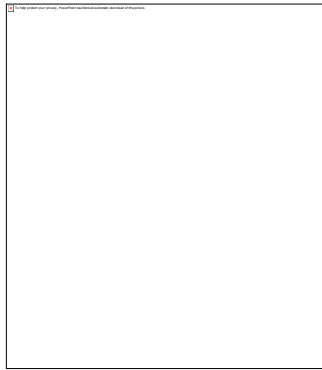


# State of the M&A Market and Transactional Risk Trends

September 28, 2021



# State of the M&A Market and Transactional Risk Trends Presenters

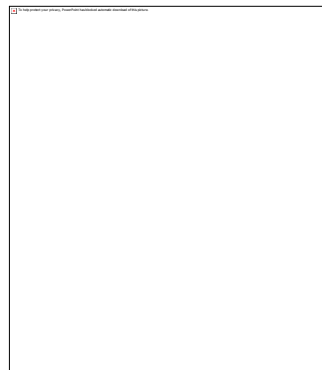


**Patrick J. Browne Jr.**

Senior Vice President,  
Transactional Risk Practice  
Group

Tax Insurance Specialist

Marsh

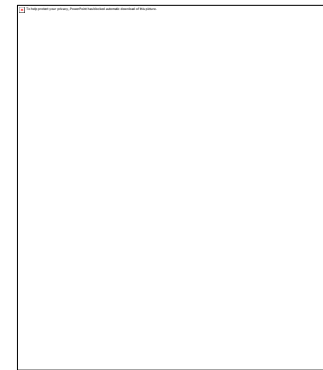


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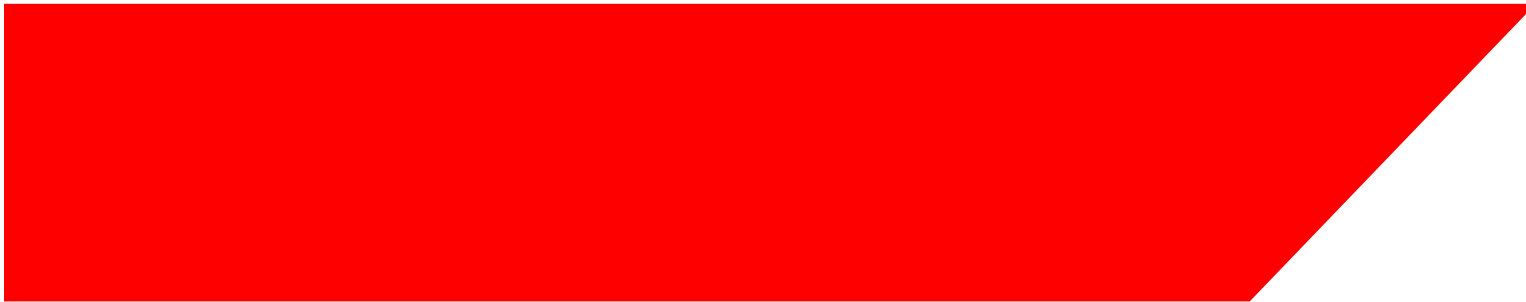


**Jason Northcutt**

Partner, M&A and Private  
Equity Practice

Akerman LLP

# Overview



# About Akerman

## Practice built with purpose

- Akerman is a client-driven enterprise, recognized by *Financial Times* as among the most forward-thinking law firms in the industry
- We collaborate with the world's most successful enterprises and entrepreneurs to navigate change, seize opportunities, and overcome barriers to innovation and growth
- We are known for our results in middle market M&A and complex disputes, and for helping clients achieve their most important business objectives in the financial services, real estate, and other dynamic sectors
- We are ranked among the top 100 law firms in the United States, with a reach that extends across the Americas and globally
- Assembling a handcrafted team for every client engagement, we leverage our more than 700 lawyers and business professionals across 24 offices

# About Marsh & McLennan Companies

Marsh & McLennan Companies delivers advice and solutions that help clients protect and enhance shareholder value. We provide the advantage of four market-leading brands — operating as one business partner — to address clients’ needs in the areas of risk, strategy, and human capital.



