, inspections and home warranties. Finally, there is a consent to dual agency on page 1, paragraph 3, but to act as a dual agent, the firm must disclose the terms of compensation which is done in the box at the bottom of page 2.

III. STATEWIDE FORMS

THE LAW OF REAL ESTATE AGENCY PAMPHLET: give to all Buyers and Sellers.

This form can be found in the pamphlets folder in TransactionDesk. This document summarizes and restates the agency law of the state of Washington.

When is the latest possible time the agency pamphlet can be given to your client? _____

Note: This must be the first document in all of the forms and documents your client receives in any electronic signing system the licensee uses.

WIRE FRAUD ALERT: give to all Buyers.

This form can also be found in the pamphlets folder in TransactionDesk. Given the rise of email wire fraud, this form should be provided to all buyers at the beginning, middle and end of all transactions with the warning they should never wire their funds to close on the basis of an email. Rather, buyers should always call to confirm wire instructions directly with the closing agent. The CFPB has estimated a loss of nearly \$1 billion in real estate transactions from such scams.

SELLER DISCLOSURE STATEMENT – IMPROVED PROPERTY – Form 17:

Use on all residential transactions (one to four living units).

The Seller Disclosure Statement (SDS – Form 17 for residential 1-4 unit properties) is **NOT** to be referenced in the PSA. The SDS is, by law, **NOT** part of a PSA. Therefore, the SDS itself should be completed by the Seller, and provided to a Buyer at or before the time the PSA is completed (e.g., in Associated Docs in the MLS and should always be kept separate from the PSA documents (i.e., sent in a separate email, never lumped in with all the other transaction documents). Also available for use are the Seller Disclosure Statement – Unimproved Property (Form 17C) and the Seller Disclosure Statement – Commercial (Form 17Comm).

Per the state statute, the Seller must provide the SDS to the buyer within how many days of mutual acceptance? _____

Upon receipt, the Buyer has how many days to rescind the PSA? _____

A copy signed by Seller and Buyer must be retained in the licensee's file. Failure to comply with the Seller's Disclosure Act gives the Buyer a "no cause necessary" rescission right which may cause the transaction to fail to close. Buyer should use the **NOTICE OF RESCISSION OF AGREEMENT PURSUANT TO RCW 64.06 - Form 90A** to give notice of rescission if displeased with SDS.

RESIDENTIAL REAL ESTATE PURCHASE AND SALE AGREEMENT - FORM 21 - SPECIFIC TERMS (page 1):

1. Date:

For reference only, does not signify acceptance. This will be the date to be used on addenda that will be added to the PSA.

MLS No:

Can fill in, but not necessary (not a material term).

Note: Never include via reference the MLS Data sheet with the PSA!

Offer Expiration Date:

The date for acceptance of an offer (unless sooner withdrawn) may be stated by the offering Buyer. Counteroffers drafted on a **COUNTEROFFER ADDENDUM Form 36** may also set specific expiration dates. If no date is stated (or if the offer is countered on the face of the PSA which is discouraged), the counteroffer carries a two-day period for acceptance (still subject to being withdrawn sooner).

Failure to accept within the time required will cause the offer or counteroffer to lapse. Withdrawal of an offer or counteroffer prior to acceptance requires a written notice delivered or transmitted by fax or email to the other side (race to the fax machine or scanner story). The appropriate form to use to withdraw an offer or counteroffer is the **WITHDRAWAL OF OFFER OR COUNTEROFFER – Form 36A**.

Mutual acceptance is considered achieved when one side has accepted all terms and provisions presented by the other side ("meeting of the minds") and then has delivered the accepted PSA to the last offeror ("mutual acceptance"). Any change in the terms of an offer or counteroffer is considered a counteroffer except insertion of or change to the Seller's name and Seller's warranty of citizenship status.

PRACTICE TIP: In noting mutual acceptance, when the licensee sending back the mutually agreed offer sends an email, he or she should note in the body of the email the date of mutual acceptance. Confirm via phone call or ask for a reply to the email from the other licensee so the licensees and parties are on the same page with regard to the mutual acceptance date. If there is a dispute, work it out ASAP. The use of a mutual acceptance date form may be useful, but "Just sayin' it so, don't make it so." Mutual acceptance by definition is the event when the PSA and all addenda are delivered to the last offering party indicating consent. Should a licensee make note on such a form of a date that is not the actual date of delivery, the actual date of delivery will trump the licensee's written mutual acceptance date.

Note: The parties to a PSA contract must acknowledge all the material terms in order for the PSA to be binding. The material terms to a PSA could be referred to as the 4 P's: Parties, Property, Purchase Price and Payment Method.

2. Buyer:

The **complete and proper legal names** for the prospective Buyer(s). Include middle initials for individuals if those should be included in the final closing documents. If an entity, include the full legal name of the entity.

Indicate the **legal status** of the Buyer(s) (e.g., "an unmarried person", "a married couple", "as tenants in common", "a Washington corporation"). Choose this status from the drop-down menu in TransactionDesk.

Practice Tip: Ask your client, "How would you like your name to appear on legal documents?" The goal is to make it clear - if we can do something to help out the lender, closing agent or title company, then be as specific as possible in drafting the PSA.

- 1) **Individuals:** The marital status of each individual should be specified (e.g. "an unmarried person" or "a married couple").

If community property is to be sold, the participation (i.e. signatures) of both spouses is required. A proper **power of attorney** may be used for this purpose.

If a married person is selling separate property, confirmation of a lack of any interest on the part of the non-participating spouse will generally be required - a **quit claim deed** is commonly executed at closing for this purpose (a power of attorney cannot be used for this purpose).

If spouses are purchasing real property as community property, participation or consent of both spouses is required. Neither spouse has the right to unilaterally commit community funds to the purchase of real estate.

If a married buyer is purchasing real property as separate property, but community funds will be required to make the down payment or purchase payments, consent of the non-participating spouse is required. Consent should be obtained at the time the PSA is written, and will also require execution of a document at closing - typically a quit claim deed.

