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# SUMMARY OF KEY PROVISIONS OF UNITRANCHE TRANSACTIONS

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# Overview

- The “Unitranche” structure is viewed as a potentially more flexible intercreditor structure to the First Lien/Second Lien and Split Lien structures. The relationship among the Unitranche lenders is governed by the “Agreement Among Lenders” (“AAL”), which is highly negotiated but the terms of which may be less extensive than an ICA
- A Unitranche typically combines what might otherwise include a separate first and second lien credit facility into one single secured loan. The borrower will become a party to one credit agreement and security agreement with one set of covenants and terms.
- The Unitranche facility is secured by a single lien on a common pool of collateral.
- The relationship among the Unitranche lenders is addressed in the “AAL” (or in some transactions in the credit agreement). The AAL supplements the terms of the credit agreement solely with respect to the various lender parties. Historically the borrower (and sponsor) have not typically been a party to the AAL, although in more recent structures, the parties have negotiated for the borrower to be a party to the AAL.

# First Out and Last Out Obligations

The AAL addresses certain intercreditor rights and obligations among the tranche of debt that will be paid first under the waterfall (“First Out”) and the tranche of debt that will be paid last under the waterfall (“Last Out”), such as the application of interest payments, the application of ordinary course payments and proceeds of collateral, the ability to exercise remedies, voting rights, interest rate skims and fee splits, bankruptcy provisions, and buyout options.

- First Out Obligations generally include all principal, interest, fees, costs, charges and other obligations in respect of Revolving Loans, Letters of Credit, Swing Line Loans, Secured Hedge Obligations and Secured Cash Management Obligations provided by one or more of First Out Holders and, in ABL deals, Protective Advances and, if applicable, all obligations in respect of the first out portion of the term loan (“First Out Term Loan”).
- The following is a standard formulation for Maximum First Out Obligations Generally: On any date of determination, the result of: (a) the sum of (i) \$[110% of commitment] [plus (ii) 110% of all increases in the Revolving Credit Commitments pursuant to Section [ ] of the Credit Agreement (as in effect on the Closing Date)] [110% of the First Out Term Loan], plus (iii) interest, fees and other charges paid to the Revolving Lenders solely “in kind” in the form of increases of the principal amount of the Revolving Loans (in lieu of, and not in duplication of, cash payments of such amounts), plus (iv) [all Protective Advances made by the Agent that constitute Revolving Loan Obligations in a maximum amount not to exceed \$\_\_\_\_\_], minus (b) the aggregate amount of all permanent reductions of the maximum Revolving Commitments (as calculated without giving effect to any termination of the Revolving Commitments as a result of any Event of Default) [and the aggregate amount of all principal payments of First Out Term Loan actually made in cash], plus (c) the aggregate amount of Secured Hedge Obligations in a maximum amount not to exceed \$\_\_\_\_\_ plus the aggregate amount of any Secured Cash Management Obligations in a maximum amount not to exceed \$\_\_\_\_\_.
- Last Out Obligations include all obligations in respect of the last out portion of the term loan (the “Second Out Term Loan”), including all principal, interest, fees, costs, charges, expenses, indemnities and other amounts to the extent accruing on or in respect of the Last Out Obligations, whether or not allowed or allowable in connection with any insolvency proceeding.
- May or may not include a Maximum Last Out Loan Obligations amount.

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# Payment Allocations

The Unitranche borrower may pay a single, blended rate of interest (which may include different interest rates for the revolving loan and the term loan pieces). Those different rates, if applicable, would be reflected in the AAL in the payment allocation section, which may also include “skims” on certain fees, application of scheduled amortization and prepayments (if the First Out Obligations include a First Out Term Loan).