## RISK & INSURANCE



Risk and Insurance Advisory Services

- Global transaction and due diligence advisory solutions.
- Industry expertise and specialization.
- Portfolio insurance programs.
- Loss Cost and optimization of insurance programs.
- Global network, one point of contact.



Reinsurance Advisory Services

- Reinsurance placement.
- Facultative reinsurance solutions.
- Advanced analytics.
- M&A and corporate finance solutions.

## CONSULTING



Talent, Health, Retirement, Investments

- Global transaction and due diligence advice.
- Portfolio Benefit Alliance (PBA).
- Flexible private health insurance exchanges.
- Benefits harmonization.
- Pension adequacy.
- Compensation.



Management Consulting

- Strategy, operations, risk management, and organization transformation.
- Portfolio company optimization strategies.
- Actuarial consulting services.
- Industry consulting and analysis.
- Brand management and strategy.
- Regulatory advisory and litigation support.

## GLOBAL EXPERTISE

Approaching 500 offices globally with Private Equity and M&A Services colleagues located in strategic hubs around the world.



# Our Private Equity and M&A Solutions and Services



## 1. Fund-Level Risk

- Risk financing optimization at the fund level.
- General partner liability protection.
- Fiduciary liability and financial institutions bond.
- Cyber risk insurance.
- Global property and casualty insurance.
- Personal property and liability insurance.



## 2. Transaction Risk

- Pre-acquisition insurance and risk management due diligence.
- Insurance capital solutions to address deal risks: representations and warranties, environmental, tax liability, successor liability, contingent risk, and other deal related solutions.
- Post-acquisition insurance placement and transaction related insurance needs: key person, claims-made run-off.
- Exit solutions that address legacy liabilities in strategic sales, bankruptcies, and initial public offerings (IPO)



## 3. Portfolio-Level Risk

- Execution of pre-acquisition proposed savings using Marsh's unique purchasing platform.
- Optimize costs across a portfolio of investments with portfolio buying approaches.
- Institute loss reduction strategies to drive down costs for life of investment.
- Customized insurance and risk solutions for each portfolio company.
- Annual metrics based performance review.



## 4. Value-Added Services

- Project finance, structured credit, and political risk.
- Enterprise-level risk optimization assistance (ERM).
- Oliver Wyman actuarial services.
- Employee health and benefits portfolio purchasing (Mercer Portfolio Benefits Alliance®).

# State of the M&A Market

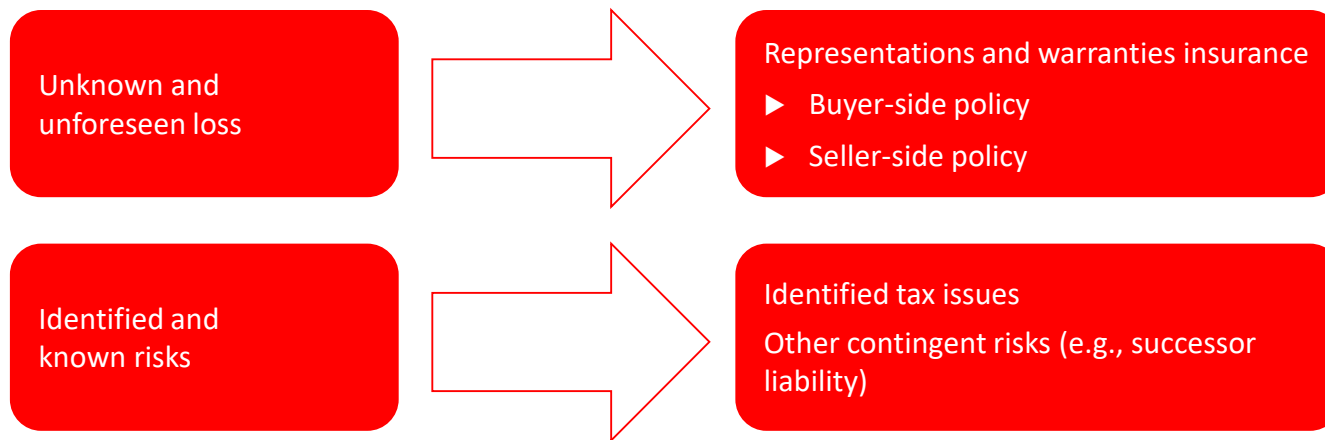
- Very high deal volume
  - “Tidal wave” of HSR filings according to FTC
- Total Value of Announced 2021 Deals = \$3.6 trillion
- Drivers of Activity
  - Private equity
  - SPACs
  - Readjusting business models to post-pandemic world
  - Tax planning

