WISCONSIN REALTORS® ASSOCIATION
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# Offer to Purchase Revisions

PLEASE ROUTE TO:

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*The information contained herein is believed accurate as of February 10, 1999. The information is of a general nature and should not be considered by any member or subscriber as advice on a particular fact situation. Members should contact the Wisconsin REALTORS® Association Legal Hotline with specific questions or for current developments.*



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## Introduction

The Department of Regulation and Licensing (DRL) has approved revisions to the WB-11 Residential Offer to Purchase. These DRL revisions fine-tune the 1994 version of the approved residential offer form, which has been in use for over five years. Similar fine-tuning revisions will also be done on the other approved listing and offer forms as well as the buyer agency agreement in the upcoming months.

Most DRL offer revisions are intended to clarify and improve the provisions already in place. Although the existing WB-11 Residential Offer to Purchase has served many licensees well throughout the past several years, some provisions of the 1994 offer do not adequately address all situations encountered by REALTORS® using the form. The DRL has focused on eliminating the difficulties and confusion that have been experienced by licensees using the offer form, and by the parties, their attorneys, and the courts in attempting to interpret the form.

Most of the revisions to the residential offer provide additional explanation and clarification of provisions already in place. In some cases, the form has been modified to more closely reflect actual practice. However, the DRL also has made a few major substantive changes, including substantive and policy changes to the delivery, financing contingency, form of title evidence, earnest money, secondary offer, and inspection contingency provisions. many of the revisions are based, to a large extent, upon the input of WRA members who have served on WRA committees and who have called the WRA Legal Hotline with comments and suggestions.

This *Legal Update* will review the changes made to the WB-11 Residential Offer to Purchase. The optional use date for the revised WB-11 is April 1, 1999, and the mandatory use date is November 1, 1999 (these dates also apply to the WB-1 residential listing contract). Watch future issues of The Wisconsin REALTOR® for information about form availability. The sample copy of the revised residential offer to purchase appearing on pages 11 - 15 of this issue is a final draft, which may or may not end up being identical to the final form. It is, however, substantially the same as the final form.

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# The Revised Residential Offer to Purchase

The DRL made the following revisions to the WB-11 Residential Offer to Purchase. In the following discussions, the existing WB-11 (mandatory use date 2/1/94) will be referred to as the ''*1994 offer*,'' and the newly-revised WB-11 will be referred to as the ''*1999 offer*.''

## Format

The *1999 listing* is on letter-sized paper and is five pages long. The DRL is changing to letter-sized paper for all new approved forms to facilitate the faxing and computer printing of documents. All blank lines and provisions requiring that a selection be stricken or written in appear on pages 1, 3, & 5 of the form, which means that the form has been reorganized. Many of the provisions from the *1994 offer* have been reordered, and some new explanatory material and definitions have been added.

## Property Description

As in the *1994 offer*, the Property Description section in the *1999 offer* eliminates the presumption that a full legal description is mandatory. In the *1999 offer*, the blanks ask for the property's street address, which generally will be a sufficient legal description. The drafter of the offer is directed to place any additional description, such as a legal description, in the blank lines of one of the Additional Provisions sections or in an addendum.

## Inclusions and Exclusions

Although it is not new, it bears repeating that the property included in the list price includes all fixtures unless explicitly excluded. The definition of a "fixture," that appears at the bottom of page 2 of the *1999 offer*, is the same as the definition in the *1994 offer*, except that it adds a boldfaced reminder that **"The terms of the Offer will determine what items are included/excluded."** The parties must understand that the offer, not the listing contract or the data sheet, determines the agreement between the buyer and seller. The listing contract only expresses what the seller is willing to have included in an acceptable offer. Similarly, MLS or office data sheets only reflect what property is available. The offer establishes the parties' agreement about personal property.

If the buyer wants to have additional property included in the sale such as freestanding appliances or curtains, this must be written into the offer. It is also prudent to list questionable items that are attached yet may be readily removed, such as a can opener attached to the kitchen wall or shelving.

The seller must exclude fixtures and questionable items that the seller wants to remove from the property, such as an antique crystal chandelier or shrubbery, and rented fixtures such as a water softener or an LP (propane) tank.

## Acceptance

The new Acceptance section states that "Acceptance occurs when all Buyers and Sellers have signed an identical copy of the Offer, including signatures on separate but identical copies of the Offer." This provision specifically allows for the use of counterparts, which is helpful when there are parties living in different states. While counterparts have always been legally acceptable, this is the first time that the form has explicitly recognized this concept.