Practice Tip: If a quit claim deed will be required, draft this as a contingency to protect the buyer. On the Optional Clauses Addendum - Form 22D, paragraph 12. Other or on an Addendum - Form 34 write "Seller may terminate this agreement if the buyer's spouse does not sign a quit claim deed within 5 days of mutual acceptance (or whatever time frame is necessary or appropriate). If the buyer's spouse does not so sign the quit claim deed, the agreement shall terminate and the earnest money shall be refunded to the buyer."

If a married buyer is purchasing real property as separate property, using only separate funds, consent of the non-participating spouse may not be technically required. As a practical matter, confirmation of non-involvement and available separate property to complete the

transaction will be required. It is likely that the title company will still require execution of a quit claim deed.

- 2) **Entities:** If the seller or buyer is an entity, the exact name and entity form should be stated. Different rules apply regarding approval of the PSA by different entities. In general, the following rules apply:

General Partnerships - absent an agreement, assume all partners must sign to bind the partnership to buy or sell partnership property. Problem: many partnerships have partnership agreements which alter the rule, so ask for a copy of the partnership agreement.

Limited Partnerships - the general partner or partners have powers like those in a general partnership, limited partners have no effective control rights - again, however, ask for a copy of the partnership agreement and see what it says regarding approval of purchases and sales.

Corporations - act through written corporate resolutions adopted at meetings. If you are not familiar with the corporation, ask for a copy of the corporate resolution which confirms the authority of the signer to bind the corporation.

Limited Liability Companies - these are governed by the provisions of company agreements, often called operating agreements. These usually specify whether there are one or more managers, or a group of members, or a requirement that all members sign any agreement to buy or sell property. Ask for a copy of the agreement.

Trusts - operate under the provisions of a written trust agreement. Generally, the signatures of all trustees will be required unless the trust specifies otherwise.

Additional potential pitfalls:

If the buyers think they want to purchase or operate in an entity form or in some relationship with one another, but have not decided what entity form or legal relationship to use (e.g., buyers deciding whether to form a corporation or partnership, individuals deciding whether to buy as tenants in common, joint tenants, etc.) do not attempt to advise them on this issue. This is an issue they should take to their legal and tax advisors. This is a clear duty under the agency law which mandates that we tell our clients to see expert advise on matters relating to the transaction that are beyond our area of expertise which arguably is limited to marketing, negotiation and facilitating the transaction to closing. Identification of, and proper execution of the PSA by, the parties who are buying and selling is necessary in order to create a binding contract. Additional issues

may arise in identifying proper parties and assuring proper authorization. In particular, any time the legal system is involved, special handling and processing rules may apply (e.g., divorce, bankruptcy, guardianships, death - with or without a probate, incompetence without a durable power of attorney, and similar matters).

Exercise:

1. What if the buyer is purchasing alone, but is married?

BUYER: _____

Note: In this situation, the closing agent will require a quit claim deed from the non-participating spouse because the transaction creates a community debt. Washington is a community property state - community property law applies to the sale or purchase of all real property even if the purchaser is from a non-community property state. If non-participating spouse does not give consent, the deal is voidable at the option of that spouse - even after the deal has closed! May not need quit claim if there is a pre-nuptial agreement or a community property agreement. If need quit claim, get ASAP because PSA is also voidable (e.g., non-participating spouse can void up until closing even if they agreed to sign the quit claim at closing). Can have non-participating spouse sign copy of PSA and write "non-participating spouse" beneath their signature (but still have them sign quit claim at closing).

Community property laws dictate that in purchasing or selling real property, the law of the state where the property is located will govern. When purchasing personal property, the law of the state where the purchaser resides will govern.

2. What if the buyers are brother and sister where the brother is married purchasing without his spouse and the sister is not married?

BUYER: _____

3. What if the buyers are from out of town, only one spouse is here looking at property and he or she finds a house and wants to write an offer - can only one spouse sign the PSA? _____

BUYER: _____

How will you deal with the fact that the other spouse is out of town?

1. _____

2. _____
3. _____

If only one spouse signs, the transaction is vulnerable. Should get signatures of both spouses (at least a fax, email or e-signature) or have an appropriate power of attorney in place.

Initialing and signing under a power of attorney exercise: Jane Q. Doe has John R. Doe's power of attorney. How will she initial and sign on his behalf?

Initials	Date	Signature	Date
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4. What if the licensee is signing on behalf of a Buyer who does not want to be identified until signed around?

BUYER:

- Notes:
- 1) *can add "undisclosed principal, a single person and a licensed real estate licensee."*
 - 2) *Licensee needs a written agreement with the undisclosed principal. Principal must be in existence at the time of the agreement (e.g., cannot be a soon to be formed corporation) and the nominee must have actual authority to sign (prove by making the principal sign and initial a copy of the final offer and leave it in the file – shows principal/buyer consented to the deal).*

Why have a nominee?

- 1) *principal/buyer's notoriety/celebrity status may injure his or her negotiating position; or*
- 2) *relational problems between the seller and the principal/buyer – feuding farmers*

3. Seller:

The complete names of the Sellers may not be known or available to the selling licensee and may need to be confirmed and completed when the offer is submitted. Addition of the Seller's name by the listing licensee will not be considered a counteroffer. Look at the SDS in the Associated Docs to see what name the listing broker used.

4. Property:

Legal Description attached as Exhibit A.

The legal description is the most important of the three property descriptors and will create a void contract if incorrect, incomplete or missing altogether. Anything labeled Exhibit A that is in fact a complete and proper legal description will be acceptable and will tighten down this loophole for both Buyer and Seller (and may prevent deposits into the licensee's real estate education fund.)

Listing Broker process:

- 1) When going out on a listing appointment, listing licensee might consider ordering a print, map and docs from a title company which will include the last recorded deed.
- 2) When the listing licensee secures the listing, call the title company as approved by the Seller and order a preliminary commitment for title insurance.
- 3) If the licensee has the Exhibit A from the preliminary title commitment for title insurance (which is the best source of the legal description) licensee should load that Exhibit A (**NOT** the entire commitment) into associated docs. If the listing licensee does not have the preliminary title commitment yet, listing licensee should use the last recorded deed labeled "Exhibit A" and upload that into Associated Docs. In a pinch (and shame on the listing broker for creating the pinch!), the parties could sign something taken from the county assessor's website if a transaction is being signed over a weekend and the preliminary title commitment Exhibit A and the last recorded deed "Exhibit A" are unavailable.