# Transactional Risk Insurance Overview

Created to facilitate M&A transactions by bridging contentious negotiation gaps:

- Representations and warranties insurance
- Tax indemnity insurance
- Contingent liability insurance

Transactional risk insurance is used to protect or mitigate two types of risks that typically arise from M&A transactions:



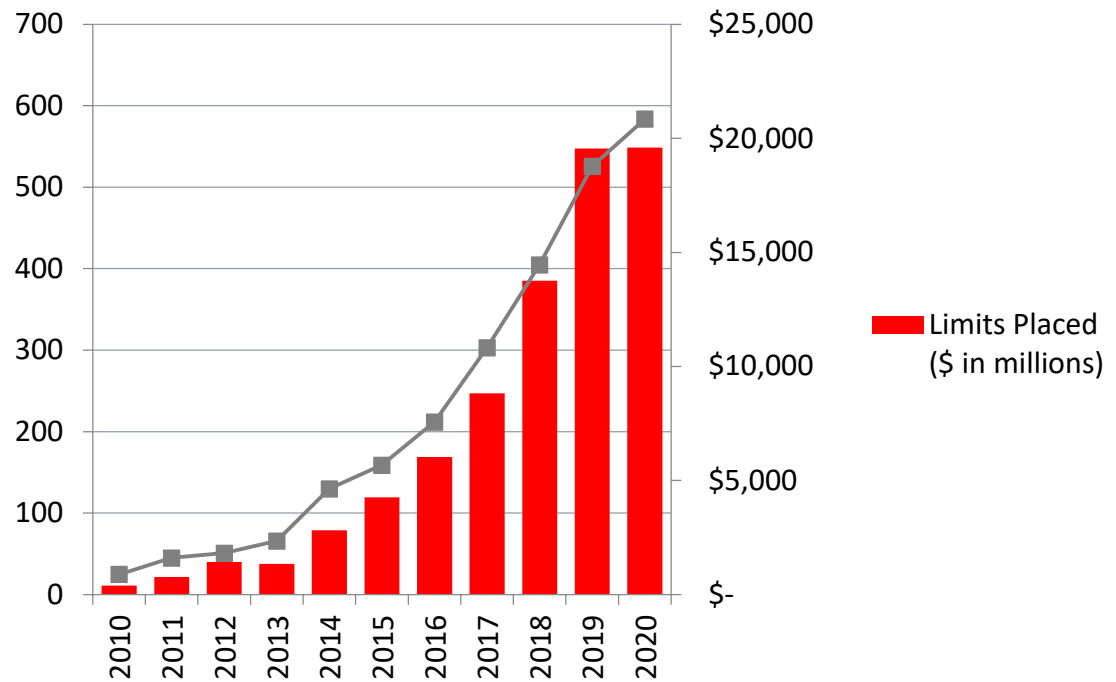


# Transactional Risk Insurance Overview

Significant growth in North America during past decade

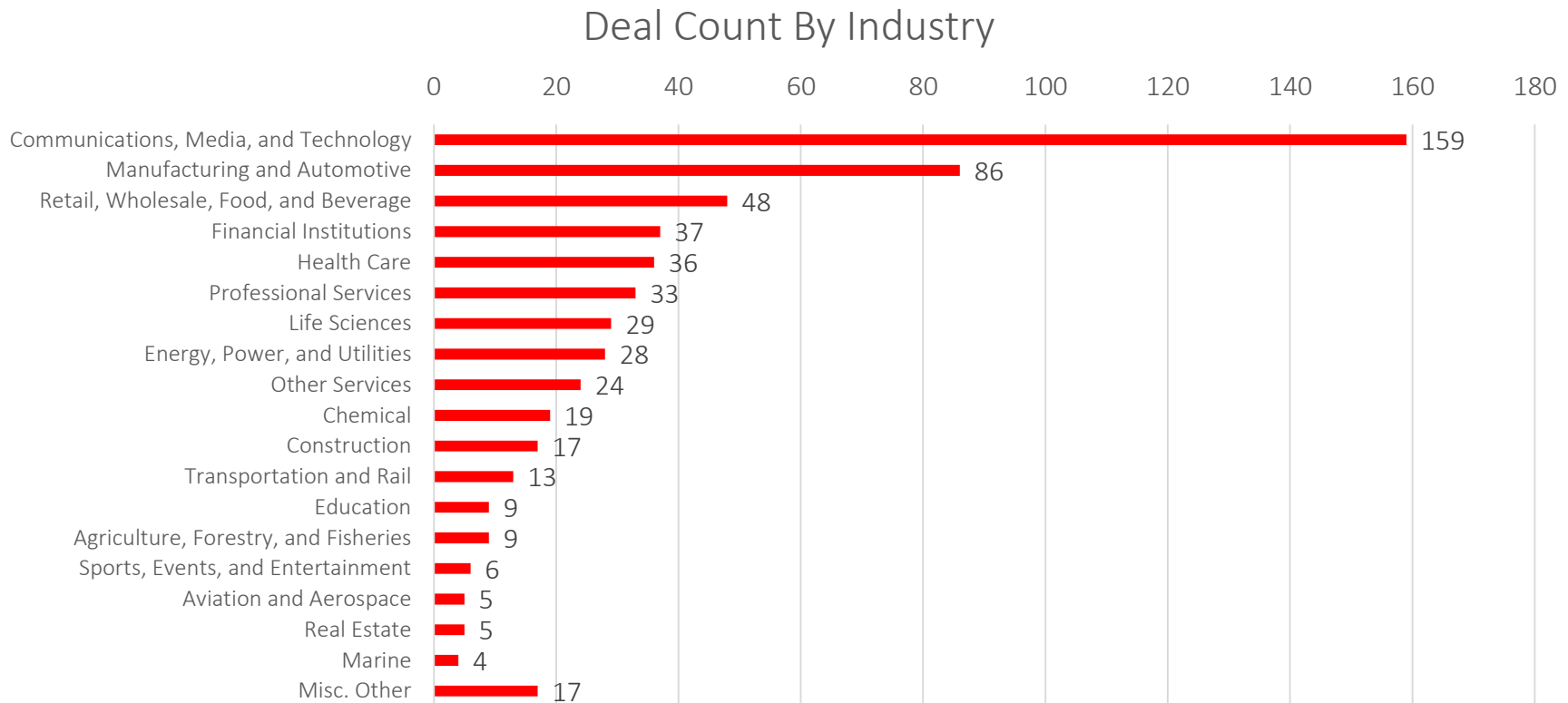
2020 – \$19.59 billion in limits / 584 closed deals  
 2019 – \$19.55 billion in limits / 526 closed deals  
 2018 – \$13.75 billion in limits / 405 closed deals  
 2017 – \$8.83 billion in limits / 303 closed deals  
 2016 – \$6.03 billion in limits / 212 closed deals  
 2015 – \$4.26 billion in limits / 159 closed deals  
 2014 – \$2.73 billion in limits / 130 closed deals  
 2013 – \$1.34 billion in limits / 66 closed deals  
 2012 – \$1.43 billion in limits / 51 closed deals  
 2011 – \$767 million in limits / 45 closed deals  
 2010 – \$387 million in limits / 25 closed deals

North America Market Statistics for Marsh only



# Transactional Risk – 2020 Deals by Industry Sector

Communications, Media, and Technology companies were the leading users of Transactional Risk insurance in 2020



# Reps & Warranties Insurance Overview

Provides coverage for financial losses resulting from breaches of representations and warranties made by target company or sellers contained in purchase agreement

- Protects an insured from unanticipated (unknown) losses that may arise subsequent to the closing
- Reps & warranties insurance generally covers all reps & warranties in the purchase agreement
- Either buyer or seller can be the insured under the policy