This section also cautions that **"Deadlines in the Offer are commonly calculated from acceptance. Consider whether short term deadlines running from acceptance provide adequate time for both binding acceptance and performance."**

## Binding Acceptance

As is stated in the *1994 offer*, the offer is binding only if a copy of the accepted offer is delivered to the buyer. This means that a copy of the offer showing the signatures of all parties must be delivered back to the buyer before the offer is binding. There must be signatures and there must be delivery. The buyer may withdraw the offer prior to the delivery of the accepted offer.

## Delivery of Documents and Written Notices

This section has been modified to clarify the mechanics of the delivery process and to bring the form more in line with the practice of licensees. This section describes the various methods that may be used to deliver the accepted offer to the buyer and to deliver other documents and written notices. As in the *1994 offer*, there are three delivery methods that may be used: (1) mail or commercial delivery service, (2) personal delivery, and (3) fax transmission.

**1) Mail or Commercial Delivery**

A document or written notice may be mailed, provided all postage and fees are prepaid. A written notice that is received with postage due would not meet this standard. A document or written notice may also be delivered via a commercial delivery service such as UPS or Federal Express, provided that all fees are prepaid or properly charged to an account with the delivery service. This brings this provision up-to-date with modern business practices.

A major change comes, however, with regard to the recipient of this mailed or commercially delivered document or written notice. The document or written notice may be addressed either to the party or to the party's designated "recipient for delivery." This allows a party to designate the licensee he or she is working with, or any other person, to serve as the recipient of his or her mailed or commercially delivered documents and written notices.

As in the *1994 offer*, each party also is asked to provide a delivery address. The sole purpose of this address is for use in addressing documents and written notices that are mailed or commercially delivered. This address has no effect for personal or fax deliveries.

Thus a document or written notice that is mailed or commercially delivered must be addressed to either the party or the party's designated "recipient for delivery," at the party's designated delivery address. If party S names agent X as his recipient for delivery and X's office address as the delivery address, a written notice may be addressed to either party S or agent X at agent X's office address. If it is addressed to party S at party S's home or business address, it is wrong and the delivery is no good. If it is addressed to agent X at agent X's home office address, it is wrong and the delivery is no good.

**2) Personal Delivery**

Personal delivery means that the document or written notice is personally given to either the party or the party's designated recipient of delivery. Leaving a written notice under the party's doormat at her home is not a sufficient personal delivery, at least not until the party comes home and finds the written notice. Leaving a document in the office mailbox of the party's agent is not a sufficient personal delivery, at least not until the agent picks up his mail at his office. Thus a document or written notice may be personally handed to party S or agent X when he or she answers the front door at home, for example, or when he or she is walking down the street or working out at the health club. It generally does not matter where the person is – what matters is that the person has been given the document or written notice.

**3) Fax Transmission**

The provisions for delivery by fax transmission have not changed. The document or written notice is delivered when it is transmitted to the fax number designated by the party. If the party designates the fax number in his dentist's office, the document or written notice must be transmitted to that number for it to be a valid delivery. It does not matter if the party is not there when the document is faxed. If the document is faxed to the party's office or home fax number when the party designated the dentist's fax number, it is wrong and the delivery is no good.

## Occupancy

The Occupancy provision in the *1999 offer* specifies that occupancy of "the entire property" will be given at closing unless modified by the parties in the Pre/Post Closing Occupancy section on the last page of the offer. Occupancy is given subject to the rights of any tenants.

## Rental Weatherization

The Rental Weatherization provision in the *1999 offer* remains the same as in the *1994 offer*, except that it adds that if the seller is responsible for compliance, the seller must furnish a Certificate of Compliance at closing.

## Property Condition Provisions

Under the Property Condition Representations subheading, the seller represents that he or she does not have any notice of knowledge of any "conditions affecting the Property or transaction" other than those stated in the Real Estate Condition Report, and those additional conditions written in on the blank line. The *1999 offer* contains a prompt to "INSERT CONDITIONS NOT ALREADY INCLUDED IN THE CONDITION REPORT." The Property Condition Representations subheading also includes several definitions and other provisions relating to the condition of the property.

**Conditions Affecting the Property or Transaction**

In the definition of a "condition affecting the Property or transaction," the item regarding conditions constituting a significant health or

safety risk includes, in the *1999 offer*, a bold-faced note that **"Specific federal lead paint disclosure requirements must be complied with in the sale of most residential properties built before 1978."** This will remind sellers and listing brokers to make sure that the seller completes the appropriate lead-based paint disclosure document as required by federal law. See *Legal Updates 96.04 & 96.07* and WRA Addendum S for further information.

