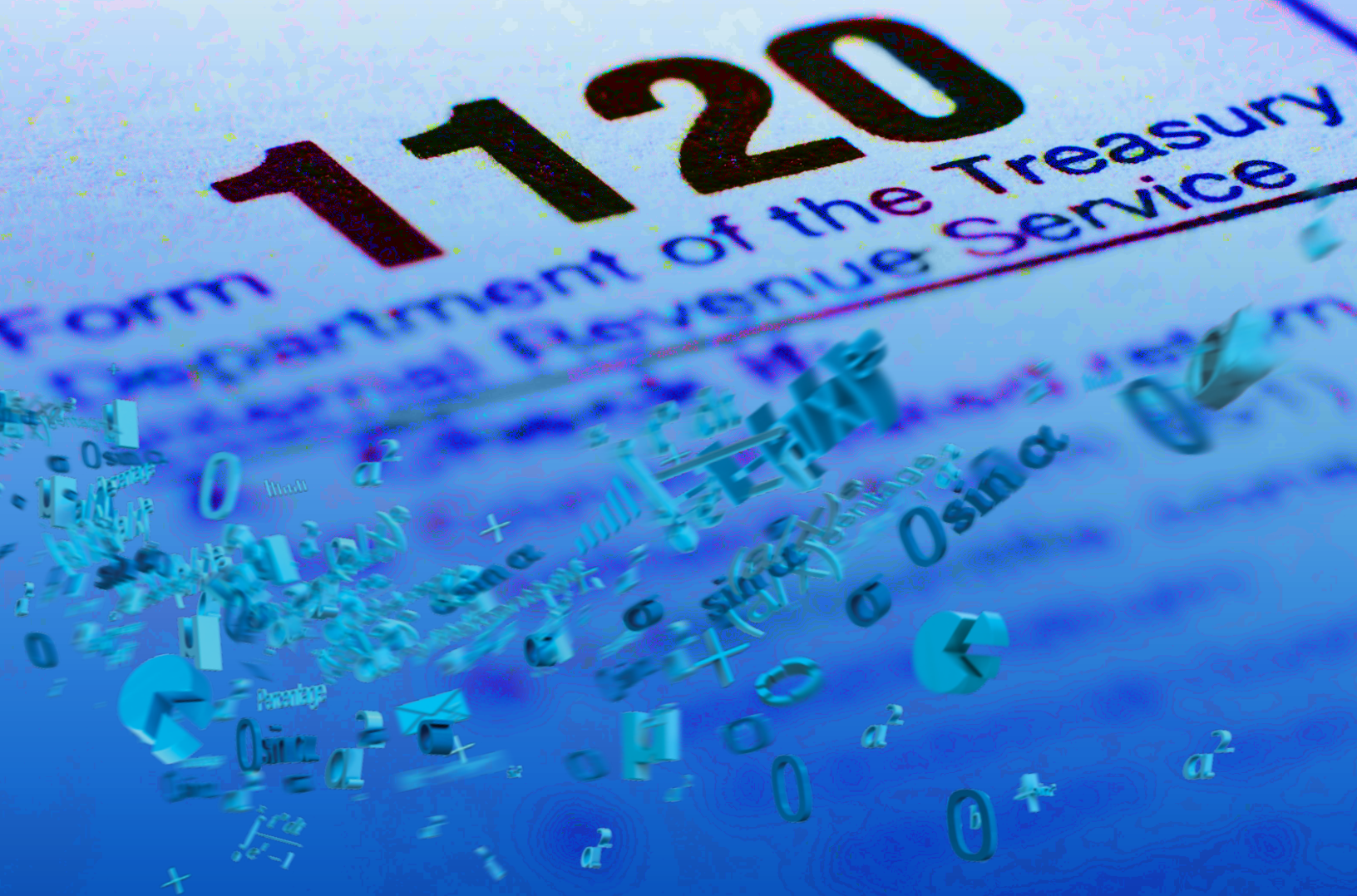


# Secure Economic Certainty through Tax Insurance



# Bring Certainty to Tax Exposures

- ▶ Tax planning in the current economic climate and the associated legal, financial, and business implications have grown rapidly in both size and complexity.
- ▶ **Tax insurance is a proven tool** to help add certainty and protect you in the event that an investment or tax position fails to qualify for its intended tax treatment.



