

TRANSACTION LIABILITY PRACTICE

# Tax Liability Insurance

*Tax insurance for tax certainty*

---

2023



**LOCKTON**<sup>®</sup>



# What is Tax Insurance?

*Tax insurance provides coverage for a specific and known tax risk.*

## KEY BENEFITS

- Tax insurance offers a financial guarantee for a position where there is at least a “more likely than not” level of comfort.
- Tax insurance can be used to replace or backstop an indemnity in transaction agreements for a specific tax risk.
- Tax insurance may be available without a formal tax opinion.
- Tax insurance may be a means to mitigate the financial statement impact of a FIN 48 (ASC 740-10) reserve.

TAX INSURANCE PROVIDES CERTAINTY AND REMOVES THE NEGATIVE FINANCIAL IMPACT ASSOCIATED WITH A TAX LIABILITY.

# Tax Insurance > Typical indemnity

	Typical indemnity	Tax insurance
Tax	✓	✓
Interest/penalties	Sometimes	✓
Contest costs	Sometimes	✓
Gross-up		✓



COVERAGE IS MORE COMPREHENSIVE THAN A TYPICAL TAX INDEMNITY AND IS INTENDED TO MAKE THE INSURED WHOLE BY COVERING TAXES, INTEREST, PENALTIES, CONTEST COSTS AND GROSS-UP.

## *Insurable risks*

### QUALIFICATIONS & ELECTIONS

- S-Corp qualifications
- 338(h)(10) elections
- REIT status and related risks
- RIC status
- Publicly traded partnerships
- Tax treaty qualification

### TAX CREDITS

- Investment tax credits
- Productions tax credits
- Carbon capture and sequestration
- R&D credits
- Employee retention credits

### REORGANIZATION & DEFERRAL

- Tax-free reorganizations and restructurings
- 355 spin-offs
- Deferred compensation 409A
- Transaction structures
- Withholding taxes

### VALUATION & COMPUTATION

- Transfer pricing
- E&P calculations
- NOL carryforwards

### STATE & LOCAL

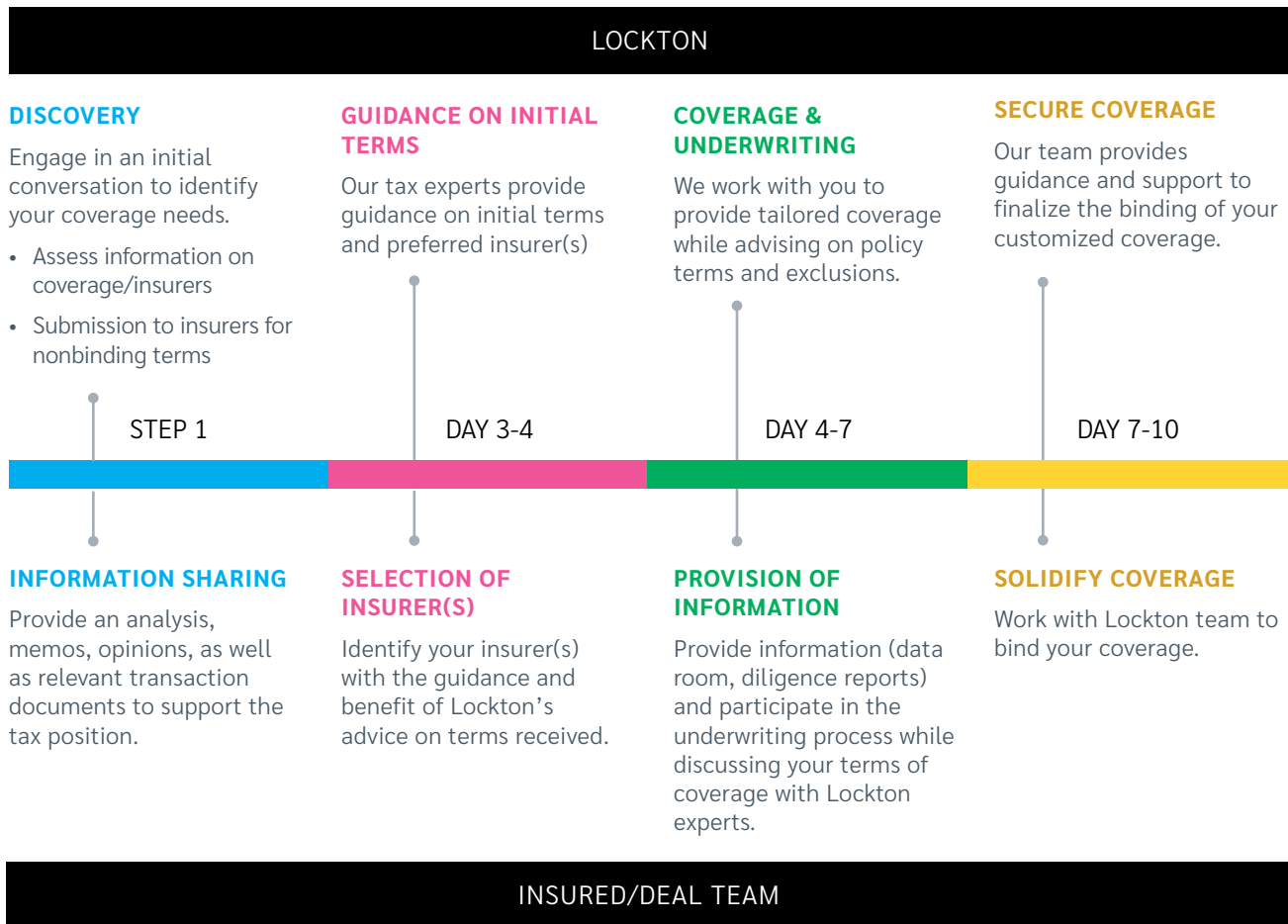
- Sales/use tax
- Transfer tax
- Domicile
- Property tax reassessment