The item concerning underground storage tanks (USTs) and aboveground storage tanks (ASTs) adds the qualifier that USTs or ASTs "which are currently or which were previously located on the Property" are considered conditions affecting the Property or transaction. A UST that has been removed without an accompanying cleanup of any resulting contamination, or even without the proper paperwork and tank registration, may be considered a condition affecting the Property or transaction.

**Property Dimensions**

The provisions concerning Property Dimensions and Surveys were expanded to emphasize that rounding, differences in formulas and methodology, and other variants can result in differing figures for room, building, and parcel dimensions, and for total acreage. These provisions caution that **"Buyer should verify total square footage formula, total square footage/acreage figures, land building or room dimensions, if material."**

REALTORS® should be sure to point this provision out to buyers, especially if there is confusion about any dimensions or area data.

**Inspection Defined**

The DRL also added new material to the provisions regarding Inspections. An "inspection" is defined in the *1999 offer* as an "observation of the property which does not include testing of the Property, other than testing for leaking carbon monoxide, or testing for leaking LP gas or natural gas used as a fuel source, which are hereby authorized." As in the *1994 offer*, the seller must permit the buyer and his or her inspectors reasonable access at reasonable times for inspections necessary to satisfy contingency provisions in the offer. The buyer must, as before, furnish copies of all inspection reports to the seller and the listing broker. In the *1999 offer*, the buyer must also promptly restore the seller's property to its original condition after any inspections unless the seller agrees otherwise.

**Testing Defined**

The *1999 offer* adds a definition and other information about testing, which is distinguished from inspections. A "test" is defined as "the taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other analysis of these materials." The preprinted form does not contain any provisions calling for testing, so testing contingencies must be added to the offer if the buyer requires that testing be performed. Testing contingencies should specify the area or materials to be tested, the purpose of the test, any limitations on the testing, and any obligations to restore the property afterwards. Testing includes procedures such as radon testing and soil borings. The revised WRA Addendum A will include a standard testing contingency.

Testing includes at least a part of the process described in the "lead-based paint inspection" contingency in the WRA Addendum S. This is apparent when the terminology and definitions used in WRA's Addendum S and in the federal lead-based paint (LBP) disclosure law are examined. "Inspection," and "risk assessment," as used in the federal LBP disclosure law and in Addendum S, each refer to procedures involving sampling and testing of LBP.

## Time is of the Essence

In the *1999 offer*, Time is of the Essence is made applicable to contingency deadlines, as well as earnest money payments, binding acceptance, occupancy, date of closing, and all other dates and deadlines in the offer, except as stricken by the parties. A definition of the term "Time is of the Essence" has also been added to the provision. If Time is of the Essence applies to a date or deadline, it is a breach of contract to fail to perform by that exact date. If Time is of the Essence does not apply to a date or deadline, then performance within a reasonable time of the deadline is allowed, and an unreasonable amount of time must elapse before there is a breach. What is a reasonable amount of time and what is an unreasonable amount of time will depend upon the facts and circumstances in each situation.

## Dates and Deadlines

The Dates and Deadlines section in the *1999 offer* elaborates on the material contained in the Days section in the *1994 offer*. This will serve as a handy reference for all parties and licensees involved with an offer when it comes time to determine deadlines.

The *1999 offer* indicates that when a deadline is expressed as a certain number of days from an event, the date of the event is excluded and subsequent calendar days are counted. If the deadline is "within 10 days of acceptance," the date of acceptance is excluded. Note that the day of acceptance is the most recent day that a party signed. If Mr. and Mrs. Seller signed to accept an offer, and Mr. Seller signed on the 5th and Mrs. Seller signed on the 6th, the date of

acceptance is the 6th. The 10 days are counted beginning with the 7th and the deadline is the 16th. The *1999 offer* indicates that the deadline will be midnight of the last day, so the deadline in this example is midnight of the 16th.

The *1999 offer* also provides guidance on determining deadlines expressed in terms of hours. If the deadline is expressed in terms of hours after the occurrence of an event, hours are counted from the exact time of the event by counting 24 hours per calendar day. For example, if the deadline is within 72 hours of buyer's actual receipt of the bump clause notice, and the notice is personally delivered to buyer at 1:15 p.m. on Thursday, the 72-hour deadline is Sunday at 1:15 p.m.

## Financing Contingency

In the *1999 offer*, all provisions pertaining to the Financing Contingency have been brought together in one section. The different components of the contingency have been organized and formatted in a manner that should be easier to understand and use.