# Waterfall Triggers

Upon a “waterfall triggering event” (example below), the allocation among the tranches changes, and the First Out generally will have priority with respect to payments (depending on the agreed upon business deal), and collections from collateral, until its tranche is fully satisfied, after which the Last Out would begin to collect. A fairly standard construct for waterfall triggers is as follows:

- (a) payment default resulting from (x) a failure to pay the principal of or interest in respect of any of the First Out Obligations when due and owing (after giving effect to any applicable grace period), or (y) a failure to pay any other First Out Obligations in an amount in excess of \$100,000 when due and owing (after giving effect to any applicable grace period); (b) insolvency/bankruptcy; (c) Exercise of Remedies; (d) acceleration of the Obligations; (e) breach of the financial covenant(s); or (f) the failure to deliver financial statements or the compliance certificate as required per the Credit Agreement
- *Notes:*
  - Depending on the transaction, the breach of the financial covenant trigger may also include a “step-back” against the actual covenant, such that the Last Out Lenders have the ability to waive or modify the covenant within certain set parameters
  - Depending on the grace periods included in the Credit Agreement, there may be an additional time period permitted to provide the financial statements/compliance certificates.

# Voting Rights

Unlike many standard multi-lender (or syndicated) loan facility arrangements, where all obligations are pari passu as to all collateral, the payment waterfall in the AAL can create conflicts of interest between the First Out lenders and Last Out lenders. As a result, the AAL typically will vary the “required lenders” provisions in the credit agreement, and the voting rights provisions of the AAL are often the most highly negotiated provisions. The determination of how the voting rights play out is a function of the deal size, the structure (whether the First Out Obligations include only a first out revolver or also a first out piece of the term loan and the anticipated outstandings under the revolver), and who the last out lending partner is and its view on protection of its investment.

- Common AAL voting rights provisions include the following:
  - Class Voting: any vote or action to be taken by the “required lenders” must be approved by the requisite majority of both the First Out lenders and Last Out lenders.
  - Full Drag-Along Voting: where one group of lenders (often, the Last Out lenders) has significantly more leverage, the group with the higher leverage (“Controlling Lenders”) will be able to require the group with lower leverage (“Drag-Along Lenders”) to vote as instructed by the Controlling Lenders in certain situations, subject to certain limitations and sacred rights.

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## Voting Rights (Cont'd)

- Minority Class Lenders/Limited Drag: when, given the size of its facility, one group of lenders would ordinarily not have a voice under the usual “required lender” rules, the AAL can provide such group with “limited class voting” on certain specific covenants and credit agreement provision that are crucial to the minority class lenders, while leaving the required lender rules in place for other credit agreement provisions and covenants.
- Example of Limited Drag: Prior to a Waterfall/Voting Triggering Event, “Required Lenders” shall have the meaning set forth in the Credit Agreement; following a Waterfall/Voting Triggering Event, “Required Lenders” shall be deemed to include and require each of the Required First Out Lenders and Required Second Out Lenders.
  - No amendment, waiver or consent (“Modification”), nor any vote in favor of nor the taking of any action that is equivalent to the foregoing, with respect to the revolving credit facility or Letters of Credit shall require the vote of any Second Out Lender, and such Modifications can only be effectuated through a vote of the Revolving Lenders or Required Revolving Lenders, as applicable, collection, application and disbursements of payments; and distribution of financial reporting relating thereto.
  - Even prior to the occurrence of a Waterfall/Voting Triggering Event, certain enumerated additional Modifications shall in all events, require the vote/consent of the Required First Out Lenders, including Modifications to the representations, warranties and covenants relating to and administration of any First Out Obligations, any Modification that contemplates the subordination of the First Out Obligations or liens securing the Obligations, financial covenants and reporting requirements, KYC/Patriot Act and AML provisions and Modifications to certain negative covenants and the corresponding baskets and thresholds (indebtedness, liens, acquisitions and other investments, restricted payments, dispositions, modification of indebtedness, etc.) beyond an agreed upon percentage (10-20%) as well as modifications regarding timing of the measurement of financial covenants and the addition of new buckets.

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# Exercise of Remedies

In addition, the AAL typically will permit a majority vote of either the First Out lenders or Last Out lenders, acting alone, to require acceleration and/or enforcement of rights and remedies subject to the standstill provisions. For example, where the Last Out lenders have superior leverage, the First Out lender's ability to trigger acceleration or enforcement may be limited to significant defaults, (i.e. Waterfall Triggering Events). Alternatively, where the First Out lenders have superior leverage, the First Out lenders may require a longer standstill period for the Last Out lenders.

