



# LEGAL UPDATE

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A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

## WB-11 Residential Offer to Purchase – 2020 Edition – Part II

The Real Estate Examining Board (REEB) at the Department of Safety and Professional Services (DSPS) has approved an updated WB-11 Residential Offer to Purchase. The optional use date for the revised WB-11 is November 1, 2019, and the mandatory use date is January 1, 2020.

The current WB-11 was last revised in 2011. Although the existing offer form has generally served licensees well, after 10 years the time has come for an update.

In the big picture, the new WB-11 is not drastically different than the 2011 version, although the sequencing of the provisions has changed. At the same time a few WB-11 provisions have undergone some substantive changes to help bring the offer up to date with current practice and hopefully improve ease of use. The REEB has tried to make changes to make the residential offer a bit more understandable and user-friendly for consumers and licensees alike. Many revisions clarify and improve the provisions already in place.

This *Legal Update* reviews the changes made to the 2020 WB-11 Residential Offer to Purchase in the 2020 Offer beginning with the Financing Commitment Contingency at line 248 on page 5 through line 515 on page 9. The section-by-section discussion points out changes adopted by the REEB and provides practice tips for getting the best results with this new version of the WB-11. See the September and November 2019 *Legal Updates* for discussion of the other portions of the 2020 Offer.

### ① MORE INFO

An “educational use only” copy of the 2020 WB-11 Residential Offer to Purchase is available on the DSPS website at <https://dps.wi.gov/Documents/BoardCouncils/REB/Forms/WB11FINALwatermarked.pdf>, and on the WRA Forms Update Resource page at [www.wra.org/formsupdate](http://www.wra.org/formsupdate). Visit the Forms Update Resource page regularly for information about forms availability and additional WB-11 resources.

## The Updated Residential Offer

In the following discussions, the existing WB-11 (mandatory use date 1-1-11) is referred to as the “2011 Offer” and the newly updated WB-11 (mandatory use date 1-1-20) is referred to as the “2020 Offer.”

### Financing Commitment Contingency (Lines 248-288)

The Financing Contingency has been renamed in the 2020 Offer and is now the Financing Commitment Contingency. This title is more accurate and hopefully more transparent for the seller so the seller understands the contingency is about the buyer obtaining a loan commitment and not a guarantee that the buyer will actually receive financing at closing if the contingency is satisfied. Various financing provisions within the Financing Commitment Contingency on page 5 of the 2020 Offer were reorganized a bit. Other changes were made on lines 249-260:

- On line 250 the prompt following the blank line has been modified and now says, “loan type or specific lender, if any.” Any entry on this line describes the first mortgage loan commitment the buyer is seeking in the contingency. This replaces the language in the 2011 Offer, which said to insert the loan program or source and was not always understood.
- Lines 253-255 indicate, “Buyer acknowledges that lender’s required monthly payments may also include 1/12th of the estimated net annual real estate taxes, hazard insurance premiums, and private mortgage insurance premiums.” This provision primarily educates buyers regarding the different costs that may be included in their total monthly payment.
- The provision on line 256 that indicates the buyer agrees to pay discount points in an amount not to exceed \_\_\_% now has a default for that blank line of “0.”
- Lines 258-259 update the costs the buyer agrees to pay as part of the loan process. These costs may include wire fees as well as customary loan and closing costs and loan origination fees. The buyer also agrees to promptly apply for a mortgage loan and to provide evidence of application promptly upon request.
- Lines 259-260 confirm that the “Seller agrees to allow lender’s appraiser access to the Property” for those who are unconvinced this was otherwise allowed under the general Inspections and Testing provisions and an essential step when securing a mortgage loan.
- The provision whereby the amounts describing the terms of the desired loan commitment automatically adjust if the purchase price changes is now in a separation subsection called Loan Amount Adjustment at lines 261-263.

### ① MORE INFO

See "Uncovering the Truth: Financing Contingency Urban Legends" in the February 2013 *Wisconsin Real Estate Magazine* at [www.wra.org/WREM/Feb13/UrbanLegend](http://www.wra.org/WREM/Feb13/UrbanLegend), "The Anatomy of the Financing Contingency" in the December 2013 *Wisconsin Real Estate Magazine* at [www.wra.org/WREM/Dec13/Contingency](http://www.wra.org/WREM/Dec13/Contingency) and "Best of the Legal Hotline: Financing Contingency," in the January 2009 *Wisconsin Real Estate Magazine* at [www.wra.org/WREM/Jan09/FinancingContingency](http://www.wra.org/WREM/Jan09/FinancingContingency).

