

Impact of the CRC Energy Efficiency Scheme on trust structures and assets

Are you ready for change?

The CRC Energy Efficiency Scheme (CRC) is the UK's new carbon emissions trading scheme that began operating in April 2010. It applies to a wide range of non-energy intensive private and public sector organisations and could have an impact on trust assets as well as corporate trustees and beneficiaries.

The CRC is a key element of the Government's strategy for controlling carbon dioxide (CO₂) emissions and dealing with climate change. It is a mandatory scheme, placing legal obligations on qualifying organisations to disclose information and, for larger energy users, to report on, and purchase allowances for, energy used and emissions made. Organisations that consume more than 6000MWh of electricity or more from half-hourly metered sources during qualification years must participate fully. The qualification year for the introductory phase of the CRC was the calendar year 2008 so qualification has already been determined.

From 1 April 2010, organisations that have met the full qualification criteria for the introductory phase will have to register with the scheme administrators (in England and Wales this is the Environment Agency) and monitor all of their energy use (electricity, gas and fuel) in anticipation of buying allowances in April 2011 to cover the CO₂ emissions from their estimated energy use from April 2011 to March 2012.

How does this affect trust structures and assets?

To maximise participation, qualification and obligation are determined on a collective group basis, rather than looking at individual companies. The CRC uses the Companies Act 2006 definitions of parent and subsidiary undertakings to determine a group, with the result that some corporate trustees may find that they are treated as a parent undertaking and bear responsibility for the energy use of all of their, potentially unrelated, asset holdings.

Corporate trustees in this position will need to report on the combined energy use of themselves and all of their corporate and asset holdings on an aggregated basis if the aggregated electricity use meets or exceeds the threshold criteria in a qualification period.

The fact that a corporate trustee is based offshore does not take it outside the scope of the CRC - if the highest parent organisation is based outside the UK, it must nominate a UK based group member to act as the primary member and facilitate participation in the scheme on behalf of the group. Any overseas or offshore subsidiaries are also included for CRC purposes, although only UK emissions are relevant for reporting and allowance purchase purposes.

Environment Agency (EA) Guidance

Although the CRC commenced some time ago, the EA have only recently (June 2010) published guidance on its interpretation of the application of the CRC to trust structures and assets held on trust. According to this guidance, a distinction has to be drawn between certain categories of trust assets. The EA assumes that where trustees are the legal owners of real property, they will generally be the undertaking responsible for the energy use of that property, which must then be collated with the energy use from all other properties that they own. Where the trustee only holds shares in a property owning company then responsibility basically flows through the company to the trust beneficiaries, who may therefore go on to form an extended CRC group. In these circumstances the trustee is not responsible for the relevant energy use.

Clearly, this guidance and interpretation has potentially highly significant implications for the way in which many trusts are structured.

Significant Group Undertakings (SGU)

A SGU is a subsidiary or related group of subsidiaries that meets the qualification criteria in its, or their, own right. The CRC concept of disaggregating SGUs continues to apply to trust structures and assets in the same way as to any other SGU containing group, therefore enabling a SGU to manage its own CRC participation separately from the trustee or beneficiary and the other companies or assets within the group which it would otherwise be aggregated with. Where a SGU is disaggregated, the remaining entities in the CRC participant group (including the corporate trustee or beneficiary) will no longer be liable for that SGU's compliance and will not be required to report on its emissions.

One important limitation, though, is that a SGU cannot separately register if the remainder of its group would, as a consequence of that separate registration, then fall beneath the full qualification criteria. So even if a corporate trustee or beneficiary could disaggregate one or more SGUs, they will still need to register their residual group for CRC purposes. However, there may be advantages in being able to manage SGUs separately from the residual group where this is possible.

What needs to be done and when?

Fully qualifying CRC participants must register with the online CRC registry during the registration period which ends on 30 September 2010. They must provide certain information on the organisation together with meter and electricity usage data and will be charged a registration fee and annual subsistence fees.

Importantly, where a CRC participant wants to disaggregate one or more SGUs at the beginning of a phase, it must normally register within the first 3 months of the registration period so that the SGU can then complete its own registration. For the registration phase which ends on 30 September 2010, registrations must be completed by 31 July 2010 if any SGUs are to be disaggregated.

Corporate trustees and beneficiaries should therefore consider and finalise their disaggregation strategy as soon as possible.

Action to be taken

- > Corporate trustees and beneficiaries should take advice now on their portfolios and determine whether or not they will be required to register under the CRC.
- > Corporate trustees and beneficiaries should consider their strategy for dealing with the CRC and, in particular, whether any SGUs should be separately registered.
- > The deadline for registration is 30 September 2010, but the deadline for registration to enable disaggregation of any SGUs is 31 July 2010.

How can Taylor Wessing help?

We advise on all legal aspects of the CRC regime, including in relation to compliance, identification of CRC participants and formulating and implementing a disaggregation strategy.

If you would like any further advice on this subject from us, please contact Noel Doran, in Taylor Wessing's Planning and Environment Group, or your usual Taylor Wessing contact.



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