# Introduction

As the leading global tax insurance broker, Aon's tax insurance team delivers an unparalleled depth of knowledge and experience to effectively guide clients in helping protect against an adverse tax ruling that can compromise the value of a transaction, a tax equity position, or corporate earnings. Our team has been instrumental in the growth of tax insurance, and we pride ourselves on being both pioneers in this industry and continual innovators. Our broad range of tax insurance solutions addresses many tax risks faced by deal teams, corporate tax professionals, and tax credit investors. When working with Aon, our clients are confident that their investments are secure and certainty for their tax positions is realized.

Aon maximizes value throughout the deal lifecycle and has a dedicated claims team that is strongly positioned to work closely with clients throughout the claims process.

## Aon's insurance solutions include:

- ▶ Representations and Warranties Insurance
- ▶ Tax Insurance (M&A, Tax Credit, Non-Transactional)
- ▶ Litigation Insurance
- ▶ Bespoke Contingent Risk Solutions

# Protect Against Unexpected Tax Liabilities

An unexpected adverse tax ruling can potentially result in the loss of anticipated tax benefits, a failed transaction, or eroded cash flow and earnings. To help protect against these risks, clients have been adopting tax insurance to help shield against unanticipated tax consequences. Aon's tax insurance team offers guidance and solutions tailored to each unique situation. Tax policies are an economical and extremely effective means to achieve certainty for material tax exposures in transactions, in tax planning, and where traditional opinions are rife with caveats and cannot be addressed with a private letter ruling.

The current economic environment can bring a great deal of uncertainty as taxpayers evaluate existing tax positions and embrace complex tax planning to increase liquidity or protect deal value. However, the unprecedented speed with which new legislation has been proposed, a trend that is expected to continue in the coming months and years, has left both tax practitioners and taxpayers scrambling.

## With tax insurance, organizations can:



Address the small probability of significant loss



Mitigate counterparty credit risk in tax indemnity agreements



Achieve certainty absent a private letter ruling from the IRS



Efficiently allocate the economic risk of a tax loss



Extend or add to the survival of the seller's escrow and indemnity for a buyer's benefit



Avoid or reverse the financial statement impact of FIN 48 reserves



Replace or reduce escrow required by a seller





## Insurable tax risks include:

### M&A

- S Corp Qualification/338(h)(10) Elections
  - Deferred Compensation/409A
  - NOL Carryforwards and Carrybacks
  - REIT Qualification
  - Transfer Taxes/SALT
  - Cross-Border Investments/Withholding Taxes
  - Transaction Structures and Step Plans
- 

### Tax Credits and Incentives

- Renewable Energy Tax Credits
  - Affordable Housing (LIHTC/NMTCs) and Historic Rehabs
  - Carbon Capture and Sequestration
  - Opportunity Zones
  - Transaction Structure
  - Qualified Basis
  - Start of Construction Safe Harbors
  - Recapture
- 

### Non-Transactional

- Tax-Free Spin-Offs
- Tax-Free or Taxable Reorganizations & Restructurings
- Capital vs. Ordinary Income
- Debt vs. Equity Treatment
- Transfer Pricing
- Estate Settlements

Note that reportable or listed transactions are not insurable.

# Strengthen Business Tax Risk Management

## Tax Insurance Outside of Transactions

Businesses can benefit from the strategic use of tax insurance to manage their contingent tax exposures even when there is no transaction involved. The insurance market has matured, and with it our insurers' willingness to entertain tax risks without a transaction – allowing tax insurance to be used as simply a corporate risk management tool in certain instances.

Tax insurance can be viewed as an alternative to a private letter ruling, helping protect a company from exposure from future challenges from the IRS or another foreign, state, or local tax authority. While private letter rulings are often unavailable or prohibitively time consuming, tax insurance can provide an efficient and cost-effective option. A process that can take a year or more is streamlined into approximately two or three weeks of underwriting, while still providing economic certainty as to a company's tax positions and mitigating balance sheet risk.