The Loan Commitment subsection contains some new material and directions for the parties and their agents. As in the *1994 offer*, the Loan Commitment subsection provides that if the buyer qualifies for the financing described in the Financing Contingency or for any other financing acceptable to the buyer, the buyer will deliver a copy of the written loan commitment to the seller or the seller's agent by the deadline specified in the Financing Contingency. This means that if the buyer obtains a loan commitment that is different from what is described in the Financing Contingency but that is still acceptable to the buyer, the buyer may use that loan commitment to satisfy the Financing Contingency.

The *1999 offer* goes on to say that **"Buyer's delivery of a copy of any written loan commitment shall satisfy the buyer's financing contingency unless accompanied by a notice of unacceptability. CAUTION: NEITHER BUYER, LENDER OR AGENTS OF BUYER OR SELLER SHOULD DELIVER A LOAN COMMITMENT TO SELLER WITHOUT BUYER'S PRIOR APPROVAL OR UNLESS ACCOMPANIED BY A NOTICE OF UNACCEPTABILITY."** This passage contains a couple of major new provisions.

First, this language clarifies that the buyer may deliver any written loan commitment to satisfy the Financing Contingency. This means any loan commitment regardless of whether it matches the financing described in the Financing Contingency, and regardless of any conditions or contingencies that may be contained in the loan commitment itself.

The term "loan commitment" is not defined in the offer. As such, it may be difficult to assert that any document that says it is a loan commitment, and that is issued by a lender which agrees to provide the loan described in the commitment to the buyer, is not in fact a loan commitment. All loan commitments have conditions or contingencies of some sort, ranging from a condition that insurance binders be produced at closing, to a contingency for an appraisal or for the sale of buyer's home. Nowhere in the offer does it say that a written loan commitment cannot contain any conditions or contingencies or that the commitment cannot contain certain kinds of conditions and contingencies.

The DRL Forms Council considered including language to remind parties that any limits on the conditions and contingencies that would be acceptable in loan commitments would have to be written into the contract. However, no such language was included in the final *1999 offer*. Any party wishing to define "loan commitment" may do so in the Additional Provisions sections or in an addendum to the offer.

Second, the DRL Forms Council was concerned with the practice of some lenders and licensees who have delivered loan commitments to the seller without first determining whether the commitment is in fact acceptable to the buyer. Hence the bold-faced, capitalized warning to lenders and licensees about checking with the buyer before delivering loan commitments to sellers.

This same concern generated the new concept of a "notice of unacceptability." Although it is not defined in the *1999 offer*, the notice of unacceptability is intended by the Forms Council to function in the same manner as a notice of defects in the Inspection Contingency. In the Inspection Contingency, the buyer receives an inspection report. If the buyer finds that the some of the conditions described in the report are deal-breaking defects, the buyer submits a copy of the inspection report, along with a notice of defects, to the seller. The buyer is given the opportunity to review the report and determine whether the condition of the property is or is not acceptable to him or her.

Likewise with the notice of unacceptability. If the buyer reviews the loan commitment and finds that it is not acceptable, the loan commitment alone should not be submitted to the seller because that would satisfy the Financing Contingency. If the buyer is dissatisfied with the loan commitment, it may be submitted to

the seller along with a notice of unacceptability to help demonstrate to the seller that the financing specified in the contingency is not available. Of course, if the loan commitment does provide the financing described in the Financing Contingency, the buyer cannot deem it to be unacceptable and give a notice of unacceptability. A notice of unacceptability may be drafted by REALTORS® in the same way that a notice of defects is prepared – in the notice section on lines 51-65 of the WB-43 Amendment/Notice Relating to Offer to Purchase.

The Seller Termination Rights subsection of the Financing Contingency is new, but the provision contained therein appeared in the Loan Commitment section of the *1994 offer*. "If Buyer does not make timely delivery of said commitment, Seller may terminate this Offer if Seller delivers a written notice of termination to Buyer prior to Seller's actual receipt of a copy of Buyer's written loan commitment." Sellers desiring to terminate the offer based on the buyer's failure to timely produce a written loan commitment should act promptly and give the buyer a written termination notice before the buyer produces a commitment. The offer is not terminated if the buyer submits a loan commitment (without a notice of unacceptability) after the Financing Contingency deadline but before the seller delivers a notice of termination.

## Title Evidence

In the Conveyance of Title subsection in the *1999 offer*, it now states in bold-faced type that **"Upon payment of the purchase price, Seller shall convey the Property by warranty deed (or other conveyance as provided herein)."** This is intended to remind the parties and licensees that if title is going to be given by a conveyance other than a warranty deed, that this must be specified in the Additional Provisions section or in an addendum to the offer. This would be true, for example, if a land contract, quitclaim deed, or a personal representative's deed will be used.