Practice Note: this is a good time to upload the Seller Disclosure Statement (SDS), Lead Based Paint Addendum (LBP), Identification of Utilities - Form 22K, the SAR-SA (Spokane Addendum), etc. to Associated Docs, as well. Make sure the SDS is a separate Associated Document, however!

Important Practice Note: If the last recorded deed is used as the "Exhibit A" for a mutually accepted PSA, when the preliminary title commitment arrives, both brokers should check and double check the last recorded deed "Exhibit A" for accuracy. If it is accurate, no need for further action. If it is not accurate, the parties should sign the updated Exhibit A from the preliminary title commitment. Similarly, if the property hasn't sold when the preliminary commitment for title insurance comes in, the listing licensee should swap out the last recorded deed "Exhibit A" for the actual Exhibit A from the preliminary title commitment in Associated Docs.

Buyer Broker process:

- 1) Check MLS for Exhibit A (in whatever form) in associated docs. If it is there, print out (or attach or incorporate into the

transaction documents) and have buyer initial and date the Exhibit A, as well as any other associated docs if applicable and available. If it is not there, go find a legal description somewhere (e.g., call the title company for a last recorded deed).

- 2) Write in the title company as stated in the Agent Remarks unless there is a compelling reason to change.

What is the most reliable source of a legal description? _____

Note: The last recorded deed is the second-best choice if Exhibit A from a preliminary title commitment is not available.

Tax Parcel Number: As identified in MLS data sheet or from tax records (e.g., 12345.6789). The PSA provides space for up to 3 parcel numbers.

Street Address: As identified in the MLS data sheet - e.g., 1234 E. Main Street, Spokane (city), Spokane, (county), WA (state) 99123 (zip).

5. Included Items:

Attached items are generally considered part of the real property and included in the sale. Built-in appliances should be considered included regardless of whether boxes are checked, but the best practice is to check all applicable boxes on page 1 in the interest of clarity. Most items on page 1 of the PSA are pluralized. If there are multiple refrigerators in the property, the seller will need to leave all of them if the "refrigerator(s)" box is checked. Exclude any particular refrigerator(s) the seller plans to keep. List other items to be transferred that would generally be considered personal property (e.g., appliances which are not built-in such as the microwave, bar stools, riding lawn mower, etc.) If there is a potential for dispute or uncertainty whether an item is "attached" and will stay with the property and the Buyer wants the Seller to leave it, list it - "When in doubt, write it out!" Several items are listed in General Term c. and need not be listed on page one of the PSA if in the included items paragraph.

Note: The PSA constitutes the full understanding of the parties (see General Term m. "Integration and Electronic Signatures"), even though unattached items may be shown as available amenities in the MLS property data sheet, flyer, etc., failure to list them in the PSA probably means they aren't included in the deal.

Excluded Items: Excluded items should be dealt with in the **OPTIONAL CLAUSES ADDENDUM - Form 22D** under paragraph 10 Excluded Item(s) on page 2 of that form.

PRACTICE TIP: If the Seller intends to keep something that is considered an included item (e.g., the dining room chandelier, master bedroom curtains that match the bedding or Aunt Mildred's prized rose bush), suggest the Seller remove the item before marketing the property. If the Seller cannot or will not remove the item, use this 3-step approach to excluding items:

- 1) exclude the item(s) in the MLS,*
- 2) tag the item(s) on the property, and*
- 3) exclude the item(s) in the Optional Clauses Addendum.*

Note: Unintended omissions of either included or excluded items can be costly to you and your client because prior understandings and agreement are wholly replaced by the provisions of the PSA. Failure to get this part of the PSA right may result in a deposit into your real estate education fund!

6. Purchase Price:

The total price, inclusive of the earnest money deposit, should be inserted.

7. Earnest Money:

Specify the amount of earnest money. 1% earnest money seems to be customary in our market though is totally negotiable between the parties. The Buyer should also note the Delivery Date by which time they will be able to deliver the earnest money to the holder of the earnest money (the Buyer Brokerage Firm or the Closing Agent). E.g., the earnest money must be received by the ultimate holder of the earnest money by that Delivery Date. Special provisions apply by law with respect to deposits greater than \$10,000 (Buyer must submit a W-9 to have earnest money submitted into an interest-bearing trust account in their name). Buyer will then next specify who is to hold the earnest money by checking the appropriate box (the Buyer Brokerage Firm or the Closing Agent). Finally, if the Buyer is offering an **Earnest Money Promissory Note (Form 31)**, check that box and include that form.

- Notes: 1) Earnest money must be deposited within 24 hours of mutual acceptance of the agreement under the Washington Administrative Code (WAC) unless otherwise agreed. If the Buyer delivers the earnest money to their broker, the broker must then deliver the earnest money to the closing agent or deposit it within 24 hours to comply with the WAC. It is therefore suggested perhaps the Buyer should deliver their earnest money directly to the closing agent*
- 2) Cash must be deposited immediately, even if still engaged in negotiations (have designated or managing broker or bookkeeper count, or at least count in the presence of another person) though ideally, simply do not take cash earnest money from a client.*

- 3) *Promissory note is not preferred because the broker/designated broker is then left to collect on the note; notes do not usually have interest unless there is a default (in no case can the interest rate be greater than the usury rate in Washington). Make promissory notes due ASAP, but date specific. Explain to Seller that broker will assign note to Seller and that broker will not be liable to collect on the note.*

*PRACTICE TIP: Licensee should receipt any collected earnest money using **RECEIPT FOR EARNEST MONEY - Form 89** and provide a copy for Seller but whiteout or redact the account/routing numbers before sending. Both listing and selling firm are required to maintain copies of the firm's receipts, as well as the receipt from the closing agent if the closing agent is holding the earnest money. Confirmation that earnest money was delivered is likely not sufficient, but in fact DOL auditors are looking for confirmation of DEPOSIT in transaction files.*