### Adjustable Rate Financing (Lines 266-270)

Changes were made to the Adjustable Rate Financing provision on lines 266-270 such that the provision now contemplates a first and subsequent interest rate increases. If the loan is to have an adjustable interest rate, "the interest rate may be increased not more than \_\_\_\_\_% ('2' if left blank) at the first adjustment and by not more than \_\_\_\_\_% ('1' if left blank) at each subsequent adjustment. The maximum interest rate during the mortgage term shall not exceed the initial interest rate plus \_\_\_\_\_% ('6' if left blank)." The provision contemplates more than one interest rate adjustment and includes defaults based on the predominant financing available in the market. The defaults were provided because all too often the caps for rate increases are not filled in, making it difficult to know if a loan commitment fulfills the contingency.

### REALTOR® Practice Tip

Ideally the licensee drafting the offer confers with the buyer to find out what loan the buyer intends to apply for and reaches out to the lender to determine the loan terms presently available. While some defaults for interest rate adjustments were added to the Financing Commitment Contingency, the drafter still needs to know the amount of the loan (amount financed), the loan term, the amortization term, and the maximum principal and interest initial payment amount.

### Satisfaction of Financing Commitment Contingency (Lines 272-281)

Instead of a Buyer's Loan Commitment subsection as there was in the 2011 Offer, there is now a subsection labeled Satisfaction of Financing Commitment Contingency, which tells the buyer how to satisfy the contingency. If the buyer qualifies for the loan described in the Financing Commitment Contingency, or another loan that is acceptable to the buyer, the buyer makes an authorized delivery of a copy of the loan commitment to the seller, as before, to satisfy the contingency.

How that delivery is authorized has changed in the 2020 Offer. Delivery is authorized if the loan commitment is signed by the buyer or if the loan commitment is delivered along with the buyer's written directions for delivery. Delivering a loan commitment along with the buyer's written delivery directions is the same as the requirement in the 2011 Offer, while the alternative to deliver a loan commitment signed by the buyer is new.

The buyer's directions for delivery could be given 1) as a WB-41 Notice Relating to Offer, 2) on a separate document, 3) by email or 4) by other written means. Just forwarding the loan commitment without the

buyer's signature or without written delivery directions is not sufficient to satisfy the contingency.

### REALTOR® Practice Tip

A valid delivery of a loan commitment to the seller requires (1) the buyer has first reviewed the loan commitment, and (2) the buyer has directed the loan commitment be delivered to the seller, either by signing the loan commitment or in separate written delivery instructions. Any separate written delivery instructions must be delivered along with the copy of the loan commitment. If any of these elements are missing, delivery of the loan commitment will be invalid.

### ① MORE INFO

The *Stubbe v. Hamland* case holds that the Financing Contingency in the 2011 Offer cannot be satisfied if loan commitment is delivered without buyer's written delivery instructions accompanying the loan commitment. See the case law summary on pages 1-2 of the October 2013 *Legal Update*, "Case Law Update 2013," at [www.wra.org/LU1310](http://www.wra.org/LU1310).

### REALTOR® Practice Tip

A loan commitment delivered by a lender does not satisfy the Financing Commitment Contingency. A loan commitment delivered along with a notice of unacceptability also does not satisfy the contingency.

If the buyer reviews the loan commitment and finds it is not acceptable, the loan commitment alone should not be delivered to the seller. 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. Although the REEB did not define a notice of unacceptability in the offer, one might imagine a notice of unacceptability would be given if the terms and conditions in the loan commitment obtained by the buyer do not meet the standards stated in the contingency and the buyer is not willing to proceed.

### Buyer Risk (Lines 279-281)

The caution in bold on lines 279-281 states: "The delivered loan commitment may contain conditions Buyer must yet satisfy to obligate the lender to provide the loan. Buyer understands delivery of a loan commitment removes the Financing Commitment Contingency from the Offer and shifts the risk to Buyer if the loan is not funded."

