

**Legal Bulletin 222**  
**Statewide Forms**  
**Broker Compensation**

*By Northwest Multiple Listing Service*  
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**1. Introduction**

Several statewide forms will be revised effective Monday, October 3, 2022.

The purpose of the revisions is to enhance transparency regarding broker compensation and create additional opportunities for consumers and brokers to discuss and negotiate compensation. The changes provide greater flexibility for consumers and brokers when selling and purchasing real estate and promote innovation and competition in the market.

The latest forms revisions are explained below and the revised *sample* forms are attached to this bulletin. Please carefully review this bulletin and the revised forms.

**2. Overview of Revisions**

Several changes will be made to statewide forms related to buyer brokerage firm compensation. The changes are as follows:

- The purchase and sale agreement will include a new “Specific Term” on the first page to specify the offered compensation and enable the buyer and buyer’s broker to accept the offered compensation or modify the compensation in an addendum.
- The Buyer Brokerage Compensation Addendum (Form 41C) will add options related to buyer brokerage firm compensation (e.g., to allow for a credit to the buyer, a reduction in compensation, or “other” options).
- The Buyer Representation Agreements will be revised to include alternatives for buyers and their broker for compensation that depend on the compensation offered in the listing.
- The Buyer Representation Agreements will be updated to preclude a broker from filtering listings sent to a buyer based upon compensation offered to the buyer brokerage firm, unless specifically requested by the buyer.

Revisions to the statewide listing agreement as follows:

- The listing agreement will address access to the property by licensed real estate brokers who are not members of the applicable MLS.
- The term “commission” will be updated to “compensation” in the applicable forms.

### 3. Specific Forms

#### a. Purchase and Sale Agreement

New Specific Term 16 in the purchase and sale agreements provides:

**Buyer Brokerage Firm Compensation Offered in Listing:** \_\_\_\_\_  Pay as Offered;  Other - See Addendum

The purpose of this revision is to ensure that the buyer understands the buyer brokerage firm compensation and to create an opportunity for discussion and negotiation.

For some users, the compensation offered in the listing will be auto-filled into the purchase and sale agreement from the listing – or inserted by the buyer’s broker (if the auto-fill tool is not used or available). The buyer and buyer’s broker then need to decide if the compensation in the listing will be accepted as offered in the listing (“Pay as Offered”) or if the compensation will be modified by the parties in an addendum. See below for information related to the Buyer Brokerage Firm Compensation Addendum (Form 41C).

The buyer’s broker should discuss compensation with the buyer early in the process and should consider entering into a written buyer’s representation agreement that addresses compensation and other matters. Brokers discuss and negotiate compensation with sellers when entering into a listing agreement and similar conversations and negotiations should take place with buyers. If compensation is discussed and agreed upon prior to writing an offer, the buyer and buyer’s broker will be able to easily navigate the revised purchase and sale agreement.

Note that revised General Term “u” provides: “The Buyer Brokerage Firm’s compensation offered in the listing shall be paid by Seller as set forth in this Agreement or any Addendum hereto. If there is any inconsistency between the Buyer Brokerage Firm’s compensation offered in the listing and the description of compensation stated in Specific Term No. 16, the terms of the listing shall supersede and control.” This means that if a mistake is made when inserting the compensation into Specific Term 16 – the compensation offered in the listing will control. These same revisions will be made to all of the purchase and sale agreements.

A new form, Buyer Brokerage Firm’s Compensation Addendum for Non-NWMLS Purchase and Sale Agreement (Form 41E), may be used in transactions where the parties use a different form of purchase and sale agreement (e.g. builder form, REO form, etc.)

#### b. Buyer Brokerage Compensation Agreement (Form 41C)

The Buyer Brokerage Firm’s Compensation Addendum (Form 41C) will be revised to include additional options regarding compensation. If, in new Specific Term 16, the buyer and buyer’s broker do not select the “Pay as Offered”, but rather select “Other – See Addendum”, Form 41C may be used to modify the buyer broker’s compensation.

Note that firms may elect to create and use their own addendum for modifying the compensation in the purchase and sale agreement to differentiate their fees and services. Form 41C, or a firm's own addendum, may be used to adjust the compensation so that it is consistent with the parties' buyer representation agreement.

The existing options in Form 41C will remain in the form. This includes requesting compensation in a FSBO transaction or where the seller has not offered compensation in the listing. This also includes the provision where a buyer and buyer's broker may request additional compensation based on the terms of a buyer representation agreement. The requirement to provide the seller with a copy of the buyer representation agreement has been removed from Form 41C. Providing the buyer representation agreement to the seller is unnecessary, as the buyer initials Form 41C requesting the increased compensation for the buyer brokerage firm.