8. Default:

Generally, if either the Buyer or Seller defaults, the non-defaulting party may seek specific performance or damages, or the Seller may elect to retain the Buyer's earnest money as liquidated damages. If the Seller's election of remedies is checked on page 1 of the PSA, then Seller shall have an election of remedies in the event of Buyer default. If the forfeiture of earnest money box is checked on page 1 of the PSA, the Seller's sole remedy in the event of Buyer's default is the forfeiture of earnest money. The Seller may not, however, retain more than 5% of the purchase price. The exclusive remedy provision does not, however, restrict a Seller's right to also retain other amounts which have been agreed to be non-refundable such as early possession rent or extension fees which have been referred to as such. As a general rule, however, Sellers should not agree to restrict their remedies to forfeiture of earnest money in situations where damages other than loss of market time are likely. For example, a Buyer granted early possession of property who then defaults will likely leave rent and utilities unpaid; repairs, cleaning and maintenance undone; and may require the Seller to evict them. These costs should be recovered in addition to the default remedy and forfeiture of earnest money alone will not be adequate.

PRACTICE TIP: If the Forfeiture of Earnest Money box is checked, as a listing licensee, you must have the "worst case scenario" conversation with your Seller, "Seller, worst case scenario, if the Buyer walks away the day of closing, will the earnest money make you whole?" If not, consider a counteroffer of higher earnest money or the Election of Remedies.

Also note, if Buyer is paying no earnest money, the parties must agree to the election of remedies lest they create an illusory contract with no remedy (if the

forfeiture of earnest money box is checked and there is no earnest money, there is no remedy in the event of buyer default – therefore an illusory contract).

Finally, if neither box is checked, the default would be the election of remedies as the Seller has not negotiated a limit to his or her remedies.

Disputes regarding earnest money may lead to interpleader in court, but the expense associated with interpleader makes this one of the least desirable alternatives for the parties. Forfeited earnest money may also be used to reimburse the brokers for expenses paid on behalf of the parties before disbursing the balance.

9. Title Insurance Company:

Buyer's broker should consult the listing to see if title has already been opened by the listing broker. If so, unless there is a compelling reason to do so, buyer's broker should not suggest a different title company lest the Buyer incur the cost of any cancellation fees by the Seller's title company.

10. Closing Agent:

Specify the closing company (e.g., title company, escrow company, closing attorney's office, etc.) first and then, if desired, specify a individual closing agent (e.g., ABC title Company – Callie Closer).

11. Closing Date:

The closing date is the earliest date which is agreeable to both parties for completion of the transaction (cross the finish line). General Term f. provides definitions of "closing" and "possession". Closing will occur on recording and availability of seller's proceeds (if any). Possession is not considered delivered until the Seller has taken their garbage and possessions with them. Note on line 77 of the General Terms Buyer is entitled to possession at 9:00 pm on the stated possession date. Some disputes have arisen regarding whether a Buyer is entitled to possession at the beginning of the day of closing, or at the end of the day or at the specific time of funding, recording and availability of Seller's proceeds (sometime during the middle of the day). It is important to communicate clearly the expectation between the parties.

If the parties include such language as "no later than" or "on or before" the language is irrelevant and cannot be used to compel either party to close sooner than the specified date.

Possession Date:

Typically, "possession" is to transfer "on closing". This may not always be realistic if the property is Seller occupied. Discourage early possession, but if early possession must occur, use an early possession rental

agreement which has been prepared after 1994, which is a lease agreement (e.g., **RENTAL AGREEMENT – BUYER OCCUPANCY PRIOR TO CLOSING – Form 65A**). Such agreements become part of the PSA and provide for unlawful detainer proceedings in the event of Buyer's default. As an aside, if a lease agreement is part of the PSA, it is exempted from the Washington Residential Landlord Tenant Act (RLTA) – early and delayed possession as long as the delayed possession is not for more than three months, the buyer does not accept any rent after three months and real estate brokers are involved in the transaction. Note that early possession does not entirely shift the risk of a casualty loss to Buyer. Therefore, the Seller needs to maintain homeowner's insurance and be sure their insurance agent is apprised of the pending sale and early possession arrangements to assure that there is no lapse in coverage. Additionally, the Buyer needs to advise their insurance agent that they are taking early possession, as the Buyer's personal property may not be covered by the Seller's homeowner policy. It may be necessary for the Buyer to obtain a special endorsement on their homeowner's policy or a renter's policy in order to protect their personal belongings during the early possession rental period. If possession is to be delivered after closing, remember to specify a per day "rent" charge for each day possession is retained, and use a late possession addendum, e.g., **RENTAL AGREEMENT – SELLER OCCUPANCY AFTER CLOSING – Form 65B**.

Buyer is entitled to receive the keys to the property as of the day of closing even if Seller is to remain after closing.

- Notes: 1) *Always explain the difference between signing, closing and possession to your client. Many clients have been upset expecting keys the day they sign their closing documents only to find out they have to sleep in their U-Haul for a day or two until the deal closes.*
- 2) *Closing date is the negotiated, set date, only earlier by mutual agreement of the parties.*
- 3) *Always specify a closing date. Never, for example, 30 days after contingencies are met, because what if the contingencies are never met, or delayed for a long time?*
- 4) *Seller has no obligation to extend beyond the closing date. In fact, if the Seller allows the closing date to pass and by his or her actions indicates they are willing to extend, the time for closing will now be within a reasonable time as a fact finder sees it (estoppel argument).*

12. Services of the Closing Agent for the Payment of Utilities:

The parties should indicate if the closing agent should prorate the lienable utilities at closing. In most instances, the parties will have the closing agent do this. If so, the parties will execute an **IDENTIFICATION OF UTILITIES ADDENDUM – Form 22K** which will identify the utilities for the closing agent.

Practice Tip: The listing broker should consider preparing this form - filling out the utility companies including name and addresses and having the Seller initial and date it - at the time of listing and placing it in Associated Docs for the Buyer to sign at the time of offer. This information is now available on the parcel information at the County's Website – Scout.

