

Model Right of First Offer

By Joshua Stein

This Model Document consists of language one might include in a long-term ground lease (a “Lease”) to establish a right of first offer (a “ROFO”), typically in favor of Tenant but sometimes in favor of either Landlord or Tenant. As the accompanying article by the author describes, when a party (an “Offeror”) grants another party (the “Offeree”) a ROFO, that means if Offeror ever decides it wants to sell its position in the transaction (its “Interest”), it must first give Offeree a chance to buy Offeror’s Interest at a price Offeror names. If Offeree declines, then Offeror can sell to a Third-Party Buyer. If Offeror later lowers the asking price, Offeree might get “another bite.” It all sounds very reasonable and perhaps even creative.

A ROFO will also sometimes appear in a joint venture agreement. The model language offered here will work as a starting point in that context, but additional issues will arise there, which this language does not consider. Buy-sell clauses in joint ventures also raise many issues like those arising in this model ROFO, plus others.

Blank spaces, brackets, or endnotes in this model ROFO indicate blanks to fill, options, and issues. Please forward comments, improvements, suggestions, or corrections to the author.

This model ROFO seems extraordinarily long, but in truth it is merely long—as opposed to extraordinarily long—if one excludes endnotes and introductory comments. After those exclusions, the model ROFO is about five pages. Great minds could still probably think of ways to double its length.

Substantive Comments. In using this Model Document, consider these issues, among others:

- *ROFO/ROFR.* This Model Document consists of a ROFO—not a right of first refusal (a “ROFR”).

These rights (each generically, a “First Right”) differ. A ROFO activates at the beginning of the selling process before Offeror begins to market its Interest. A ROFR, in contrast, arises only when Offeror has signed a contract with a Third-Party Buyer. At that point, Offeree can then match the deal Offeror made with the Third-Party Buyer. One can adjust this Model Document to work for a ROFR, although nonobvious differences exist between the two First Rights. Anyone using this document as a ROFR should review other ROFR documents and consider issues beyond those raised here.

- *Not a Fan.* The author’s recent experiences suggest that no First Right will ever actually work as the parties expect. A First Right will instead simply create disputes, issues, and uncertainty. The parties and their counsel are overly optimistic, perhaps even hubristic, to think they can “get everything right.” The author does not guarantee that this model ROFO achieves that difficult and perhaps illusory goal.
- Any ROFO, if fully thought through and played out, can easily become the longest, most important, and most complicated part of any Lease, with implications for many other parts of the Lease as well. But the ROFO will still very likely never work perfectly. The facts will inevitably unfold in whatever way lays bare the deficiencies. Any Offeror should strenuously resist granting any First Right. Tenant can reasonably point out, however, that the whole premise of a Lease consists of the proposition that “Landlord doesn’t want to sell.” If Landlord changes its mind, shouldn’t Tenant get “first shot” at making the deal

Tenant originally wanted, i.e., a purchase? As a result, many Leases do have First Rights, particularly in favor of Tenant. Even if a First Right will never work right, it may at least force the parties to have a conversation and perhaps a negotiation. If the parties ever go through the ROFO process in accordance with its terms, though, that usually means the relationship has gone bad—not a great start for enduring a very complicated process with a lot of moving parts, nuances, and potential for varying interpretations, i.e., litigation.

Both parties should instead seek to maintain a reasonable relationship with reasonable lines of communication. For more thoughts on First Rights, please see the author’s article in this issue of the New York State Bar Association *N.Y. Real Property Law Journal*. Endnotes in this model ROFO repeat and supplement many comments from that article.

- *Complexity vs Practicality.* This model ROFO goes beyond a typical ROFO in the detail it provides about exactly how the process will work. That detail responds to sad history. But, when anyone actually pulls this language out of the drawer and tries to comply with it, he or she may experience the same problem that arises whenever any legal document goes into a lot of detail: provisions that sounded perfectly reasonable to the drafter may not actually work all that well—and may raise a panoply of new issues of their own—when someone actually has to live with and work through all those words. We think we know how a ROFO should work. But we can’t possibly figure out every weird

set of facts in which this or any other ROFO might unfold. That problem is hardly unique to this model ROFO. It arises whenever anyone needs to actually apply and follow to the letter any modern legal document that was carefully thought through by lawyers who believed they thought of everything and got everything right.