Additional options have been added to Form 41C to enable the buyer brokerage firm to reduce its compensation and have seller credit the amount of the reduction to the buyer's obligations at closing. Note that such credit is subject to approval by the buyer's lender. Another new option in the form is a simple reduction in the buyer broker compensation paid to the firm. This option could be used in situations where a buyer and buyer's broker agreed to a lesser amount of compensation in a buyer representation agreement or a reduction to make the buyer's offer more competitive. There is also an "other" box that the parties may use to agree on different compensation terms.

Note that the revised Form 41C provides a signature block for the buyer's broker. Some firms may have policies that would require the designated broker or branch manager to agree to any buyer credits or compensation reductions. That issue should be addressed by the firm's office policies.

Finally, there may be situations where a buyer and buyer's broker do not want to include certain compensation modifications (e.g. buyer credits) in the purchase and sale agreement. In that case, the buyer and buyer's broker may accept the compensation offered in the listing (i.e. "Pay as Offered") and address the credit in a separate agreement that is not a part of the purchase and sale agreement. Of course, this type of arrangement must be approved by the buyer's lender and communicated to the closing agent, so the applicable adjustments can be made.

### **c. Buyer Representation Agreements**

Several changes will be made to the buyer representation agreements. The first is to create separate forms for exclusive agency relationships and non-exclusive agency relationships. This will simplify the individual forms, yet the forms will reference one another to inform the parties of the existence of the other option (exclusive vs. non-exclusive).

The compensation section of the forms will be clarified to separately address compensation paid by seller and compensation paid by buyer. The forms include a new section

where, if the compensation offered by seller is greater than the compensation agreed to by buyer, the parties direct that portion of the compensation to the buyer brokerage firm, the buyer, or the seller. The “tail provision”, which obligates a buyer to pay compensation under certain circumstances after expiration of the agreement, will be revised to include a fill-in field for the length of the “tail” (with a six month default). Note that similar revisions will be made to each Buyer Representation Agreement.

A new provision provides that the broker shall bring listings to the attention of the buyer, regardless of the amount of seller’s offer of compensation, unless otherwise agreed by the parties.

Of course, like the buyer brokerage firm compensation addendum, firms may create their own buyer representation agreements to more effectively differentiate their services, accommodate buyer’s needs and interests, and better compete in the market.

d. **Listing Agreements**

i. *Tail Provision*

The “tail provision” provides that if the seller sells the property after the expiration of the listing agreement to a person who became aware of the property through the efforts of the listing firm during the listing, the seller owes compensation. The tail provision will include a “fill-in” field where parties may agree to the length of the provision (6 months is the default).

ii. *Property Access*

The listing agreement will address access to the property by licensed brokers who are not members of the applicable MLS. Of course, providing access to the property (with seller’s permission) to non-member licensed brokers is consistent with a broker’s agency law duties to the seller.

The listing agreement will be revised to give the seller the choice (via a checkbox) whether to authorize the listing firm to provide access to the property to licensed brokers who are not members of the applicable MLS. While this may not be a common occurrence in many areas, listing brokers may get these requests from time to time from non-member licensed brokers. The seller may also decide whether to require those brokers to sign an “access agreement” prior to any preview or showing. Note that NWMLS will publish an access agreement that sellers and listing brokers may use to address property access, property damage, liability, etc. Also, note that the non-member broker will not have access to the keybox, so the listing firm will need to coordinate and arrange access in another manner (e.g., the listing broker or seller provide access directly).

### *iii. Other Changes*

The listing agreement will be revised to clarify that the seller owes compensation when the sale closes or if the sale fails due to the seller's breach of the purchase and sale agreement. Other changes to the listing agreement include removing the seller representation related to boundary lines and encroachments, revising the indemnity related to seller's warranties and representations to apply to seller's right to sell and seller provided photographs, and adding an indemnity related to property damage and injury. The order of some of the paragraphs has also been revised to make the form easier to use.

## **4. Conclusion**

The revised forms are currently available for review. The revised forms will be published for use on Monday, October 3, 2022. The deferred implementation is intended to give brokers time to adjust their policies and practices to adopt these changes when they take effect.

Note that beginning October 3<sup>rd</sup>, brokers should use the new forms, including the revised purchase and sale agreements, listing agreements, the new listing agreement addendum (if applicable), buyer representation agreements, and buyer brokerage firm compensation addendum. This includes writing offers on existing listings with the revised purchase and sale agreement. For existing listing agreements and pending sales – there is no need to update and use the new forms.

Again, these revisions further enhance transparency regarding broker compensation, create additional opportunities for consumers and brokers to discuss and negotiate compensation, provide greater flexibility for consumers and brokers when listing and purchasing real estate, and promote innovation and competition among member brokers.