In the Form of Title Evidence subsection in the *1999 offer*, the standard language requires the seller to provide the buyer with a title insurance policy, rather than giving the seller a choice of providing either a title insurance policy or an abstract, as was the case in the *1994 offer*. This change was made in recognition of the predominant use of title insurance in Wisconsin. The *1999 offer* does include, however, cautionary language directing the parties to strike the title insurance provisions and to insert abstract provisions if title evidence will be given by abstract. The revised WRA Addendum A will include abstract provisions to facilitate transactions in which abstracts are used.

Cautionary language has also been added to the Provision of Merchantable title subsection of the *1999 offer*. The buyer is cautioned to **"CONSIDER UPDATING THE EFFECTIVE DATE OF THE TITLE COMMITMENT PRIOR TO CLOSING OR A "GAP ENDORSEMENT" WHICH WOULD INSURE OVER LIENS FILED BETWEEN THE EFFECTIVE DATE OF THE COMMITMENT AND THE DATE THE DEED IS RECORDED."**

There is a standard exception in title insurance commitments that excludes title insurance coverage for "Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment." This standard exception is referred to as the "gap exception." The gap exception puts the buyer at risk for any title defects which appear of record after the effective date of the commitment and before the buyer's deed or mortgage is recorded, i.e. the "gap period." The title commitment provided to buyers under the standard offer language is subject to the gap exception. If the buyer wants gap coverage, the buyer should request it in the offer. See pages 5-8 of *Legal Update 96.02* for discussion of gap endorsements. If the parties do not wish to pay for a gap endorsement, it may be prudent to have the title company update the date of the title commitment just prior to, or at closing.

The Special Assessments subsection in the *1999 offer* also includes new material. The cautionary language urges the parties to consider a special agreement for "other expenses" as well as for area assessments and property owners' association assessments. "Other expenses" are defined as "one-time charges or ongoing use fees for public improvements (other than those resulting in special assessments) relating to curb, gutter, street, sidewalk, sanitary and stormwater and storm sewer (including all sewer mains and hook-up and interceptor charges), parks, street lighting and street trees, and impact fees for other public facilities." These different types of fees that are not special assessments can nonetheless cause problems for buyers and sellers if they are not addressed in the offer. The title company and the local municipality may be good sources of information about these types of fees.

## Delivery/Receipt

The new Delivery/Receipt section in the 1999 offer contains several different provisions relating to the delivery and receipt of documents. These provisions address issues such as (1) facsimile transmission of documents, (2) personal delivery and receipt where there is more than one

seller or buyer, (3) withdrawing notices, (4) reinstating waived contingencies, (5) modification of delivery and receipt provisions in the offer, and (6) the distribution of copies of the offer.

**(1) Facsimile Transmission.**
The *1999 offer* indicates that signed documents transmitted by fax shall be treated as original documents, and that the signature of a party on any document transmitted by fax shall be considered to be an original signature. These types of provisions have often appeared in offer addenda such as the WRA Addendum A and now have been made part of the offer to eliminate any possible doubt that documents and signatures transmitted by fax are to be treated as originals.

**(2) Personal Delivery and Actual Receipt for More Than One Buyer or Seller**
When there is more than one seller or more than one buyer, the argument can be made that if a notice is being personally delivered, it must be personally delivered to each seller or each buyer. Likewise if a notice must be actually received, one can assert that it must be actually received by each seller or by each buyer. This is problematic, for example, when the buyers are a married couple and the husband's job causes him to be out of town a great deal of the time. If a notice for the buyers must be actually received by each spouse, this could cause long delays and lost opportunities — a lot can happen and change while a licensee waits for the husband to return from his four-day business trip.

A new provision in the *1999 offer* specifically states that "Personal delivery to, or actual receipt by, any named Buyer or Seller constitutes personal delivery to, or actual receipt by Buyer or Seller." This means that personal delivery to, or actual receipt by, the wife constitutes personal delivery to, or actual receipt by, both the husband and wife (all buyers).

**(3) No Withdrawal of Notices**
The *1999 offer* also provides that one party may not withdraw a notice that has been received by the other party, at least not without the other party's consent. This provision is similar to the case law doctrine that a notice cannot be withdrawn if the party who has received the notice takes action in reliance upon the notice. This rule, however, is simpler and easier to administer. It will mean that, for example, a buyer who gives a notice of defects will not be permitted to change his or her mind and unilaterally withdraw the notice of defects once it has been received by the seller.

