

United States and Coalition Partners Commence Maritime Services Policy and Adopt Oil Price Cap Extension to Seaborne Russian Oil

By John E. Bradley, Brent Connor and Jaime L. K. Rosenberg

December 9, 2022

On September 9, 2022, the United States announced its intention to implement a policy (known as the “maritime services policy”), in conjunction with other G7 countries, the European Union (“EU”) and Australia, banning a range of services related to the maritime transportation of crude oil and petroleum products of Russian Federation origin. As then stated, the ban would be subject to an exception, in the form of a safe harbor, which would authorize maritime actors to deliver prohibited services where the seaborne Russian oil was purchased at or below a price cap to be later agreed.¹ The policy was set forth in Preliminary Guidance issued by the Office of Foreign Assets Control (“OFAC”) of the U.S. Department of the Treasury (“Treasury”),² which we reviewed and analyzed in a previous Bulletin on the topic [\[click here\]](#).

A. Preliminary Guidance

The Preliminary Guidance indicated that the legal basis for the ban would be in the form of a “determination” issued by Treasury pursuant to Executive Order 14071 of April 6, 2022 (*Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*) (the “Executive Order”).³ The determination would identify the specific “services” subject to the prohibitions and the corresponding safe harbor. The Preliminary Guidance anticipated that OFAC would issue follow-up guidance on the specific contours of the maritime services policy.

B. Determination and Guidance: Covered Services

On November 21, 2022, Secretary of the Treasury Janet Yellen issued the anticipated legal determination, captioned “Determination Pursuant to Section 1(a)(ii) of Executive Order 14071 (Prohibition on Certain Services as They Relate to the Maritime Transport of Crude Oil of Russian Federation Origin)” (the “Determination”).⁴ On November 22, 2022, OFAC issued its corresponding Guidance on Implementation of the Price Cap Policy for Crude Oil of Russian Federation Origin (the “Guidance”), clarifying the rules by which maritime services would be authorized for purposes of the safe harbor.⁵

The Determination explicitly applies the service prohibitions contained in Executive Order 14071 to six discreet forms of maritime service, collectively referred to as “Covered Services,” as they relate to the seaborne transportation of “crude oil”⁶ of Russian Federation origin. They are:

¹ The exception was born of the collective view that a complete shutdown of maritime services associated with the transportation of seaborne Russian oil would only exacerbate inflation and would roil already jittery energy markets around the world.

² U.S. Department of the Treasury, *Preliminary Guidance on Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil* (Sept. 9, 2022) (the “Preliminary Guidance”) (https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220909_33).

³ Section 1(a)(ii) of the Executive Order prohibits “the exportation, re-exportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any category of services as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, to any person located in the Russian Federation.” A United States person is defined to mean “any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.” The term “person” includes entities as well as individuals.

⁴ See <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20221122>.

⁵ *Id.*

⁶ Crude oil is referenced in the Determination to mean those “articles defined at Harmonized Tariff Schedule of the United States (“HTSUS”) subheading 2709.00.”

- “*Trading/commodities brokering*: Buying, selling, or trading commodities and/or brokering the sale, purchase, or trade of commodities on behalf of other buyers or sellers.”⁷
- “*Financing*: A commitment for the provision or disbursement of any debt, equity, funds, or economic resources, including grants, loans, guarantees, suretyships, bonds, letters of credit, supplier credits, buyer credits, and import or export advances.” As they relate to financing, “Covered Services” do **not** include “the processing or clearing of payments by intermediary banks” where the bank “(1) is operating solely as an intermediary and (2) does not have any direct relationship with the person providing services related to the maritime transport of the Russian oil...as it relates to the transaction.”⁸
- “*Shipping*: Owning or operating a ship for the purpose of carrying or delivering cargo and/or freight transportation; chartering or sub-chartering ships to deliver cargo or transport freight; brokering between shipowners and charterers; and serving as a shipping/vessel agent.”⁹
- “*Insurance*: The provision of insurance, reinsurance, or protection and indemnity (“P&I”) services; satisfying claims related to underwriting insurance policies that protect policyholders against losses that may occur as a result of property damage or liability; assuming all or part of the risk associated with existing insurance policies originally underwritten by other insurance carriers, including the reinsurance of a non-U.S. insurance carrier by a U.S. person; and liability for insurance for maritime liability risks associated with the operation of a vessel, including cargo, hull, vessel, P&I, and charterer’s liability.”¹⁰
- “*Flagging*: Registering or maintaining the registration of a vessel with a country’s national registry of vessels.” As they relate to flagging, “Covered Services” do **not** include “the deflagging of vessels transporting Russian oil sold above the price cap.”¹¹
- “*Customs brokering*: Assisting importers and exporters in meeting requirements governing imports and exports.” As they relate to customs brokering, “Covered Services” do **not** include “legal services or assisting importers and exporters in meeting the requirements of U.S. sanctions.”¹²