Reps & Warranties Insurance: Typical Uses:

Buyers	Sellers
<ul style="list-style-type: none"><li>▶ Increase maximum indemnity / extend survival period for breaches of reps &amp; warranties</li><li>▶ Provide recourse when no seller indemnity possible</li><li>▶ Distinguish bid in auction</li><li>▶ Protect key relationships</li><li>▶ Elimination of seller post-closing credit risk</li></ul>	<ul style="list-style-type: none"><li>▶ Reduce contingent liabilities enabling distribution of sale proceeds</li><li>▶ Include R&amp;W insurance as the sole remedy in draft agreements in auctions</li><li>▶ Attract best offers by maximizing indemnification</li><li>▶ Protect passive sellers</li></ul>

# Reps & Warranties Insurance: State of the Market

## Increased popularity and well-developed market

- 2,000+ deals completed annually in North America (split between corporate and PE buyers)
- Insurers / brokers staffed by former attorneys – work on deal timeframes
- International capabilities

## Target transactions and market trends

- Transactions between \$25M – \$5B+
- Limits available - \$1B+ per transaction

## Insurer commitment



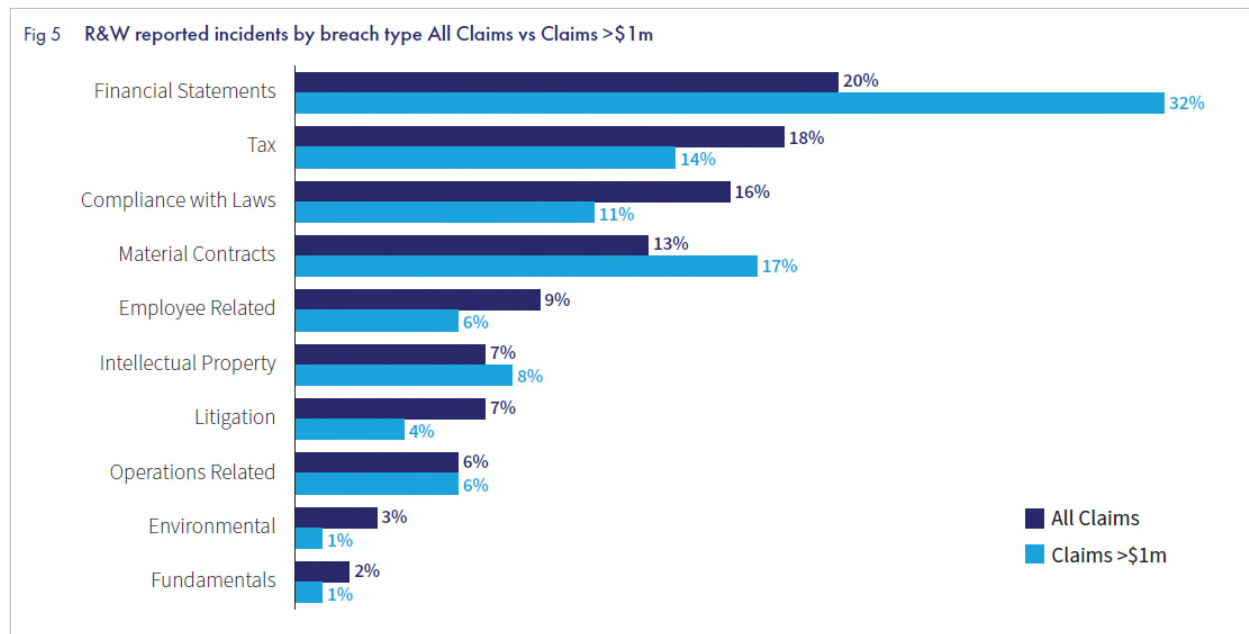
# Reps & Warranties Insurance: Heightened Risk Areas

Certain reps & warranties are more difficult to insure and may be addressed through increased due diligence, additional premium, or exclusions

- COVID-19
- Cyber security/data privacy
- Products Liability
- Environmental
- Wage and hour laws
- Healthcare (Medicare and Medicaid billing)