13. Charges/Assessments Levied Before but Due After Closing:

There are really three types of assessments:

- 1) Assessments that have been assessed and are due at or before closing. The Seller will likely pay these unless specifically negotiated otherwise.
- 2) Assessments that are pending, but not yet charged or due prior to closing. The Buyer will be responsible for these, but to the extent the Seller is aware of them, the Seller should make full disclosure of them.
- 3) Assessments that have been assessed, but are not due to be paid in full until after closing (e.g., sewer assessment the Seller has been making payments on as part of their utility bill which can be assumed by the Buyer, thus not due to be paid in full until some time after closing). This provision of the PSA will determine who will pay this type of assessment - either assumed by the Buyer or prepaid in full by the Seller at closing.

Note: As a buyer's agent, a licensee should NEVER check the "assumed by Buyer" box even if the Buyer is planning to assume say the sewer assessment. In doing so, the buyer has agreed to assume ALL assessments. Rather, the buyer's broker should always check the "prepaid in full by Seller at Closing" and specify elsewhere in the PSA the Buyer is to assume the sewer assessment.

14. Seller Citizenship (FIRPTA):

A Buyer (and their broker!) can be ultimately held liable for taxes due on the sale of property if the Seller does not pay them because they are not a taxable entity in the United States, therefore it is incumbent upon the Buyer to determine the Seller's citizenship status early on in the transaction. Seller shall provide a FIRPTA certification within 10 days of mutual acceptance to the closing agent. A listing broker may want to have the Seller sign a **FIRPTA Certification – Form 22E** at the time of listing and provide in Associated Documents to facilitate the checking of this box

for the buyer's broker, as well as the provision of the FIRPTA certification as required by the PSA.

15. Information Verification Period:

Buyer may verify information provided from Seller or Listing Brokerage Firm related to the property. Buyer must give notice (**Form 90Z – Buyer's Notice of Termination – Information Verification Period**) during this negotiated time period of any materially inaccurate information, and if they do so, the Agreement shall terminate and the Earnest Money shall be refunded to the Buyer. Buyer may also check the box indicating they have already satisfied or waived this contingency.

16. Agency Disclosure:

Complete agency disclosure requires completion by the buyer broker of the information in this provision (i.e., checking the appropriate boxes), as well as identification of the buyer brokerage and listing brokerage firms and brokers at the bottom of page 1 of the PSA.

17. Buyer Brokerage Firm Compensation:

Buyer brokerage firm compensation shall be disclosed in this provision with the options of disclosing the compensation and marking the box "Pay as Offered" if the Buyer Brokerage Firm is taking the offer of compensation offered in the MLS, or marking the box "Other – See Addendum" and including typically a **Form 41C – Buyer Brokerage Firm Compensation** if requesting something other than what is offered through the MLS.

18. Addenda:

Some contingencies are built into the PSA, such as title marketability, etc. Other contingencies such as financing, inspections, well and septic, etc. are to be described in addenda referenced in Section 18 and attached to the PSA. The buyer's broker should list the addenda by number on the lines provided (e.g., 22A, 22D, 22EF, 22T, 22VV, 35, SAR-SA). This Section is not adequate in space to state the full text of other intended provisions. Otherwise, except as provided by law, Buyer's obligations are not subject to contingencies. Most of the contingencies a Buyer may want to include are set out in the preprinted addenda provided under the statewide set of forms. Occasionally, a contingency may be required drafting. If the contingency is legally complex (and many are), the licensee should consider referring the client to an attorney for the drafting of the contingency.

A. Drafting Contingencies: Use the appropriate contingency addendum or if necessary draft the contingency on an **GENERAL ADDENDUM (BLANK) – Form 34** and address 7 specific areas:

1. Subject of the contingency.

2. Standard for approval.
3. Who pays for it?
4. Time for satisfaction.
5. Effect of silence – what happens if nothing is ever said?
Use the silence shall be deemed satisfaction clause
("Silence shall be deemed satisfaction of this contingency.")
6. Continued marketing/removal period.
7. What happens to the earnest money after termination by Buyer if contingency is not satisfied or waived.

*Note: Reminder, even though the Form 17 or 17C is now generally required in the sale of residential properties, as well as land zoned residential, as mentioned earlier, it is **not** to be referenced in the PSA. The SDS is, by law, not part of a PSA. Therefore, it should never be referenced in Specific Term 18. As a practical matter, any addenda listed in section 18 must be provided to the lender, and the Buyer and Seller generally never want an underwriter to see the SDS. Similarly, the Buyer Representation Agreement (Form SAR-BR) and the Inspector Referral Form (Form 41D) which are between the Buyer and their broker and do not involve the Seller should not be listed on the lines in the Addenda provision.*

Signatures and Contact Information:

All information at the bottom of page 1 should be completed. Complete signatures and dates from all parties should be obtained. Addresses, phone numbers and e-mail information are extremely helpful in eliminating unnecessary delays as the transaction progresses toward closing. At a minimum, note the parties' address as certain processes contained in the PSA provisions require deliver of notices to the addresses listed on page 1 of the PSA. Note, it is best business practice to fill in both sets of brokers' and firms' emails (total of four email addresses), as well, to take full advantage of email transmission provision as set out in general term k.

GENERAL TERMS (pages 2-6 of the PSA):

a. Purchase Price.

Earnest money is credited to the Buyer at closing. Buyer represents Buyer has sufficient funds to complete the transaction and is not relying on any contingent source of funds, including loans, sale of other property, gifts, retirement funds or future earnings. If the Buyer needs one or more of these contingent sources of funds to complete the transaction, failure to disclose this contingent source of funds means the Buyer takes a risk. At best Buyer is misrepresenting their financial capability to close the transaction, at worst, Buyer commits fraud. In other words, unless the Buyer has the cash in hand, a contingency may be in order but at a

minimum disclosure is required. Be sure to advise Buyer that wire transfers or cashier's checks will be needed. Private checks, three party checks, and drafts or warrants will all delay disbursement because of the time necessary to clear the closing agent's trust account. This paragraph also includes a wire fraud alert provision.

