

CLIENT ALERT

OFAC Explains Implementation of Russian Oil Price Cap and Offers a “Safe Harbor” for U.S. Companies Facilitating Purchases of Russian Oil

September 12, 2022

AUTHORS

David Mortlock | Britt Mosman | David Levine | Nikki M. Cronin

When the G7 countries [announced](#) in early September that they would impose a price cap on Russian oil to curb Moscow’s ability to finance its war in Ukraine, there was considerable uncertainty over how such an unprecedented cap would be executed. On September 9, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“**OFAC**”) published preliminary [implementation guidance](#), explaining how the G7 commitment will translate into legal prohibitions on U.S. persons. In practice, the price cap will operate via a ban on the export of services by U.S. persons related to the maritime transportation of Russian-origin crude oil and petroleum products (“**Seaborne Russian Oil**”), with a carve out for Seaborne Russian Oil purchased below a set price. The exact price will be set by a coalition of participating countries and published by OFAC once established. The new prohibitions on services will take effect on **December 5, 2022** with respect to the maritime transportation of crude oil and **February 5, 2023** with respect to the maritime transportation of petroleum products.

Moreover, in an exceptional departure from OFAC’s usual practice in which it generally reserves its discretion to enforce violations on a strict liability basis, OFAC has provided an explicit “safe harbor” for service providers that inadvertently deal in the purchase of Seaborne Russian Oil above the price cap. If the violation was caused by falsified records or material misrepresentations made by persons attempting to circumvent or evade the sanctions, service providers who undertake certain recordkeeping and diligence procedures will be spared from liability. OFAC’s guidance outlines the due diligence practices that it expects from a variety of service providers, which we discuss in more detail below.

OFAC Explains Implementation of Russian Oil Price Cap and Offers a “Safe Harbor” for U.S. Companies Facilitating Purchases of Russian Oil

I. New Category of Service Banned

OFAC intends to issue a determination pursuant to Executive Order (“E.O.”) [14071](#) of April 6, 2022¹ that will prohibit the exportation, reexportation, sale, or supply, directly or indirectly, from the United States or by a U.S. person of services related to the maritime transportation of Seaborne Russian Oil, if the Seaborne Russian Oil is purchased above the price cap. The provision of such services for Seaborne Russian Oil purchased at or below the price cap will be permitted. OFAC makes clear in its guidance that U.S. persons will continue to be prohibited from importing Russian-origin crude oil, petroleum, and petroleum products into the United States pursuant to [E.O. 14066](#), issued on March 8, 2022.² Nonetheless, U.S. persons are not currently prohibited from facilitating the importation of such products into third countries (subject to the forthcoming price cap).

II. Implementation and OFAC’s “Safe Harbor”

While imposing such a price cap is uncharted territory for OFAC, its preliminary guidance foreshadows a willingness to provide an exceptional amount of certainty to service providers attempting to comply with the cap. Providers dealing in Russian oil and petroleum products should make use of this novel guidance to safeguard their operations from enforcement actions.

In the published guidance, OFAC describes three “tiers” of service providers and the associated due diligence that each will be expected to conduct in order to make use of OFAC’s “safe harbor.” This diligence should be conducted on counterparties to verify whether Seaborne Russian Oil that is the subject of a transaction was purchased above the price cap.

OFAC’s expectations are as follows:

- **Direct Access to Price Information:** Actors who regularly have direct access to price information (“such as commodities brokers and refiners,” who OFAC refers to as “Tier 1 Actors”) should retain and share price information (such as invoices, contracts, or receipts) and provide attestations regarding the same to other actors involved in the transaction.
- **Periodic Access to Price Information:** Actors who are sometimes able to request and receive price information from their customers (“Tier 2 Actors” such as financial institutions) should request, retain, and share, as needed,

¹ E.O. 14071 authorizes the Treasury Secretary to prohibit U.S. persons from providing any category of services to Russian persons, upon a finding, or determination, that a particular category of services is subject to the ban.

² See our prior client alert [here](#) for additional information on previously issued E.O. 14071 and E.O. 14066 and the existing prohibitions on dealing in Russian-origin oil.

OFAC Explains Implementation of Russian Oil Price Cap and Offers a “Safe Harbor” for U.S. Companies Facilitating Purchases of Russian Oil

price information (when practicable) or obtain an attestation in which the customer commits not to purchase Seaborne Russian Oil above the price cap if directly obtaining documentation showing the price is not practicable.

- **No Direct Access to Price Information:** Actors who do not regularly have direct access to price information (“Tier 3 Actors” such as insurers) should obtain and retain customer attestations in which the customer commits not to purchase Seaborne Russian Oil above the price cap.

Furthermore, OFAC expects all such actors to retain the above-described records for a minimum of five years. Those who comply with OFAC’s attestation and recordkeeping expectations can take advantage of the “safe harbor” for liability from enforcement in the event the actor inadvertently violates the prohibition on exporting services related to Seaborne Russian Oil purchased above the price cap due to falsified efforts or misinformation provided by illicit actors seeking to evade the price cap.

In addition to the compliance controls described above regarding price-related due diligence and recordkeeping, OFAC’s preliminary implementation guidance highlighted a number of red flags that companies should look out for to identify potential efforts to evade OFAC’s sanctions, including refusal to provide requested price information, unusually favorable payment terms, or indications of manipulated shipping documentation. These listed red flags are not exhaustive and should be combined with other risk-based sanctions compliance due diligence as well as standard sanctions provisions in written agreements, where appropriate.

* * *

While the G7’s price cap on Seaborne Russian Oil is yet another novel use of sanctions policy by the United States and its allies to respond to Russia’s invasion of Ukraine, OFAC’s willingness to provide guidance and a “safe harbor” to providers should be viewed as a positive sign for operators attempting to navigate this difficult and evolving landscape. Service providers who deal in Seaborne Russian Oil should review carefully OFAC’s diligence expectations and recommendations to ensure that they will remain in compliance once the price cap goes into effect on December 5, 2022. Beginning immediately, providers should determine which risk tier they fall into and take steps such as updating the terms and conditions of their standard contracts, modifying their invoicing procedures to include an itemized price for oil, drafting requests for information (RFIs) or appropriate attestations, and providing guidance to staff and counterparties.

OFAC Explains Implementation of Russian Oil Price Cap and Offers a “Safe Harbor” for U.S. Companies Facilitating Purchases of Russian Oil

For assistance with evaluating OFAC’s guidance or implementing its recommendations, please reach out to any of the attorneys from Willkie’s Global Trade and Investment group listed below or the Willkie attorney with whom you regularly work.

David Mortlock

202 303 1136

dmortlock@willkie.com

Britt Mosman

202 303 1057

bmosman@willkie.com

David Levine

202 303 1062

dplevine@willkie.com

Nikki M. Cronin

650 887 9327

ncronin@willkie.com

Copyright © 2022 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in Brussels, Chicago, Frankfurt, Houston, London, Los Angeles, Milan, New York, Palo Alto, Paris, Rome, San Francisco and Washington. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.