I. Introduction
   a. Presenters
      i. Matthew Roberts
         1. Director-Contracts, Procurement and Risk Management (Cal Poly SLO)
      ii. Tom Roberts
         1. Director-Contract Services and Procurement (Chancellor’s Office)
      iii. Dru Zachmeyer
         1. Associate Director-Contracts, Procurement and Risk Management (Cal Poly SLO)
   b. Purpose
      i. To address issues commonly encountered by CSU contracting officers when handling real property leases.
         1. Auxiliary agreement update
         2. Arms-length transactions
            a. These general guidelines and observations are not intended to be comprehensive or definitive. We do hope they will help you identify and resolve common leasing issues.
   c. Topics
      i. Auxiliary leases
      ii. Leasing authority
      iii. Lease vs. license
      iv. Key lease principles and terms
      v. Leases of interest
   d. Poll on types of leases most frequently dealt with by campuses:
      i. Auxiliary
      ii. Off campus office
         1. Short term (2 years or less)
         2. Long term (over 2 years)
      iii. On campus commercial operators
         1. Banks
         2. ATMs
         3. Restaurants
         4. Research firms
         5. Other
      iv. Uncommon
         1. Airplane hanger
         2. Seafloor “ground lease” beneath pier
3. Bowling alley
4. Other

e. Lease defined
   i. The terms “lease” and “license” are applied to temporary conveyances of real property, personal property and intellectual property.
   ii. Real property lease
      1. A temporary conveyance of the right to use and occupy real property, usually in exchange for rent; the lease term can be for life, for a fixed period, or for a period terminable at will, but always for less time than the lessor has a right to. (Black’s Law Dictionary)

II. Auxiliary operating agreement/lease update
a. Auxiliary Organization Operating Agreements
   i. Auxiliary Operating Agreement
      ii. New as of December 2011
      iii. Must be used by all, no later than January 1, 2013
      iv. Template # CRL036
b. Auxiliary Operating Agreement Student Union Lease Supplemental Clauses
   i. New as of December 2011
   ii. Must be used by all, no later than January 1, 2013
   iii. Template # CRL045
   iv. Templates located at: http://www.calstate.edu/CSP/crl/crl.shtml#models
c. Auxiliary Organization Facility Model Leases
   i. Auxiliary Organization Sublease
      1. When used - “to sublease CSU facilities (previously leased) to another auxiliary or not-for-profit”
      2. New as of December 2011
      3. Must be used by all, no later than January 1, 2013
      4. Template # CRL031
   ii. Support Services Lease
      1. When used - “Lease of facilities to any Auxiliary except Student Unions”
      2. New as of December 2011
      3. Must be used by all, no later than January 1, 2013
      4. Template # CRL033
   iii. Templates located at: http://www.calstate.edu/CSP/crl/crl.shtml#models

III. Leasing Authority
a. Trustees as Lessor
   i. Trustees may lease CSU property (Ed. Code §§ 89046, 89036)
   ii. Trustees may delegate this authority (Ed. Code § 89035)
   iii. Trustees have delegated authority to execute leases to the Chancellor (Trustees Standing Orders)
   iv. Chancellor has generally delegated this authority to the campuses with four exceptions (EO 669)
1. Lease as security for financing (personal property)
2. Term of 20 or more years (includes options)
3. Annual rent $1,000,000 or greater
4. CSU property leased out for public private partnership (PPP) development

b. Trustees as Lessee
   i. Trustees may enter into agreements for the furnishing of facilities for the Trustees. (Ed Code § 89036)
   ii. Trustees may enter leases (as lessee) without the review or approval of any other state agency. (Ed Code § 89048(e))
   iii. Trustees may delegate this authority. (Ed Code § 89035)
   iv. Trustees have delegated this authority to the Chancellor. (Standing Orders of the Board of Trustees)
   v. Chancellor has generally delegated this authority to the campuses with four exceptions (same as above)

c. License
   i. Trustees may enter into agreements for the furnishing of facilities by or for the Trustees. (Ed Code § 89036).
   ii. Trustees have delegated this authority to the Chancellor. (Standing Orders of the Board of Trustees)
   iii. Chancellor has delegated this authority to the campus presidents. (E.O. No. 372, Item 5)

IV. Lease vs. license vs. easement
a. Lease
   i. A lease is an agreement in which the landlord agrees to give the tenant the exclusive right to occupy real property, usually for a specific term and, in exchange, the tenant agrees to give the landlord some sort of consideration. A lease transfers to the tenant a leasehold interest in the real property and, unless otherwise provided in the lease, a lease is transferable and irrevocable.

