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REPRESENTATIONS AND WARRANTIES INSURANCE (RWI) FOR PROJECT-LEVEL M&A AND PROJECT FINANCE TRANSACTIONS

Overview & Benefits

RWI has emerged as a valuable tool in project- and portfolio-level transactions across a broad range of energy and infrastructure (E&I) investments, providing synthetic indemnification for losses arising from breaches of representations and warranties made by sponsors, developers, and joint venture partners. Although traditionally associated with buy-out M&A transactions, RWI is increasingly being applied to complex financing structures such as project finance, capital recycling, minority sell-down, and joint-venture transactions. It is tailored to address the nuances of the deal structure and the sector's unique risks.

Mitigate Credit Risk, Preserve Relationships, and Safeguard Project Capital & Cashflows

RWI in project-level transactions functions similarly to its use in M&A transactions, providing a safeguard against breaches of representations and warranties by project sponsors and developers. In project-level transactions, counterparty credit risk is a significant concern. RWI offers synthetic protection without being constrained by an indemnification limits set out in transaction agreements. This eliminates the need to rely on the financial strength of the counterparty - providing greater security to investors and lenders.

Another key advantage of RWI in transactions involving joint venture partners, other investors, and key stakeholders is the ability to bring indemnity claims against a reputable third-party insurer rather than against fellow partners and investors in the deal (even where traditional indemnification from a creditworthy counterparty may be available). Absent RWI, some investors are reluctant to bring claims against other stakeholders. Reluctance to bring claims generally stem from concerns about further imperiling an otherwise attractive project and/or jeopardizing a working relationship or reputation. In these cases, RWI helps preserve relationships, preventing disputes that could hinder ongoing operations and future deal-making. Having an experienced third-party insurer handle claims streamlines the process, offering a neutral and financially stable entity to address issues while maintaining the integrity and cooperation of the project investors, lenders, and operators.

Ease Negotiations and Enhance Protection

Sellers and joint venture partners are far more likely to give a broad suite of representations and warranties, including broadly drafted representations for higher-risk matters such as condition of assets, environmental matters, and tax matters, if there is nil/limited liability for breaches of representations and warranties under the transaction agreement.

Furthermore, RWI insurers can offer enhancements under the policy, providing an insured with positions that sellers are unlikely to agree to under the transaction agreement, including:

- Scraping materiality qualifiers (including MAEs).
- Establishing broader loss definitions, including cover for indirect and consequential losses, and silence with respect to multiplied losses.
- Extending survival periods to six or more years for fundamental and high-priority representations (e.g., title, capacity, real estate matters, environmental, and tax).
- Providing larger caps (limits of liability) than most sellers are willing to offer under transaction agreements.

Secure Meaningful, Dynamic Coverage Aligned to Development Milestones

Development-stage projects are inherently subject to substantial physical changes and operational exposures from notice to proceed (NTP) through placement in service (PIS)/commercial operation (COD). Therefore, it is paramount that RWI covering project-level transactions is proactively structured to expand coverage commensurate with the completion of the project and corresponding confirmatory due diligence. Examples include coverage for the condition of the asset, inclusion of safe-harbored equipment, and workstreams subject to bring-down diligence at or prior to completion (e.g., environmental, technical).

Policy Parameters & Process Considerations

Limit of Liability:

RWI typically provides a limit of liability based on the protection required by lenders and investors, with coverage amounts tailored to the project's value (usually around 10%, though it may be higher or lower depending upon the appetites of various stakeholders). In the case of tax credit financing transactions, RWI limits of liability align to some portion of the value of credits to be generated by the project (and may be as high as 100% of the value of the credits). In any event, the limit of liability available from RWI will meet or exceed any indemnity caps provided by a seller.

Competitive Premiums & Retentions:

Atlantic approaches the entire RWI market consisting of ~30 insurers to secure the best possible pricing, retention, and cover. In the current market environment, policy premiums for project-level transactions range from 2% to 2.5% of the limit of liability purchased (the "rate on line" or "ROL"), significantly less than historic averages of ~3 to 4% ROL. ROLs for large transactions with limits of liability greater than $100 million may be even lower, often less than 2% ROL. Similarly, retentions usually stand at 0.5% or less of the project's value, decreasing further after 12 months post-completion. For larger transactions, the retentions can be even lower.

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Policy Inception & Interim Period:

RWI policies typically incept at the time of signing the transaction agreement (often at or immediately prior to NTP). While RWI for buyout M&A deals generally has limitations on interim periods (usually capped at 12 months post inception), RWI for pre-NTP and construction-phase projects can be structured to align with longer interim periods (i.e., 24+ months) required for the longer construction periods required for larger projects.

Process:

Policy terms can be secured within 3–5 days, with underwriting often finalized 1–2 weeks after advanced due diligence materials are provided. Atlantic's E&I specialists take an advisory role to provide end-to-end service, often kicking off long before approaching underwriters for terms. Atlantic helps clients scope and review diligence materials and transaction documents to mitigate execution risk at the outset of engagement. We do this to ensure we select an insurer whose diligence expectations align with the client's due diligence process, as opposed to amending the due diligence process to meet the expectations of the insurers. This helps to negotiate process and coverage terms well in advance, avoiding last-minute surprises. This is particularly important for project-level transactions with development, which may involve multiple bring-downs to capture updates commensurate with milestone completion and corresponding diligence.

Conclusion

Incorporating RWI in project-level M&A and financing transactions has substantial benefits for all stakeholders in a project – protecting relationships, enhancing protections for investors and lenders, streamlining negotiations, and reducing the financial impact of unforeseen breaches of representations and warranties. By transferring risk to the insurer, RWI promotes confidence and security in long-term project investments while maximizing valuation and liquidity.

Additional Solutions to Consider for Project- and Portfolio-Level Transactions

In addition to RWI, E&I investors and lenders are increasingly looking to transactional insurance solutions to facilitate deal-making and mitigate risks. Other solutions include:

Tax liability insurance, credit solutions and non-payment insurance, insurance-backed reverse termination fees, surety & insurance-backed letters of credit, and technology performance insurance. For a more detailed summary of these solutions, please see: Transactional Insurance Solutions for Project Finance and Project M&A Transactions.

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ABOUT ATLANTIC

Atlantic is a specialist insurance broker focused on structuring insurance policies that transfer complex legal, tax, and credit risks to the insurance market. More often than not, these solutions are used to facilitate transactions that are impeded by a risk that is dragging on the economic terms (i.e., M&A, financing, distribution, liquidation, restructuring). Atlantic specializes in the following products: (i) representations and warranties insurance or RWI; (ii) tax liability insurance; (iii) contingent risk insurance; and (iv) non-payment insurance. Atlantic is one of the largest independent transactional insurance brokerage firms with ten offices across North America and a team of industry outsiders including former litigators, M&A attorneys, tax attorneys, structured finance professionals, and sector experts.

For more information, please go to: www.atlanticgrp.com

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