- *Maintenance Fee.* Offeror may want Offeree to pay a modest annual fee to retain the ROFO. This would incentivize Offeree to release its rights if it no longer regards them as valuable. The idea of a recurring maintenance fee (for any pre-emptive right of any kind, including an ordinary option) makes great sense but the author has never actually seen it in any document.

Other Documents. The parties may, in appropriate cases, want to provide for other documents as exhibits to the Lease of which this ROFO would be part, such as: (a) a form of contract of sale, perhaps even with closing documents annexed; (b) forms of the various notices contemplated here; (c) an organizational chart for each party to memorialize ownership of Equity Interests at Lease signing; and (d) disclosure of the ROFO in any recorded memorandum of Lease.

Other Lease Provisions. The existence of a ROFO may lead the parties to a Lease to include other provisions in the Lease to make the ROFO work right. Those provisions include:

- *Transfer Procedures.* As a condition to any Transfer, Offeror must comply with the ROFO, where required. Also, after the closing of any Transfer, including even many Exempt Transfers, Offeree should receive notice and copies of all closing documents. Somewhere the Lease should say, once, that a "copy" means a full, complete, and unredacted copy, including all related documents and side letters.

- *Reporting and Documentation.* Offeror must periodically report ownership of its Equity Interests, to police compliance with the ROFO. Offeree may want the right to receive backup documentation for that ownership.
- *Financing Limitations.* Because Foreclosure Events are exempt from the ROFO, Offeree may wish to limit any financing that Offeror obtains. Those limits could fall away if the Mortgagee agrees to either: (a) honor the ROFO in connection with a foreclosure sale; or (b) give Offeree at least __ days' prior notice of the time and place of any foreclosure sale, and at least __ days' prior notice of any adjournment. Any Mortgagee will generally laugh at either suggestion, and note that the first suggestion might impair Mortgagee's ability to hold a valid foreclosure sale. Hence the justification to limit Offeror's financing.
- *Cross-Default.* Although a transfer in violation of the ROFO can constitute a Default, a Leasehold Mortgagee will worry that a ROFO creates a huge number of headaches and concerns. The Lease should say that any default or dispute arising under a ROFO will either: (a) not constitute a Default at all for the Lease; (b) never entitle Landlord to exercise Lease remedies so long as a Leasehold Mortgage exists; or (c) expressly constitute a "Tenant-Specific Default" so that instead of curing that Default, a Leasehold Mortgagee can preserve the Lease by foreclosing or otherwise removing Tenant from the Leasehold Estate. Leasehold Mortgagee will want to know it will never need to cure any failure to perform under a contract resulting from the ROFO.
- *Definitions.* This model ROFO assumes the Lease defines these terms: Arbitration, Affiliate, Business Day, Default, Equity

Interest, Exempt Transfer, Fee Estate, Foreclosure Event, Insolvency Proceeding, Laws, Lease, Lease Abandonment, Leasehold Estate, Leasehold Mortgage, Leasehold Mortgagee, Modification, Mortgage, Notice, Notify, Permitted Exceptions, Person, Rent Regulation, and Transfer.

A Different Approach. Instead of a ROFO, the parties might want to try a simpler approach, sufficient merely to push the parties to have a meaningful conversation if either wants to buy out the other. Each of these alternatives would establish channels of communications, and then let ordinary business negotiations and incentives take over the process. That should work well as long as the relationship has not deteriorated. Unfortunately, it often does deteriorate, because over time either Landlord or Tenant often ends up wishing it had not signed the Lease. And the three suggestions here are not much better than the suggestion that the parties should maintain each other's contact information and once in a while have a conversation. Here are three possibilities:

(a) *Expression of Interest.* Either party (a "Purchaser") may at any time give the other ("Seller") non-binding notice (an "Expression of Interest") that Purchaser would have an interest in purchasing Seller's Interest. Any Expression of Interest shall include a conspicuous reference **IN BOLD FACE ALL CAPITAL LETTERS** to this paragraph and shall state the purchase price that Purchaser would potentially pay for Seller's Interest (the "Target Price"). Each Expression of Interest shall remain effective for 90 days (the "Window Period") and shall then automatically terminate. If, in any Window Period, Seller decides to sell its Interest, at an asking price at or below 110% of the Target Price, then Seller shall so notify Purchaser. The parties shall then diligently seek to negotiate a sale of Seller's Interest to Purchaser. If those negotiations fail to produce a binding agreement within 10 days (which the parties may extend by agreement

via email) after Seller received the Expression of Interest, then Seller may offer the Interest to the market. In doing so, Seller shall initially offer the Interest at an asking price that equals or exceeds the Target Price. Seller may, however, change that asking price and sell Seller's Interest on any price and at any terms Seller negotiates. Seller shall keep Purchaser reasonably informed of Seller's asking price and negotiations.