**(4) No Unilateral Reinstatement of Waived Contingencies**
The *1999 offer* also provides in the Delivery/Receipt section that a party who gives notice waiving a contingency may not unilaterally reinstate that contingency without the consent of the party who received the notice.

**(5) Delivery and Receipt Provisions May Be Modified**
A bold-faced reminder in the Delivery/Receipt section reminds the parties that various provisions in the offer to purchase may be modified. For example, mail delivery may not be desirable in certain situations such as for the binding acceptance of the offer or for the delivery of a bump clause notice. Personal delivery may not be practical when the party is not available to receive a notice - use of a designated recipient for delivery may be the better choice.

**(6) Authorization for Distribution of Copies of the Offer**
The Delivery/Receipt section concludes with an authorization to the agents of the buyer and the seller to distribute copies of the offer to purchase to the buyer's lender, appraisers, title insurance companies, and other settlement service providers. The offer to purchase is considered to be confidential so this authorization is needed if the real estate agents in the transaction are going to be able to furnish copies of the offer to other settlement service providers who may have a legitimate need for a copy of the offer.

## Earnest Money

The provisions addressing who is to hold the earnest money have been modified to eliminate the need for the cooperating broker to handle the earnest money, thereby simplifying and streamlining the earnest money process. The Held By subsection in the *1999 offer* provides that the earnest money will be held in the listing broker's trust account. The buyer's agent will hold the earnest money in his or her trust account if the property is not listed, and the seller will hold the earnest money if there are no brokers involved in the transaction.

This provision eliminates any authorization for the common practice under the *1994 offer* of having the buyer pay the earnest money to the cooperating broker who would forward the earnest money to the listing broker after the offer was accepted and the buyer's check had cleared the broker's trust account. This process caused countless problems and delays. The cooperative broker had to remember to advise the listing broker once the earnest money was received, deposit the earnest money in his or her trust account, and then remember to forward the money to the listing broker once the buyer's check had cleared. The listing broker often had to check with the cooperating broker to see if the money had been received and then had to remind the cooperating broker to have the money forwarded to the listing broker's trust account.
Under the *1999 offer*, the buyer is to

pay the earnest money directly to the listing broker and not to the cooperating broker in all cases where there is a listing broker. Unless these provisions are modified by the parties, REALTORS® using this offer form in cooperative transactions must advise the buyer to pay his or her earnest money directly to the listing broker.

The Held By subsection in the *1999 offer* also contains a new bold-faced caution to the parties that **"Should persons other than a broker hold earnest money, an escrow agreement should be drafted by the Parties or an attorney."** For example, if the earnest money is going to be held by a title company or in a joint bank account for the parties so that the buyer may receive interest on his or her earnest money, the parties should have an escrow agreement governing the disposition of that earnest money. This agreement cannot be drafted by the real estate licensees in the transaction per Wis. Admin. Code § RL 18.06.

The Disbursement subsection in the *1999 offer* contains a new provision concerning the disposition of the earnest money in cases where an offer is not accepted. This new provision provides that if the earnest money is paid by a check that is deposited in the listing broker's trust account, the earnest money will be returned to the person who paid the earnest money, but only after the earnest money check has cleared the listing broker's trust account. When a buyer becomes impatient for the return of his or her earnest money, the broker may point to this provision and remind the buyer that the broker needs to wait for the check to clear before the money may be returned.

The Disbursement subsection also contains another new parenthetical note of explanation. Like in the *1994 offer*, this subsection provides that if the offer does not close, the earnest money will be disbursed according to a written disbursement agreement signed by all parties. The new parenthetical note indicates that "Wis. Admin. Code § RL 18.09(1)(b) provides that an offer to purchase is not a written disbursement agreement pursuant to which the broker may disburse."

While this statement is true and there is nothing in the 1999 preprinted offer to purchase form that authorizes any automatic disbursement of earnest money to one party or the other when the transaction falls apart, the statement may be a bit misleading. Wis. Admin. Code § RL 18.09(1)(f) provides that the earnest money may be disbursed "Upon authorization granted within the contract." This means that if the parties have written in a provision or contingency that specifically directs the return of the earnest money to one party or the other under certain circumstances, that is a valid earnest money disbursement authorization. For example, it used to be a common practice to have a financing contingency provision that indicated that if the buyer failed to obtain financing, that all earnest money was returned to the buyer. Although this practice is no longer common given the preprinted contingency provisions in the DRL-approved offer forms, any such provision appearing in an offer would continue to be a legal and valid earnest money disbursement authorization.