## Mitigate Financial Statement Impact

With its expanded use, the accounting treatment for tax insurance also has become clearer. Aon has been informed by a Big Four firm that tax insurance can be a means to mitigate the financial statement impact of a preexisting or new federal, foreign, or state and local FIN 48 (ASC 740-10) reserve.

In this regard, by incorporating tax insurance into a company's strategy, what might have had a negative P&L and balance sheet impact can be viewed as P&L and balance sheet positive.



### Alternative to Private Letter Rulings

Tax insurance can be viewed as an alternative to a private letter ruling, providing upfront certainty with respect to the economic outcome of tax planning.



## Tax Insurance in Action

### Tax-free Spin-off

A public company client – a leading foreign multinational in the manufacturing industry – spun off a U.S. business unit. Less than a year later, the client sold that unit to a private equity firm. Taxpayers no longer receive comprehensive “comfort” rulings from the IRS on whether a spin-off transaction qualifies for tax-free treatment under Section 355 of the Tax Code. For example, the IRS will not rule on certain key technical aspects such as the “business purpose,” “device,” and Section 355(e) “plan” requirements. Instead, the IRS will issue rulings only on one or more “significant issues” presented in a transaction – not on the entire transaction. The potential tax liability was approximately \$270 million if the tax-free nature of the spin-off was successfully challenged by the IRS. Aon structured and secured an insurance program covering potential U.S. federal and state income taxes, interest, penalties, and defense costs following a successful challenge by the IRS, and a gross-up for any income tax due on the insurance proceeds.

### Cross-Border Reorganization / FIRPTA

A European-based multinational was seeking to reorganize its global corporate structure. As part of the reorganization, the European parent entity would sell a U.S. subsidiary to another group member. Under the U.S. Foreign Investment in Real Property Tax Act (FIRPTA), a non-U.S. corporation’s gain from the sale of a U.S. real property holding corporation (USRPHC) is treated as effectively connected with the conduct of a U.S. trade or business. With a \$240 million potential tax exposure, our client was unwilling to undertake the reorganization without some upfront certainty that IRS would not be able to successfully assert post-transaction that the sold entity was a U.S. real property holding corporation (USRPHC), thus triggering FIRPTA tax. Since they were unable to obtain a Pre-Filing Agreement from the IRS, Aon structured and placed a tax insurance policy protecting our client against any successful IRS challenges on this issue, which allowed them to proceed with the reorganization.

### Other recent examples of tax insurance outside of M&A transactions:

- Multinational client in connection with a reorganization where a change in entity-type election for certain non-U.S. subsidiaries could result in a taxable “recapture” event if the IRS determined that a “dual consolidated loss” existed.
- Insured estate beneficiaries against an adverse gift tax ruling that certain claims made against an estate by the decedent’s children to enforce agreements made during the decedent’s lifetime were not testamentary distributions subject to gift tax.
- Treatment of lump-sum payment negotiated between previously related entities in settlement of a historic tax sharing agreement, where future challenges by a tax authority could devalue deferred tax assets that were being paid for in advance.
- The protection of a publicly traded Canadian corporation against the failure of a previous “Butterfly Transaction” to be respected by the Canadian Revenue Authority while the transaction was under audit.
- Protect extended family from unanticipated future tax assessments following family member’s death and highly contentious estate settlement dispute.





# Improve Outcomes for M&A and Other Transactions

A large tax exposure can present a challenging or even insurmountable obstacle in a deal negotiation, particularly if it will take many years to resolve. Tax insurance can be used to provide certainty and allow a buyer and seller to move past a difficult negotiation over an uncertain issue and close a deal. As a strategic financial tool, tax insurance assists a seller looking to backstop its indemnity obligation for pre-close tax exposures, or allows a buyer to insure itself against a sensitive tax issue rather than seek a special indemnity that can hinder the deal.

