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OFAC Issues Preliminary Guidance on Safe Harbor for Maritime Services if Russian Oil is Sold at or Below Price Cap

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The United States has maintained strict prohibitions against importing Russian oil, which were adopted March 8, 2022, pursuant to Executive Order 14066 ("Prohibiting Certain Imports and New Investments with Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine"). The ban covers Russian Federation origin crude oil, petroleum, and petroleum fuels, oils, and products of their distillation, as well as other items. The ban also prohibits U.S. persons from participating in any dealings related to Russian oil including finance, brokering, transportation, insurance, etc.

As part of its sixth package of sanctions against Russia, adopted on June 3, 2022, the EU has joined the United States by prohibiting the import of seaborne crude oil from Russia, beginning on or about December 5, 2022, following a six-month wind-down period. The EU has also banned the import from Russia of refined petroleum products, beginning on or about February 5, 2023, following an eight-month wind-down period. As part of the sixth package, the EU will also prohibit EU firms from furnishing insurance, brokering and banking services for the seaborne shipment of Russian oil and refined products.

Outside of the United States and the EU, many global markets and countries, notably China and India, continue to freely trade and purchase Russian oil and refined oil products. Russia's continuing sale of such products has helped finance its war effort against Ukraine and has caused economic disruptions throughout world markets by driving up energy and food costs, especially in lower and middle income countries. To counter these effects, the G7 Finance Ministers announced their joint political intention on September 2, 2022, to implement a broad prohibition of services which enable the maritime transportation of Russian crude oil and refined products, except in circumstances where such products are purchased at or below a yet-to-be-determined price cap.

On September 9, 2022, the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury issued preliminary guidance on when insurance, trade finance, banking, brokering, navigation and similar services can be provided for seaborne Russian oil. Following the G7 lead, the policy is constructed as a ban on such services with one critical exception: actors that purchase seaborne Russian oil at or below a price cap established by the G7 coalition will be permitted to receive such services. The goal is to keep Russian oil in the market and flowing to consumers who need it, but restrict Russian revenue at the same time. Those that provide the services must exercise enhanced due diligence to confirm that the oil at issue was in fact sold at or below the cap, and must retain records showing the price, or attestations of purchases at or below the cap, for at least five years.

How the Cap Will Be Established

G7 members intend to set the price cap above Russia's marginal cost of production and at a level consistent with prices Russia has accepted in the past. According to OFAC, Russia does not have much storage capacity for oil; many of its wells and equipment are outdated and conditions are worsening through sanctions, which deny Russia access to critical software and drilling equipment. These circumstances make it difficult for Russia to stop and restart production without incurring significant costs. OFAC explained that this leaves a lot of room below prevailing market prices and the price Russia currently receives. This provides an opportunity to deny Russia the revenue required to pursue the war in Ukraine. At the same time, the policy will lower economic pressures that countries around the world are experiencing, due in part to the fact that Russia this summer received prices 60 percent higher than last year for energy exports. This more than offset the decline in Russia's export volumes due to bans among G7 members on imports of Russian oil.

Enforcement and Compliance are Critical to Implementation

OFAC is working with the G7 to develop a robust but simple documentation and attestation system that can give service providers comfort that they are complying appropriately with the prohibition against dealing in Russian oil. In regard to enforcement, OFAC stated that those who evade the price cap by falsifying documentation or otherwise hiding the true origin or price of the oil would face consequences under domestic law of the jurisdiction implementing the price cap. Those such as traders, brokers and refiners who have access to price information should retain and share documents that show seaborne Russian oil was purchased at or below the price cap. These documents include invoices, contracts and proof of accounts payable. Financial institutions should request such documents from customers. Service providers such as insurers, who do not regularly have direct access to price information in the ordinary course of business, should obtain and retain customer attestations in which the customer commits to not purchase seaborne Russian oil above the price cap. This recordkeeping and attestation process is designed to create a "safe harbor" for service providers.

Russian Origin Oil is Still Banned from the United States

The new policy will not affect the existing bans on the importation of Russian oil and refined oil products into the United States. The White House made the decision to ban Russian oil in close consultation with U.S. allies and partners around the world, as well as members of Congress of both parties. At the time, the White House recognized that not all U.S. allies and partners were in a position to join in the ban. The White House stated, however, that the United States remains united with its allies and partners in working together to reduce our collective dependence on Russian energy and keep the pressure mounting on Russia, while at the same taking active steps to limit impacts on global energy markets and protect our own economies.

Violations Result in Severe Penalties

Under U.S. law, any dealing in Russian oil, or facilitation of Russian oil transactions, including transporting, financing and insuring such transactions, are also prohibited under the import ban (subject to the price cap and any other exceptions available under U.S. law). Penalties for willful or knowing violations of economic sanctions include fines of up to $1 million and/or 20 years' imprisonment. Mistakenly violating economic sanctions can result in fines of up to $330,947.00 or twice the value of the transaction that is the basis of the violation, whichever is greater.

Additional Policy Guidance and Determinations Expected

OFAC anticipates issuing a determination 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 Aggression"), which will permit the exportation, re-exportation, sale or supply of services relating to the maritime transportation of Russian seaborne oil if such oil is purchased at or below the price cap and, conversely, prohibit such services if the oil is purchased above the price cap. OFAC also anticipates publishing, alongside the determination, industry guidance that will implement the maritime services policy and its price cap exception.

Evasive Transactions and Red Flags

OFAC emphasizes that all U.S. persons will be expected to reject participation in any transaction that evades or otherwise violates the maritime services policy and related price cap exception. OFAC urges persons engaged in maritime commerce to be alert to red flags of possible violations, including those outlined in its preliminary guidance, and indicates that specific published guidance from the agency may be in the offing.

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Please feel free to contact **John E. Bradley, Brent Connor**, **Jaime L. Rosenberg** **or** **Henrietta Worthington** for assistance with Russian sanctions or if you have questions regarding any economic sanctions program.

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