(b) *Inquiries on Sale.* Either party ("Purchaser") may, at any time, ask the other party ("Seller") whether Seller anticipates seeking to sell its Interest within the next 90 days and, if so, Seller's asking price and terms. Seller shall respond to those inquiries promptly and in good faith.

(c) *Determination to Sell.* If either party ("Seller") decides it may wish to sell its Interest, then Seller shall Notify the other party ("Purchaser") at least: (i) five days before listing the Interest with a broker or starting

any marketing activities; and also (ii) 10 days before Seller signs a binding agreement to Transfer the Interest. If Purchaser notifies seller that Purchaser may have an interest in purchasing, then Seller shall keep Purchaser informed of Seller's marketing and selling activities; give Purchaser a reasonable opportunity to make an offer; and consider any offer from Purchaser.

Post-Closing Administration. If a Lease contains a ROFO, the parties may wish to pay special attention to these post-closing administrative matters:

- *Workings and Clarity.* Because any ROFO is counterintuitive and, when actually played out, more complex than it sounds, counsel should make sure its client understands how the ROFO works and what might trigger it. This may require a written memo.

- *Address.* If Offeree changes its address, the existence of a ROFO makes it particularly important for Offeree to notify Offeror of the change.
- *Status Checks.* Offeree should periodically exercise its right to obtain an updated report on the ownership of Offeror's equity interests, with suitable backup.
- *Pay Attention.* Offeree should keep its ear to the ground and be ready to assert its rights if Offeror initiates any transaction. Conversely, if Offeree would like to acquire Offeror's Interest, Offeree should make that desire known in a serious way.
- *Relationship.* Best of all, Offeree should maintain a relationship and lines of communication with Offeror so that Offeror never sees any need to activate the ROFO. Instead, if Offeror wants to sell, the parties should have a conversation and try to make a deal.

Right of First Offer

If at any time¹ Landlord or Tenant (either, "Offeror") desires to Transfer its interest in the Premises (its "Interest"), except an Exempt Transfer,² then, provided that no Lease Abandonment has occurred, Offeror shall first give the other party ("Offeree") a Notice (the "ROFO Notice") offering to Transfer Offeror's Interest to Offeree (Offeree's rights under that Notice, collectively, the "ROFO"), all in accordance with this Article. Offeror shall not engage a broker, market Offeror's Interest, solicit offers, communicate to third parties the possible availability of Offeror's Interest, offer Offeror's Interest to anyone else, or Transfer Offeror's Interest unless and until Offeror has complied with this Article.³ The ROFO shall apply to each and every proposed Transfer of an Interest that is not an Exempt Transfer. Any Transfer of an Interest, whether or not an Exempt Transfer, shall not terminate this ROFO except as this Article expressly states.⁴

A. *Contents of ROFO Notice.* Any ROFO Notice shall include, and shall not be valid unless it includes: (a) all material economic terms⁵ on which Offeror proposes to Transfer its Interest; (b) a proposed contract for the Transfer of the Interest in compliance with this Article (that contract, in the form submitted by Offeror, as modified by written agreement between Offeror and Offeree, the "ROFO Contract"), which ROFO Contract would bind the parties if Offeree were to exercise its ROFO;⁶ (c) a statement on the first page of the ROFO Notice, **IN BOLD FACE TYPE ALL CAPITAL LETTERS**, that it is intended to constitute a ROFO Notice (with a citation to this Article); (d) a statement on the first page, **IN BOLD FACE TYPE ALL CAPITAL LETTERS** (the "Deemed Approval Reminder"), reminding Offeree that if Offeree fails to reasonably object to the ROFO Notice or the accompanying form of ROFO Contract (with a statement, in reasonable detail, of all of Offeree's reasonable objections) within 10 Business Days after receipt (an "Objection Notice"), then Offeree shall be deemed to have waived its objections to the ROFO Notice and the form of ROFO Contract (a "Deemed Approval");⁷ and (e) only if Tenant is Offeror, then a Tenant Due Diligence Package.