In a transaction, tax insurance complements representations and warranties insurance, which includes protection against unknown breaches of the tax representations and the pre-closing tax indemnity. Where a material, known tax risk has been identified that results in an exclusion to representations and warranties coverage, tax insurance is an accepted means to transfer that risk away from the buyer and seller.



## Tax Insurance in Action

### Public Merger – Exit Tax

Our client, a Fortune 500 U.S. public company, merged with a large business unit of an FTSE 100 U.K. public company. For various business reasons, the parent entity of the combined company is based in the U.K. The client received a tax opinion from a Big Four accounting firm that the merger is not an abusive corporate inversion designed to avoid paying U.S. corporate tax rates. Due to the magnitude of the risk, the client desired tax insurance to protect against a successful IRS challenge.

To bring certainty to this deal, Aon was able to structure and secure a \$750 million tax insurance program with a seven-year claims period. The tax policy covered any challenge by the IRS or state that the client's transaction triggered the U.S. anti-inversion tax laws. The tax policy covered (a) potential U.S. federal and state income taxes, plus interest and penalties following a successful challenge by the IRS or state, (b) contest costs, and (c) a gross-up for the tax on proceeds received by the client under the tax policy with only a minimal retention applicable to contest costs.

### Sale of a Private Real Estate Investment Trust (REIT)

In recent years, a popular investment strategy has been to hold real estate through a single-purpose REIT. However, as the owners of such properties consider their exit, they come to realize that buyers are discounting the purchase price if they buy the REIT entity rather than the property itself. In addition, the seller typically is required to provide representations and warranties and a multi-year indemnity regarding REIT qualification under relevant tax rules, making REITs particularly unattractive to PE sellers looking to return capital to investors soon after the sale of a property. A hybrid tax and representations and warranties insurance product will assume the risk of REIT disqualification during the seller's period of ownership. Further, the seller will be allowed to conclude the transaction without the survival of its representations and warranties relating to the tax treatment of the REIT as well as the business. This coverage can be implemented on a single-transaction or programmatic basis. This use of tax insurance has continued to evolve. In a recent transaction involving the sale of a limited partner's interest, coverage was provided to the buyer even though it had no right to participate in the tax contest and unique go-forward coverage also was arranged by Aon.



## Excluded Tax Risk under a Representations and Warranties Policy – S Corporation Validity and Basis Step-Up

Aon's client, a private equity buyer, purchased a U.S. retail business that was family-owned and operated since the 1950s, comprising four entities qualifying as S corporations. Although the seller's Big Four tax advisors provided tax advice that the S corporations were valid, the buyer and its Big Four advisor felt it was not sufficiently conservative. The representations and warranties policy purchased by the buyer at closing excluded coverage for tax losses associated with the S corporation status, which included potential second-class-of-stock issues. Additionally, the parties were negotiating to file an election to treat the transaction as an asset sale under Section 336/338(h)(10), which would create substantial future tax benefits to the buyer that would be lost if the S corporation status and election were not respected.

Aon was able to help its client by structuring and securing a \$100 million tax insurance program, which protected the buyer against an adverse resolution of the S corporation issues. In the event of a successful IRS challenge to the S corporation status, the insurers would pay the additional federal and state income taxes, plus interest and penalties, as well as the net present value of lost future tax benefits.

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## Other recent insured exposures in M&A transactions:

- Net operating loss ("NOL") carryforwards will be available to offset any taxes due on a pre-closing restructuring and any other undisclosed pre-closing tax liabilities.
- Seller's determination of the "transition tax" triggered by the transaction under new legislation under the recent Tax Cuts and Jobs Act.
- Target holding highly appreciated energy property, with potential historical exposure if earlier valuations were challenged by the IRS.
- Tax characterization of payments made under an employee stock purchase program under Sections 280G and 409A.

# Safeguarding Value in Distressed Transactions

After many years of growth, the economic shocks of 2020 brought a renewed focus on distressed business transactions, such as financings that create enhanced liquidity, reorganizations focused on core businesses and shoring up balance sheets, and asset sales out of bankruptcy. In all cases, the treatment of tax issues and tax assets, and obtaining certainty surrounding the outcome, can have a central role in the strategy to maximize asset values. Tax insurance is a vehicle to obtain that certainty for the benefit of lenders, creditors, investors, and owners.