The caution reminds the licensees and parties a loan commitment may contain conditions and requirements that must be met before the lender becomes obligated to provide the purchase money. This alerts the parties and reminds licensees that a conditional loan commitment fulfills the contingency if delivered, but does not guarantee the lender will lend. The buyer still has work to do to satisfy the conditions of the loan commitment.

This also is an important aid when explaining to the buyer that if the buyer delivers a loan commitment, then the buyer will be obligated to come up with the necessary money to close if the lender fails to

timely provide the funds; the protection of the Financing Commitment Contingency is removed upon delivery of a loan commitment.

### **Seller Termination (Lines 282-284)**

The Seller Termination subsection in the 2020 Offer specifies when the buyer's delivery of a written loan commitment is timely on line 282: "If Buyer does not deliver a loan commitment on or before the Deadline on line 251." Otherwise this provision operates like the corresponding provision in the 2011 Offer. The seller may deliver a Notice of Termination if the seller has not actually received the buyer's loan commitment.

Sellers desiring to terminate the offer based on the buyer's failure to timely deliver a written loan commitment should act promptly and deliver a written termination notice to the buyer before the buyer produces a commitment. The termination notice must be delivered before the seller's actual receipt of the loan commitment the buyer has delivered to the seller, even if that occurs after the contingency deadline at line 251.



#### **REALTOR® Practice Tip**

Buyers have a grace period under the Seller Termination provision and may deliver a loan commitment after the deadline on line 251 and avoid termination if the loan commitment is actually received by the seller before the seller delivers a termination notice to the buyer. Buyers have the ability to deliver loan commitments late as long as the seller has not acted. Sellers wishing to terminate an offer in reliance upon the Seller Termination subsection may wish to be poised to deliver a termination notice and a Cancellation Agreement and Mutual Release (CAMR) upon the stroke of midnight concluding the deadline day.

### **Seller Financing (Lines 289-297)**

A substantive change comes with respect to the Seller Financing language, which has been split apart from the Financing Commitment Unavailability provision that appears at the bottom of page 5 on lines 285-288: "If a financing commitment is not available on the terms stated in this Offer (and Buyer has not already delivered an acceptable loan commitment for other financing to Seller), Buyer shall promptly deliver written notice to Seller of same including copies of lender(s)' rejection letter(s) or other evidence of unavailability."

Seller Financing is now a separate, optional, check box provision at the top of page 6.

If the offer is to include the option for seller financing, the check box at line 289 at the top of page 6 will need to be checked. If this Seller Financing provision is included in the offer, the seller has 10 days after the buyer's delivery of evidence of unavailability or the deadline for delivery of the loan commitment at line 251, whichever comes first, to deliver written notice to the buyer informing the buyer the seller will provide financing. The seller's opportunity to provide seller financing in the 2020 Offer is not taken away if a specific loan source was named at line 250 and totally depends upon whether the box at line 289 is checked.

If the seller decides the seller will provide financing, it will be in the form of a note and mortgage on the same terms expressed in the Financing Commitment Contingency. This section does not give the seller the authority or opportunity to provide land contract financing or find the buyer a third-party lender to finance the buyer's transaction.

The time for closing can be extended as needed if the seller is providing financing. The buyer authorizes the seller to obtain any credit information reasonably appropriate to determine the buyer's credit worthiness for seller financing.

If the seller does not give notice within the 10 days, then the opportunity for seller financing is waived. If the seller does not provide financing, the offer continues on; it does not become null and void as was the outcome in the 2011 offer.



#### **REALTOR® Practice Tip**

If the seller does not wish to offer seller financing, the WB-45 Cancellation Agreement & Mutual Release is a useful tool to bring the transaction to an immediate end, if the parties agree. The seller also might choose to exercise the Seller Termination provision at lines 282-284 as the buyer would not have delivered an acceptable loan commitment.

### **Unfulfilled Contingency**

Contingencies, such as financing contingencies, have been construed by Wisconsin courts to be a condition precedent to the buyer's performance. Thus, a contract that is subject to a condition precedent is not enforceable unless that condition has been fulfilled.



