

## Energy

# Tax Credit Insurance for Clean Energy Projects in the Era of OBBBA

The One Big Beautiful Bill Act (OBBBA) rolls back many incentives provided by the Inflation Reduction Act and is changing the energy-generating landscape. Transferability remains intact, and project development is not slowing down in the short term. Surging electricity demand and the ongoing shift to lower emissions are influencing new approaches to building and financing projects. Tax credit insurance continues to play an important role in supporting energy expansion within the legal and regulatory framework of OBBBA.

### **Bespoke coverage to de-risk transactions**

Tax insurance is a strategic tool utilized in a wide range of scenarios. Given the complexity and ambiguity around the evolving IRS rules for renewable energy tax credits, developer/owners, tax equity investors and tax credit buyers face insurable tax risks. Insurance protects against tax authority challenges related to investment tax credit (ITC) and production tax credit (PTC) eligibility.

Many consider the coverage “contingent capital” that facilitates investment by backstopping indemnities, enhancing the credit quality of the sponsor and shifting risk associated with potential loss of the credits to insurers. Policies are highly customizable to fit transactions, covering just a single, narrow tax position or a broad indemnity requiring an all-encompassing combination of solutions including, but not limited to, tax protection (e.g., hybrid representations and warranties, environmental/pollution, business interruption/delays, liquidated damages, technology performance, output warranty, revenue shortfalls, etc.).

### **Key impacts under OBBBA**

**The accelerated phase-out of solar and wind tax credits** has created a push to get projects started to meet the “beginning of construction” and “placed in service” deadlines. As the window closes, developer/owners are accelerating timelines and re-evaluating portfolios including repowering projects.

**Tax credits for other clean technologies** including BESS, geothermal, hydro and nuclear are largely left untouched, with a phased sunset in credit value beginning in 2033. We are seeing an uptick in submissions for 45Q, 45Z and BESS augmentation.

**There are evolving and complex compliance requirements** including Foreign Entities of Concern (FEOC) that necessitate that all new clean energy projects must meet strict ownership and sourcing requirements to be eligible.

**The Treasury and IRS continue to provide guidance** around who qualifies for tax credits and how to claim before final regulations are issued.

The OBBBA creates new tax issues and guidelines, but the same need for insurance to address uncertainty remains.

## Key risks — Three main areas of coverage

STRUCTURE	QUALIFICATION	RECAPTURE
<b>Of the investment/transaction</b> <ul style="list-style-type: none"><li>• The tax equity investor — whether the partnership, lease or credit purchaser — is respected</li><li>• The party intended to get the tax credits, including through transfer, receives the anticipated amount</li><li>• Hybrid and preferred equity arrangements</li></ul>	<b>Of the intended tax benefit</b> <ul style="list-style-type: none"><li>• Qualified basis/appraisal respected</li><li>• FMV of the project and depreciation</li><li>• Prevailing wage and apprenticeship (PWA) requirements</li><li>• Beginning-of-construction and placed-in-service dates</li><li>• Bonus adders allowed</li></ul>	<b>Loss of credits during the vesting period</b> <ul style="list-style-type: none"><li>• Clawback or disallowance of credits after the project is placed-in-service</li><li>• If the project is destroyed, sold inappropriately or foreclosed on</li><li>• If there is carbon leakage</li><li>• Falls on the party who claims the credits</li></ul>

### Insurance market and underwriting roadmap

- The market has grown to 20-plus underwriters and more than \$1 billion of capacity per transaction.
- There is higher underwriter scrutiny with breadth of coverage being prioritized and price only part of the equation.
- A policy generally covers the expected tax benefit along with any fines and penalties, interest, legal contest costs and gross-up if policy proceeds are taxable.
- Typical exclusions include inconsistent filing positions, material misstatements or misrepresentations, and changes in the law.
- The premium is paid one time, upfront, for a policy term that is typically seven years. Longer policy periods or back-to-back policies can be negotiated to match the tax exposure.
- Insurers can typically underwrite the risk using available materials, piggybacking off what investors use to get comfortable with the transaction.

#### Steps and timing:

Underwriters quickly become integrated into the deal team and work efficiently to offer policy terms generally within two to four weeks.

The process has two steps:

1. Insurers review the submission and provide an initial non-binding indication of terms.
2. Insurers complete formal underwriting — which requires a due diligence fee to engage outside counsel (typically \$50,000 to \$100,000) — and draft the policy.

#### A quality submission contains:

- Overview of the project and the parties involved
- Motivation of insurance, including sections of the Code
- Legal analysis/support
- Exposure calculations/financial model
- Timing goals
- Copies of transaction documents

### Why Gallagher?

Our team of attorneys, analysts, brokers, engineers, claim advocates and account managers is exclusively dedicated to and comes from the energy industry. We are an extension of your team via an outsourced risk management service model. 4,025-plus US energy clients rely on our thought leadership to provide strategic solutions to today's complex challenges as well as prepare you for those yet to come. The \$1.1 billion-plus of annual US energy premiums we place in the global markets means we have the leverage to obtain the most effective coverage for our clients.

### Connect with us

**Stefan Szulc**  
US Renewable Energy Leader  
Energy, Power & Utilities

T: (303) 889-2602

E: stefan\_szulc@ajg.com