b. License
   i. A license gives the permission of the owner to an individual or an entity to use real property for a specific purpose. Unlike a lease, it does not transfer an interest in the real property. It is personal to the licensee and any attempt to transfer the license terminates it. It is (usually) revocable and can be either exclusive or non-exclusive.
   ii. Licenses are sometimes buried in other agreements, e.g. a memorandum of understanding. It is highly recommended that a separate license be created whenever a right to use another party’s space, usually for a shorter term, is part of a larger relationship. The separate license should be attached as an exhibit to the more general agreement.

c. Easements distinguished
i. Similar to a license except it transfers an enduring interest to the beneficiary that encumbers title. Easements are assignable and presumed to be permanent.

ii. Be sure to follow CSU procedures when granting easements.

V. Key lease principles and terms
a. General principles
   i. General contract law applies to commercial leases
      1. Unlike residential leases which are governed by various statutory restrictions and obligations, there are few non-contractual rights implied in commercial leases (e.g. no duty to make property fit for tenant’s intended purpose). For this reason, commercial leases are typically longer and more complex than residential leases.
      2. It is important to keep this in mind when dealing directly with commercial operators (as opposed to auxiliaries). For-profits will hold us to the terms contained in the lease and they may exploit any omissions.
         a. Leases are extremely important to businesses, particularly large, sophisticated businesses like banks, cell phone providers and chain restaurants. For this reason, they usually hire lawyers to handle their lease agreements. Consult General Counsel if you have any concerns about terms they present during negotiations.
   b. Competitive selection
      i. Real estate in inherently unique, so “sole sourcing” is almost always justifiable.
         1. You should still search the market for the best deal in most instances.
      ii. CSU as lessee
         1. RFP
            a. RFPs are not common in commercial real estate, so this approach may not be effective in all instances. State and federal agencies do issue RFPs when selecting long term office space. You can find a sample at [enter web address].
            b. For short term or small square footage space requirements, using a commercial broker will likely produce better results than RFP.
      2. Commercial brokers
         a. Select based on area of expertise (e.g. office, industrial, etc.). Commercial real estate brokerage is highly specialized. If you are looking for office space, use a broker who primarily deals with office properties.
         b. Ask them to document their research for you. Keep this on file as evidence of competitive selection.
         c. Fees paid by landlord
   iii. CSU as lessor
1. Commercial opportunities on campus should be open to competition to the greatest extent possible. When leasing out campus facilities for commercial use, solicit bids through:
   2. RFP
   3. Auction
   4. Informal solicitation

c. Term and termination
   i. Length
      1. 3-5 years is typical for most types of leases. If your tenant is asking for 10 or more years, they are either investing a lot of money in the property or you may be giving them a very good deal!

   ii. Commencement
      1. Lease commencement may precede rent commencement to allow time for installation of tenant improvements
         a. Commercial operators may ask for a reasonable amount of “rent abatement” to accomplish this. Basically, you are agreeing that all terms of the lease will apply except the rent term during this abatement period.

   iii. Options
      1. Automatic renewal
         a. The term is automatically extended unless the lease is terminated as specified. This type of option should be avoided.
      2. Standard options
         a. These extensions of the lease term are typically exercised by tenants in good standing at their discretion
            i. Usually must give advance notice as specified in the lease
      3. “Mutual consent” options
         a. Options that require landlord’s consent are not recognized as true options in the world of commercial real estate. Do not be surprised if commercial tenants balk at option language their ability to exercise options unilaterally.

   iv. Holdover
      1. Most leases state that the term will be month-to-month if the lease expires but the tenant remains.

   v. Strategy
      1. Shorter is better?
         a. Public universities do not share many of the incentives that cause private landlords to covet longer lease terms from good
tenants (e.g. recovery of construction costs, increased investment value for property, etc.).

b. In most instances, we will enjoy greater benefit from the flexibility derived from shorter lease terms. This allows for changes in use, tenancy etc.

c. This is true both when acting as lessor and lessee.

vi. Termination

1. Pay attention to events constituting default or allowing for termination.
2. Be careful when dealing with commercial tenants. Consult General Counsel before terminating a lease, even if the tenant is in default. Unlawful detainer procedures must be followed or you may expose the university to liability.

d. Rent

i. Always negotiable in terms of amount, payment schedule and increases.