- First Out Standstills range from 5 business days to 30 days, with a shorter period for a payment default or in the event of exigent circumstances.
- Last Out Standstills range from 45 to 150 days.
- Note: there may be certain transactions where based on the exposure amounts and transactional leverage, the Last Out Lenders may seek to control the Exercise of Remedies and subject the First Out Lenders to the longer standstill (Last Out Standstill period may be from 0-20 days and First Out Standstill may be 45 days or longer).
  - In these types of situations, First Out lenders may require outside timeframes by which the Last Out Lenders must satisfactorily resolve the situation. For example, a provision that: From and after the date that is 150 days after the earlier of the date that the Last Out Lenders or First Out Lenders direct the collateral agent to exercise remedies, if First Out Obligations are then outstanding, the First Out Lenders may direct the collateral Agent to commence and pursue an Exercise of Remedies and in conjunction therewith, for the avoidance of doubt, direct the collateral Agent to accept any bids for the Collateral that had been, or may thereafter be, made for the purchase of such Collateral.



# Bankruptcy Provisions

- Required First Out Lenders may direct Agent to consent/object to use of cash collateral or DIP financing, and Last Out Lenders shall not object to any cash collateral use or DIP Financing consented to by the First Out Lenders, in each case, subject to satisfaction of DIP financing conditions. Last Out Lenders generally may not provide any DIP financing that would have priority with respect to, or be pari passu with, the First Out Obligations.
  - Note: there may be certain transactions where based on the exposure amounts and transactional leverage, the Last Out Lenders will insist that they have the first right to provide a DIP or permit the use of cash collateral.
- Required First Out Lenders may credit bid the amount of any First Out Obligations (excluding Excess First Out Obligations) on behalf of all First Out Holders (and Last Out Holders will not object to such credit bid) and (b) Required Last Out Lenders may credit bid the amount of any Last Out Obligations although First Out Lenders will generally require that all First Out Obligations are paid in full in cash in connection with the initial closing of such disposition.
- The typical construct is that the First Out Lenders have the right to control the bankruptcy sale process under Section 363 of the Bankruptcy Code.
  - Note: there may be certain transactions where based on the exposure amounts and transactional leverage, the Last Out Lenders will insist that they have the first right to control the 363 Sale process, again based on the notion that they have more to lose and every effort to maximize recovery.
- The “standard construct” is that the AAL will provide that adequate protection and Plan of Reorganization payments flow through the waterfall. Last Out Lenders may seek to have adequate protection payments (typically referenced as the ability to receive post-petition interest) permitted to be received during the pendency of the case.
  - Note: there may be certain transactions where bankruptcy provisions may not be included in the AAL. In these circumstances, it would be no different than a typical syndicated loan agreement where bankruptcy provisions are rarely included in the credit agreement.

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# Right of First Offer

Before any lender transfers or sells all or a portion of its rights and obligations in respect of the obligations, or sells a participation interest in the obligations to any third person (other than its affiliates or other Lenders in its tranche) (each such proposed transfer, sale or participation is a “Sale”), such lender shall offer the other tranche of lenders a right of first offer to purchase the interest subject to the Sale (a “ROFO Offer”). Such ROFO Offer will contain a reasonable description of the interest to be transferred and the terms of the proposed Sale (other than price). The offeree lenders must promptly accept or reject such ROFO Offer and if such lenders accept, must promptly (and in any event within 5 business days) close the purchase. If the offeree lenders reject the ROFO Offer, the offeror lender shall be free for a period of up to 90 days following such date to consummate such Sale to any such third person for net cash consideration no less than the net cash consideration set forth in the ROFO Offer.

# Buy-Out Rights

Within TBD days following the occurrence of a Last Out Triggering Event (defined below), the Last Out Holders may acquire all First Out Obligations (limited to the Maximum First Out Obligations Amount) at par.

- Last Out Triggering Events often include the following: (a) termination or suspension of the revolver for a period of five (5) Business days notwithstanding that there is availability thereunder, (b) insolvency/bankruptcy, (c) payment default of Last Out Obligations on account of principal, interest, or other obligations in excess of \$100,000, (d) the Exercise of Remedies (or request for Exercise of Remedies) by the Required First Out Lenders, (e) any First Out Holder does not consent to a Modification of any loan document that has been consented to by Required Last Out Lenders or (f) any request by the Required First Out Lenders to consent or object to a disposition of collateral under Section 363 of the Bankruptcy Code.