

## MODEL LEASE CLAUSE

### Negotiate Owner-Favorable Lease Audit Provisions

The following lease audit provisions were drafted by Eric D. Rapkin, Esq., who has a full-service commercial real estate practice, including the leasing, financing, acquisition, and disposition of office buildings, shopping centers, hotels, and industrial properties for developers, retailers,

and institutions. Show these provisions to your attorney before using them.

Note that the provisions here are very owner-friendly because the tenant alone must pay for the audit and may not use a contingency fee auditor.

#### TENANT LEASE AUDIT

During the Term or any extension thereof, but not more than *[insert #, e.g., 1]* time per year, and provided that no monetary default exists under this Lease beyond applicable notice and cure periods, Tenant, at its sole cost and expense shall have the right to cause Owner's books and records with respect to Operating Expenses to be audited by an independent certified public accountant (not to include a contingency fee auditor) of Tenant's choosing. Owner shall cause such books and records to be made available for such inspection during such normal business hours as are prescribed by Owner and at such location where Owner regularly keeps its books and records, upon *[insert #, e.g., 10]* business days' prior notification to Owner. (Prior to the audit commencing, upon Tenant's request, Owner will reasonably cooperate with Tenant in order to review the billing in question and the back-up documentation therefor, in order to explain any questions Tenant may have prior to Tenant conducting the audit.) Such audit shall be done in accordance with generally accepted accounting principles, consistently applied.

If, at the conclusion of such audit, Tenant's audit of such expenses for the preceding year indicates that Tenant made an overpayment to Owner for such preceding year, Owner shall credit such amount to Tenant's subsequent payments of Rent, or if the Lease has terminated, and no default exists under the Lease, remit the amount of such overpayment to Tenant within *[insert #, e.g., 30]* days after receipt of notice from Tenant of the amount of such overpayment. If, at the conclusion of such audit, such audit reveals an underpayment by Tenant, Tenant will remit the amount of such underpayment within *[insert #, e.g., 30]* days of Tenant becoming aware of such underpayment.

Should Owner disagree with the results of Tenant's audit, Owner and Tenant shall refer the matter to a mutually acceptable independent certified public accountant, who shall work in good faith with Owner and Tenant to resolve the discrepancy. The fees and costs of such independent accountant to which such dispute is referred shall be borne by the unsuccessful party and shall be shared pro rata to the extent each party is unsuccessful as determined by such independent certified public accountant, whose decision shall be final and binding.

With regard to Tenant's initial audit, Tenant, or its employees or agents, may not make any copies thereof, and such books and records and the results of any such audit are to be kept strictly confidential and are not to be made available or published to anyone, unless required by any applicable legal requirement or governmental authority.

Owner shall pay the cost of Tenant's initial audit if the total amount of Operating Expenses used for the calculation of pass-throughs for the year in question exceeded *[insert #, e.g., 10]* percent or more of the total amount of Operating Expenses that should properly have been used.