   1. Landlords generally view government tenants favorably (the state cannot go bankrupt), so use your leverage in negotiations.

ii. Common terms

   1. Gross: flat rent amount
   2. Net: rent plus percentage of operating expenses and taxes
   3. Triple net: rent plus pro rata share of maintenance, repair, tax and insurance
   4. Percentage rent: rent is a percentage of gross sales.

iii. Escalation

   1. Rent escalation terms vary depending on many factors. Our standard forms use CPI, but other approaches may be simpler or economically advantageous. Do not assume that rent increases are merited in all instances.

   2. CPI

      a. The Consumer Price Index (CPI) is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services.

      b. This approach links rent increases with inflation.

   3. Scheduled percentage

      a. 1-3% annual increases are typical in private sector retail and office leases.

iv. Deposits

   1. As lessee

      a. Like all terms in commercial leases, deposit terms are negotiable. Given our status as the “ultimate credit tenant”, we should be able to negotiate deposit amounts down in most instances. Some landlords will waive the deposit altogether.

   2. As lessor
a. You should require enough deposit to cover unpaid rent and “reasonable and necessary” expenses to repair damages. The amount should be determined based on the tenant’s use (e.g. specialized tenant improvements) and creditworthiness. There are no limits on how much deposit you can require in a commercial lease.

b. After deducting for unpaid rent and damages, you must return remaining deposit within 30 days of taking back possession.

e. Assignment and sublease
   i. Leases may be assigned or subleased unless prohibited
   ii. Assignment vs. sublease
       1. Assignment = transfer of entire interest
       2. Sublease = transfer of less than entire interest
   iii. The original tenant remains liable for all lease obligations (including rent) in both cases.
   iv. Consent
       1. Our leases should always require consent to sublease or assign
       2. Unless otherwise specified, landlord cannot unreasonably withhold consent to sublease

v. Cell sites
   1. Assignment is a crucial issue for cell companies as they frequently change their corporate structures. They want to be able to assign their leases/licenses to new holding companies as necessary, so they ask for advance approval. This standard provision should not cause you concern.

f. Insurance requirements
   i. Note the increased coverage amounts recently mandated by Risk Management. These presumably apply to tenants on campus.

g. Possessory interest
   i. Be sure to include our standard clause.
   ii. Information on commercial leases should be reported to the county assessor.
       The assessor should send out annual requests for information. If you do not do your part to keep these up to date, the county is missing out on tax revenue.

h. Seismic review/waiver
   i. Newly leased or licensed space may be occupied only if it satisfies the seismic safety requirements of CSU Seismic Standards at the time the lease or license is executed, which can be established by one of the following:
       1. A determination that a Waiver Letter can be issued, (see CSU Seismic Policy Manual at [enter web address] for details on each of these requirements), or
       2. A FEMA 154 Evaluation Report that indicates the building is not expected to pose a seismic safety risk, or
3. A Certificate of Applicable Code indicates the building was designed to modern Code requirements and does not have characteristics known to be hazardous, or
4. An Independent Review Report that states that the building has an earthquake damageability Level of IV or better, as defined in the table Earthquake Damageability Levels for Existing Buildings.

ii. Waiver Letter
1. The requirements for seismic evaluation under this Standard may be waived under the following limited conditions:
   a. The space will be occupied for less than two years, and CSU does not currently occupy space in the building, or
   b. The area of the space to be occupied by CSU is 3,000 sf, or less, and the space is not to house pre-school age children, or
   c. The building is a one-story, wood-framed building, or a one or two-story, wood-framed single-family residence on level site, or
   d. The building is a re-locatable structure, such as a trailer, even if permanently located, but only if the structure does not have a natural gas connection, or
   e. The building is subject to the regulatory authority of the Office of Statewide Hospital Planning and Development, or is a schoolhouse regulated under the Field Act by the Division of the State Architect, (and accordingly is otherwise evaluated pursuant to a rigorous seismic safety standard) or
   f. The space to be occupied is within a structure currently occupied by and previously evaluated and accepted under this Standard by any of the named entities, or
   g. The space must be occupied because of administrative requirements beyond the control of CSU as certified by a policy level person. Each CSU organizational unit shall designate the person(s) authorized to make such waivers.

2. Any Waiver Letter issued under one or more of the above allowances must be in writing by the person making the determination.

j. Other required terms
   i. ADA
   ii. Non-discrimination
   iii. Etc.

VI. Leases of interest
   a. Ground lease
   b. Retail/restaurant
   c. Temporary off-campus academic space
   d. Cell site lease/license
   e. ATMs