## Tax Insurance in Action

### Securing Bad Debt Deductions

Aon's client, a U.S. public company, entered into an intercompany agreement to make loans to a subsidiary in excess of \$600 million. Years later, the client and its subsidiaries filed for Chapter 11 bankruptcy. As part of the windup and with the advice of counsel, the client decided to file an amended return for the year of the bankruptcy claiming a bad debt deduction in connection with their intercompany loans. This tax planning allowed them to claim a refund for tax paid in prior years. Despite the client's auditors requiring a tax reserve for a portion of the credits, Aon placed a \$100 million insurance policy protecting the company and its creditors from any challenge to their positions that the intercompany agreements constituted debt at issuance and until the time it became worthless, and that a bad debt deduction would be respected for the year of the bankruptcy filing.

### Protecting the Value of NOLs

A publicly traded U.S. company loaned money to a third party that subsequently filed for Chapter 11 bankruptcy protection. As part of a court-approved exit plan, a lender, Aon's client, swapped most of its debt into a controlling equity share in the bankrupt company. In this transaction, the client inherited significant NOLs and other carryforward credits. To protect the client, Aon placed a policy protecting the inherited tax assets, ensuring that the NOLs and other credits would not be limited under Section 382 ownership change rules due to the loans, bankruptcy proceedings, and certain other recent transactions. As a result, the lender achieved certainty that it would receive value from the NOLs it received as part of the plan.



### Insurable tax risks in distressed transactions include:

- Interest deductions
- NOL carryforwards and carrybacks
- Cancellation of debt and debt restructuring
- Worthless stock deductions
- Reorganizations and recapitalizations
- Intercompany transactions
- Employee benefits issues



# Bringing Certainty to Tax Treatment of Benefit Plans

With the complexity surrounding compliance of employee benefits plans with the tax code and regulations, benefits plans can bring uncertainty to a company's tax compliance and planning or to a merger or acquisition, where it can create additional friction between a buyer and seller. Tax insurance is an effective tool that can provide certainty should a plan be out of compliance or in the event of unintended tax consequence.

Regularly used as a tool to obtain tax certainty for situations involving federal, state and local, and foreign transactions, tax insurance can be viewed as the insurance version of a private letter ruling. If an insured tax position is successfully challenged by the IRS or another tax authority, the tax obligation is transferred to the insurers, who will pay the tax, interest, penalties, contest costs, and a gross-up for tax on the insurance proceeds.

## Tax Insurance in Action

### Treatment of Employee Stock Plan under 280G

The employee stock purchase program maintained by a large private manufacturing company raised several tax issues to a client considering its sale. The client was concerned that the tax characterization of payments would not be respected by the tax authorities and amounts were subject to Section 280G. Aon secured a policy that was part of the indemnification package to the ultimate acquirer. The total limits placed by Aon for the tax exposure on the employee stock purchase plan were over \$1.5 billion, believed to date to be the largest aggregate limits placed for tax exposures on a single M&A transaction.

### 409A Disqualification Re: Value of Underlying Stock on Exercise Date

A leading IT advisory firm was purchased by a competitor. A few years prior, the target had granted stock options with an exercise price of \$2 per share. At the time of the grant, the target obtained an outside advisor valuation report, which valued the target at a smaller value per share. Under Section 409A, a stock option having an exercise price less than the FMV of the stock on the option grant date results in adverse tax consequences for the option recipient and a tax withholding responsibility for the company. The buyer purchased a \$10 million tax insurance policy to cover the risk that post-close, the IRS will successfully assert that Section 409A applied to the target's stock options – in other words, the \$2 exercise price of the options was actually less than the FMV of the target stock on the grant date.