The Legal Rights/Action subsection in the Earnest Money section of the *1999 offer* also has a new provision. This provision states that "Buyer's or Seller's legal right to earnest money cannot be determined by Broker." A broker who is dealing with a frustrated party (or attorney) demanding the earnest money in a failed transaction can refer the party to this provision to help make the party understand that it is not up to the broker to decide who gets the earnest money.

## Sale Of Buyer's Property Contingency

In the *1994 offer*, the Sale of Buyer's Property Contingency on lines 241-246 in reality contained two separate provisions: the sale of buyer's property contingency and the bump clause. In the *1999 offer*, these two provisions have been separated. The *1999 offer* contains a Sale of Buyer's Property Contingency and a Continued Marketing (bump clause) provision. These two provisions have been separated to make it clearer in cases where parties are attempting to remove or waive one, but not both, of these provisions. A buyer generally may unilaterally remove or waive the Sale of Buyer's Property Contingency, but does not have the right to unilaterally remove the bump clause which is for the benefit of the seller. In the past, it was often difficult for a buyer to do this because the two provisions were blended together.

The Sale of Buyer's Property Contingency in the *1999 offer* contains no new substantive material and reads the same as in the *1994 offer*. What is new is the boldfaced reminder that if parties include the Sale of Buyer's Property Contingency in an offer, the Continued Marketing section is automatically also included unless it is marked as "N/A" or otherwise deleted.

## Continued Marketing (Bump Clause)

The section labeled "Continued Marketing" contains the bump clause. This provision remains the same substantively as in the *1994 offer*. The parenthetical instructions, however, have been expanded to prompt the parties regarding additional provisions or contingencies that the primary buyer may be required to remove if he

or she receives a bump notice. In addition to having to remove the Sale of Buyer's Property Contingency upon the receipt of a bump notice, it is suggested that the parties may also wish to require the buyer to pay additional earnest money, remove all other contingencies in the offer, or provide evidence of a bridge loan.

## Secondary Offer

The optional Secondary Offer provision in the *1994 offer* is a priority provision which requires the seller to elevate the secondary offer to primary position if the primary offer is bumped. The DRL Forms Council adopted this approach because they were concerned that it was unfair for a secondary buyer to patiently wait in line only to have another secondary buyer skip past him or her to primary status when the primary offer is bumped. This provision was designed for the second offer accepted in a situation where the seller would elevate back-up offers to primary position only in the order in which they were accepted. Given this priority style, if another secondary offer was accepted, this provision needed to be modified to clarify that the offer was third in line, and to indicate in what order the secondary offers would be bumped.

In a major substantive change, the Secondary Offer provision in the *1999 offer* is a discretionary provision which leaves the seller free to choose from among all secondary offers when it is time to give a secondary buyer notice that his or her offer has become primary. In this style, there is one primary offer and a pool of secondary offers.

The Secondary Offer provision in the *1999 offer* states that "Unless otherwise provided, Seller is not obligated to give Buyer notice [of becoming primary] prior to any deadline, nor is any particular secondary Buyer given the right to be made primary ahead of other secondary offers." This provision should help make it clear to secondary buyers that they do not have any particular ranking or priority rights.

The Secondary Offer section also includes one additional clarification. The last sentence of this section states that "All other Offer deadlines which run from acceptance shall run from the time this Offer becomes primary." This means that a secondary buyer's deadlines for provisions such as the financing contingency or the inspection contingency will run from the date that the offer is made primary instead of the date of acceptance. This was a bit unclear in the *1994 offer*.

## Pre/Post Closing Occupancy

Whereas the Occupancy After Closing contingency in the *1994 offer* was designed solely for sellers occupying the property after closing, the Pre/Post Closing Occupancy provision in the *1999 offer* is designed to be used when the seller occupies after closing or when the buyer occupies before closing. As the boldfaced caution in this section indicates, REALTORS® are urged to **"Consider a special agreement regarding occupancy escrow, insurance, utilities, maintenance, keys, etc."** The WRA's Addendum O to the Offer to Purchase — Occupancy Agreement was designed for this purpose and attempts to address the numerous issues and problems that may arise in such occupancy situations.

## Inspection Contingency

The Inspection Contingency in the *1999 offer* also contains some major substantive changes and clarifications. The Inspection Contingency provides for a home inspection by a Wisconsin registered home inspector. Wisconsin law now requires that all home inspectors be registered with the DRL.