B. *ROFO Contract.* The "ROFO Contract" shall be on ordinary, customary, and commercially reasonable terms⁸ and shall conform to **Exhibit A**. The Transfer shall otherwise be on the terms of a standard printed form contract of sale used in the State for improved real property and selected by Offeror with Notice to Offeree, modified only as necessary to reflect the terms of the ROFO Notice and the factual circumstances of the Interest, except matters that violate this Lease.⁹

C. *Tenant Due Diligence Package.* The “Tenant Due Diligence Package” means copies of all: (i) subleases and sub-subleases, and all Modifications, with a schedule of legal rents for all units subject to Rent Regulation; (ii) service agreements or contracts that will not terminate at closing; (iii) outstanding notices of violation; (iv) engineering, insurance, environmental, or other reports Tenant received in the last three calendar years; (v) income and expense statements in sufficient detail to evaluate their accuracy, for the last three calendar years and any completed calendar quarters since then; (vi) current rent roll; (vii) unrecorded documents listed in every schedule or exhibit to the ROFO Contract; and (viii) other due diligence materials, if any, provided for in the ROFO Contract.

D. *Noncompliant ROFO Notice.* If Offeree receives a Notice from Offeror that states it is intended to constitute a ROFO Notice, but Offeror believes that the purported ROFO Notice (or anything in or submitted with it) does not comply with this Lease or is otherwise not valid as a ROFO Notice, then Offeree shall promptly give Offeror an Objection Notice. If Offeree fails to do that within 10 Business Days after Offeree receives the ROFO Notice and the ROFO Notice included a Deemed Approval Reminder, then a Deemed Approval shall occur. A Deemed Approval only prevents Offeree from asserting objections to the ROFO Notice. It does not constitute an Acceptance Notice.¹⁰ If a Deemed Approval occurs, then Offeree shall on request confirm it in recordable form.¹¹

E. *ROFO Acceptance.*¹² Any ROFO Notice shall remain open for 60 days¹³ after Offeree receives it (the “Deadline”). To accept Offeror’s ROFO Notice, Offeree must give Notice of acceptance (an “Acceptance Notice”) so Offeror actually receives it before the Deadline, accompanied by: (a) a counterpart of the ROFO Contract signed by Offeree or its designee,¹⁴ and (b) a check, payable to the escrow agent designated in the ROFO Contract, for the deposit under the ROFO Contract. TIME IS OF THE ESSENCE ON DELIVERY OF AN ACCEPTANCE NOTICE BEFORE THE DEADLINE. If Offeree delivers a timely and valid Acceptance Notice, then Offeror shall promptly countersign and return the ROFO Contract. Failure to perform under a ROFO Contract shall not constitute a Default under this Lease. It shall constitute a default only under the ROFO Contract, giving the non-defaulting party only the rights and remedies under the ROFO Contract.¹⁵ If Offeror does not sign and return an executed ROFO Contract within 10 days after receiving it in compliance with this Article, then Offeree shall be entitled to all legal and equitable remedies against Offeror, excluding any right to declare a Default under this Lease.¹⁶

F. *Extension.* Offeree may from time to time extend the Deadline for up to __ additional days in aggregate (an “Extension Period”), by giving Offeror a Notice of extension (an “Extension Notice”) so Offeror actually receives it on or before the Deadline, before extension. To be effective, any Extension Notice must: (a) state the Extension Period; and (b) include a check payable to Offeror for \$____¹⁷ for each day of the Extension Period. Offeror may keep that payment free of any claims of Offeree and with no obligation to credit it against any payment obligation of Offeree. TIME IS OF THE ESSENCE ON DELIVERY OF AN EXTENSION NOTICE UNDER THIS PARAGRAPH. Offeree may deliver multiple Extension Notices, in aggregate providing for only the maximum Extension Period this paragraph allows. If Offeree delivers a valid and timely Extension Notice, the Deadline shall be redefined to include the Extension Period Offeree specified in the Extension Notice. Notwithstanding anything to the contrary in this paragraph, Offeree may never extend the Deadline beyond the aggregate maximum Extension Period this paragraph allows.¹⁸

G. *Closing of Third-Party Transfer.* If Offeree does not deliver a valid Acceptance Notice before the Deadline, TIME BEING OF THE ESSENCE, then Offeror may Transfer the Interest to any Person (“Third-Party Buyer”) if the Transfer otherwise complies with this Lease and satisfies each of these conditions and qualifications (the “Third-Party Closing Conditions”):