### Other examples of insured tax risks involving benefits plans:

- Potential golden parachute excise tax obligation if the IRS did not respect the value of the non-solicitation agreement agreed to by the former CEO of a company emerging from Chapter 11.
- Application of Section 409A to the replacement of stock option grants as part of a reorganization.
- Treatment of lapse of restriction of a restricted stock plan due to merger as not a compensable event.
- Sale of assets from a large public company obligated to contribute to a multi-employer pension plan structured so as not to trigger withdrawal liability under ERISA Section 4204.

# Secure Tax Equity Investments

Tax credits are a staple of the federal and state government's toolbox to encourage a variety of social or environmental investments. For tax equity investors, a key incentive to invest in these projects is monetizing the associated tax credits, which in turn provides a source of funding for the development of the projects.

Tax equity investors can also help secure coverage to protect against retroactive change in law and nonperformance by state and local governments with respect to refundable tax credits.

Because tax equity investors are passive parties to the investment, they are subject to a number of tax risks, including

- **The investment structure not being respected**
- **The transaction not qualifying for the projected tax benefits/credits**
- **The loss of tax benefits through recapture**

Tax insurance helps manage these risks and was identified by the IRS in Rev. Proc. 2014-12 as a preferred vehicle over guarantees by transaction parties.

**Tax insurance can bring certainty to a variety of tax equity investments**



## Affordable Housing

The Internal Revenue Code and many states' tax codes provide a 10-year (less in some states) stream of low-income housing tax credits (LIHTC) for building affordable housing with the purpose of renting to qualified tenants. Failure to operate the project in compliance with the tax rules can result in the recapture of credits. Tax insurance can be used to help protect institutional investors investing in funds owning these projects. In addition, tax insurance has been used to protect against the failure of the IRS to respect the structure of credit transactions. Aon has placed long-term insurance programs to address the 15-year LIHTC recapture period. Insurance can also be used to help protect against disallowance or specified events of recapture of New Markets Tax Credits.

## Historic Rehabilitation Tax Credit Insurance

Today, the Internal Revenue Code provides for a five-year credit against tax for qualified expenditures of specified historic structures in the year a rehabilitated building that meets Department of Interior standards is placed in service. For these investments, insurance can help protect against the impact of a loss of the historic structure as well as loss or interruption of the credits due to the investor's failure to qualify or to future intervening events that take the project out of service, formerly referred to as "recapture events." Aon has been able to place longer policies to accommodate the extended statute of limitations applicable to the new five-year credit.





## Renewable Energy Tax Incentives – Wind, Solar, and Other Technologies

The federal government and several states provide an investment tax credit for a percentage of the cost of various types of renewable energy projects, most notably solar, and a production tax credit for wind and other technologies. The federal investment tax credit and the production tax credit are now sunseting. Tax insurance can help protect tax equity investors in the event that the investment structure and allocations are not respected; the investor does not qualify for the projected credits, including that the amount of the tax credit and safe harboring strategies are not respected; or tax credits are recaptured during the recapture periods.

The marketplace has developed since 2013, when Aon placed a tax insurance program on behalf of a major solar developer and tax equity investor. Today, Aon is in position to arrange policies that have industry-leading terms and conditions and economics that are better than these vintage programs. In addition, it has become common for transactions in which lenders are exposed to cash sweeps securing the tax indemnity of the developer or sponsor to use tax insurance to protect them from interruption in the debt service.

## Carbon Oxide Sequestration Credits

The Internal Revenue Code provides a tax credit for qualified carbon oxide sequestered by a taxpayer. The amount of the tax credit, calculated per metric ton of carbon oxide captured, and the length of time a taxpayer can take the credit, can vary depending on when the taxpayer places such project in service and whether the captured carbon oxide is disposed of, used to extract oil or natural gas, or utilized in other specified ways. Although tax equity is just beginning to consider this tax credit for investment, Aon's experience with tax credit insurance relating to other technologies and asset classes can be brought to bear to place insurance to help protect taxpayers against the failure to qualify for, or loss via recapture of, the Carbon Oxide Sequestration credits.



