

The Carbon Reduction Commitment energy efficiency scheme (CRC)

Have you complied with the September 2010 registration deadline?

September 2010

Any company with one or more settled half-hourly meter for their electricity supply should have decided whether they need to complete a registration application before the end of September 2010, to comply with the Carbon Reduction Commitment (CRC) Energy Efficiency Order 2010. For those organisations that had more than 6,000 MWh half hourly metered electricity usage in 2008, failure to register in time could result in heavy civil penalties under the CRC.

Importantly, all organisations with half hourly electricity meters (which are commonly used in commercial premises) will be affected by the CRC regardless of whether they meet the 6,000 MWh threshold of metered electricity usage in 2008 that is discussed below. Organisations with less than this electricity usage will have to make an online non-participant disclosure to the Environment Agency by the end of September 2010.

This article will assist those private sector companies who have not already completed a CRC registration, or decided if this is necessary. It sets out the key steps that must be carried out to ensure CRC compliance, highlights important CRC considerations and explains how we could help.

Key issues for Property Sector

Aside from being part of ongoing financial management for any company covered by the CRC, assessing potential CRC costs will be important when drafting service or property agreements, to decide whether they need to be covered by charging mechanisms.

Many landlords and tenants have already been discussing provision for CRC costs in leases. Difficult discussions are also commencing about how the CRC might drive more energy efficient practices by tenants and affect building design and layout.

There is as yet no standard drafting for passing on CRC costs in leases and the government is not expected to pass legislation to address this point. A number of landlords have taken the view that they will bear these costs in the introductory phase of the CRC. Once companies have confirmed that they will be participating in the CRC, we can help with drafting relevant provisions in leases.

Step One - How is my organisation covered by the CRC?

The first question for any organisation is to address precisely where the boundaries of that organisation lie under the CRC Scheme. This has been a key area of uncertainty for many organisations.

The Order sets out when private organisations are required to participate as groups, who is responsible in group structures, how subdivision of groups can occur and how franchises, JVs and PFI structures are treated.

Reminder - Qualification Criteria:

The qualification criteria for full participation in the Introductory Phase of the CRC Scheme are that an organisation, during the 2008 calendar year (or qualification year): (1) had at least one settled half-hourly meter for their electricity supply; and (2) used at least 6,000 MWh of electricity through half-hourly meters.

Private Sector Organisations

The default position in the CRC Order is that parent and subsidiary undertakings of private sector organisations will participate together in the CRC. The CRC uses the terminology of 'undertakings' and related definitions from the Companies Act 2006 to effect this grouped participation. The effect of this is that all UK operations of any ultimate parent company (whether that parent is outside or within the UK) are grouped as one organisation under the CRC.

Importantly, a group is a 'participant' under the Scheme. Responsibilities for the registration of the group, reporting on the group's emissions and ensuring sufficient allowances are surrendered by the group rests with the 'participant', and not any specifically nominated account holder (previously termed the 'primary member') or ultimate parent company. This means that although each group may nominate a member of the group to act as account holder, each member of the group is jointly and severally liable for all members of the group for all compliance matters.

continued

Significant Group Undertakings

The default all-inclusive position set out above is qualified somewhat by the ability of group organisations to request separate participation for certain parts of the organisation. This "disaggregation" is possible where:

- an undertaking or group of undertakings would itself satisfy the qualification requirements itself (it is a 'Significant Group Undertaking');
- the remaining parts of the group still meet the qualification requirements;
- the administrator¹ agrees to such separate participation; and
- the Significant Group Undertaking registers to participate separately within the required timeframes.

Where disaggregation occurs, the parent group and the Significant Group Undertaking will be considered as separate groups under the Scheme and no joint and several liability will exist between those parties.

JV/PFI

Any body corporate (including those that are joint ventures or special purpose vehicles used to deliver services/assets in the context of a PPP/PFI project) with a private sector parent undertaking is grouped with that owner under the Scheme.

Where there is no parent undertaking, the joint venture or PFI company is required to participate in their own right, if the qualification threshold is met.

Step Two - Who has responsibility for supply?

Having defined the boundaries of an organisation, the next step is to assess the energy which that organisation is responsible for under the Scheme. It is important to determine where responsibility for energy use lies both when assessing whether an organisation qualifies for participation, and subsequently for reporting requirements under the Scheme. A group is accountable for energy use under the Scheme where the following definition of supply is met:

- it has an agreement with a supplier to purchase either electricity, gas, or another fuel source;
- it does in fact receive such a supply; and
- that supply is measured using a metering device².

Self Supply

In addition to the above definition, any authorised suppliers of electricity or those who hold generation, transmissions or distribution licences that supply themselves with electricity will be responsible for such 'self supplies' under the CRC. Any such self supply used directly for the generation, transmission or distribution

of electricity will be excluded from the CRC. A similar exclusion affects supplies of gas for the transport, supply or shipping of gas.