1. *Third-Party Contract.* Offeror and Third-Party Buyer execute and deliver their contract for the Transfer of Offeror’s Interest (including all side letters and related agreements, the “Third-Party Contract”), within six months after the earlier of (a) the Deadline or (b) the date of Offeree’s Notice that Offeree will not deliver an Acceptance Notice, TIME BEING OF THE ESSENCE;

2. *Copy of Contract.* Within three Business Days after Offeror and Third-Party Buyer sign their Third-Party Contract, Offeror so Notifies Offeree, with a copy of the Third-Party Contract¹⁹ and a certificate from Third-Party Buyer confirming: (a) the Third-Party Contract contains the entire agreement between the parties and their Affiliates; and (b) no other transaction is conditioned on the closing under the Third-Party Contract, or induced Third-Party Buyer to enter into the Third-Party Contract;²⁰

3. *Closing.* Offeror Transfers Offeror’s Interest to Offeror’s Transferee in accordance with the Third-Party Contract no earlier than 15 days²¹ (which waiting period Offeree shall promptly waive on request provided Offeree has reasonably confirmed that the Third-Party Contract complies with this Lease) and no later than 90 days after execution of the Third-Party Contract, subject to extensions equivalent to those (if any) permitted in the ROFO Contract to allow for assumption of Mortgages, TIME BEING OF THE ESSENCE;

4. *Price.* The price for the Transfer equals or exceeds 95% of the price in Offeror's ROFO Notice.

5. *Terms Generally.* The terms of the Third-Party Contract: (a) to the extent they relate to assumption or obtaining any financing, including deadlines and cost allocations, are to no degree more favorable than those in the ROFO Contract; (b) are otherwise not, taken as a whole, materially more favorable to the purchaser than those in the ROFO Contract;²² (c) give Third-Party Buyer no due diligence information beyond the Tenant Due Diligence Package, plus due diligence information on this Lease; and (d) contain no representations and warranties beyond those in the ROFO Contract, except on this Lease.

H. *Failure to Meet Third-Party Closing Condition.* If Offeror fails to meet any Third-Party Closing Condition, including because Seller or its Affiliate enters into any Modification or additional agreement relating to the Third-Party Contract that causes any Third-Party Closing Condition to fail, then Offeror shall not proceed with its Transfer without again delivering to Offeree a ROFO Notice. If the unmet Third-Party Closing Condition related to the price or terms of the ROFO Contract, then the additional ROFO Notice shall disclose the change and include copies of all related documentation. Offeree shall again have a ROFO, except that: (a) every reference to the ROFO Contract shall refer to the Third-Party Contract; (b) the Third-Party Contract must nevertheless comply with all requirements that applied to the ROFO Contract; and (c) the Deadline shall be __ days after Offeree actually received the ROFO Notice.²³

I. *Termination of ROFO.* Offeree's rights under the ROFO shall terminate, and the ROFO shall be deemed to have been permanently and irrevocably removed from this Lease to the extent it gives any rights to Offeree, if: (a) Offeror gives Offeree a ROFO Notice and both (i) Offeree does not validly and timely accept it before the Deadline; and (ii) Offeror Transfers its Interest in compliance with this Article;²⁴ (b) Offeror gives Offeree a ROFO Notice and after Offeree delivers a valid and timely Acceptance Notice, the purchaser defaults under the ROFO Contract; (c) Offeree [is ever the subject of] [Transfers this Lease in] any Insolvency Proceeding;²⁵ or (d) Offeror loses Offeror's Interest through a Foreclosure Event.²⁶

J. *Simultaneous Transactions.* If Offeree gives an Acceptance Notice and Offeree or its designee or assignee actually acquires Offeror's Interest, then the ROFO shall: (a) terminate; and (b) not apply to any Transfer that Offeree makes or initiates and closes only simultaneously with or after Offeree's acquisition of Offeror's Interest.²⁷ Any contract that Offeree enters into contemplating a Transfer of the type referred to in clause "b" shall not require Offeree to give a ROFO Notice, provided that the closing under that contract cannot occur except simultaneously with or after Offeree's acquisition of Offeror's Interest.

K. *Equity Interests.* If the holder of any Equity Interest in Landlord or Tenant desires to Transfer that Equity Interest or any part of it, except an Exempt Transfer, then the ROFO shall apply as if that Equity Interest were an Interest subject to the ROFO, suitably adjusted given the nature of the Interest. If the Equity Interest relates to direct or indirect ownership in Tenant, then Landlord shall be the "Offeree" for that ROFO, and vice versa. Landlord or Tenant, as the case may be, shall cause Offeror of that Equity Interest to comply with the ROFO before Transferring that Equity Interest.