# Frequently Made Claims

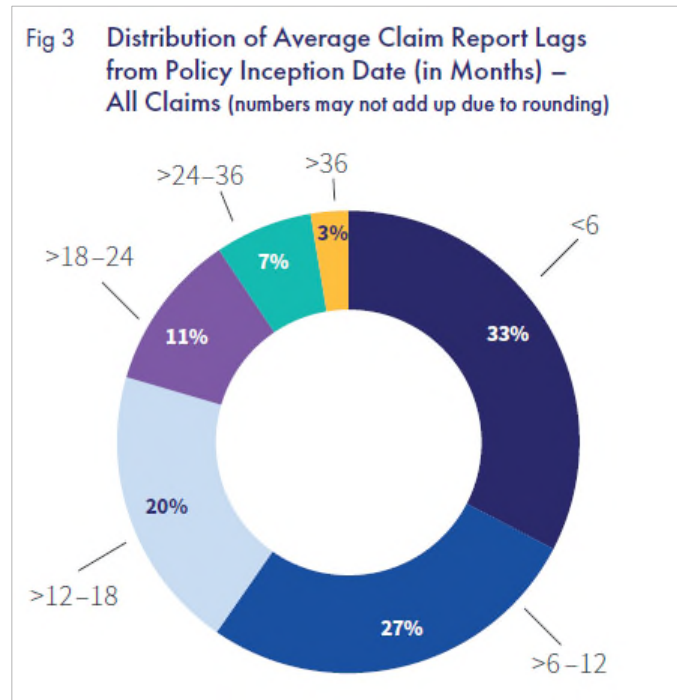
Representations relating to financial statements, compliance with laws, material contracts and taxes are the most frequently alleged to have been breached



Source: 2020 AIG Claims Study

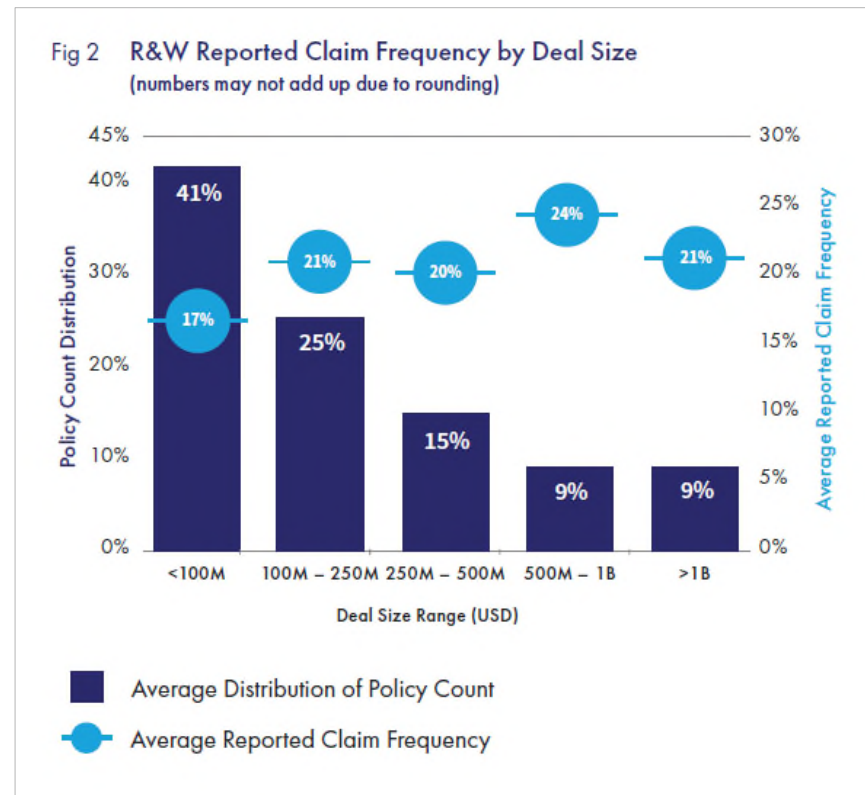
# Timing of Claims

More than half of all claim notices are received within the first 12 months of the policy's issuance