Landlords and Tenants

Landlords need to be aware of how the Scheme treats their tenants' consumption of energy. Where a landlord has the supply contract for a tenant's energy use they are responsible for that supply under the Scheme. Organisations should also be aware that, due to the drafting of the Order, these provisions are applicable to any property arrangements that involve occupation of premises with the owner's permission and may extend beyond the traditional landlord/tenant scenario (for example, licences to occupy).

Franchises

We have not provided further details here on franchises, for which there are separate requirements under the CRC Order, but could do so on request.

Step Three - Registration

Registration applications are made to the Environment Agency's online Registry, and are required by **30 September 2010**.

A failure to register by this date could result in a civil penalty being levied by the Environment Agency. Under the CRC the penalty for registering late or failing to register is £5,000 plus £500 each day until the application for registration is made, up to a maximum of 80 days, which would equate to a total maximum penalty of £45,000.

Where disaggregation is being considered by an organisation there was a further, earlier, deadline. To disaggregate a group must first have applied to be registered by the end of June 2010 (this was extended to end of July 2010 by the Environment Agency). Once the group has been registered, a further application to register the Significant Group Undertaking that is being disaggregated needs to be completed. This second registration must be completed by the overall registration deadline of 30 September 2010.

At registration the participant is required to supply a list of all half-hourly electricity meters through which the organisation received a supply of electricity during the qualification year. With assistance from energy suppliers, the amount of electricity used through the listed half-hourly meters for the 2008 calendar year can be calculated and then supplied on-line to the Environment Agency. Participants will also be required to submit information concerning their organisation, their Significant Group undertaking and the intended compliance account holder.

Step Four - Footprinting & Reporting

The process of footprinting requires participants to submit, prior to the final working day of July in 2011, a footprint report containing the following information:

- the amount of electricity, gas and fuel supplied to the participant for the footprint year (subject to deductions);

¹ The Environment Agency

² Measurement by a metering device is a requirement which only attaches to electricity and gas supply.

³ Core Supplies being gas, electricity or fuel supplied to a participant and measured by half hourly meters, non-domestic meters or dynamic supply

- the amount of "core supplies" that participant has received during the footprint year³, excluding supplies which generate emissions covered by the European Union Greenhouse Gas Emissions Trading System (EU ETS) or Climate Change Agreement (CCA) regimes;
- any other amounts of energy supplied to the participant during the footprint year (i.e. other than electricity, gas or any other fuels listed under the Order);
- a list of further residual supplies of energy where the 90% minimum is not met;
- the amount of any electricity generating credits received and renewables generation during the footprint year;
- the level of emissions captured under the EU ETS or a CCA;
- any decisions made regarding the transport deduction and inclusion of un-metered electricity or gas that the participant has decided is not for the purposes of transport; and
- any changes to the Participant required to be reported to the registry (refer Section 2, Part 3, Schedule 6).

Participants will be required to submit a footprint report for each successive phase of the CRC.

Step Five - Ongoing Considerations

The CRC will impact on many commercial arrangements and it is important to consider these implications in both existing arrangements and those that may be entered into in the future. Examples of these could include:

- including specific provision for the pass-on of CRC costs, and dealing with recycling payments in property agreements;
- where services are provided that affect energy use, including efficiency requirements in contracts;
- considering the transfer of information and any allowances in any transactions involving the transfer, disposal or acquisition of part or the whole of a CRC organisation by another organisation;
- estimating and including CRC related costs in prices provided in project pitches; and
- intra-group agreements providing for information gathering, allocation of costs and indemnification for account holders that may incur liabilities.

Legal Implications of the CRC

We expect that organisations that are well prepared for the CRC will be able to reduce costs, increase their potential revenue recycling arising in connection with the CRC and avoid penalties under this Scheme. The legal assistance we can offer to help you prepare for the CRC includes:

- an in-depth explanation of the Scheme in its final form;
- review of property agreements to consider passing on CRC related costs;
- assistance in liaison with the administrator;
- consideration of Scheme coverage, how this applies to an organisation with your structure (including private and public sector, PFI and franchise arrangements) and the possibility of any relevant exemptions or exclusions;
- analysis and advice on your supply relationships and the supplies for which your organisation may be liable;
- intra-group agreements on CRC costs and liabilities;
- advice on further detailed aspects of the Scheme including the treatment of fuels, renewable energy, third party use of energy, the 10% uplift for estimates, conversion factors and reporting requirements;
- advice on transactions relating to any CRC organisations; and
- review of service contracts to ensure these appropriately apportion CRC costs and include energy efficiency targets where necessary.

Further information

If you would like to receive information on how Burges Salmon could assist you with the CRC, or details of our team's capabilities on the full range of environmental issues, please contact:



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