#### **REALTOR® Practice Tip**

If the buyer cannot successfully deliver a loan commitment in accordance with the contingency terms, the offer will no longer be enforceable against the buyer. The buyer's offer was conditioned upon the buyer delivering a loan commitment per the contingency terms and conditions and that contingency has not been fulfilled. As long as good faith and due diligence were employed the fact the contingency was not able to be satisfied is not a default of the contract.

### **Offers Not Contingent Upon Financing (Lines 298-309)**

If the box on line 249 is not checked to include the Financing Commitment Contingency, then the page 6 provision on lines 298-309, If This Offer Is Not Contingent Upon Financing Commitment, automatically applies. This provision establishes a mechanism for a buyer without a Financing Commitment Contingency to provide the seller with some reassurance that the buyer has the financial wherewithal to purchase the property.

First of all, there is a change regarding the time frame. The 2011 WB-11 says the buyer must deliver verification of funds to the seller within seven days of acceptance. The 2020 offer gives a blank line for the time frame with a default of seven days.

The documentation to be delivered may be reasonable written verification from a financial institution or third party in control of the buyer's funds that the buyer has, at the time of verification, sufficient funds to close, as is the case in the 2011 offer. But there is a second choice: the parties may write in on lines 302-303 whatever documentation they agree the buyer should deliver to the seller, presumably to reassure the seller the buyer has the financial means to buy the property. If something



is written in on lines 302-303, the buyer may choose whether to deliver the reasonable third-party written verification of the buyer's financial wherewithal or the documentation specified in the blank lines. If nothing is written in, the provision will operate as before with the seller entitled to receive the reasonable third-party financial verification.

If the buyer does not provide the written verification or documentation, the seller may terminate the offer. The seller terminates by delivering written notice to the buyer prior to the seller's Actual Receipt of the buyer's documentation.

#### REALTOR® Practice Tip

Buyers should consider when drafting the offer and naming documentation to be delivered to the seller that if the seller is not satisfied with the proposed documentation the seller may counter the offer. If the blank on lines 302-303 is completed, for example, to refer to the buyer's loan pre-approval or a projected closing statement for the sale of the buyer's property, the seller may not find that to be sufficiently reliable assurance that the buyer will have the financial means to close and may counter.

#### REALTOR® Practice Tip

There is no specific hard deadline for the seller's notice of termination so the seller could potentially deliver a termination notice at any time if the buyer has not complied with the "If This Offer Is Not Contingent On Financing Commitment" requirements.

The If This Offer Is Not Contingent On Financing Commitment provision will help parties and licensees understand all offers without Financing Commitment contingencies are not necessarily "cash offers." The provision acknowledges buyers may choose to obtain mortgage financing from a lender even though they did not include a Financing Commitment Contingency, but they will not enjoy the benefits and protections of the Financing Commitment Contingency. If the buyer wishes to have a Financing Commitment Contingency, the buyer would need to check the box at line 249 to include that provision. The language does permit the buyer to have the property appraised, so the seller must give the appraiser access to the property, but that does not mean there is an Appraisal Contingency. If the buyer wishes to have an Appraisal Contingency, the buyer would need to check the box at line 310 to include that provision.

## Appraisal Contingency (Lines 310-329)

The Appraisal Contingency on page 6 of the 2020 offer now has a right to cure. If the buyer is dissatisfied with the appraised value, the buyer can deliver a copy of the appraisal report along with a notice objecting to the appraised value. By way of contrast, in the 2011 version, the buyer delivered the appraisal report plus a Notice of Termination.

The Appraisal Contingency in the 2020 WB-11 has a STRIKE ONE feature for indicating whether the seller does or does not have the right to cure. If the seller has the right to cure, the seller may deliver a written notice to the buyer adjusting the purchase price to match the appraised value. The time frame for the seller's notice is expressed as a blank

line with a default of five days after delivery of the buyer's notice of objection. The parties also agree to promptly execute an amendment to the offer, if initiated by either party, to change the purchase price to match the appraised value.

If the seller does not have a right to cure or does not deliver notice adjusting the purchase price, the offer is null and void.

#### REALTOR® Practice Tip

This Right-to-Cure provision doesn't take away the option for the parties to instead agree to an amendment naming a compromise price or some other solution, as would be the case in the 2011 Offer.