Under the Determination, certain maritime services involving crew members, such as medical evacuation, emergency and insurance services, and services involving the classification, inspection, bunkering and pilotage of vessels, are not included within the meaning of “Covered Services” and, therefore, are not subject to the maritime services policy.¹³

C. Covered Services Effective Date

The prohibitions on the delivery of Covered Services in the Determination took effect at 12:01 a.m. eastern standard time on December 5, 2022. However, Covered Services with respect to Russian crude oil loaded onto a vessel prior to 12:01 a.m. eastern standard time on December 5, 2022, and unloaded prior to 12:01 a.m. eastern standard time on January 19, 2023, are excluded from the Determination and are **not** subject to the maritime services policy.¹⁴

D. Establishment of the Oil Price Cap

On December 2, 2022, following weeks of internal discussion, debate and eventual consensus among the 27 member states of the EU, the Council set the oil price cap at \$60 per barrel on seaborne crude oil of Russian Federation origin. Other members of the G7 and Australia agreed to join the EU in adopting the price cap at this level.¹⁵ It should be noted that the price cap is established in U.S. dollars on a per-barrel basis and may be adjusted over time to reflect market developments.¹⁶ A price cap for refined products will follow.

⁷ Guidance at 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 4–5.

¹¹ *Id.* at 5. The EU likewise applies the maritime services policy to flagging services. See European Commission, *Guidance on Oil Price Cap, Section 4, ¶ 23 (Dec. 2, 2022) (“EC Guidance”)* (https://finance.ec.europa.eu/publications/oil-price-cap_en).

¹² *Id.*

¹³ *Id.*

¹⁴ See also OFAC, *Frequently Asked Question 1094 (Oct. 31, 2022)* (<https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20221031>).

¹⁵ On December 5, 2022, Treasury issued its *Determination Pursuant to Sections 1(a)(ii), 1(b), and 5 of Executive Order 14071, Price Cap on Crude Oil of Russian Federation Origin*, which officially set the price cap of \$60 per barrel as a matter of U.S. law and policy.

¹⁶ See European Commission, *Questions and Answers: G7 agrees oil price cap to reduce Russia’s revenues, while keeping global energy markets stable, at 1 (Dec. 3, 2022)* (https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7469).

As explained in the Guidance, the price cap as applied in the United States includes the following technical aspects:

First, “shipping, freight, customs, and insurance costs” are not included in the price cap and “must be invoiced separately and at commercially reasonable rates.”¹⁷ The Guidance notes that, although shipping and insurance are Covered Services, “these costs are distinct from the price cap on Russian oil.”¹⁸

Second, the price cap contains certain “starts” and “stops.” The price cap will apply “from the embarkment of maritime transport of Russian oil (e.g., when the crude oil is sold by a Russian entity for maritime transport)” through the “first landed sale” in a jurisdiction other than Russia.¹⁹ Accordingly, once the Russian oil has cleared customs in a jurisdiction other than Russia, the price cap will not apply to any further onshore sale.²⁰ However, if the oil is reexported using maritime transport without being “substantially transformed,” then the price cap still applies and the delivery of Covered Services will remain subject to the price cap.²¹

Third, if the oil is “substantially transformed,” which the Guidance states as being “refined or undergoes other substantial transformation such that the product loses its identity and is transformed into a new product having a new name, character, and use, in a new jurisdiction other than Russia,” then the oil is no longer considered of Russian origin and the price cap does not apply.²²

E. Safe Harbor Provisions

As first introduced in OFAC’s Preliminary Guidance, the Guidance establishes a safe harbor mechanism against OFAC enforcement for U.S. service providers that comply with a prescribed recordkeeping and attestation process. This process allows such service providers to demonstrate or confirm that the Russian oil was purchased at or below the price cap, thereby providing them with a regulatory safe harbor. The Guidance groups these service providers into three distinct “tiers” of actors, depending upon their relative market proximity to the underlying sale. To be afforded a safe harbor, the “tiered actors” must comply with the following:

- *Tier 1 Actors:* Tier 1 Actors include those who “regularly have direct access to price information in the ordinary course of business, such as commodities brokers and oil traders. Tier 1 Actors must retain documents showing that Russian oil was purchased at or below the relevant price cap. This may include invoices, contracts, or receipts/proof of payment.”²³
- *Tier 2 Actors:* Tier 2 Actors include those who are “sometimes able to request and receive price information from their customers in the ordinary course of business, such as financial institutions, ship/vessel agents, and customs brokers.” Tier 2 Actors must, to the extent practicable, “request and retain documents that show that Russian oil was purchased at or below the relevant price cap.” If this is not feasible, Tier 2 Actors “must obtain and retain customer attestations, in which the customer commits that for the service being provided, the Russian oil was purchased or will be purchased at or below the relevant price cap.”²⁴
- *Tier 3 Actors:* Tier 3 Actors include those who “do not regularly have direct access to price information in the ordinary course of business, such as insurers, P&I clubs, shipowners, and flagging registries.” Tier 3 Actors “must obtain and retain customer attestations, in which the customer commits that for the service being provided, the Russian oil was purchased or will be purchased at or below the relevant price cap.” For marine insurers, this can be achieved “as part of their annual insurance policy renewal process or updates to their insurance policies” or through “a sanctions exclusion clause written into or already included in policies or contracts.”²⁵

To be afforded the safe harbor, actors must keep relevant records for a minimum of five years, in accordance with OFAC’s general recordkeeping requirements:

¹⁷ Guidance at 3.

¹⁸ *Id.* See also EC Guidance, Section 1, ¶ 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 6. Specific guidance for Tier 1 actors can be found on page 7 of the Guidance. Examples of “safe harbor documentation” for Tier 1 actors can be found on page 9 of the Guidance.

²⁴ *Id.* Specific guidance for Tier 2 actors can be found on pages 7–8 of the Guidance. Examples of “safe harbor documentation” for Tier 2 actors can be found on page 9 of the Guidance.

²⁵ *Id.* Specific guidance for Tier 3 actors can be found on page 7 of the Guidance. Examples of “safe harbor documentation” for Tier 3 actors can be found on page 9 of the Guidance. It should be noted that price information is **not** required of Tier 3 actors. See also EC Guidance, Section 7, ¶ 41. It should be further noted that, under the EC Guidance, if cargo is traded **above** the price cap during the voyage, shipowners “are not required to obtain further attestation from subsequent buyers of the cargo during the transit.” EC Guidance, Section 7, ¶ 39.

“[E]very person engaging in any transaction subject to the provisions of this chapter shall keep a full and accurate record of each such transaction engaged in, regardless of whether such transaction is effected pursuant to license or otherwise, and such record shall be available for examination for at least 5 years after the date of such transaction.”²⁶

F. Due Diligence, Red Flags and Compliance Recommendations

The Guidance states that, as an element of the safe harbor, OFAC expects that U.S. service providers “will continue to implement and perform the standard due diligence practices that are customary for their industry and for their role in a particular transaction.”²⁷ Among other things, U.S. service providers must pay attention to “red flags” and must avoid participation in “evasive transactions” or transactions that otherwise violate the Determination.²⁸ Although not expressly stated as a condition of the safe harbor, the Guidance provides recommendations for “risk-based” compliance measures for each tiered actor.²⁹

G. General Licenses

With the Guidance and Determination, OFAC also released the following general licenses:

- [General License 55](#) authorizes all transactions prohibited by the Determination “related to the maritime transport of crude oil originating from the Sakhalin-2 project” for importation into Japan.³⁰
- [General License 56](#) authorizes all transactions prohibited by the Determination “related to the importation of crude oil into the Republic of Bulgaria, the Republic of Croatia, or landlocked European Union Member States.”³¹
- [General License 57](#) authorizes all transactions prohibited by the Determination that are “ordinarily incident and necessary to addressing vessel emergencies related to the health and safety of crew or environmental protection, including safe docking or anchoring, emergency repairs, or salvage operations.” The offloading of Russian oil is authorized under this general license **only** as necessary to address vessel emergencies.³²

H. Impact and Next Steps

The United States and its price cap coalition partners, including the EU and Australia, have repeatedly emphasized that the price cap is an important tool designed to restrict the oil revenues Russia receives to fund the war in Ukraine while maintaining a reliable supply of oil to global markets, thereby benefitting low and medium income countries. However, the maritime services policy and price cap represent a complex and relatively novel price-dependent sanctions measure that may be difficult to enforce or may produce unintended or unforeseen consequences.

The price cap has already caused criticism and confusion. Ukraine has criticized the cap as being too high. Russia has indicated that it will not accept the price cap³³ and analysts have predicted that, in the absence of acceptance, the price cap may remove over a million barrels of Russian oil a day off the global market.³⁴ While countries outside of the price cap coalition have been encouraged by members of the G7 to leverage the price cap to negotiate lower prices for their own imports of Russian oil,³⁵ Russia has threatened to cut off supplies to any countries that do.³⁶

²⁶ 31 C.F.R. § 501.601; see also EC Guidance, Section 7, ¶ 43.

²⁷ Guidance at 7.

²⁸ *Id.* at 6–7. U.S. service providers are required to report such transactions to OFAC. *Id.* at 6.

²⁹ *Id.* at 9.

³⁰ See General License No. 55, *Authorizing Certain Services Related to Sakhalin-2* (Nov. 22, 2022) (<https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20221122>).

³¹ See General License No. 56, *Authorizing Certain Services with Respect to the European Union* (Nov. 22, 2022) (<https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20221122>).

³² See General License No. 57, *Authorizing Certain Services Related to Vessel Emergencies* (Nov. 22, 2022) (<https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20221122>).

³³ C. Davis & M. Trevelyan, Maritime Link, *Russia Says It Won't Accept Oil Price Cap* (Dec. 5, 2022) (<https://www.marinelink.com>).

³⁴ The Maritime Executive, *As Russian Oil Price Cap Approaches, OPEC+ Leaves Output Cuts Intact* (Dec. 4, 2022) (<https://www.maritime-executive.com/article/as-russian-oil-price-cap-approaches-opec-leaves-output-cuts-intact>).

³⁵ See Press Release, *Statement of G7 and Australia on a price cap for seaborne Russian-origin crude oil* ¶4 (Dec. 2, 2022); see also U.S. Department of the Treasury Press Release, *Remarks by Assistant Secretary Elizabeth Rosenberg at the ACI Annual Conference on Economic Sanctions* (Dec. 6, 2022).

³⁶ See P. Peachey, TradeWinds, *EU oil import ban in force as uncertainty hits tanker deals* (Dec. 5, 2022) (<https://www.tradewindsnews.com/tankers/eu-oil-import-ban-in-force-as-uncertainty-hits-tanker-deals/2-1-1366536>).

In the meantime, the usual sanctions-busting forces seem ready to employ tactics to circumvent the multilateral oil price cap regime. For example, the use of ghost vessels (i.e., tankers that are not registered in a flag state or the IMO and do not carry commercial insurance) to carry Russian oil in defiance of the cap has been reported.³⁷ The standing up of “alternative” Russian insurers and reinsurers to replace UK marine insurers has also been reported.³⁸ In addition, sales of over 400 tankers to unknown or new-to-the-sector buyers since the beginning of the Ukraine war have been observed as have flag-state changes from EU member states such as Malta, Greece and Cyprus to flag states outside the EU.³⁹

Enforcement by the United States and other members of the price cap coalition and EU members states will be the key to the success of the oil price cap and maritime services policy. And, as is very often the case in these situations, the regulators have enlisted private industry as their partners to achieve their inter-governmental program goals. Accordingly, for maritime service providers within the jurisdiction of the various price cap coalition members, this means that close attention to the new attestation, recordkeeping, due diligence and compliance procedures required across multiple jurisdictions has now become a part of their business profiles. A complete risk and compliance assessment by maritime actors affected by the regulations must be undertaken to ensure that their delivery of maritime services will achieve a safe harbor within these programs.

If you have any questions regarding the topics discussed in this article, please contact **John E. Bradley** at jbradley@vedderprice.com, **Brent Connor** at bconnor@vedderprice.com, **Jaime L. K. Rosenberg** at jrosenberg@vedderprice.com or any Vedder Price attorney with whom you have worked.

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³⁷ E. Braw, Foreign Policy, *How Greek Companies and Ghost Ships are Helping Russia* (Nov. 23, 2022).

³⁸ *Id.*

³⁹ See P. Peachey, TradeWinds, *Hundreds of 'unknown' owners take control of tankers* (Dec. 2, 2022) (<https://www.tradewindsnews.com/tankers/hundreds-of-unknown-owners-take-control-of-tankers/2-1-1362123>).