

## MEMORANDUM

June 15, 2020

**TO:** Port Staff

**FROM:** Katharine E. Petrucione  
Acting Executive Director

**SUBJECT:** Opt-In Rent Deferral Program (“Opt-In Program”).

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### **Background**

The Opt-In Program is prompted by the remarkably rapid developments and economic fallout from the Covid-19 pandemic. Major milestones in the local response to the pandemic include:

- On February 25, 2020, Mayor London Breed issued the Proclamation by the Mayor Declaring the Existence of a Local Emergency (the "Mayor's Proclamation") under Sections 8550 et seq. of the Government Code, Section 3.100(13) of the San Francisco Charter, and Chapter 7 of the San Francisco Administrative Code, establishing the existence of an emergency within the City and County of San Francisco due to the ongoing spread of "Covid-19".
- On March 4, 2020, Governor Newsom issued the Proclamation of a State of Emergency (“Governor’s Proclamation”) under Section 8625 of the California Government Code and the California Emergency Services Act, establishing the existence of a state of emergency throughout California due to Covid-19.
- On March 16, 2020, the City Health Officer issued an order (the “Shelter In Place Order”) directing all residents to remain at their place of residence, except to conduct Essential Activities, Essential Businesses, and Essential Government Functions (as defined in the Shelter in Place Order).
- Since that time, the Mayor and the Health Officer have regularly supplemented and updated these orders in order to protect public health and re-open the economy; and the Board of Supervisors have concurred in the Mayor's Proclamation as supplemented and enacted other measures to address the emergency.
- Through the Fourth (March 18, 2020) and Eighth Supplementals (April 1, 2020) to the Mayor’s Proclamation, the Mayor imposed a moratorium on landlords recovering possession of commercial space for non-payment of rent if the tenant was unable to pay due to the COVID-19 crisis (“Commercial Eviction

Moratorium”). The Commercial Eviction Moratorium also protects month-to-month tenancies including where the landlord has the right to terminate or not renew the agreement at the landlord’s discretion and imposes prohibitions on requiring replenishment of a tenant’s security deposit. In summary, and subject to certain conditions, if a commercial tenant misses a rent payment because of financial impacts resulting from the COVID-19 crisis, then the landlord may not attempt to recover possession for at least six months after the rent payment was first due. Once a rent payment is six months overdue and the tenant has not paid back the missed rent or made alternative arrangements with the landlord, then the landlord may attempt to recover possession at that time. The Commercial Eviction Moratorium expires on June 16, 2020, but is expected to be further extended. To qualify, a tenant or subtenant must be registered to do business in San Francisco and have combined worldwide gross receipts for tax year 2019 of \$25 million or less.

- On March 27, 2020, in response to these emergency measures and the severe impacts on Port’s tenants, Port Executive Director Elaine Forbes issued an Executive Directive Regarding Enforcement of Lease Obligations (the “Executive Directive”).
- On April 28, 2020, by Resolution 20-18, the Port Commission ratified and extended the term of the relief under the Executive Directive through May 31, 2020 and, on May 26, 2020, by Resolution 20-27, the Port Commission again extended the term through July 31, 2020 (“Extended Rent Deferral Policy”).
- The Port’s broad-based Extended Rent Deferral Policy provides a penalty-free offer to tenants to defer rent due for use of Port property from March 1, 2020 through July 31, 2020, where such amounts were not fully paid due to the impacts of COVID-19, and makes commitments to forbear from initiating legal proceedings to evict tenants who have been unable to pay rent due to the impacts of COVID-19 during that same time period, subject to continuing to comply with all lease provisions and tenant’s resumption of regular rent payments on August 1, 2020 and paying all deferred amounts by July 31 2020.
- On June 9, 2020, by Resolution 20-29, the Port Commission approved this Opt-In Policy.

Additional background and context can be found in the following Memos to the Port Commission and supporting documentation: April 23, 2020 (Ratification of Executive Directive and Extension to May 31, 2020); April 24, 2020 (Info on Revenues); May 8, 2020 (Information on Tenant Relief); May 22, 2020 (Approval of Extension of Extended Rent Deferral Policy to July 31, 2020); June 5, 2020 (Approval of Opt-In Program); and June x5, 2020 (approval of Revised FY 2020/21 Budget).

## 1. **Policy:**

Under the Opt-In Policy, as further described below, for those tenants that opt in, Port staff will waive all late charges, default interest and associated penalties and fees for any delinquent rent payments that were or are due for use of Port property during the period of August 1, 2020 through December 31, 2020. Tenants that choose to participate must agree to pay all deferred rent by December 31, 2020 and resume normal and timely payment of rent on January 1, 2021. Staff from the Real Estate & Development, Maritime, Engineer, and Finance Divisions will be available to provide support to tenants through the application process and will also assist in the review of submitted information. Staff will follow up with tenants as they complete their submittals and notify tenants that they are in the Opt In program.

Port staff will also follow the policies and timeframes set forth in the Eviction Moratorium Order for qualifying tenants with respect to the initiation of any default enforcement or eviction process due to the failure to pay rent owed under any commercial lease due to the impact of COVID-19 while the Commercial Eviction Moratorium is in effect. Further, the Port will not issue any Three Day Notice to Pay or Quit for nonpayment of any portion of rent due during the Commercial Eviction Moratorium.

All tenant rent is still due and payable in accordance with the applicable lease, license or other agreement; as such, the Port will be issuing invoices in its normal course of business. Tenants that opt in may continue to pay all or a portion of their rent while still taking advantage of the Opt-In Program. Port will accept rent, including partial payments.