Source: 2020 AIG Claims Study

# Claims Frequency by Deal Size



Source: 2020 AIG Claims Study



# Tax Insurance: Overview

## Coverage

- Insures against the financial consequences of an intended tax treatment being disallowed by relevant tax authority in situations where:
  - There is no clear precedence or guidance
  - Transaction economics flowing to parties relies heavily on the tax structure such that investors and/or lenders thereto require comfort that the tax structure and benefits will be respected
  - Tax authority approval (e.g., PLR) is not available or cannot be received in required time frame
  - Potential downside is significant relative to transaction size and the financial model does not allow for “margin for error”

## Tax Liability Insurance

- Tax Opinion Insurance: Insure the conclusion of a tax opinion or filing position for a specific transaction or event
- Tax Return Insurance: Insure some or all positions on a tax return of a specific taxable period

## Tax Indemnity Insurance

- Typically occurs in M&A context
- Known tax risks and certain tax attributes (e.g., NOLs) are excluded from traditional R&W policy
- Backstops/replaces tax indemnity and/or escrow in SPA
- A separate tax insurance policy provides a holistic insurance solution

## Common Issues

- 355 spin-offs
- 338(h)(10)/336(e) elections/S-Corp issues
- Debt/equity characterization
- Cancellation of indebtedness
- Tax free reorganizations
- Section 163(j) business interest deductibility rules
- NOL protection
- Tax credits (including “green energy” credits and 45Q)
- Successor liability
- Liquidating trust status
- Capital gain v. ordinary income treatment
- REIT status
- Withholding taxes (e.g., under a tax treaty)
- Permanent Establishment

# Tax Insurance: Policy Considerations

Duration of Policy	Typically 7 years; non-cancellable
Cost and Coverage Limits	All-in costs are 3% to 5% of the policy limit (one-time payment); varies depending on facts and circumstances; typical policy minimum of \$3 - \$5 million;
Retention / Deductible	Varies based on particular risk (often limited to "Contest Costs Only")
Definition of Covered Tax Position	Bespoke language related to specific issue
Covered Items	(a) Additional Taxes; (b) Fines and Penalties; (c) Interest; (d) Contest Costs; and (e) Tax Gross-up
Jurisdictions	US and foreign tax risks
Standard Exclusions	(a) Inconsistent filing position; (b) material misrepresentation; (c) change of law; and (d) settlement by insured without consent
Definition of Knowledge	Buyer-side M&A: generally limited to actual conscious awareness (no constructive or imputed knowledge), with no duty to inquire and the carrier having the burden of proving knowledge
Contest by Tax Authority	Insured is responsible for any contest. Underwriter must be kept informed and have the ability to comment and provide input
Settlements	Any settlement must be with the consent of the underwriter
Underwriting	Varies based on risk covered: may include statement of facts; recent draft acquisition agreement (if any); CIM (if any); tax memo/opinion or statement of facts; tax loss exposure calculation; other relevant/supporting information
Signing vs. Closing	In the M&A context, underwriters will typically bind coverage at signing subject to a 10% to 20% premium deposit

# Tax Insurance: State of the Market

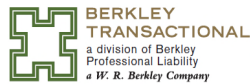
## Increased popularity and well-developed market

- Insurers / MGUs staffed by former tax attorneys – work on deal timeframes
- International capabilities

## Target transactions and market trends

- No minimum transaction size; generally only policy minimums (\$3 to \$ 5 million)
- Limits available - \$1B+ per transaction
- Non-M&A transactions (restructurings, debt-equity issues)
- Transactions under tax audit or the IRS CAP (compliance assurance process) program

## Insurers with tax underwriting



## MGUs with tax underwriting



# Contingent Liability Insurance

Contingent liability insurance covers “one-off” identified potential exposures that have not yet crystallized

- Recent examples
  - Successor liability
  - Specific indemnities
  - Fraudulent conveyance
  - Other legal, legislative or regulatory risks
- Three things necessary to insure a risk:
  - Quantifiable risk
  - Probability analysis
  - No moral hazard
- Cost, limits and deductibles vary based on the particular risk

# Contact Us

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