Line 329 adds a note indicating an executed FHA, VA or USDA Amendatory clause may supersede the Appraisal Contingency. Offers for those loan programs typically provide the buyer may terminate the transaction if the property does not appraise at the purchase price and have their earnest money returned.

The primary reason to include an Appraisal Contingency in an offer to purchase is to protect the buyer against becoming contractually obligated to purchase a property when it turns out that the property does not appraise at or above the purchase price and, as a result, the lender will not make the loan. If the buyer uses a separate appraisal contingency and receives a loan commitment subject to an appraisal, the separate Appraisal Contingency is not waived by delivering the loan commitment. If there is no separate appraisal contingency and the buyer delivers a loan commitment that is subject to an appraisal, the buyer is assuming the risk that the property will appraise at the required value. If the property does not appraise at that value, a buyer without a separate Appraisal Contingency is in breach of contract if he or she does not close. If an independent Appraisal Contingency is used, the buyer is protected and is not in breach if the property does not appraise at the required value, even if a loan commitment subject to an appraisal had previously been delivered to the seller.



## Closing of Buyer's Property Contingency (Lines 330-336)

For those rare cases when the deadline for the closing of the sale of buyer's property is not the same as the closing date, changes have been made in the Closing of Buyer's Property Contingency on page 6 of the 2020 WB-11 to indicate the consequences if the transaction for the sale of the buyer's property does not close by the stated deadline. Specifically, the offer becomes null and void if the deadline passes without a closing unless the buyer delivers to the seller, on or before the deadline, reasonable written verification from a financial institution or third party in control of the buyer's funds that the buyer has the funds to close at the time of verification.

The provision in the 2011 Offer did not offer guidance regarding the seller's remedies if the sale of the buyer's property did not close. Presumably the seller expected and was anticipating the buyer would complete the sale of their property so they would be able to use the proceeds of that transaction to buy the new property. If this did not occur, that would appear to jeopardize the buyer's ability to close. The provision in the 2020 Offer therefore allows the buyer to save the transaction by delivering third-party verification of the buyer's financial ability to still close.



### REALTOR® Practice Tip

This Closing of Buyer's Property Contingency provision most often is completed to provide the contingency deadline to be the same as the closing date in the main transaction. Everything comes to head all at once: there is a successful closing, the parties work out a solution or the buyer is in breach and does not close. The contingency deadline and the closing date may become different if there is an amendment extending the closing date that neglects to also extend the deadline in this provision.

Note that the bump clause now appears in a separate yet interconnected provision.

## Bump Clause (Lines 337-349)

The Bump Clause is now a separate check box item in the 2020 WB-11 and it has that "spread out" formatting with lists of numbered items and bullet points to enhance user understanding.

The most important change in the Bump Clause, appearing at lines 337-349 on the bottom of page 6 directly after the Closing of Buyer's Property Contingency, is the default of 72 hours for the blank at line 338 where the Bump Clause time frame is entered. Failing to insert the number of hours for the bump clause is one of the most frequent errors reported to the Legal Hotline and finally it will stop!

In terms of what a buyer must deliver to the seller to avoid being bumped, the provision gives a numbered list:

1. Item (1) states a written waiver of the Closing of Buyer's Property Contingency must be delivered to the seller if the box on line 330 has been checked, making that contingency a part of the offer.
2. Item (2) gives the opportunity to make other provisions in the offer subject to the bump clause. A waiver of any contingencies written in the blank at lines 341-342 must also be delivered. If "N/A," a dash (--) or nothing is written in, then the second item does not apply and may be disregarded.

3. Item (3) lists other items, if any, the buyer must deliver to avoid being bumped. There are check boxes for a bridge loan and for third-party reasonable written verification of funds, and a blank to write in other requirements where it says "Other," for instance, additional earnest money might be written in there.

Thus, there is a laundry list of the items a buyer must deliver to the seller to avoid being bumped. If parties only want a waiver of the Closing of Buyer's Property Contingency to be delivered, as is the case in the 2011 Offer if nothing additional is written in, all that needs to be done is to check the box for the Closing of Buyer's Property Contingency at line 330 and check the box for the Bump Clause at line 337.

### ① MORE INFO

For further discussion of Bump Clause issues, see pages 7, 14 and 15 of the November 2009 *Legal Update*, "WB-11 Residential Offer to Purchase – 2010 Edition," at [www.wra.org/LU0911](http://www.wra.org/LU0911) and pages 14-15 of the August 2007 *Legal Update*, "'Favorite' Offer to Purchase Provisions," at [www.wra.org/LU0708](http://www.wra.org/LU0708).

## Secondary Offer (Lines 350-356)

The Secondary Offer provision at the top of page 7 was essentially left as it was in the 2011 Offer. The only change made to the provision was to add a seven-day default at line 355.

### ① MORE INFO

Information on secondary offers is available in "Best of the Legal Hotline: Secondary Offers," in the February 2009 *Wisconsin Real Estate Magazine* at [www.wra.org/WREM/Feb09/SecondaryOffers](http://www.wra.org/WREM/Feb09/SecondaryOffers).

## Homeowner Association (Lines 357-360)

There is a new provision regarding homeowner associations (HOAs). The new provision, found near the top of page 7 of the 2020 WB-11, advises the parties that if the property is subject to a homeowner association, the property may be subject to periodic fees and a fee upon the transfer of the property. The parties may use the included [STRIKE ONE] feature to indicate whether any transfer fee will be paid by the buyer or by the seller. The default is the buyer in case this provision is overlooked.

The parties can look for information regarding any applicable HOA in the seller's disclosures and in the title commitment. HOAs can have a significant legal impact on the property and the property owner's rights and, therefore, a buyer must take great care to understand any obligations, limitations, fees or the like when considering purchasing a property in an HOA. The rules and regulations of HOAs are often included in recorded covenants, conditions and restrictions, sometimes referred to as CC&Rs.

## Closing Prorations (Lines 361-384)

The Closing Prorations provisions in the 2020 Offer are substantially the same as the corresponding provisions in the 2011 Offer. Homeowners association assessments has been added on line 363 to the list of items that may need to be prorated at closing.

### ① MORE INFO

For an outstanding overview of the property assessment process, see the Department of Revenue 2019 *Guide for Property Owners* at [www.revenue.wi.gov/DOR%20Publications/pb060.pdf](http://www.revenue.wi.gov/DOR%20Publications/pb060.pdf). See "Tax Proration for New Construction & Divided Parcels: Make Sure All Parties Pay Their Fair Share" in the June 2005 edition of the *Wisconsin Real Estate Magazine* at [www.wra.org/WREM/June05/TaxProration](http://www.wra.org/WREM/June05/TaxProration). The line numbers and offer terms have changed since publication of this article, yet it captures negotiation strategies and risks in new construction transactions. For more information on tax proration, see pages 8-9 of the November 2009 *Legal Update*, "WB-11 Residential Offer to Purchase – 2010 Edition," at [www.wra.org/LU0911](http://www.wra.org/LU0911) and page 4 of the February 2011 *Legal Update*, "2011 WB-11 Residential Offer to Purchase," at [www.wra.org/LU1102](http://www.wra.org/LU1102) for further discussion of the tax proration provisions.

## Title Evidence (Lines 385-429)

Very few changes were made in the 2020 Offer provisions regarding title evidence.

Concerns are occasionally expressed regarding the portion of the Conveyance of Title subsection on lines 386-398 with regard to the reference to the seller's Real Estate Condition Report (RECR) and the offer, which are not a permanent part of the recorded title record. The WRA Forms Committee and the DSPS Real Estate Forms Advisory Committee asked the Wisconsin Land Title Association (WLTA) for commentary and feedback about the Title Evidence provisions and specifically the language on lines 390-391 referring to, "present uses of the Property in violation of the foregoing disclosed in Seller's Real Estate Condition Report and in this Offer, ...." Although they acknowledged this is not perfect, they did not recommend any modification to the language in the 2011 Offer. So other than the addition of a prompt on line 393 indicating the blank lines should be used to "insert other allowable exceptions from title, if any," there were no changes to the Conveyance of Title subsection.

In the Title Evidence subsection on lines 399-402, language was added at line 402 to confirm the buyer will pay recording costs for the deed or other conveyance and all costs of providing the title evidence required by the buyer's lender.

In the Gap Endorsement subsection on lines 403-408, there were a few word changes recommended by WLTA: "Seller shall provide a "gap" endorsement or equivalent gap coverage at (Seller's)(Buyer's) [STRIKE ONE] ('Seller's' if neither stricken) cost to provide coverage for any liens or encumbrances first filed or recorded after the effective commitment date of the title insurance commitment and before the deed is recorded, subject to the title insurance policy conditions, exclusions and exceptions, provided the title company will issue the endorsement coverage."

The Provision of Merchantable Title subsection from the 2011 Offer is now the Delivery of Merchantable Title subsection on lines 409-412 of the 2020 Offer. The required title insurance commitment shall be delivered to the buyer's attorney or the buyer not less than five business days before closing, as was the case in the prior offer. The Title Not Acceptable for Closing subsection on lines 413-419 was not changed.

The Special Assessments/Other Expenses subsection on Lines 420-429 was updated by adding a definition of the term "levied" that is based on the general special assessment process described in Wis. Stat. § 66.0703(8). Lines 422-423 provide, "'Levied' means the local municipal governing body has adopted and published a final resolution describing the planned improvements and the assessment of benefits."

## Definitions (Lines 435-453)

The Leased Property section on lines 430-434 was not changed and the next section on page 8 is Definitions.

In the 2020 Offer the definitions are organized differently when compared to the 2011 version. In the prior offer there was one section of definitions, but it was split into two sections appearing on pages 2 and 4 because those are pages where there are no blanks to fill in, boxes to check, [STRIKE ONE] features and so forth.

In the 2020 Offer there is still a section of definitions on page 8, but some of the definitions instead appear next to the provisions in which the definition is a key concept. For example, the definition of Fixture appears on the first page immediately adjacent to the provisions where it plays a predominant role, that is, Included in Purchase Price and Not Included in Purchase Price.

Likewise, the definition of Conditions Affecting the Property or Transaction appears on page 3 of the offer immediately following the Property Condition Representations section where that definition plays a central role. That definition of Conditions Affecting the Property or Transaction was updated so the content matches the content of the RECR, which was updated effective July 1, 2018.

## Actual Receipt (Lines 436-438)

In the Definitions section on page 8, the definition of Actual Receipt has been modified to indicate that if a document or notice is electronically transmitted, then actual receipt occurs when the party opens the electronic transmission, in other words, opens the email.



### REALTOR® Practice Tip

This does not mean that it is a good idea to coach parties to not open emails they receive in order to delay a timeline or obstruct the delivery process. The parties still have the duty stated at lines 490-491 to use good faith and due diligence. It is not an earmark of competent practice to prompt a client or customer to breach their contractual obligations.

## Business Day (Lines 439-441)

A definition of Business Day was added, taken largely from the content of the Deadlines definition in the 2011 Offer. Business Day means a calendar day other than Saturday, Sunday, a Wisconsin or federal holiday, and other days designated by the President for no mail delivery. The definition of Deadlines, in turn, was also modified.

## Deadlines (Lines 442-448)

The definition of Deadlines, in turn, uses the term the Business Day, which is now defined, and defines Midnight as 11:59 p.m. Central Standard Time. In all other respects this Deadlines definition remains as it was before. The Deadlines definition explains how to calculate



deadlines and explains how to determine deadlines expressed in hours rather than days.

### Defect (Lines 449-451)

Defect is defined in the 2020 Offer to match the definition used in Wis. Stat. § 709.03 regarding the RECR. The definition of Defect also appears on lines 213-216 in the Note in the Inspection Contingency.

#### MORE INFO

See “What the Defect? Legislative changes impact what a home inspector calls a defect” in the July 2018 *Wisconsin Real Estate Magazine* at [www.wra.org/WREM/July18/Defect](http://www.wra.org/WREM/July18/Defect) and “Help! Is It a Defect?” in the November 2015 *Wisconsin Real Estate Magazine* at [www.wra.org/WREM/Nov15/Defect](http://www.wra.org/WREM/Nov15/Defect).

### Firm (Line 452)

The definition of Firm was also added as was the case in the approved listing contracts. A firm is a licensed sole proprietor broker or licensed broker business entity.

### Property (Line 453)

Property is the real estate described on lines 4-8 of the contract.

## Inclusion of Optional Provisions (Lines 454-455)

The Optional Provisions section provides the instructions to the parties regarding completion of those sections in the offer with optional provisions preceded by check boxes: “Terms of this Offer that are preceded by an OPEN BOX (  ) are part of this offer ONLY if the box is marked such as with an “X”. They are not part of this offer if marked “N/A” or are left blank.”

#### REALTOR® Practice Tip

Licensees must be careful when drafting and working with offers because there are association and company addenda on the market that provide for the opposite result: if anything is filled in within a provision the provision is presumed to be part of the contract even if the check box at the beginning of the provision is not marked. A provision such as this in an addendum will generally override the state-required form.

## Distribution of Information (Lines 461-467)

The Distribution of Information provision provides written authorization from the parties to the licensees to provide certain information relating to the transaction that is often needed for appraisers attempting to get comparable information, listing information and other data needed for compliance with appraisal standards.

The Distribution of Information provision at the bottom of page 8 of the 2020 WB-11 has an addition to the language. The buyer and the seller authorize their agents to: ... “(iv) distribute copies of this Offer to the seller, or seller’s agent, of another property which Seller intends on purchasing.”

This language will enable the seller, if the seller is purchasing a new property for herself, to provide a copy of the offer whereby she is selling her property to the sellers of the property she is buying should that be required in the offer.

#### REALTOR® Practice Tip

This provision does not authorize licensees to provide copies of offers to other buyers in a price escalation or acceleration scenario.

## Maintenance (Lines 468-470)

A portion of what had been in the Property Damage Between Acceptance and Closing provision in the 2011 Offer has been split off to create the Maintenance provision appearing at the top of page 9 in the 2020 WB-11. This separate Maintenance provision states: “Seller shall maintain the Property and all personal property included in the purchase price until the earlier of closing or Buyer’s occupancy, in materially the same condition as of the date of acceptance of this Offer, except for ordinary wear and tear.” This helps clarify the seller has the obligation to maintain the property until closing.

## Property Damage Between Acceptance and Closing (Lines 471-480)

The new Maintenance section is immediately followed by the Property Damage Between Acceptance and Closing provision, which includes new obligations for the seller:

1. If the property is damaged in an amount not more than five percent of the purchase price, the seller must:
  - promptly notify the buyer, in writing
  - restore the property
  - provide the buyer with copies of all required permits and lien waivers no later than closing
2. If the property is damaged in an amount that exceeds five percent of the purchase price, the seller must:
  - promptly notify the buyer, in writing, of the damage

The buyer then decides whether to cancel the offer or carry out the offer and receive the seller’s insurance proceeds and a credit in the amount of the seller’s deductible on his insurance policy.

#### REALTOR® Practice Tip

The seller is obligated to notify the buyer in writing if there is any property damage occurring after acceptance of the offer and before closing regardless of whether the amount of the damage exceeds, is equal to, or is less than 5 percent of the purchase price.

There were no changes to the Buyer’s Pre-Closing Walk-Through provision on Lines 481-484. The Occupancy provision on Lines 485-489 was modified by adding the word “refuse:” “At time of Buyer’s occupancy, Property shall be in broom swept condition and free of all debris, refuse, and personal property except for personal property belonging to current tenants, or that sold to Buyer or left with Buyer’s consent.” After several attempts to define “broom swept” and “delivery

condition,” the DSPS Real Estate Contractual Forms Advisory Committee instead added the word “refuse.” The dictionary meaning of refuse refers to trash, garbage or the worthless or useless part of something.

There also were no changes to the Default section on Lines 490-509, the Entire Contract section on Lines 510-512 or the Notice About Sex Offender Registry on Lines 513-515.

#### ① MORE INFO

For further information about the rest of the 2020 WB-11 Residential Offer to Purchase, see the September 2019 *Legal Update*, “WB-11 Residential Offer to Purchase – 2020 Edition – Part I,” at [www.wra.org/LU1909](http://www.wra.org/LU1909) and the November 2019 *Legal Update*, “WB-11 Residential Offer to Purchase – 2020 Edition – Part III,” at [www.wra.org/LU1911](http://www.wra.org/LU1911). Also please regularly visit the WRA Forms Update Resource page at [www.wra.org/formsupdate](http://www.wra.org/formsupdate) for information about forms availability and additional WB-11 resources.

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