All eligible tenants that complete the following submittal requirements by July 15, 2020 shall qualify for relief under the Opt-In Program: (see online submittal form for more details):

- Describe impact from COVID-19 and need for relief.
- Describe business plan to operate safely while COVID-19 is still circulating in the community.
- Provide revenue projections from July - December in light of current economic conditions.
- Using those revenue estimates, project anticipated cash flow that indicates whether the tenant can resume current rent payments on or before December 31, 2020.
- Document any and all submittals to federal, state and local relief programs and summary of application status. If no such applications were filed, tenant would be asked to explain reasons (ineligibility, etc.).
- Submit a mid-term report to the Port, due in October.

**Estimated Program Timeline**

<b>Date</b>	<b>Action</b>
June 15	Finalize online systems
June 15	Launch Opt-In Rent Deferral Program, outreach to tenants
June 29	Follow up outreach to tenants
July 14	Update to Port Commission on submittals to date
July 15	Deadline for initial opt-in submittals
July 17	Finalize list of tenants included in the Opt-In Program
July 20-24	Outreach to tenants of opt-in status
July 31	Broad-based rent deferral period expires
August 1	Opt-In Rent Deferral Program starts
October 16	Updated financial reports from Opt-In tenants
December 31	End of Opt-in deferral period and all deferred rent due; Rental payments must resume on January 1, 2021

**2. Lease Obligations and Payment Provisions under Opt-In Program:**

The relief under the Opt-In Program is contingent upon the tenant’s continued compliance with all lease obligations other than the payment of rent (such as maintenance and repair obligations and percentage rent reporting obligations), the tenant’s resumption of normal timely rent payments on January 1, 2021 and payment of any rent arrearages (including for March through December 2020) in full no later than December 31, 2020 (subject to any extension of these deadlines and/or additional relief). Any amounts not paid in full as of December 31, 2020 would then be subject to interest and penalties from and after that date (subject to any further relief action taken by the Port before that date).

If a tenant is unable to fulfill non-monetary lease obligations due to impacts from the current emergency situation, Port staff will address those issues on a case-by-case basis. The forbearance program outlined in this Directive does not change the terms or conditions of any lease or other Port agreement.

This Directive will not affect ongoing lease enforcement actions or lease enforcement actions for defaults not related to the current emergency. For any tenant claiming the benefit of force majeure or similar provisions in its lease, those provisions will control.

**3. Tenants that do not Opt In:**

Staff will follow up with tenants that do not complete the submittal by the July 15 deadline to determine the next steps for those tenants, and who are not paying rent.

In response to those tenants who do not opt-in to the program and instead wish to wind down their business or restructure in a manner that no longer utilizes Port property, Port staff may utilize Port Commission Resolution 09-04 under which Port staff may enter into mutual early termination agreements for leases with a term of less than five years remaining and with a monthly rent of less than \$10,000, where the Executive Director finds the lease is no longer in the Port's best interest and where Port staff negotiates a return of the premises to the Port on terms and conditions that benefit the Port. For those tenants who opt out of the deferral program because they do not see a future for their business at the Port, such a mutual termination could provide significant benefits to the Port in terms of certainty, control and limiting costly legal action later. Depending on the level of tenant interest in "opting-out," Port staff may also propose revising the limits in the current delegation and/or addressing other policy concerns such as conditions on the rights of such tenants to seek new leases with Port in the future. All mutual termination agreements are subject to approval by the Executive Director and approval as to form by the City Attorney.

Tenants that do not pursue a mutual termination agreement and also do not opt in to the Program, will be required to pay all outstanding rent deferred during the period of March 1 – July 31 to the Port by July 31, 2020 and any balances not paid will be subject to late fees and interest calculated from August 1, 2020.

#### **4. Reporting:**

Port staff will monitor and analyze rent collections and tenant operational conditions during this time and will track and report on the amounts deferred under the Opt-In Policy and the parties that received relief, including review and analysis of the mid-October reports from tenants. This data will enable Port staff to focus on a sector-by-sector (base rent and historic percentage rent) analysis which will help the Port formulate further strategies for tenant relief and for the Port to stabilize its own revenue portfolio. This information will be provided to the Port Commission as soon as possible, but no later than the next Port Commission meeting.

#### **5. Eligibility:**

The Opt-In Policy is available for users of Port property under all leases, licenses and other agreements except for MOUs with City departments, lay berthing agreements, and berthing agreements for small vessels at South Beach Harbor. In any scenario where a Port tenant has subleased some or all of its space, including master tenants, such relief will only be available to the master tenant to the extent that the master tenant has offered equivalent relief to the subtenant(s).

**6. Other Sources of Relief:**

Staff is directed to work with the Risk Manager to document and seek recovery from any possible private or public insurance program or other assistance that is forthcoming in the ongoing response to this situation. Tenants have been and should continue to be encouraged to investigate any coverage available to them under any business interruption or similar policies or programs along with public assistance efforts.

Staff is directed to monitor and report on on-going and new City-wide and state-wide measures that affect Port and its tenants. This includes tracking the Commercial Eviction Moratorium; potential City legislation under which the Board of Supervisors would delegate to departments the ability to enter into lease amendments and termination agreements that would otherwise require the Board's approval under Charter Section 9.118; and State Senate Bill 939, an emergency measure, which proposes various commercial tenant relief and mandates certain actions for landlords.

As further actions become warranted, Port staff will communicate as much as possible with affected tenants and the Port Commission so that appropriate decisions can be made. As always, the goal is to take the steps that provide the best opportunity to regain the Port's economic footing at such time when the disease no longer necessitates impactful defensive measures.