



## WHAT IS IT?

# Agreement Among Lenders: Triggering Events

## Summary

Direct lending transactions are often effected through a unitranche credit facility that include “first out” and “last out” classes of loans (aka FOLO structure). The relative rights of each such class are often governed by an Agreement Among Lenders (or AAL). A highly negotiated concept in any AAL involves “Triggering Events” which grant the “first out” lenders increased rights (whether economic, voting, or otherwise) when a Borrower’s performance begins to show trouble. ***Failure to carefully negotiate “Triggering Events” can cripple a Last Out Lender’s ability to provide solutions or shape the path forward where a Borrower is showing signs of distress.***

## What are Typical Triggering Events?

Triggering Events vary from deal to deal, but commonly include the below:

1. Non-payment of principal, interest or fees (subject to a de minimis carve-out);
2. An Exercise of Remedies has occurred; and
3. An Insolvency Proceeding has occurred.

First Out Lenders sometimes also negotiate the inclusion of a “Control Trigger”, which is typically a leverage-based financial test and often tied to the financial covenant in the Credit Agreement.

# Agreement Among Lenders: Triggering Events (cont'd)

## What Can Happen if a Triggering Event Occurs?

- 1. Voting.** Prior to a Triggering Event, voting rights of the lenders are governed by the voting provisions in the Credit Agreement, as modified in certain cases by additional specific consent rights that “first out” lenders may negotiate at the outset of a Transaction (e.g. loosening of a financial covenant beyond an agreed cushion, increasing interest beyond an agreed rate, adding amortization or increasing mandatory prepayments). ***However, following a Triggering Event, First Out Lenders (or at least a majority thereof) will typically be required for any vote.***
- 2. Exercise of Remedies.** Prior to a Triggering Event, a majority of all lenders (which often doesn't require inclusion of any First Out Lenders), will typically have the ability to direct the exercise remedies subject to a short notice period. ***Upon a Triggering Event, the First Out Lenders get to direct any Exercise of Remedies (subject to a limited standstill period to permit exercise of the Buy Out Right described below).***
- 3. Waterfall.** Prior to a Triggering Event, payments on account of the loans will commonly be applied pro rata as among “first out” and “last out” tranches per the Credit Agreement. ***However, following a Triggering Event, a superseding AAL waterfall kicks in requiring all payments to be applied toward repayment of the “first out” loans prior to the “last out” loans.***
- 4. Buy Out Right of Last Out Lenders.** Following a Triggering Event, the Last Out Lender can typically purchase all (but not less than all) of the “first out” loans, allowing the Last Out Lenders to reclaim control in any downside scenario. ***Even if Last Out Lenders don't intend to exercise a Buy Out Right, it is important for their leverage as it makes clear to the Borrower that to the extent the First Out Lender was being counted on to help or hold up a process, they can be taken out of the picture.***

### Practice Pointers for Last Out Lenders

- Set any “Control Trigger” wider than the applicable financial covenant level to ensure that even a slight miss doesn't give First Out Lenders control.
- Any rights exercisable by First Out Lenders upon a Triggering Event should require affirmative notice (vs. automatic).
- Following exercise of a Buy Out Right, First Out Lenders should have no future rights (other than contingent indemnification rights)
- Pre-Triggering Event, limit the universe of amendments that would require First Out Lender approval.
- Keep the First Out standstill following a Triggering Event short and/or permit Required Lenders to exercise remedies upon an Event of Default that triggers the AAL waterfall, so as to avoid being sidelined.
- Negotiate knowing that First Out Lenders typically won't deviate from precedent, regardless of Sponsor or industry, once an AAL is agreed upon in any deal.