

# TRANSFERABLE TAX CREDIT DUE DILIGENCE CHECKLIST

*Q2 2024*

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## ABOUT THE AUTHORS



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David Burton is a partner at Norton Role Fulbright, focused on project finance and energy tax credits. He advises clients on a wide range of US tax matters, with an emphasis on project finance and energy transactions. He has extensive experience structuring tax-efficient transactions for wind and other renewables with particular expertise with respect to flip partnerships and sale-leasebacks. David also advises clients on the tax aspects of the formation and structuring of private equity funds with particular expertise regarding renewable energy investment funds. David is also the editor of the [Tax Equity News Blog](#).



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Bryen Alperin, Managing Director at Foss & Company, is a recognized leader in renewable energy investment. He oversees all facets of origination, investment, and portfolio management for renewable and sustainability funds. These funds have syndicated tax credits to dozens of recurring Fortune 500 investor clients, including the largest banks and insurance companies in the country. Bryen's robust experience includes closing and managing approximately 200 significant tax equity investments across 15 states and territories, including approximately 2 gigawatts of renewable energy projects. An influential speaker and published expert in journals like Bloomberg Tax Journal and Novogradac Journal of Tax Credits, Bryen holds a Bachelor's degree in Economics from the University of California, Davis, and an Executive Certification in Sustainable Capitalism & ESG from the University of California, Berkeley. He is based in Denver, and led Foss & Company's expansion into clean energy, now managing over \$1.7 billion in assets.



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## TRANSFERABLE TAX CREDIT DUE DILIGENCE CHECKLIST

When preparing for a transferable tax credit transaction, a due diligence checklist informs the conversation, identifies impediments to the transaction, and allows stakeholders to focus on strategy, structure, and deal execution. This checklist provides a list of standard deliverables required for transferable tax credit execution. Due diligence is inherently subjective and there is not a “one size fits all” approach to every transaction. The buyer’s diligence requirements should often correspond to the complexity of the transaction, the strength of the seller’s credit profile and the seller’s track record of successfully developing and operating similar projects.

Below are two examples of due diligence checklists that help demonstrate how the scope of diligence can vary depending on the complexity and type of tax credit transfer being contemplated:

1. The first is for the transfer of investment tax credit (ITCs) from a transferor (i.e., a tax equity partnership) in which the managing member is an affiliate of a closely-held developer without a credit rating, the tax equity investor member has minimal involvement and the project is collateral for a term loan.
2. The second is for the transfer of production tax credits (PTCs) from a creditworthy transferor with an investment grade credit rating.

## AN ITC TRANSFER (I.E., WITH A TAX EQUITY PARTNERSHIP AS THE SELLER, A PROJECT SECURING DEBT & THE SELLER DOES NOT HAVE AN INVESTMENT GRADE CREDIT RATING)

TOPIC	CATEGORY	EXAMPLES
Seller Entity Information	Organization, Governance, and Good Standing	<ul style="list-style-type: none"> <li>✓ Articles of organization; by-laws; operating agreements</li> <li>✓ Identify shareholders, directors, and officers (KYC forms)</li> <li>✓ Taxpayer Identification Number</li> <li>✓ Certificate of Good Standing</li> <li>✓ Standard Entity Searches: Tax (state and federal); UCC; Bankruptcy; Judgement (for the past 10 years); and Litigation</li> <li>✓ Resolution / written action</li> </ul>
	Subsidiaries, Affiliates, and Joint Ventures  Sometimes Applicable	<ul style="list-style-type: none"> <li>✓ Entity organization chart and descriptions for all entities involved in the transaction (e.g. guarantor if separate from seller)</li> <li>✓ Gather the information listed above for all related entities</li> <li>✓ Background checks on seller's leadership team, and reference checks from other financing parties (may not be necessary for sellers you already have a relationship with, or who have a well-established track record)</li> <li>✓ Legal opinion</li> </ul>
Recapture / Disallowance Mitigation	Key Seller / Transaction Information	<ul style="list-style-type: none"> <li>✓ Seller entity is eligible to sell the tax credits (e.g. not an affiliate of the buyer)</li> <li>✓ IRS pre-filing documentation showing the tax credits have not been previously transferred</li> <li>✓ IRS registration number</li> <li>✓ Sufficient diligence to ensure the project exists as represented and related supporting documentation (such permits, certifications, evidence of ownership that ties to a land deed, lease, or other documented right to use and access any real estate on which the project is constructed (see Prop. Reg. § 1.6418-4(b)(5)(vii)(C)))</li> <li>✓ Compliance documentation for Prevailing Wage &amp; Apprenticeship, OR documentation demonstrating that the project meets the requirements of an exception</li> <li>✓ Documentation that the project has satisfied the factual criteria to be placed in service</li> </ul>
	Sometimes Applicable	<ul style="list-style-type: none"> <li>✓ Documentation and records for any bonus tax credits (aka "adders") included in the purchase, if applicable</li> <li>✓ Documentation and records demonstrating the project has met the 80/20 requirement for repowering, if applicable</li> <li>✓ Report from a third-party independent engineer with production estimates (a site visit may be required for some transactions)</li> <li>✓ Tax opinion from third-party law firm</li> <li>✓ Advice from a tax adviser on state tax treatment of the purchase (tax credit purchases could be taxable in some states)</li> </ul>