L. *Acknowledgment.* If Offeree does not deliver a valid Acceptance Notice, then at Offeror's request, Offeree shall promptly deliver to Offeror and Third-Party Buyer a recordable confirmation: (a) of that waiver; and (b) that the Third-Party Contract met the Third-Party Closing Conditions that apply to the Third-Party Contract and does not entitle Offeree to another ROFO Notice. If Offeror requests that confirmation but Offeree believes it would be inaccurate, then Offeree shall promptly Notify Offeror, specifying in reasonable detail the basis for that belief. Offeror and Third-Party Buyer may modify the Third-Party Contract to seek to eliminate any issues Offeree raised. If they do that, then they shall give Offeree a copy of the modified Third-Party Contract and this Article shall again apply.

M. *ROFO Disputes.* If a party disagrees about the other's rights, obligations or actions under this Article (including the validity, form, or terms of any ROFO-related document, delivery or Notice), then the parties shall resolve that dispute by Arbitration.²⁸ Any dispute arising under a ROFO Contract shall, however, be resolved through litigation in accordance with the ROFO Contract.²⁹ If the parties disagree about whether a dispute arises under the ROFO or under the ROFO Contract, or if a dispute relates to both the ROFO and the ROFO Contract, then they shall proceed through [litigation under the ROFO Contract] [Arbitration].

N. *Miscellaneous.* Notwithstanding anything to the contrary in this Article, no ROFO, ROFO Notice, ROFO Contract, or Third-Party Contract, or any exercise of rights, (non)performance of obligations, or dispute about any of the foregoing shall impair any Mortgage or any rights of any Mortgagee or entitle anyone to any rights senior or prior to any Mortgage.

EXHIBIT A

TERMS OF ROFO CONTRACT

Any ROFO Contract shall provide for at least these terms, subject to the requirements in this Lease on any ROFO Contract:

- (a) *Timing.* A closing date, no earlier than 90 days after Offeree elects to purchase Offeror's Interest³⁰ (and, for ROFO Contracts that contemplate assumption of Mortgages, commercially reasonable periods to meet customary lender requirements, consistent with the loan documents and the Mortgagee's ordinary operating procedures, with full contact information for the Mortgagee included in the ROFO Contract);
- (b) *Cash Price.* The purchase price, payable in cash at closing except to the extent the Offeror's Mortgagee approves assumption of existing Mortgages;
- (c) *Overfinancing.* If Offeror's Mortgages exceed the purchase price, then: (1) the Mortgagees' consent to the transaction; and (2) commercially reasonable arrangements to assure payment of that excess at closing;
- (d) *Deposit.* A deposit of up to 5% of the purchase price, to be held in escrow by a licensed title insurance company;
- (e) *Transaction Costs.* Responsibility for transfer taxes and other transaction costs;
- (f) *Operations.* Operation and leasing only in the ordinary course pending closing, with no major leases to be signed;
- (g) *Representations and Warranties.* Ordinary and customary representations and warranties on: (1) this Lease and the Interest, in each case limited to customary authority to assign, lack of prior assignment and similar representations; and (2) if Tenant is Offeror, the Tenant Due Diligence Package and other customary matters about the Premises;
- (h) *Breaches.* A statement of any existing breaches of representations and warranties, and Offeror's agreement to notify Offeree of any later breach;
- (i) *Material Notices.* Offeror's obligation to give Offeree copies of any material notices received and to update representations and warranties at closing;
- (j) *Attachments.* Completed schedules and exhibits;
- (k) *Remedies.* Only ordinary and customary remedies for default, with any disputes resolved through litigation subject to a confidentiality stipulation substantially in the form promulgated by the New York City Bar Association;
- (l) *Post-Closing.* Neither purchaser nor Offeror shall perform or bear any material post-closing obligations or deliver any guaranty;³¹
- (m) *Assignable.* Assignable to any Person at [or before] closing;³²
- (n) *Interaction.* No cross-default between the ROFO Contract and this Lease; and
- (o) *Permitted Exceptions.* Conveyance subject only to Permitted Exceptions designated in the ROFO Contract and Mortgages encumbering the Interest (with credit against the purchase price).

