Powering renewable energy projects via tax insurance

Global Transactional Risk Practice

The successful financing of any renewable energy development in the US is contingent on a project’s eligibility for investment tax credits (ITC) or production tax credits (PTC). Where the facts and circumstances of a project do not fit squarely and unambiguously within the scope of tax legislation and IRS guidance, renewable energy companies can use tax insurance to provide the protection that capital providers require.

Marsh specialists understand the challenges that renewable energy companies face during the development lifecycle. We can help to guide you through those challenges and craft a holistic tax insurance program that provides protection for lost tax credits in both filed tax returns and anticipated future filings and is tailored to meet your unique needs.

BENEFITS OF TAX INSURANCE

Tax insurance can provide effective protection against the loss of ITC or PTCs due to a successful challenge by a taxing authority.

Tax insurance can be instrumental in facilitating financing of a project, providing:

- **Certainty:** Assurance of tax credit eligibility.
- **Credit Enhancement:** A diversified pool of highly rated insurers supplement the developer or sponsor's tax indemnity.

Tax insurance is relevant when there is a change in the capital story of a development:

- **Pre-COD:** when recycling developer capital, selling a development, introducing a joint venture partner, and/or taking a strategic decision.
- **At COD:** as a condition to funding tax equity and/or back-leverage or to de-risk the balance sheet of the developer/ sponsor providing the tax indemnity.

COMMON AREAS OF COVERAGE

Bespoke tax insurance policies can also be crafted to address one or more identified tax positions, including:

Begun construction: Confirms that onsite or offsite physical works are of a significant nature.

Continuity and delay: Provides assurance that the facts and circumstances satisfy the continuous efforts requirement for tax credit eligibility notwithstanding COD is beyond the continuity safe harbor period.

Continuity and mitigation: Underwrites strategies to switch to the continuous efforts standard for those developments that will otherwise fail a continuous program of construction, including 80/20 JV structures.

Structural: Provides a backstop that the allocation of tax and cash attributes between parties will be respected as anticipated in the financial model. Policies can cover business purpose.

Repowering: Underwrites both the (re)qualification for tax credits and the 80/20 appraisal. Policies can cover repowered projects originally under the Section 1603 cash grant.

Qualified basis: Confirms that the fair market value used to compute ITCs will be respected by the IRS. Certain recapture risk can also be included.

Battery storage (BESS): Included in a qualified basis policy for battery storage integrated into a solar facility.

Hybrid raw: Addition of coverage for non-tax representations and warranties in the Equity Capital Contribution Agreement (ECCA) and Limited Liability Company Agreement (LLCA) tailored toward a full indemnity package.

Summary of Tax Insurance Coverage

	ITC	PTC
Tax Credit Qualification	•	•
• Begun Construction	•	•
• Deploy Safe Harbor Equipment	•	•
• COD Beyond Continuity Safe Harbor	•	•
• Excusable Disruptions	•	•
Qualified Basis (Recapture)	•	
Repowering (Eligibility and 80/20)	•	•
Battery Storage	•	
Structural Allocation/ Business Purpose	•	•

BUILDING THE RIGHT PROGRAM FOR YOUR ORGANIZATION

Marsh can help you secure cost-effective protection that is bespoke and tailored to your commercial objectives. Determining the appropriate policy limit starts with quantifying your liability for additional taxes:

- **Begun construction and continuity:** Depending on situation, either (i) the delta between the base case credits and the alternate begun construction date (for example, 100% PTC for 2016 versus 60% PTC for 2021); or (ii) 100% of the tax credits.
- **Qualified basis:** The ITCs attributable to the “developer margin” (the markup above cost).
- **Structural and repowering:** 100% of the tax credits due to the binary nature of the covered risk.

Once quantified, a tax insurance policy can cover the value of lost tax attributes (liability for additional taxes) along with penalties and interest levied by taxing authorities. Defense costs related to tax authority challenges (in excess of the retention) are also included, as is a gross-up where the receipt of payment under the policy is taxable. Securing tax coverage is generally an efficient process, with a typical three-week timeline from initial discussion to the binding of a policy.

WHY MARSH?

With experience helping renewable energy companies and backgrounds in taxation, corporate law, investment banking, and accounting policy, specialists from Marsh’s Global Transactional Risk Practice are well-positioned to help build bespoke tax insurance programs that can deliver certainty for developers and capital providers, allowing them to proceed with renewable energy projects without concerns as to tax attributes. Our specialists understand the critical risks that you may be facing during the development lifecycle. And we have relationships with all leading transactional risk insurers — a deep pool of 16 markets that can provide more than $1 billion in capacity per transaction — which can help you select the right coverage and build programs with low retentions and competitive pricing of between 2.5% and 3.5% of limits procured.

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