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Seller Financial Information	Financial Statements	<ul style="list-style-type: none"> <li>✓ Most recent three years of audited financial statements (if not publicly available)</li> <li>✓ Most recent year-to-date unaudited financial statements, and comparable statement from previous year for same YTD period (may not be available for publicly traded sellers)</li> <li>✓ Schedule of contingent liabilities detailing liabilities related to guarantees and put options for other tax equity and tax credit purchase transactions (may not be available for publicly traded sellers)</li> <li>✓ Consider credit enhancing the seller's indemnity by requiring tax credit insurance (see below)</li> <li>✓ Ongoing financial statements and compliance reporting</li> </ul>
Project Finance Documents	Transfer Documentation	<ul style="list-style-type: none"> <li>✓ Tax Credit Transfer Agreement</li> <li>✓ Transfer Election Statement (when filed with transferor's tax return)</li> <li>✓ Guaranty</li> </ul>
	Key Project & Investment Documents	<ul style="list-style-type: none"> <li>✓ Interconnection Agreement</li> <li>✓ Power Purchase Agreement or other Offtake Agreement</li> <li>✓ O&amp;M Agreement</li> <li>✓ Asset Management Agreement</li> <li>✓ Financial Projections prepared by third-party CPA or project finance adviser</li> <li>✓ REC Sale Agreement (if applicable)</li> <li>✓ Subscription Management Agreement for "community solar" projects</li> </ul>
	Loan Documents	<ul style="list-style-type: none"> <li>✓ Loan Agreements &amp; Ancillary Loan Documents</li> </ul>
	Real Estate Diligence	<ul style="list-style-type: none"> <li>✓ Land Lease</li> <li>✓ Memorandum of Land Lease</li> <li>✓ Title Report</li> <li>✓ ALTA Survey</li> <li>✓ Phase I Environmental Site Assessment</li> <li>✓ PILOT Agreement</li> </ul>
	Sometimes Applicable	<ul style="list-style-type: none"> <li>✓ Land Lease Estoppel (for ITC)</li> <li>✓ Offtake Estoppel (for ITC)</li> <li>✓ Other Estoppels as applicable</li> </ul>
	Liability & Property Insurance	<ul style="list-style-type: none"> <li>✓ Sponsor/O&amp;M Liability Insurance</li> <li>✓ ProjectCo/Sponsor Permanent Property Insurance</li> </ul>
	Potential Add Ons	<ul style="list-style-type: none"> <li>✓ Financial Compilation Report prepared by a third-party CPA</li> <li>✓ Independent Insurance Consultant report</li> <li>✓ Advice from a tax adviser on state tax treatment of the purchase (tax credit purchases could be taxable in some states)</li> </ul>