Endnotes

1. A ROFO will sometimes not apply at certain times, for example if: (a) Tenant has not yet completed initial development; (b) Offeree is in Default, either before or after expiration of notice and cure periods; or (c) Offeree has previously committed chronic monetary or material Defaults, even if cured, over some extended time. Limitations like these should not worry Leasehold Mortgagees, as Leasehold Mortgagees will not attach much value to a ROFO.
2. "Exempt Transfers" would generally match Transfers that a party can consummate as of right, by satisfying only certain limited conditions, such as a Foreclosure Event or transfers of passive minority interests. In a 99-year Lease, Offeror's Interest will probably change hands many times. Thus, Exempt Transfers should adequately cover both the initial parties (specifically) and their successors, whoever they may turn out to be (generically). This concern arises in all types of Transfer-related restrictions, though the parties may want to tailor it for a ROFO. For example, if a Foreclosure Event generally constitutes an Exempt Transfer, Offeror will prefer to terminate the ROFO completely at that point, to preserve Offeror's ability to obtain a Mortgage. Mortgagees hate ROFOs. If a transfer of a passive minority interest is an Exempt Transfer, Offeree may want the ROFO to still apply to those transfers.
3. Offeror may favor a less sequential process. Why can't Offeror defer the ROFO Notice until Offeror has an offer in hand (subject to the ROFO) or at least until Offeror has tested the market a bit?

