

## Environment Agency Guidance

### Application to trust structures and treatment of assets held on trust

This guidance note sets out:

- how we propose to treat assets held on trust for the purposes of the CRC Energy Efficiency Scheme (**the Scheme**); and
- the manner in which trustees and/or beneficiaries of trusts should therefore register for, and participate in, the Scheme.

### 1. Distinction to be drawn between certain categories of Trust assets

#### 1.1 General

The only trust assets which will be relevant for the purposes of the Scheme are those which are capable of receiving a supply of electricity, gas or other fuels. We anticipate that such assets will be limited to two categories:

- real property;
- shareholdings in companies (or analogous interests in other types of undertaking) which own real property.

Assets held on trust are held by the trustee for the benefit of one or more beneficiaries. Such assets are said to be held by the trustee in a “fiduciary” capacity. A fiduciary, or someone acting in a fiduciary capacity, is someone who has “*undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*” (Bristol and West Building Society v Mothew [1998] Ch 1 at 18 per Lord Millett).

The provisions of the Companies Act 2006 operate to treat shareholdings held in a fiduciary capacity differently from real property assets held in a fiduciary capacity. The implications of this distinction, while seemingly esoteric, are of fundamental importance in determining how we are required to treat trust assets for the purposes of the Scheme.

Where a trustee holds real property assets on trust, it will need to consider whether it holds such assets directly (i.e. as registered owner of the legal title) or whether it holds the title to such assets indirectly, via its ownership of the shares in one or more undertakings (such as title nominee companies). For the purposes of this guidance, where a trustee holds real property assets indirectly via one or more nominee companies, such holdings will be treated in the same way as all other shareholdings (i.e. in accordance with paragraph 1.3 of this guidance).

## 1.2 Real property assets

The general assumption which we will adopt regarding directly held<sup>1</sup> real property trust assets is that the trustee, as legal owner of the relevant property, will be the undertaking responsible for any energy supplies to such assets, unless another undertaking can be shown to be responsible for such supplies in accordance with the supply rules set out in Schedule 1 of the Order<sup>2</sup>.

The implications for the trustee as regards participation in the Scheme are that the trustee must, in assessing whether it (or the group of which it forms part) is required to register for the Scheme, aggregate all supplies of qualifying electricity for which it is responsible relating to any real property assets which it holds directly with any other supplies of qualifying electricity which it and all other members of any group of which it forms part receive<sup>3</sup>. If the total supplies of qualifying electricity are 6,000 MWh or more, the trustee (or the group of which it forms part, as appropriate) must register for CRC.

Trustees may therefore be required to aggregate energy supplies in relation to real property assets which they hold for different trusts and beneficiaries. Where a corporate trust company directly holds significant amounts of real property and it is the undertaking responsible for energy supplies to such property, the requirement to aggregate qualifying electricity supplies to all the UK properties it owns may result in it needing to undertake a significant information-gathering operation regarding such properties. It should be noted that this may bring some real property assets within the Scheme which, if they had been considered on a discrete trust-by-trust basis, would not have qualified on the basis of their electricity consumption. Commercial trustees are therefore encouraged to commence gathering the relevant information as soon as possible.

Less onerous obligations apply where the qualifying supplies are between 3,000 MWh and 6,000 MWh or if the supplies are less than 3,000 MWh. For more details on such obligations, see the following guidance notes which we have published on our website:

[Am I in? A guide to qualification and organisational structure \(PDF, 5MB\)](#)  
[Registering as a CRC participant \(PDF, 7MB\)](#)  
[Making an information disclosure \(PDF, 2.8MB\)](#)

To the extent that the assets of a trust constitute directly held real property, the identity of the beneficiary or beneficiaries of the trust is irrelevant: such trust assets will be treated as held by the trustee and any qualifying electricity supplies for which the trustee is responsible relating to such trust property must be aggregated with all other qualifying electricity supplied to the trustee and the trustee's group.

---

<sup>1</sup> In this guidance note, we use the phrase "hold directly" as shorthand for where the trustee is the registered owner of the legal title of the relevant property.

<sup>2</sup> See also [our guidance on the supply rules](#)

<sup>3</sup> Subject always to the general rule of the Scheme that, where a tenant of a property makes its own arrangements for energy supplies independently of the landlord, it is for the tenant to account for such energy use in the Scheme, not the landlord.

The above analysis assumes that the trustee is an undertaking, rather than an individual. Where the trustee is an individual, see paragraph 3.1 below.

As to the situation where real property is held jointly by more than one trustee, see paragraph 3.2 below.

### **1.3 Shareholdings or other analogous interests in undertakings**

As regards shareholdings held on trust, the first issue to determine is whether the trustee is a parent undertaking<sup>4</sup> of the undertaking(s) in which it holds shares. It is on this basis, which broadly depends upon the level of “control” that the trustee is able to exercise over the undertaking(s) in which it holds shares, that the Scheme aggregates undertakings into groups of undertakings for the purposes of qualification and participation.

Where undertakings are part of a larger group of undertakings, if that group meets the qualification threshold, it is required to participate in the Scheme as a group, rather than as individual undertakings. The rules for ascertaining whether one undertaking is or is not part of a group with other undertakings are set out in sections 1161 and 1162, and Schedule 7, of the Companies Act 2006.

In determining whether one undertaking is a parent undertaking of another undertaking, these sections broadly look to whether the former undertaking can control the latter. The size of a shareholding in an undertaking is only relevant in determining control over that undertaking to the extent that such shareholding is accompanied by equivalent voting or other rights in the undertaking. To the extent that any shares held do not have voting or other rights attached (as will be the case, for example, with some forms of preference share), they are likely to be irrelevant for the purposes of this analysis.

The powers that an undertaking can exercise vis-à-vis another undertaking in which it holds shares can more properly be referred to as “rights” rather than “assets” and, as regards such rights, paragraph 6 of Schedule 7 to the Companies Act 2006 provides that:

*“Rights held by a person in a fiduciary capacity shall be treated as not held by him”*

The implications of paragraph 6 are that we are required to adopt a fundamentally different approach as regards shareholdings from that outlined in relation to real property above. Since a trustee holds any shares which it holds in an undertaking on trust for one or more beneficiaries in a fiduciary capacity, the rights which attach to the shares are to be treated as held not by the trustee but by the beneficiary or beneficiaries of the trust.

Where the beneficiaries of the trust are individuals, then the shareholdings will be treated as owned by such individuals. Any qualifying electricity supplied to the

undertaking(s) in which shares are held will not need to be aggregated with that consumed by the beneficiaries, since individuals are outside the scope of CRC.

Where the beneficiaries of the trust are undertakings, then the shareholdings will be treated as owned by such undertakings in proportion to their rights under the Trust Deed (the document pursuant to which a trust is constituted). If any of the beneficiaries is beneficially entitled to more than 50% of the voting shares in any one undertaking held in the trust (or otherwise qualifies as a parent undertaking of that undertaking in accordance with the Companies Act 2006), then any qualifying electricity supplied to each such undertaking must be aggregated with that consumed by the relevant beneficiary (and its wider group) for the purposes of assessing qualification for CRC.

## **2. Analogy with assets held in limited partnerships**

The above analysis and proposed treatment is also relevant to limited partnerships which do not have separate legal personality<sup>5</sup>, where (somewhat akin to the position of a trustee) the general partner holds the assets of the limited partnership in a fiduciary capacity.

To the extent that the assets of a limited partnership constitute real property and the legal title to such property is held directly by the general partner (rather than indirectly via one or more nominee companies), any qualifying electricity supplies for which the general partner is responsible relating to that property must be aggregated with all other qualifying electricity supplied to the general partner and the general partner's group (assuming of course that the general partner is an undertaking, rather than an individual).

To the extent that the assets of a limited partnership constitute shares, then such assets will be treated as owned by the limited partnership, and not by the general partner. If the limited partnership is beneficially entitled to more than 50% of the voting shares in any one undertaking (or otherwise qualifies as a parent undertaking of that undertaking in accordance with the Companies Act 2006), then any qualifying electricity supplied to each such undertaking must be aggregated with that consumed by the limited partnership for the purposes of assessing qualification for CRC.

Additionally, if the general partner is deemed to exercise sufficient control over the limited partnership to qualify as its parent undertaking pursuant to the Companies Act tests, the limited partnership will usually need to be grouped with the general partner and the general partner's group for CRC purposes (assuming of course that the general partner is an undertaking, rather than an individual). Whether or not the

---

<sup>4</sup> As defined in s.1162 and Schedule 7 of the Companies Act 2006

<sup>5</sup> Such as those established under the laws of England & Wales or the Cayman Islands. By contrast, in Scotland and various other jurisdictions, a limited partnership has separate legal personality and the above analysis is unlikely to be relevant, since the partnership will usually hold assets directly rather than them being held in a fiduciary capacity by the general partner.

general partner does in fact exercise such control is an analysis that will need to be carried out on a case by case basis.

See the document [Environment Agency Guidance: Application to private equity trusts](#), for more information in relation to this analysis.

### **3. Other relevant considerations**

#### **3.1 Trustee is an individual**

Individuals are not required to participate in the Scheme so, if the trustee is an individual, the Scheme will only be of relevance if any of the undertakings in which it holds a shareholding or other interest consume sufficient supplies of qualifying electricity to participate in the Scheme in their own right. In such instances, however, the responsibilities for complying with the Scheme's registration and participation obligations will fall on the relevant undertaking and not on the individual trustee.

#### **3.2 Joint trustees**

Where the trust assets are held jointly by more than one trustee, once again a distinction needs to be drawn between real property assets and shareholdings.

As regards shareholdings, since the impact of Schedule 7 of the Companies Act 2006 is to treat these as held by the beneficiaries, the number of trustees holding the legal title to the shareholdings is not relevant.

To the extent that the trust property constitutes directly held real property assets, however, the qualifying electricity supplies to such property should be aggregated with those of the particular trustee (if any) which assumes responsibility<sup>6</sup> for the electricity supplies to each of the properties.

Where no one trustee assumes individual responsibility for such supplies, the trustees must decide amongst themselves which of them is to assume such responsibility for the purposes of the Scheme. In the event that the trustees cannot decide who is to assume such responsibility, they should notify the Agency of such inability to make a decision. The Agency will then liaise with the trustees with a view to brokering an agreement regarding which trustee assumes responsibility for the supplies.

#### **3.3 Trust located offshore or trustee incorporated overseas**

Whether a trust is 'offshore' or not is irrelevant to any analysis regarding CRC participation. Similarly whether the trustee is incorporated overseas or in the UK is

---

<sup>6</sup> In accordance with the supply rules set out in Schedule 1 of the Order. See also [our guidance on the supply rules](#)

also irrelevant<sup>7</sup>. The only relevant criterion is whether the relevant supply of electricity takes place in the UK.

#### **4. Applicability of this Guidance**

This guidance has been prepared for use in conjunction with trusts established under the laws of England and Wales. However, it should not be interpreted as legal advice and all potential participants should take independent legal advice regarding the applicability of the Scheme to their organisation.

Where a trust is established under the laws of another jurisdiction, certain aspects of the above guidance may not be applicable and bespoke legal advice should be sought from counsel in the jurisdiction of establishment regarding the treatment of such trusts in the Scheme.

---

<sup>7</sup> Where a trustee is incorporated overseas and the group of which it forms part contains no undertakings incorporated in the UK, it will need to appoint a compliance account holder with a principal place of activity in the UK to represent it in the Scheme.