### DEDUCTIONS

- Debt/equity treatment
- Ordinary/capital characterization
- Bad debt deductions
- Worthless stock deductions

# How Long Does The Process Take?

*Our comprehensive process is detailed, hands-on and driven by communication.*



NOTE: Process typically takes two weeks but can be completed faster if required by deal dynamics.

# Market Trends & Capacity

*Tax insurance has become more cost efficient, and capacity has significantly expanded to cover larger potential tax exposures.*



## MARKET TRENDS

- Cost and key terms
  - More competitive pricing (2% of limit)
    - 30%-50% decrease in premium costs over the past five years
  - Deductibles for contest costs only
    - Nil retentions are increasingly available for certain risks
- Coverage for positions with “more likely than not” advice
- No premium due until coverage is bound



## MARKET CAPACITY

- **\$1.5B+** of coverage limits available per transaction
- **17** primary U.S. markets
- **20+** markets available to participate in any program
- Current insurers include:
  - AIG
  - Ambridge
  - ASQ
  - Berkley
  - Berkshire Hathaway
  - BlueChip
  - Certa
  - CFC
  - Concord
  - Dual
  - Ethos
  - Euclid
  - Everest
  - Great American
  - Liberty
  - Mosaic
  - QBE
  - RiskPoint
  - Themis
  - Vale

*“I’m proud to be working [with President Biden] to ensure the IRS has the funding to ensure the wealthiest pay their fair share.”*

— REP. PETER DEFAZIO (D), OREGON

*“I look forward to working with [former IRS Commissioner Rettig] in examining the efficacy of possible additional resources intended to collect more revenue from those who owe it.”*

— SEN. MIKE CRAPO (R), TOP REPUBLICAN OF SENATE FINANCE COMMITTEE

*“\$1 trillion a year in federal taxes may be going unpaid.”*

— FORMER IRS COMMISSIONER CHARLES RETTIG

# Increased & Aggressive IRS Enforcement

## SHIFT IN TAX ADMINISTRATION

**\$80B**

Funding boost for the IRS under the Inflation Reduction Act (IRA) to strengthen tax enforcement

**\$204B**

Of additional tax revenue expected to be generated by such funding under the IRA

**6x**

Every incremental dollar invested in the IRS generates a \$6 return according to Treasury estimates

**66%**

Of tax leaders say tax risk and controversy management has risen in the corporate agenda.

Source: 2021 EY survey

# Lockton Tax Insurance Experts



**DANIEL BERGER**

---

Senior Vice President,  
Head of Tax Insurance  
845.596.8339  
[dberger@lockton.com](mailto:dberger@lockton.com)

Dan most recently led tax insurance underwriting for AIG in North America and has more than 12 years of tax experience. He previously worked as a Tax Director at Brookfield Asset Management and as an Associate at Moelis & Company, both in New York. Dan began his tax career as an attorney at Proskauer Rose, where he advised on various transactional tax matters.

Dan received his J.D. from the University of Pennsylvania Law School and his LL.M. in taxation from New York University School of Law.



**AUDREY BAILEY**

---

Vice President,  
Tax Insurance  
281.772.3268  
[abailey@lockton.com](mailto:abailey@lockton.com)

Prior to joining Lockton's tax insurance team, Audrey was a Senior Manager in EY's M&A tax practice. She worked on a variety of corporate and private-equity transactions for which she performed tax due diligence, advised on tax structure, drafted tax opinions and memoranda, and modelled tax cost calculations.

Audrey received her J.D. from the University of Houston Law Center and her LL.M. in taxation from Georgetown University Law Center.



**DOUG BRODY**

---

Senior Vice President,  
Tax Insurance  
516.316.1184  
[doug.brody@lockton.com](mailto:doug.brody@lockton.com)

Doug Brody is the Senior Vice President of Business Development, M&A Tax at Lockton. Previously, Brody was a Managing Director of Tax Business Development in Aon's Transaction Solutions practice. In his current role, Brody works with taxpayers and their advisors to design tax insurance solutions for corporate, pass-through, individual and estate tax matters. Brody is also focused on growing knowledge and utilization of tax insurance solutions through the creation of tax thought-leadership in the form of published articles and podcasts and participation in industry events.



**JOHN RAYIS**

---

Senior Strategic Advisor,  
Tax Insurance  
917.698.6289  
[john.rayis@lockton.com](mailto:john.rayis@lockton.com)

John was previously a tax partner at the global law firm of Skadden, Arps, Slate, Meagher & Flom LLP, where he served as tax partner for companies in a variety of complex corporate and partnership tax law matters, with a particular focus on real estate investment trusts (REITs), as well as external tax counsel for several large private equity funds.

John is a Senior Strategic Advisor for Lockton and will advise clients on tax insurance and other transaction-related insurance.



**LOCKTON<sup>®</sup>**

---

UNCOMMONLY INDEPENDENT