## ✓ Tax Insurance in Action

### Solar Investment Tax Credit (ITC) Fund

A technology company sought to invest in a fund sponsored by a solar energy company that would, in turn, invest in a portfolio of residential and commercial projects. Because the investment was outside its core business, the technology company required assurance that the projected tax benefits would be received and not lost due to a recapture event. Tax insurance was used to assure the investor that the investment vehicle would be respected as a pass-through entity, that the solar facilities would indeed qualify for the credit and the tax basis would be respected, and that there would not be a tax loss due to recapture. The tax insurance policy had a \$50 million limit equal to the amount of projected tax benefits and provides coverage for additional taxes, interest, and penalties for a disallowance or recapture that runs through the end of the recapture period.

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### Other examples of insured tax equity investments:

- Wind PTC protection for sponsor/developers and tax equity investors in new and repowered wind projects against a loss of future expected cash flows related to a 10-year stream of PTCs. Covered tax risks included begun construction, placed in service, and application of the 80/20 Test.
- Portfolio program protecting debt investors in securitizations of residential solar receivables against the interruption of the cash flow following a successful challenge to the qualified basis of the solar equipment in 20 funds.
- Program to protect tax equity investor in a historic rehabilitation that the structure of the investment vehicle will be respected and the tax equity investor is entitled to claim the historic tax credits in accordance with the negotiated percentage allocations.



## Client Testimonials

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"Aon team – while we're waiting for last Ts to be crossed on the merger agreement, I wanted to thank you for your excellent and tireless work and your leadership with the insurers. The [transaction] we are about to sign most definitely would not have happened without this highly bespoke insurance. Great job, greatly appreciated by both law firms and both clients."

– **M&A Partner at Major Law Firm**

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"We have been recommending the Aon Transaction Solutions team to our clients needing tax insurance for over 10 years. We have closed deals that simply would not have happened without tax insurance.

The creativity, professionalism, and technical abilities of Aon were critical to achieving the transfer of the tax risk to the insurers."

– **Tax Partner at Major NY Law Firm**

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"I wanted to briefly let you know how much we appreciate all of your work on our transaction. The tax policy ended up being a challenging but essential piece of the puzzle that I truly believe was the bridge over the value gap between the buyers and sellers.

Although tax is clearly not our strong suit, your guidance through the process made binding achievable and for that we are grateful.

Thanks and look forward to working with the Aon team on future transactions."

– **Vice President at Midstream Energy Company**

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## The Aon Advantage

# Delivering a Long-Standing, Proven Approach



Tax insurance is a solution with a long and successful history. It has been written by the insurance markets for Fortune 1000, private equity, and middle market companies since the early 1980s, when Lloyd's of London covered investors in lease transactions against loss of projected tax benefits.

Aon was among the first to participate in this specialty market and we have worked closely with our clients to manage a wide range of tax risks. A team comprised of tax attorneys and tax accounting professionals, Aon brings a depth of knowledge and passion needed to develop tailored solutions to your complex tax risks. We offer experienced guidance to help ensure that your investments are secured, and that value is enhanced.

Since 2013, Aon's U.S. tax practice has placed hundreds of policies representing **over \$20 billion of limits**. Programs over \$500 million are more frequent occurrences and, with the entrance of additional "A" rated or better insurers to the market, our ability to place programs over \$1.5 billion per risk has been enhanced. Additionally, since 2013, over 450 transaction liability claims were made, and with the assistance of our dedicated claims team over \$425 million was paid by insurers to Aon clients in amounts ranging from \$400,000 to over \$50 million.

Aon's Transaction Solutions team is the industry-leading tax insurance team in North America with a best-in-class dedicated tax team including five former tax lawyers, and an expanding tax team globally.

## To Learn More

Aon professionals can provide your organization with the experience, tools, and deep industry expertise required to maintain a competitive edge in today's markets. Contact the following representatives to learn more about specialized solutions from Aon's Transaction Solutions Practice.

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*With deep global tax insurance experience and in-country support in the Americas, EMEA, and APAC, Aon helps clients realize certainty in jurisdictions around the world. The members of the America's tax team are pleased to make introduction to our global colleagues.*

## About Aon

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance. [www.aon.com](http://www.aon.com)

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