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## PTC TRANSFER WITH AN INVESTMENT GRADE SELLER

TOPIC	CATEGORY	EXAMPLES
Seller Entity Information	TIN and Good Standing	✓ Taxpayer Identification Number
		✓ Certificate of Good Standing
Project / Tax Credit Information	Key Seller / Transaction Information	✓ Seller entity is eligible to sell the tax credits (e.g. not an affiliate of the buyer) and not eligible for elective pay
		✓ IRS pre-filing documentation showing the tax credits have not been previously transferred
	Sometimes Applicable	✓ IRS registration number
		✓ Sufficient diligence to ensure the energy property exists as represented and related supporting documentation (such as permits, certifications, evidence of ownership that ties to a land deed, lease, or other documented right to use and access any real estate on which the project is constructed (see Prop. Reg. § 1.6418-4(b)(5)(vii)(C)))
Potential Add Ons	✓ Compliance documentation for Prevailing Wage & Apprenticeship, and/or documentation demonstrating that the project meets the requirements of an exception	
	✓ Documentation and records for any bonus tax credits (aka “adders”) included in the purchase, if applicable	
Project Finance Documents	Transfer Documentation	✓ Documentation and records demonstrating the project has met the 80/20 requirement for repowering, if applicable
		✓ Advice from a tax adviser on state tax treatment of the purchase (tax credit purchases could be taxable in some states)
	Real Estate Diligence	✓ Tax Credit Transfer Agreement
		✓ Transfer Election Statement (when filed with transferor’s tax return)
	Sometimes Applicable	✓ Site Control Documentation (e.g., land lease)
		✓ Memorandum of Land Lease
		✓ Title Report
	✓ ALTA Survey	
	✓ Land Lease Estoppel (for multi-year PTC commitment); and	
	✓ Offtake Estoppel (for multi-year PTC commitment)	
	✓ Tax Credit Insurance (Notwithstanding a credit worthy counterparty, there may be interpretive tax issues where the parties seek greater certainty or the transferor may wish to seek financial protection indemnity. See tax credit insurance section below regarding how tax credit insurance can support the transaction.)	

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## ITC AND PTC TAX CREDIT INSURANCE

TOPIC	CATEGORY	EXAMPLES
Tax Credit Insurance	Policy Sizing and Terms	<ul style="list-style-type: none"> <li>✓ Policy is appropriately sized (ideally will cover the tax credit amount, penalties such as the 120% penalty for excessive transfer, interest, and a gross up for the taxable portion of the insurance payment)</li> <li>✓ Policy has appropriate noncancelable duration (typically, 7 years for ITC transactions, though longer periods may be appropriate for projects with longer construction periods, or if investor plans to carryforward tax credits and therefore extend the statute of limitations on audits)</li> <li>✓ Insurers involved are creditworthy, with an “A” rating or stronger</li> <li>✓ Policy conditions and exclusions, e.g. misrepresentations, change in law, and any subject matter limitations, and tax contest requirements are appropriate for the coverage provided and the tax credit buyers’ risk transfer expectations.</li> <li>✓ Satisfactory deductibles and self-insured retentions and contest costs</li> </ul>
	Coverages for Investment Tax Credits (ITCs)	<ul style="list-style-type: none"> <li>✓ Qualification – insurance covering that the project has met the requirements of the Internal Revenue Code and other guidance to qualify for the tax credits, including: <ul style="list-style-type: none"> <li>✓ Eligible basis</li> <li>✓ Adders (Energy Community, Domestic Content, LMI)</li> <li>✓ Prevailing Wage &amp; Apprenticeship qualification or exemption</li> <li>✓ Eligible energy equipment</li> <li>✓ Placed in service dates</li> </ul> </li> <li>✓ Structure – insurance that the transfer itself and any tax equity partnerships involved in the transfer will be respected by the IRS, including the seller’s ability to sell the tax credits</li> <li>✓ Recapture – insurance that the credits will not be clawed back for an improper transfer of the project, total physical loss, or a debt foreclosure</li> </ul>
	Coverages for Production Tax Credits (PTCs)	<ul style="list-style-type: none"> <li>✓ Qualification – insurance covering that the project has met the requirements of the Internal Revenue Code and other guidance to qualify for the tax credits, including: <ul style="list-style-type: none"> <li>✓ Adders (Energy Community, Domestic Content, Environmental Justice Adder)</li> <li>✓ Prevailing Wage &amp; Apprenticeship qualification or exemption</li> <li>✓ Eligible equipment</li> <li>✓ Placed in service dates</li> </ul> </li> <li>✓ Structure – insurance that the transfer itself and any tax equity partnerships involved in the transfer will be respected by the IRS, including the seller’s ability to sell the tax credits</li> <li>✓ Production – while not typically included within the tax credit insurance policy, a separate production shortfall policy can be used to mitigate ongoing production risk that could lead to under-delivery of PTCs.</li> </ul>

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**Tax Credit Specific  
Requirements**

**ITC Specific**

- ✓ An Interparty Agreement or Forbearance Agreement with any project lenders to prevent recapture due to foreclosure
- ✓ Cost Segregation Report or Cost Certification from third-party firm
- ✓ Appraisal from third-party firm if the eligible basis of the project has been “stepped up” through a sale

**PTC Specific**

- ✓ Supporting documentation for production levels

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