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U.S. Publishes Preliminary Guidance on the Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil

Client Alert | September 19, 2022

On September 9, 2022, the U.S. Department of the Treasury ("**Treasury**") published Preliminary Guidance on Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil (the "**Guidance**"),[1] taking a step toward implementing the commitment made at the G7 Finance Ministers Meeting on September 2, 2022 to institute a comprehensive prohibition of services that enable maritime transportation of Russian-origin oil and petroleum products unless such oil is purchased below an agreed-upon price cap.[2] The Guidance outlines the United States' forthcoming policy and anticipated regulations from Treasury's Office of Foreign Assets Control ("**OFAC**") on the U.S. treatment of services related to the maritime transportation of Russian Federation-origin crude oil and petroleum products ("**seaborne Russian oil**").

The mechanisms described in the Guidance will operate quite differently from the way other U.S. sanctions programs have targeted the oil trade and oil producing countries, such as the 'waiver' program under the Iran sanctions program whereby certain countries are excepted from sanctions targeting the purchases of Iranian oil if those countries have agreed to eliminate or substantially reduce their consumption of Iranian oil over time.[3] This forthcoming policy and regulation in the Russia context will create additional sanctions compliance obligations and challenges for companies across many sectors wherever there are services being provided relating to the maritime transportation of oil.

1. **Focus of the policy**

The policy seeks to establish a framework whereby the provision of services for Russian oil being exported by sea is prohibited unless the oil was purchased below the price cap, with the goal of reducing Russia's overall revenues from its oil exports while maintaining a reliable supply of seaborne Russian oil to the global market and reducing upward pressure on energy prices. In the wake of the Ukraine invasion, Russian oil is increasingly transported via maritime tankers as opposed to land-based pipelines, with reported estimates that such tankers carry about 70% of Russian crude oil exports.[4]

The prohibitions will take effect (i) on December 5, 2022 with respect to maritime transportation of crude oil, and (ii) on February 5, 2023 with respect to maritime transportation of petroleum products.

2. **Implementation**

To implement the policy, OFAC anticipates issuing a determination pursuant to Executive Order 14071,[5] which will prohibit the exportation, re-exportation, sale, or supply, directly or indirectly, from the United States, or by a U.S. person, wherever located, of services

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related to the maritime transportation of seaborne Russian oil if the oil is purchased above the price cap.

The price cap will be set by a coalition of countries including the G7 and EU. The coalition will conduct a technical exercise to consider a range of factors with a rotating lead coordinator, in order to reach consensus on setting the price cap level. OFAC will issue additional guidance on how the price cap level will be published and updated.

Treasury and the U.S. Government broadly anticipate working with other members of the coalition implementing the maritime services policy to enforce the price cap.

Note, even with the new policy, the United States will continue to prohibit the importation of Russian-origin crude oil, petroleum and petroleum fuels, oils and products of their distillation into the United States, in accordance with Executive Order 14066.[6]

3. **Anticipated compliance guiderails**

In order to steer clear of a potential OFAC enforcement action, service providers dealing with seaborne Russian oil will need to be able to provide certain evidence that the price cap was not breached in regard to the shipment they are servicing. The specific evidence and level of diligence required will vary depending on the role the service provider is playing in the supply chain, as noted below. If the service provider satisfies the applicable requirements, the service provider can avail itself of a "safe harbor" from the ordinarily strict liability of sanctions, in the event of an inadvertent provision of services related to a purchase of seaborne Russian oil above the price cap. This process, of course, is in addition to standard due diligence procedures a service provider may already be carrying out for sanctions risks.

The Guidance describes the following three tiers of service providers, with examples and recommended evidentiary and diligence best practices. OFAC expects each covered service provider to retain relevant records for five years.

- **Tier 1 Actors**: service providers who regularly have direct access to price information in the ordinary course of business should retain and share necessary documents showing that seaborne Russian oil was purchased at or below the price cap ("**necessary price cap documents**"). Examples of Tier 1 Actors include commodities brokers and refiners. Relevant documentation includes invoices, contracts, or receipts/proofs of accounts payable. Recommended risk-based measures to comply with the price cap include updating terms and conditions of contracts.

- **Tier 2 Actors**: service providers who are sometimes able to request and receive price information from their customers in the ordinary course of business should (i) when practicable, request, retain and share necessary price cap documents or (ii) if not practicable, provide customer attestations in which the customer commits to not purchase seaborne Russian oil above the price cap ("**customer price cap attestations**"). Examples of Tier 2 Actors include financial institutions. Recommended risk-based measures include providing guidance to trade finance departments, relationship managers and compliance staff.

- **Tier 3 Actors**: service providers who do not regularly have direct access to price information in the ordinary course of business should obtain and retain customer price cap attestations. Examples of Tier 3 Actors include insurers and protection and indemnity clubs. Insurers may request customer price cap attestations that cover the entire period a policy is in place, rather than requesting separate attestations for each shipment. Recommended risk-based measures include updating policies and terms and conditions.

Companies that make significant purchases of oil above the price cap and knowingly rely

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on service providers subject to the maritime services policy, or those that knowingly provide false information, documentation, or attestations to a service provider, will have potentially violated the maritime services policy and may be a target for a U.S. sanctions enforcement action.

4. **Red flags to identify evasive or violating transactions**

U.S. companies and banks are required to reject transactions that violate or seek to evade the maritime services policy and price cap, and report any such a transaction to OFAC. The Guidance provides the following red flags which service providers should consider:

- **Evidence of deceptive shipping practices**: The Treasury, U.S. Department of State and U.S. Coast Guard issued a global advisory in 2020 to alert the maritime industry to deceptive shipping practices used to evade sanctions (the "**2020 Maritime Sanctions Advisory**").[7] The indicators included in the 2020 Maritime Sanctions Advisory, such as falsifying cargo and vessel documents and complex ownership / management, are also relevant for the Russia oil price cap. Recommended business practices to address such red flags include institutionalizing sanctions compliance programs, adopting know-your-customer practices and exercising supply chain due diligence. Please consult the 2020 Maritime Sanctions Advisory for more information.

- **Refusal or reluctance to provide requested price information**: A customer's refusal or reluctance to provide the necessary documentation or attestation, as well as requests for exceptions to established practice, may indicate that they have purchased seaborne Russian oil above the price caps.

- **Unusually favorable payment terms, inflated costs or insistence on using circuitous or opaque payment mechanisms**: Seaborne Russian oil purchased so far below the price cap as to be economically non-viable for the Russian exporter or excessively high service costs may be indicators the purchaser has made a back-end arrangement to evade the price cap. Attempts to use opaque payment mechanisms may also indicate that the counterparty is avoiding creating payment documentation.

- **Indications of manipulated shipping documentation, such as discrepancies of cargo type, voyage numbers, weights or quantities, serial numbers, shipment dates**: Any indication of manipulated shipping documentation may be a red flag which should be fully investigated before providing services.

- **Newly formed companies or intermediaries, especially if registered in high-risk jurisdictions**: Firms should exercise appropriate due diligence when providing services to new counterparties, particularly if such entities were recently formed or registered in high-risk jurisdictions and do not have a demonstrated history of legitimate business.

- **Abnormal shipping routes**: Using shipping routes or transshipment points that are abnormal for shipping seaborne Russian oil to the intended destination may indicate attempts to conceal the true history of an oil shipment in violation of the price cap.

We will continue to closely monitor developments in this area, and will provide a more detailed analysis when OFAC publishes the forthcoming determination implementing this policy.

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[1] Preliminary Guidance on Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil, published by the U.S. Department of the

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Treasury (Sept. 9, 2022), https://home.treasury.gov/system/files/126/cap_guidance_20220909.pdf.

[2] *See* "G7 Finance Ministers´ Statement on the united response to Russia´s war of aggression against Ukraine," Sept. 2, 2022, https://www.bundesfinanzministerium.de/Content/EN/Downloads/G7-G20/2022-09-02-g7-ministers-statement.pdf?__blob=publicationFile&v=7.

[3] *See* our prior publication, "Iran Sanctions 2.0: The Trump Administration Completes Its Abandonment of the Iran Nuclear Agreement," Nov. 9, 2018, https://www.gibsondunn.com/iran-sanctions-2-0-the-trump-administration-completes-abandonment-of-iran-nuclear-agreement/#_ftn28.

[4] "The story behind the proposed price cap on Russian oil," D. Wessel, *Brookings* (July 5, 2022).

[5] Executive Order 14071, 87 Fed. Reg. 20999 (Apr. 6, 2022), https://home.treasury.gov/system/files/126/14071.pdf.

[6] Executive Order 14066, 87 Fed. Reg. 13625 (Mar. 8, 2022), https://home.treasury.gov/system/files/126/eo_14066.pdf.

[7] Sanctions Advisory for the Maritime Industry, Energy and Metals Sectors, and Related Communities, published by the U.S. Department of the Treasury, U.S. Department of State and U.S. Coast Guard (May 14, 2020), https://home.treasury.gov/system/files/126/05142020_global_advisory_v1.pdf.

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