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The US Department of the Treasury's Office of Foreign Assets Control (OFAC) Issues New Guidance Concerning the Price Cap Policy for Russia's Oil and Petroleum Products

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In coordination with the Price Cap Coalition[1], OFAC issued a revised Guidance on Implementation of the Price Cap Policy for Russia's Crude Oil and Petroleum Products (Price Cap Guidance) on December 20, 2023. The Price Cap Guidance builds on an a Coalition Advisory for the Maritime Oil Industry and Related Sectors issued by the Price Cap Coalition on October 12, 2023.

OFAC expects the US service providers to comply with this guidance by February 19, 2024. As the Price Cap Policy enters the second year of enforcement, the updated guidance with enhanced attestation requirements and record-keeping requirements for the diverse participants in the Russian oil trade, including vessel operators, commodities traders and financial institutions and presents stakeholders with complex compliance challenges.

Background

In response to a growing shadow trade in Russian crude oil and petroleum products, the international Price Cap Coalition adopted a Price Cap Policy relating to the transport of Russia's crude oil and petroleum products on February 3, 2023. The policy aims to curtail the revenues that Russia obtains from the sale of its crude oil and petroleum products to fund the war in Ukraine while maintaining a stable global energy market.

The Price Cap Guidance categorizes service providers into three tiers, which are based on the service providers' ability to either directly or indirectly access price information. The Price Cap Guidance also clarifies the "safe harbor process" that permits service providers, including US service providers, to provide such "covered services" as trading and commodities brokering, financing, shipping, insurance, flagging and customs brokering in transporting Russia's oil and petroleum products so long as these commodities are bought below a price cap. When service providers comply in good faith with the safe harbor in providing the "covered services," they will avoid strict liability for a breach of sanctions and penalties that otherwise exist to enforce compliance with the Price Cap Policy.

The Safe Harbor: Guidelines for the Three Tiers of Actors

The safe harbor only applies when service providers comply with a stringent recordkeeping and attestation process. The process requires that service providers verify that Russia's oil and petroleum products were in fact bought below the price cap. This process also requires the providers to establish that the refiners in third countries that have not restricted the import of Russian oil and petroleum products bought these commodities below the appropriate price cap. It is important to note that service providers must retain records such as invoices, contracts or receipts, among others, demonstrating their compliance with the safe harbor for specified time periods following the purchase of the Russian commodities.

Service providers may fall within the three tiers of actors:

- Tier 1 actors are those providers that have direct access to price data in the ordinary course of business. Among these are commodities brokers and oil traders.
- Tier 2 actors include providers who may be able to receive price information from their customers in the ordinary course of business. For instance, ship agents, financial institutions and customs brokers are Tier 2 actors. To the extent practicable, these providers must obtain records such as customer attestations demonstrating that Russian crude and petroleum products were bought below the price cap. Importantly, the attestations must be obtained no later than 30 days after a counterparty's lifting or loading of these commodities.
- Tier 3 actors include those who have no direct access to price information in the ordinary course of business. Among these actors are insurers, P&I clubs, shipowners and flagging registers. They must obtain customer attestations and freight and insurance costs before or no later than 30 days after each loading or lifting of Russia's crude and petroleum products.

Takeaway

OFAC has broad powers to enforce the US service providers' compliance with the Price Cap Policy. OFAC also takes a broad jurisdictional view and has been active in enforcing the Price Cap Policy as evidenced OFAC's designation of Sun Ship Management, Covart Energy Limtied, Volition DMCC, Bellatrix Energy and others as Specially Designated Nationals for violating the Russian oil price cap.

1 The Price Cap Coalition is the US, the G7, the European Union and Australia.

In the first price cap enforcement action of 2024, OFAC under Executive Order 14024[2] designated Hennesea Holdings Limited (Hennesea), a United Area Emirates based shipping company that is the ultimate owner of the 18 vessels, including the HS Atlantica, which OFAC previously identified as having engaged in the transport of crude oil of Russian Federation origin priced above the US$60 per barrel price cap. Hennesea was established in late 2022, shortly before the price cap was enacted. OFAC said the company acquired older tankers that have repeatedly conducted port calls in Russian Federation ports to ship crude and petroleum products. Shipping databases show a fleet of nearly 30 ships acquired by Hennesea in 2022 and 2023, with an average age of about 17 years. OFAC's designation of Hennesea should be part of a larger and on-going effort to target the "shadow fleet" that transports Russian oil.

As is readily apparent, price cap violations carry significant consequences. OFAC divides US service providers into three tiers of actors in relation to the maritime transport of Russia's crude oil and petroleum products in the global market while offering a safe harbor to those who comply with the necessary attestation and record keeping requirements.

Given the Price Cap Policy's complex nature, service providers should retain counsel to ensure that a robust compliance program is in place so that the service provider understands what tier they belong to and how to ensure that they comply with the safe harbor guidelines for the relevant tier through the process of attestation and recordkeeping. Doing so in good faith will shield the providers from strict liability and penalties for breach of sanctions imposed for a sale of Russia's oil and petroleum products. The failure to educate and train employees could certainly increase service providers' exposure to significant penalties, not to mention related reputational damage.

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2 Executive Order (E.O.) 14024 is entitled "Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation.