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Tenant's perspective on 10 commercial lease provisions

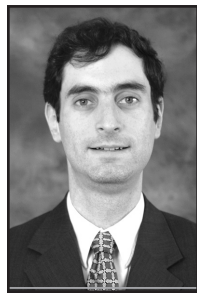
The landlord typically prepares the first draft of a commercial lease. As the tenant has different concerns than the landlord, the list below provides a short summary of 10 of the more important items from the tenant's perspective when negotiating the lease.

■ Operating expenses.

Many commercial leases are "triple net" in nature where the tenant pays the operating expenses associated with the property and the base rent. In a multitenant building, these expenses could include the tenant's pro-rata portion of taxes, insurance and other operating costs for the building. The tenant should be aware of the types of expenses in this area and how the landlord calculates them. The tenant should watch out for big-ticket items, such as capital costs and other items that should be the landlord's responsibility.

■ **Assignment and subletting.** Most leases require the tenant to obtain the landlord's consent if the tenant wants to assign the lease or sublease the premises. As it may take time and effort to obtain the landlord's consent and the landlord might deny the consent, the tenant should understand what events require consent. The tenant may want the landlord not to unreasonably withhold, condition, or delay the consent or provide exceptions, such as for transfers to affiliates.

■ **Waiver of subrogation.** The landlord typically obtains property insurance on the building, but the tenant may pay for such insurance as a part of the operating expenses. If the landlord's insurance company pays for a loss to the building,



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the insurance company may use its rights of subrogation and sue the tenant if the tenant was somehow negligent or otherwise responsible. Therefore, the tenant should make sure that the lease provides a

waiver of this right of subrogation, which prevents the landlord's insurance company from seeking to recoup this loss from the tenant.

■ **Scope of landlord responsibility and tenant indemnities.** A landlord usually disclaims any responsibility for losses or damages to the tenant and requires that the tenant indemnify the landlord for certain matters. Although many landlords are reluctant to change these provisions, the tenant should be aware of the scope and may want to avoid providing any indemnities to the landlord where the landlord may be fully or partially responsible for the damages or losses created.

■ **Use.** The tenant should make sure that any lease restriction on the tenant's use does not prevent what the tenant contemplates it will or might be doing. A lease with a narrow use provision could hamper reasonable changes or expansions of the tenant's initial use and also make the premises less desirable in case the tenant needs to assign the lease or sublease the space.

■ **Default.** Although a tenant does not enter into a lease anticipating that it will default, it needs to consider the possibility that certain events could trigger a default that could then allow the landlord to terminate the lease or pursue other remedies. The tenant will want notice from the landlord and a reasonable period of time in which to cure defaults before the landlord can undertake its remedies.

■ **Eminent domain and casualty loss.** A lease usually specifies what happens when a casualty loss damages the premises or a governmental entity uses the power of eminent domain to take all or part of the property containing the premises. These provisions may allow the landlord to terminate the lease. The tenant should evaluate if the landlord should have broad termination rights where a loss or condemnation does not materially affect the tenant's use of the premises and if the tenant should have any similar termination rights if it does.

■ **Estoppels.** A landlord's lender or potential purchaser of the building may want to know the status of the tenant's lease to determine items such as the term of the lease, the amount of rent and if the landlord is in default. The landlord may request that the tenant sign an estoppel certificate to address these factual items about the lease, and the lease may require the tenant to do so. As the signed estoppel will legally bind the tenant to these factual statements, the tenant should consider in the lease what types of estoppel questions the landlord can ask and

how quickly the tenant has to respond.

■ **Lenders.** Many landlords have lenders holding deeds of trust or mortgages encumbering the property. The lease may state that the lender is to have rights in the property superior to the tenant's lease rights. If the landlord defaults under the loan with the lender, the tenant could be at risk of having its lease terminated in the lender's foreclosure unless the lender provides the tenant with a nondisturbance agreement. In such an agreement, the lender agrees not to terminate the lease in case of foreclosure but instead will allow the tenant to remain if the tenant treats the lender as the landlord and complies with the lease. In the lease, the tenant could require that the landlord obtain a nondisturbance agreement from its existing lender and agree that the lease will only be subordinate to future loans if the tenant receives a nondisturbance agreement from the lenders.

■ **Letters of intent.** Letters of intent are not part of the lease and may not be binding. It is common, however, that the landlord and tenant sign a letter of intent before preparing a written lease indicating certain key provisions the parties would like addressed in the lease. The tenant should review the letter of intent as it negotiates the lease to make sure that the lease does not omit important terms.

As a lease provides the rules for the long-term relationship between the landlord and tenant, the tenant should carefully review and negotiate its provisions.▲