

BE SURE BEFORE YOU SHIP: OFAC'S NEW GUIDANCE ON IMPLEMENTATION OF THE PRICE CAP POLICY FOR CRUDE OIL OF RUSSIAN FEDERATION ORIGIN

On November 22, 2022, the US Department of Treasury Office of Foreign Assets Control ("OFAC") released its "OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil of Russian Federation Origin" ("[Crude Oil Guidance](#)").

The Crude Oil Guidance is a supplement and further clarification from OFAC's September 9, 2022, "Preliminary Guidance on Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil" ("[MSP Guidance](#)"), which is briefed separately [here](#). OFAC noted in its Crude Oil Guidance that it intends to release further guidance that will also cover petroleum products of Russian Federation Origin.

In addition to the Crude Oil Guidance, OFAC also issued (on November 21, 2022, but released November 22, 2022), a "determination" pursuant to Executive Order 14071 ("Prohibitions on Certain Services as They Relate to the Maritime Transport of Crude Oil of Russian Federation Origin") ("[determination](#)"). As OFAC states in its Crude Oil Guidance (in bold), "**In short, the determination authorizes U.S. persons to provide covered services if the Russian oil is purchased at or below the price cap.**" Those covered services are enumerated and are as follows:

- Trading/commodities brokering;
- Financing;
- Shipping;
- Insurance, including reinsurance and protection and indemnity;
- Flagging; and
- Customs brokering.

Notably, the determination will take effect on December 5, 2022, at 12:01 a.m. EST, although the Crude Oil Guidance does clarify that the determination does not apply to crude oil loaded onto a vessel prior to that time, so long as it is unloaded at the destination port prior to 12:01 a.m. EST January 19, 2023. Therefore, U.S.

services are permissible for Russian Federation-origin crude oil fitting the above parameters, regardless of the price.

As the price cap changes, a new determination will be issued with new effective dates and timing calculations. What the price cap will be on December 5, 2022, is not yet known or announced (although media reports suggest that a meeting of those setting the price cap will occur on November 23, 2022).

As should be well understood, the determination does not authorize the import of Russian oil into the United States, that is otherwise prohibited pursuant to E.O. 14066.

Further Guidance on the Price Cap

OFAC has provided some further guidance on the price cap as well as potential compliance "red flags":

- Shipping, freight, customs, and insurance costs are not included in the price cap, and "OFAC would view the billing of commercially unreasonable shipping, freight, customs, or insurance costs as a sign of potential evasion of the price cap."
- Once crude oil is substantially transformed in a jurisdiction other than the Russian Federation, it is no longer considered to be of Russian Federation origin, and thus the price cap no longer applies. OFAC does not consider blending of crude oil alone to be substantial transformation for the purpose of the determination. For purposes of assessing whether crude oil is of Russian Federation origin, U.S. persons may reasonably rely upon a certificate of origin but should exercise caution if they have reason to believe such certificate has been falsified or is otherwise erroneous.

Further Guidance on What is and What Isn't a Covered Service

OFAC's Crude Oil Guidance provides specific details regarding each of the covered services and those who believe they may fall within one of the covered services should review in detail.

OFAC does note that the following are not covered services and therefore not within the scope of the determination:

- Medical evacuation or other emergency services for crew members.
- Health, travel, or liability insurance for crew members.
- Classification, inspection, bunkering, and pilotage.

No New Impact for Intermediary Financial Intermediaries

OFAC clarifies that the determination does not impose any new prohibitions or requirements related to the processing, clearing, or sending of payments by intermediary banks.

OFAC Safe Harbor

The Crude Oil Guidance establishes a "safe harbor from OFAC enforcement for U.S. service providers that comply in good faith with a recordkeeping and attestation process. This recordkeeping and attestation process allows each party in the supply chain of Russian oil shipped via maritime transport to demonstrate or confirm that the Russian oil has been purchased at or below the price cap." An example attestation is included within the Crude Oil Guidance, though OFAC notes use of a particular form of attestation is not required for purposes of the safe harbor.

OFAC notes that records must be retained for five years in order to avail oneself of the safe harbor.

Due Diligence and Compliance Reminders

As OFAC set out previously in the MSP Guidance, OFAC expects certain due diligence measures to be undertaken depending on where the actor falls within the different elements of the transaction or which "tier" the actor is classified as, and the Crude Oil Guidance includes a helpful "Table of safe harbor documentation" that reflects the due diligence and documentation expected from OFAC.

OFAC repeats several times in its Crude Oil Guidance that its focus in enforcement will not be on those who act in good faith or on reasonable reliance and who heed OFAC's guidance as to due diligence and record retention, but OFAC will be looking to penalize those who act wilfully or seek to evade OFAC's restrictions as to abuse the price cap and safe harbor.

CONTACTS

David DiBari
Partner

T +1 202 912 5098
E david.dibari
@cliffordchance.com

George Kleinfeld
Partner

T +1 202 912 5126
E george.kleinfeld
@cliffordchance.com

Renée Latour
Partner

T +1 202 912 5509
E renee.latour
@cliffordchance.com

Michelle Williams
Partner

T +1 202 912 5011
E michelle.williams
@cliffordchance.com

Jacqueline Landells
Counsel

T +1 202 912 5061
E jacqueline.landells
@cliffordchance.com

John-Patrick Powers
Counsel

T +1 202 912 5048
E john-patrick.powers
@cliffordchance.com

Holly Bauer
Associate

T +1 202 912 5132
E holly.bauer
@cliffordchance.com

Kimberly Shi
Associate

T +1 202 912 5922
E kimberly.shi
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA

© Clifford Chance 2022

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Delhi •
Dubai • Düsseldorf • Frankfurt • Hong Kong •
Istanbul • London • Luxembourg • Madrid •
Milan • Munich • Newcastle • New York • Paris
• Perth • Prague • Rome • São Paulo •
Shanghai • Singapore • Sydney • Tokyo •
Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement
with Abuhimed Alsheikh Alhagbani Law Firm
in Riyadh.

Clifford Chance has a best friends relationship
with Redcliffe Partners in Ukraine.