

NAVIGATING CHOPPY WATERS: OFAC'S GUIDANCE ON IMPLEMENTATION OF A MARITIME SERVICES POLICY AND RELATED PRICE EXCEPTION FOR SEABORNE RUSSIAN OIL

On September 9, 2022, the US Department of Treasury Office of Foreign Assets Control ("**OFAC**") released its "Preliminary Guidance on Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil" ("**MSP Guidance**").

The [MSP Guidance](#) provides additional information to help companies navigate a pending OFAC prohibition on US persons, globally, in a "broad range of services" relating to maritime transportation of Russian crude oil and petroleum products ("**seaborne Russian oil**") set to take effect on December 5, 2022 (for crude oil) and February 5, 2023 (for petroleum products). The MSP Guidance also addresses an exception to the ban for such services for seaborne Russian oil that is purchased at or below a set price cap.

The prohibition on maritime services and the price cap exception are being implemented in coordination with the G7. The MSP Guidance follows on the G7 Finance Ministers [announcement](#), at their September 2, 2022 meeting, of their intent to implement a comprehensive plan to permit services that will "clearly sustain the maritime transportation of seaborne Russian oil, permitting oil purchased at or below a price cap to be established by an implementing coalition of countries" ("**G7 Plan**").

WHAT IS THE BAN AND WHAT IS THE EXCEPTION?

To implement the G7 Plan, OFAC stated that it anticipates issuing a determination pursuant to Executive Order ("**EO**") 14071 "Prohibiting New Investment In And Certain Services To The Russian Federation in Response to Continued Russian Federation Aggression." OFAC explains in the MSP Guidance that the determination will:

- permit the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located,

of services related to the maritime transportation of seaborne Russian oil, if the seaborne Russian oil is purchased at or below the price cap and

- prohibit such services if the seaborne Russian oil is purchased above the price cap.

The dollar amount for the price cap will be coordinated by the coalition of countries imposing the ban. OFAC has stressed that its determination will be and should be considered foremost a ban, to which a limited exception will apply, namely, to permit for the purchase of Russian seaborne oil at or below the to-be determined price cap.

OFAC explicitly states that this exception will not authorize imports of seaborne Russian oil into the United States. The United States has, under EO 14066, prohibited the importation into the United States of, among other things, Russian origin: crude oil; petroleum; petroleum fuels, oils and products of their distillation; and natural gas. That prohibition will remain in effect alongside the maritime services prohibition and related price cap exception.

IMPORTANT CONSIDERATIONS TO MANAGE RISKS

Documentation

In the MSP Guidance, OFAC notes that maritime service providers for seaborne Russian oil will have a "safe harbor" from OFAC sanctions enforcement actions if they inadvertently provide maritime services related to seaborne Russian oil sold above the capped price, provided that the service provider reasonably relied on "certain documentation or attestations that the purchase price of the oil is at or below the price cap." OFAC stresses the importance that service providers implement recordkeeping and attestation processes for demonstrating compliance with the price cap exception and notes that these should occur in addition to standard sanctions-related due diligence.

OFAC identifies 3 different tiers of actors who participate in the supply chain for Russian seaborne oil, specifying the steps and documentation each tier should obtain. Tier 1 are those actors with direct access to price information. Tier 2 are those that are sometimes able to request price information. Tier 3 are those without direct access to price information. A chart is included within the MSP Guidance, illustrating how the recordkeeping and attestation process may work across the 3 tiers and describing OFAC's recommendations for risk-based compliance measures.

For example, OFAC identifies shippers as "Tier 2 Actors" and expects as part of the recordkeeping and attestation process, that they will:

- Request, retain, and share, as needed, documents evidencing that the seaborne Russian oil was purchased at or below the capped price, when practicable, such documentation might include contracts, invoices, and receipts. When such document requests are not practicable, shippers should request customer attestations wherein the customer undertakes that it will not purchase seaborne Russian oil above the price cap.

OFAC recommends that risk-based compliance measures for Tier 2 Actors include giving guidance to relevant personnel, including compliance staff, the trade

finance department, and relationship managers; updating the company's sanctions questionnaire templates and requests for information ("**RFIs**"); and updating bill of lading templates to include attestations.

OFAC considers that insurers, protection and indemnity ("**P&I**") clubs, and other parties who, in their ordinary course of business, do not have direct access to price information are "Tier 3 Actors." The MSP Guidance states that Tier 3 Actors should:

- Obtain and retain customer attestations in which the customer commits to not purchase seaborne Russian oil above the price cap, for example as part of their annual insurance policy renewal process or updates to their insurance policy to comply with the price cap. Insurers may request attestations from customers that cover the entire period a policy is in place, for example for the entire length of an annual policy, rather than request separate attestations for each shipment.

OFAC recommends that risk-based compliance measures for Tier 3 Actors include updating policies and terms and conditions, as well as providing guidance to relevant personnel.

Retain Records for Five Years

OFAC states that it will expect service providers to maintain records for five (5) years.

Watch for Sanctions Evasion Red Flags

OFAC also provides guidance on "red flags" for service providers to monitor for companies that are trying to evade the price cap requirements. These should be incorporated into diligence, new customer on-boarding, transaction monitoring, and training for employees as these are new potential risks with individuals on the other side who will be highly motivated to transport Russian seaborne oil. The "red flags" identified by OFAC are:

- Evidence of deceptive shipping practices, such as disabling or manipulating the automatic identification system (AIS) on vessels; physically altering vessel identification; falsifying cargo and vessel documents; ship-to-ship (STS) transfers; voyage irregularities; false flags and flag hopping; and complex ownership or management.
- Refusal or reluctance to provide requested price information or requests for exemptions.
- Unusually favorable payment terms, inflated costs, or insistence on using circuitous or opaque payment mechanisms.
- Indications of manipulated shipping documentation, such as discrepancies of cargo type, voyage numbers, weights or quantities, serial numbers, shipment dates, etc.
- Newly formed companies or intermediaries, especially if registered in high-risk jurisdictions.

- Abnormal shipping routes, including for example, transshipment through one or more jurisdictions for no apparent economic reason and sudden unexplained changes in route.

KEEPING A WEATHER EYE ON THE HORIZON

As noted, the prohibition and exception are not currently in place but will be implemented for crude oil on December 5, 2022 and for petroleum products on February 5, 2023. OFAC states in the MSP Guidance that it intends to issue additional guidance in connection with its pending implementation of the G7 Plan. While OFAC has indicated that additional guidance is forthcoming, and that the rest of the G7 will be taking similar steps that will need to be considered, companies with potential exposure to seaborne Russian oil and petroleum products should carefully consider this guidance, identify which of the 3 tiers they fall into, and begin to identify, map and develop enhancements to their compliance systems and controls to meet these expectations. As we have seen in other matters involving Russia sanctions, despite the high degree of coordination among countries, there are likely to be differences that will need to be navigated.

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