*PRACTICE TIP: Buyer's broker should ask at this time in reviewing the PSA with the Buyer where the Buyer's funds to close are coming from. In other words, "Buyer, do you have your down payment and closing costs not being covered by the Seller in the bank?" Said differently, "Show me the money!" If not, consider drafting a contingency, but at a minimum disclose the contingent source of funds. The **EVIDENCE OF FUNDS ADDENDUM – FORM 22EF** can be used for this purpose.*

Note the absence of a provision for stating the method of payment of the purchase price. Absent other provisions, the price is to be paid in cash. Commonly included provisions are lender financing (**FINANCING ADDENDUM – Form 22A**) or seller financing (**SELLER FINANCING ADDENDUM – Form 22C**). Additional payment methods include assumption of existing financing, sales made "subject to" existing financing, wrap around seller/underlying lender combination financing. In these scenarios, the licensee will still use the Payment Terms Addendum Form 22C.

Seller financing terms and instruments are not as standardized and therefor require significant care. To be mutually binding, agreement must be reached in the PSA on all essential terms. Essential terms with regard to seller financing have been determined to include: the principal amount; the interest rate; the date interest commences; the amounts, timing and place for payments; dates and amounts for any balloon payments; final payment dates; rights and/or penalties for prepayment; "due on sale or encumbrance" provisions; grace period and default interest rate provisions. Use of the **SELLER FINANCING ADDENDUM – Form 22C** will greatly assist in covering the essential terms for financing.

b. Earnest Money.

Here are the provisions regarding Buyer's delivery of earnest money within the Delivery Date specified in Specific Term 7 (2 days after mutual acceptance if not filled in). You will also find the provisions for earnest money deposits in excess of \$10,000 including the right of the holder of earnest money to withhold banking fees from money to be returned to the Buyer. This paragraph also includes instructions to the closing agent: 1) provide written verification of receipt of earnest money and notice of any dishonor of any earnest money check, and 2) instructing the holder of earnest money to commence an interpleader action after going through a very specific process per RCW 4.28.080. The holder of the earnest

money can withhold the costs of the interpleader action up to \$750.

c. Included Items.

This paragraph lists those items that are included in the sale of the property in addition to the items that were checked on page 1. Note the verbiage "items located in or on the property." The Seller may not swap out the stainless steel appliances for the avocado green ones taken out of a rental property! Note also some generic terms such as window treatments (if it is treating a window, it must stay or be excluded) and irrigation fixtures. If any item in this paragraph is leased or encumbered, the Seller agrees to acquire and clear title at or before closing.

d. Condition of Title.

Title is to be "marketable" at closing. This is not the same as absolutely clean or perfect title, but is title which is free from reasonable doubt and one which a reasonably informed and intelligent buyer would be willing to accept. Note the matters which are not considered to render title unmarketable so long as they do not materially affect the value of the property or interfere with Buyer's intended use. Buyer's intended use, therefore, needs to be determined, and the title commitment should be ordered as soon as possible (if not already ordered by the listing broker). Copies of the documents controlling potential use which are not going to be cleared from title, such as CC&R's, restrictions and easements should be provided to the Buyer for review and consideration, especially if the Buyer intends to change the existing structures or use at the property.

Title is to be conveyed via statutory warranty deed (instructions to the closing agent).

e. Title Insurance.

The Agreement provides for an ALTA form of Homeowner's Policy of Title Insurance. Herein lies the provision that the Buyer must pay for the cancellation fee if they choose a different title insurance company than the one the Seller has chosen. If the title insurance company will not issue the Homeowner's Policy, the parties agree to the lesser policy of coverage (the Standard Owner's Policy). The title insurance company is to send a copy of the preliminary commitment for title insurance to the brokers and the parties. If title is not insurable, the Buyer's remedy is to terminate the transaction and receive a refund of their earnest money. The Buyer shall have no right to specific performance or damages as a consequence of Seller's inability to provide insurable title.

f. Closing and Possession.

The sale shall be closed by the closing agent on the closing date. If the closing date falls on a Saturday, Sunday, legal holiday, or day when the county recording office is closed, the closing agent shall close the sale on

the next business day. Closing is defined in this provision as the day when the transaction is recorded and sale proceeds, if any, are available to the seller.

PRACTICE TIP: Do not use the word "funding" in the PSA paperwork. It is confusing and means different things to different people. Stick with the defined term, "closing."

The PSA obligates the Seller to use best efforts to maintain the property until Buyer is provided possession. If Seller fails to maintain the property, or if an accident causes material damage, the Buyer may cancel the deal. Insignificant damage is not intended to provide a basis for termination (normal wear and tear). Unfortunately, there is no "bright line" test to determine what is normal wear and tear. In general, however, those are items and conditions which a reasonably prudent person would consider to be significant in deciding whether to enter into or continue with the transaction on those terms would be considered material. If an appliance, system, etc. become inoperative prior to closing, the Seller agrees to repair or replace with an appliance or system of equal quality. A very important right associated with confirming the absence of material damage is the walk through within 5 days prior to possession. This walk through is used to confirm that there is no material damage which was not present when the offer was made or which was previously concealed.

This section also provides the Seller will not enter into nor modify any leases or agreements, service contracts or other agreements which affect the property with terms extending beyond closing without the Buyer's consent.

This provision also provides the Buyer and Seller will execute a **RENTAL AGREEMENT - Occupancy Prior to Closing (Form 65A)** or **RENTAL AGREEMENT - Seller Occupancy After Closing (Form 65B)** as applicable and contact their respective insurance companies to assure appropriate policies are in place if early or delayed possession is being negotiated.

Finally, this section provides information about the state statutes (RCW 19.27.530 & 43.44.110) governing the Seller's obligation to install carbon monoxide alarms in accordance with the state building code, as well as a smoke detection device and that the brokers and firms are to be held harmless from any claim resulting from Seller's failure to install CO alarm(s) or smoke detector(s) in the property.

g. Section 1031 Like-Kind Exchange.

The parties agree in this provision to cooperate with the other party's 1031 like-kind exchange as long as they incur no liability in doing so and they

are reimbursed any costs associated with doing so. Notwithstanding the assignment provision of the PSA, the parties agree to the assignment of the transaction to the exchange facilitator for the purposes of completing the exchange.

h. Closing Costs and Prorations and Charges and Assessments.