The Inspection Contingency has been designed so that the parties may also require a second concurrent inspection by a qualified inspector of a particular feature or structure which may designated in the blank line included in the contingency. For example, the parties may provide for an inspection of the roof by a roofing contractor along with the home inspection by a Wisconsin registered home inspector. The Inspection Contingency may also be modified by striking out one inspection and leaving the other. Thus, this provision may be used just for a home inspec-tion or just for a roof inspection, if this is desired by the parties.

Other changes to the Inspection Contingency in the *1999 offer* relate to the process of the buyer giving a notice of defects versus proposing an alternative amendment for repairs. With respect to those items in the inspection report(s) which are defects, e.g., no installed smoke detectors, the buyer may consider giving a notice of defects. The buyer must understand, however, that this is a serious step. If the seller has the right to cure, the seller may choose, in his or her discretion, whether to cure the listed defects or make the offer become null and void. If the seller has another more desirable offer, one may assume that the seller will let the offer die. Accordingly, the buyer may not wish to give a notice of defects unless the defects are "deal breakers" which must be fixed if the buyer is to continue with the offer. Giving the seller a notice of defects puts the power to decide the fate of the offer in the seller's hands.

A notice of defects is prepared on lines 51 through 65 of the WB-43 Amendment to Offer to Purchase/ Notice Relating to Offer to Purchase. This notice should specify that "This is a notice of defects." Language to

the effect that "Buyer requests seller to repair the broken windows" may not be interpreted as a notice of defects. The defects are then listed in the notice. The notice must be accompanied by a copy of the inspection report and must be delivered to the seller and the listing broker by the specified deadline.

The *1999 offer* specifically cautions that **"A proposed amendment will not satisfy this notice requirement."** REALTORS® must clearly distinguish between notices of defects and proposed amendments.

Instead of giving a notice of defects, some buyers may wish to propose an amendment to the contract that suggests an alternate resolution rather than requiring the seller to cure the defects revealed in the inspection report(s) and risking that the offer will become null and void. Such an amendment may be proposed on lines 8 through 27 of the WB-43. The amendment may state that "This is not a notice of defects. The Inspection Contingency (lines 298 - 316 of the offer) is waived and deleted. Seller agrees to (perform the following repairs) (give the following credit at closing) (establish the following repair escrow): give details, time frames, etc." An attachment may be required for this. The seller then has the option to accept or reject the buyer's proposed amendment or propose a different amendment. Because this proposed amendment is not a notice of defects, it does not trigger the seller's right to cure provisions. REALTORS® must be aware that if a proposed amendment is given instead of a notice of defects, the deadline for giving a notice of defects may pass. If no notice of defects is given by the deadline and the seller will not accept the proposed amendment, the buyer will have accepted the property as is.
The Inspection Contingency in the *1999 offer* contains other clarifications. This section indicates that "Buyer shall order the inspection and be responsible for all costs of inspection, including any inspections required by lender or as follow-up inspections to the home inspection." This statement clearly specifies that the buyer orders and pays for all inspections under this contingency, a specification that was missing from the *1994 offer*.

The Inspection Contingency in the *1999 offer* also reminds the parties that **"This contingency only authorizes inspections, not testing."** Buyers who want, for example, a radon test, need to insert a separate radon testing contingency.

The Right to Cure subsection of the Inspection Contingency in the *1999 offer* indicates that the seller will have a right to cure if the parties fail to make a choice in the Right to Cure provision. This is a much needed fail-safe measure because of the number of parties who do not make this selection in their offers. The seller will always have the right to cure unless the parties indicate otherwise in the offer.

The Right to Cure subsection of the Inspection Contingency in the *1999 offer* also makes a change relating to the seller's response to a notice of defects when the seller has a right to cure. In the *1994 offer*, the seller was given a choice between giving a notice of his or her election to cure defects, or allowing the 10 days allocated for the seller's response to run, which made the offer become null and void. The seller had no other options unless the parties agreed to sign an amendment or a cancellation agreement and mutual release.

The *1999 offer* gives the seller another much-needed option. The seller is permitted to give the buyer notice that the seller will not cure. The result of the giving of this notice is that the offer is null and void. Thus the seller has more control when faced with a notice of defects and can unilaterally and quickly end the offer if the seller does not intend to cure the listed defects.

# Conclusion

The revisions to the WB-11 Residential Offer to Purchase provide some much-needed clarifications and should make the offer process clearer for the parties and licensees who use the form. This form has an optional use date of April 1, 1999, and a mandatory use date of November 1, 1999. Members with questions about this revised offer may contact the WRA Legal Hotline at 608/242-2296.

***This Legal Update and other Updates beginning with 92.01 can be found in the Members Section of the WRA website at http://www.wra.org.***