4. Later language in this model ROFO suggests Transfers that should terminate the ROFO. Offeror can reasonably take the position that Offeree gets "one chance" and then the ROFO, a huge burden for Offeror, goes away. To the extent that the parties agree to limit or terminate the ROFO after certain Transfers, edit this sentence.
5. It may make sense to list those material economic terms. A generic reference to "material economic terms" leaves some uncertainty, but a purchase and sale is not all that complicated. This ROFO later requires a full ROFO Contract when Offeror gives a First Right Notice, though the parties may not like that idea.
6. Most ROFOs do not require a ROFO Contract, leaving the actual terms of the Transfer to be negotiated (fought about) later if Offeree exercises its ROFO. The requirement to include a ROFO Contract seems burdensome to Offeror, but that burden will, among other things, give Offeror an incentive to work cooperatively with Offeree rather than activate the ROFO.
7. Perhaps flip this around. Instead, obligate Offeree within a certain time to acknowledge receipt of the ROFO Notice and acknowledge that it complies with the Lease. If Offeree fails to give that acknowledgment, then the parties would go straight to Arbitration. Either process serves Offeror's interest in not having to "wait to the last minute" to see if Offeree claims to have found some basis to object to the ROFO Notice.
8. This sounds reasonable but could provoke a dispute, hence Arbitration for all disputes.
9. ROFOs often say very little about the actual terms of any ROFO Contract, as if the only relevant term of the transaction is its price. This paragraph makes an effort to plug that gap by attaching an Exhibit with the terms for any ROFO Contract. Once one has gone to all that trouble, though, perhaps one should go to the additional trouble of attaching a form of ROFO Contract to the Lease itself. That does not seem typical. Also, a sale of real estate is really not all that complicated a transaction. We just make it complicated. All the protracted negotiations of a purchase and sale typically relate to no more than a low single-digit percentage of the effective value of the entire transaction.
10. The author's experience handling ROFO-related disputes inspired this paragraph, which is not "standard." Deletion of this paragraph would also require conforming changes in requirements for the ROFO Notice.
11. This sounds like good protection for Offeror, but it means Offeror's Purchaser and any title insurance company will force Offeror to obtain a recordable confirmation of any Deemed Approval. They may demand that anyway.
12. If Offeree does not give a timely Acceptance Notice, Offeror may want the right to require Offeree to confirm that in recordable form, acknowledging it has received a valid ROFO Notice and chose not (or at least failed) to timely exercise it. Third-Party Buyers and their title company will like to see confirmations like these. They eliminate uncertainty. Offeree may also worry about an Offeror's possible withdrawal of a ROFO Notice. If Offeror does that, Offeree will perhaps have spent considerable time and resources—on an emergency basis—trying to decide whether to exercise its ROFO and trying to find a loan. Offeree may wish to negotiate that if Offeror withdraws a ROFO Notice, then Offeror: (a) cannot send another ROFO Notice for a certain period; and (b) must pay Offeree some amount. One could also prohibit a withdrawal.
13. Usually the Deadline is 30 days—much too short. Sixty days seems reasonable. Optional language allows Offeree to extend the Deadline by paying a daily extension fee.
14. Again, Offeree wants the ability to "flip" the ROFO Contract. This language allows Offeree to designate a third party to enter into the ROFO Contract, which usually works better than assigning the ROFO Contract, either before or at closing. With or without a flip, consider whether Offeree should be entitled to a deal more favorable than whatever Offeror intends to take to market. For example, perhaps Offeree should receive a 2% discount off the price in the ROFO Contract. This would compensate Offeree for its trouble and trauma of dealing with a ROFO Notice, and incentivize Offeror to do anything other than activate the ROFO.
15. Without the previous sentence, the possibility of a default under a ROFO Contract could create significant concerns for a Leasehold Mortgagee. If the Leasehold Mortgagee cannot control the pricing under a ROFO Contract, then a default under that ROFO Contract might create a Lease Default that a Leasehold Mortgagee would have no appetite to cure.
16. Think about other rights and remedies. For example, perhaps deny Offeror the right to initiate any Transfer or ROFO for several years.
17. The parties can negotiate any fee they want, but it should be substantial, perhaps matching the Fixed Rent, as Offeror will find the Deadline extension to be extremely burdensome and difficult. The potential of enduring that extension will give Offeror another incentive to have a conversation with Offeree rather than trigger the ROFO. Any such incentive is probably a good thing.
18. This optional paragraph applies only if Offeror is willing to extend the Deadline for a fee. Any such extension is nonstandard but makes a lot of sense.
19. This allows Offeree to confirm the Third-Party Contract complies with the ROFO. Offeror may want to provide for a Deemed Approval process.
20. Should any inaccuracy in that certificate constitute a Default under the Lease?
21. Offeror may want the ability to sign and close simultaneously, a common occurrence. Offeree, on the other hand, will want the ability to see the Third-Party Contract and have a chance to object to it.
22. Words like these often appear in ROFOs. They leave lots of room for interpretation, i.e., litigation or Arbitration. Also, when the Third-Party Buyer obtains title insurance, the title insurer may worry about uncertainty on compliance with the ROFO. Thus the title insurer might require Offeree to deliver a recordable release, acknowledgment, or estoppel certificate.
23. This paragraph gives Offeree a "second bite" at purchasing the Interest at the lower price than the original ROFO Contract contemplated.
24. Offeree would prefer the ROFO continue in this case, burdening the next holder of Offeror's Interest.
25. Don't assume this clause is enforceable. On the other hand, the bankruptcy courts may enforce a ROFO against an Offeror subject to an Insolvency Proceeding, as long as the ROFO applies to Transfers generally, not just Transfers through Insolvency Proceedings. *The IT Group v. The Shaw Group Inc. (In re The IT Group, Inc., Co.)*, 302 B.R. 483 (D.C. Del. 2003).
26. Offeree will want the ROFO to continue to apply to all future possible Transfers of Offeror's Interest. Offeror will want to limit the ROFO by having it go away permanently in as many circumstances as possible. This paragraph represents Offeror's "wish list." Offeree will not necessarily agree to any or all of these items. The parties might compromise by saying that if certain of these events occur, the ROFO is suspended for a certain period.

27. This allows Offeree to “flip” Offeror’s Interest, with or without Offeree’s Interest, with no need to give a new ROFO Notice.
28. For any dispute on the ROFO, the parties will typically choose Arbitration. That Arbitration should probably take the form of an expedited “baseball” Arbitration with an experienced commercial real estate attorney acting as arbitrator and required to select only either Landlord’s or Tenant’s “last and final” proposal for resolution of the disagreement (“baseball” arbitration).
29. Ordinarily the parties to a purchase and sale agreement will not want to arbitrate disputes.
30. Consider making time is of the essence 30 days after the required closing date.
31. This prohibition seeks to prevent Offeror from “gaming the system” by coming up with a sale that Offeree or purchaser cannot match or could not reasonably match. What if Offeror wants to undertake a more complicated transaction in good faith? For example, Offeror might stick around after the sale to finish capital improvements or help with re-leasing.
32. If Offeree receives a ROFO Notice, Offeree may have no interest in buying, but may want to “flip” the deal to someone else, either to assure a friendly counterparty or to make a profit. The timelines in a typical ROFO make that process difficult or impossible. The ROFO Contract should, perhaps, at least allow it. And, as suggested elsewhere, perhaps Offeree should have the right to an extension of time by paying for it.

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