Seller and Buyer will each pay one-half of the escrow fee unless otherwise agreed or required by government regulations (e.g., VA or FHA loan). Taxes, rents, interest and lienable HOA dues are prorated. Buyer agrees to pay Buyer's loan costs unless otherwise agreed (i.e., a seller contribution as set out in the **FINANCING ADDENDUM – Form 22A**). Be sure to inform the parties of estimated closing costs: the Buyer of their estimated cash to close requirements, and the Seller of their estimated proceeds. Ask to see a copy of the Buyer's Loan Estimate they received from their loan officer. Any delinquencies or encumbrances that will remain after closing (e.g., assumable sewer assessment) shall be brought current by the closing agent. Buyer agrees to pay for remaining fuel in the fuel tank provided Seller gets a written statement as to the quantity and current price thereof from the supplier. Closing agent shall prorate the lienable utilities per **IDENTIFICATION OF UTILITIES – Form 22K**.

Buyer is advised to verify the existence of any other charges and assessments that may be charged against the property after closing. Assessments shall be paid pursuant to the provisions set out in Specific Term No. 13.

i. Sale Information.

This provision authorizes either listing or selling broker to report the sale to the appropriate MLS. The parties also authorize the affiliate service providers to give information pertinent to the transaction to the brokers. Note, the affiliate service providers may be limited by statute to how much they can disclose (e.g., a lender must not disclose confidential information about the Buyer, and the listing broker will not be entitled to it notwithstanding this provision).

j. Seller Citizenship and FIRPTA.

Seller warrants the Seller's citizenship status for US income taxation purposes marked on page 1 of the PSA is correct. Seller agrees to execute a FIRPTA certification (**CERTIFICATION UNDER THE FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT ("FIRPTA") – Form 22E** or similar form) and provide it to the closing agent within 10 days of mutual acceptance. If they fail to do so, the Buyer may give a "Right to Terminate Notice". If Seller fails to provide the FIRPTA certification within 3 days after the Buyer's "Right to Terminate Notice", Buyer may then terminate the transaction and receive a refund of their earnest money. If the seller is a foreign person (e.g., does not have a US tax identification number of

some type), closing agent will hold funds in order to pay appropriate taxes. If not, Buyer (and broker!) may become responsible for the tax liability.

k. Notices and Delivery of Documents.

Any notice per the PSA must be in writing. Notice to the Seller must be signed by at least one Buyer and will be deemed to be given when received by the Seller, their broker or at their broker's office. Notice to the Buyer must be signed by at least one Seller and is deemed to be given when actually received by the Buyer, their broker or their broker's office. Actual receipt by the Buyer's broker of the Form 17 (SDS), Lead Based Paint Addendum, Public Offering Statement or Resale Certificate, HOA docs pursuant to Optional Clauses Addendum, or a preliminary commitment for title insurance pursuant to the Title Contingency Addendum shall be deemed delivery to the Buyer. Notices do not require the signature of the other party.

The brokers have no responsibility for notices beyond calling the party or causing the notice to be delivered to the address noted on page 1 of the PSA. Parties are requested to keep their brokers advised of their whereabouts in order to receive prompt notification of notices.

Facsimile (fax) transmission of any notice or document shall be delivery. E-mail transmission of any notice or document (or directly link to such notice of document such as forwarding an AuthentiSign e-mail with a link to the final version) shall constitute delivery when:

- 1) the e-mail is sent to both the brokers' and their firms' e-mails listed on page 1 of the PSA; or
- 2) the receiving broker sends written acknowledgement of receipt of the e-mail even if it is not delivered to the firm e-mail.

Practice Tip: It is best business practice to e-mail documents and notices to both the firm and the broker e-mails because if the receiving broker does not send written verification of receipt, you have not accomplished delivery if not delivered to the firm, also.

In either scenario (fax or e-mail) the parties agree to sign an original if requested by either party or the closing agent.

l. Computation of Time.

Time periods begin the day after the event commencing the time period (do not count the trigger date) and expire at 9:00 pm of the last calendar day of the specified time period. Except for the possession date, if the last day is a Saturday, Sunday or legal holiday (defined in RCW 1.16.050), the time period shall then expire on the next business day (e.g., if the 10th day of the home inspection period falls on a Saturday, Sunday or legal holiday, the Buyer has until Monday at 9:00 pm to provide

their inspection notice). Any period of time 5 days or less shall count only business days (therefore, a period of time six days or longer, the parties should count all calendar days). If the parties agree that an event will occur on a specific calendar date, the event shall then occur on that date except closing which will occur on the next business day if the calendar date is a weekend day, holiday or day when the recording office is closed.

When counting backwards from closing, any period of time measured in days shall start on the day prior to Closing (again, don't count the trigger date) and if the last day is a Saturday, Sunday or legal holiday, the time period will expired on the next day that is NOT a Saturday, Sunday or legal holiday (e.g., Monday or Tuesday).

If the parties attach the legal description (Exhibit A) after mutual acceptance, mutual acceptance will nonetheless be the date the mutual acceptance of an offer or counteroffer was delivered.

"Time is of the essence" is a very significant provision in written contracts meaning that the times and dates specified in the contract must be observed with specificity. Even minor deviations or delays do not have to be accepted or tolerated by the other parties. The contract will be subject to modification by the conduct of the parties, however, if the time lines are not honored and the parties demonstrate by their actions that the deadlines are not intended to be given effect. The risks and consequences to the parties in not observing and adhering to stated dates (including extending dates by addendum when required) can be severe.

m. Integration and Electronic Signatures.

Specifying that the PSA is fully integrated is intended to mean that there are no agreements or understandings outside of the written provisions of the PSA. However, this clause is intended to make it clear that all prior negotiations and information (including the MLS data sheets, flyers, etc.) are replaced by the PSA. Be sure to act in a manner which is consistent with this requirement and document and incorporate understandings and agreements into the PSA. This provision affords some protection to parties from purported oral agreements and understandings which were not made part of the Agreement, but also penalizes careless parties who forget to list significant oral agreements and understandings which the parties have reached.

This provision also allows for signatures in electronic form to have the same legal effect and validity as a handwritten signature.

n. Assignment.

The Buyer may not assign the agreement without the Seller's consent unless the parties have agreed to an "and/or assigns" clause. Note, if the

Seller does not want to sell to someone (e.g., feuding farmer scenario), they should not accept an “and/or assigns” clause as they will be “stuck” with the assignee. Similarly, if the Buyer knows they will want to assign the contract to someone (e.g., a parent buying a house for a child where the child may or may not be on the loan), then they should include an “and/or assigns” clause lest the Seller withhold consent and then they are on the hook to buy the property.

A real estate broker who signs the PSA, but reserves the right to assign is taking the responsibility of a party as of the time of acceptance, a greater risk than the broker may appreciate. As an alternative, the person signing the PSA may act as a nominee - a limited agent for a specific purpose. If the buyer is acting as nominee, this should be specified (e.g. "Jonathan Q. Doe, as nominee on behalf of an undisclosed principal, with no liability to nominee.") Note that there is more risk in acting as a buyer with the right to assign than as a nominee acting on behalf of a principal.

o. Default.

If the Forfeiture of Earnest Money box was checked on page 1, the only remedy to the Seller in the event of Buyer’s default is the forfeiture of earnest money up to 5% of the sale price. If the Election of Remedies box was checked, in the event of Buyer’s default the Seller may 1) keep the earnest money as liquidated damages, 2) sue for actual damages, 3) sue for specific performance, or 4) pursue other remedies available at law or equity.

p. Professional Advice and Attorney’s Fees.

Buyer and Seller are advised to seek the advice of an attorney and CPA. Should they do so, they will pay the costs of such review. However, if either party sues the other concerning this agreement, or if a party holding the earnest money commences an interpleader action, the prevailing party is entitled to reasonable attorney’s fees and expenses.

q. Offer.

Seller has until the offer expiration date to accept the Buyer’s offer unless it is sooner withdrawn. Acceptance shall not be effective until a signed copy is actually received by the Buyer, their broker or at the office of their broker. If the offer is not accepted within the offer expiration time period, the offer lapses and the earnest money is refunded to the Buyer.

r. Counteroffer.

Any change in the terms presented in the Buyer’s offer shall be considered a counteroffer (with the exception of the insertion of or change to the Seller’s name or warranty of citizenship status). Buyer has until the offer expiration date to accept the Seller’s counteroffer unless it is sooner withdrawn. Acceptance shall not be effective until a signed copy is

actually received by the Seller, their broker or at the office of their broker. If the counteroffer is not accepted within the offer expiration time period, the offer lapses and the earnest money is refunded to the Buyer.

s. Offer and Counteroffer Expiration Date.

If no date is specified, the offer or counteroffer shall expire 2 days after the offer or counteroffer is delivered unless sooner withdrawn.

t. Agency Disclosure.

The parties authorize the designated broker to be a dual agent in in-house dual agency transactions. The parties authorize the broker and designated broker to both be dual agents in pure dual agency transactions. The parties acknowledge receipt of the pamphlet, "The Law of Real Estate Agency." Good practice encourages having the Agency Law Pamphlet signed by the Buyers and Sellers, as well, though is not required.

u. Brokerage Firm Compensation.

The parties agree to pay the commission in accordance with any commission agreement to which they are a party. The listing firm shall split the total commission with the selling firm per the listing agreement. The buyer brokerage firm compensation offered in the listing is to be paid as set forth in the agreement or per any addendum attached. If there is an inconsistency between, what is offered in the listing and what is in Specific Term No. 17, the terms of the listing supersede. The parties consent to the firms receiving compensation from both parties. The parties agree the closing agent shall pay the commission at closing out of their funds or proceeds. In any action to enforce the commission, the prevailing party is entitled to receive attorney's fees and expenses. The parties agree that the licensees are third party beneficiaries to this transaction.

*Note: Under the Agency Law, if a licensee is acting as a dual agent, full disclosure of compensation (paid by all parties) must be made. The only place for the buyer's agent to make this disclosure is on the **BUYER REPRESENTATION AGREEMENT – Form SAR-BR.***

v. Cancellation Rights/Lead-Based Paint.

If a residential dwelling was built on the property prior to 1978, and the Buyer receives the **DISLCOSURE OF INFORMATION ON LEAD-BASED PAINT AND LEAD-BASED PAINT HAZARDS – Form 22J** after mutual acceptance, the Buyer has the right to rescind the transaction for 3 days after receipt of the Form 22J. Don't forget to give the Buyer the Lead-Based Paint Pamphlet, as well.

w. Information Verification Period.

Buyer shall have the time period negotiated in Specific Term No. 15 after mutual acceptance to verify all the information from the Seller or Listing Brokerage Firm related to the property. Buyers should be encouraged to take advantage of this opportunity. Discovery within the investigation period that information provided in marketing the property was inaccurate may provide a basis for terminating the PSA.

x. Property Condition Disclaimer.

Buyer and Seller agree that information comes from the parties, not any broker. Parties are responsible for performing their obligations, not the brokers. The brokers are not required to independently investigate or confirm information from the parties unless they agree to do so in writing. If the broker agrees to conduct an independent investigation it should be spelled out specifically in a separate addendum and referenced on an addendum (e.g., "Selling Broker will contact health district to request information on whether property is hooked to sewer and provide response to Buyer."). Note that the broker is not claiming to be the source of the information or the expert who assesses its significance. None of these provisions mean that the brokers are relieved of their duties to note and disclose adverse material facts which become known to them and which are not apparent or readily ascertainable.

Brokers do not guarantee the value, quality or condition of the property. The provision goes on to point out things may be defective with the property, brokers do not have expertise in finding these items, and the Buyer is advised to retain the services of an inspector qualified to find these defective products, materials or conditions. Brokers may assist in locating and selecting these third-party service providers, but brokers cannot guarantee or be held responsible for these service providers.

y. Fair Housing.

Buyer and Seller acknowledge that local, state and federal fair housing laws prohibit discrimination based on a person being associated with one of the listed protected classes.