

Locke Lord QuickStudy: OFAC Russia Related Sanctions Update: ??February 13, 2023?

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On February 3, 2023, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") issued a determination ("Price Cap on Petroleum Products of Russian Federation Origin") pursuant to section 1(a)(ii), (1)(b) and 5 of Executive Order ("EO") 14071 (the "Petroleum Price Cap Determination") and a determination ("Prohibitions of Certain Services as They Related to the Maritime Transport of Petroleum Products of Russian Federation Origin") made pursuant to section 1(a)(ii) of EO 14071 (the "Petroleum Products Determination") to implement the price cap policy for crude oil and petroleum products of Russian Federation origin. In addition, OFAC published guidance on the implementation of the price cap policy for crude oil and petroleum products of Russian Federation origin and issued General License ("GL") 56A ("Authorizing Certain Services with Respect to the European Union") and GL 57A ("Authorizing Certain Services Related to Vessel Emergencies") related to the Russian Harmful Foreign Activities ?Sanctions Regulations, 31 CFR Part 587 (the ???"RuHSR").

Determinations

Through the issuance of the Petroleum Price Cap Determination, OFAC set the price cap on "Discount to Crude" petroleum products of Russian Federation origin at \$45 per barrel, and the price cap on "Premium to Crude" petroleum products of Russian Federation origin at \$100 per barrel. The price caps are effective as of February 5, 2023 pursuant to EO 14071 ("Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression") and the Petroleum Products Determination. The price cap prevents firms in participating countries from providing shipping, insurance and other services, including trading brokering to shipments of Russian petroleum products that are above the related price caps.

To implement the price cap policy for Russian petroleum products, OFAC issued the Petroleum Products Determination, which authorizes U.S. persons to provide certain services as they relate to the maritime transport of petroleum products of Russian Federation origin ("Covered Services"), as long as the price of the Russian petroleum product is at or below the relevant price cap. Covered Services include trading/commodities brokering, financing, shipping, insurance (including reinsurance and protection and indemnity), flagging and customs brokering. The Petroleum Products Determination took effect beginning on February 5, 2023, except does not apply to any petroleum products of Russian Federation origin loaded onto a vessel at the port of loading prior to February 5, 2023 and unloaded at the port of destination prior to April 1, 2023. The Petroleum Products Determination does *not* authorize the import of Russian petroleum products into the United States, which is prohibited pursuant to EO 14066 ("Prohibiting Certain Imports and New Investments with Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine").

Guidance

OFAC published guidance on the implementation of the price cap policy for petroleum products of Russian Federation origin (“Guidance”), expanding on the guidance OFAC initially issued on November 22, 2022 related to the price cap policy for crude oil. In our QuickStudy published on November 29, 2022, we examined OFAC’s guidance on the implementation of the price cap policy for Russian crude oil, as well as addressed what measures firms can take to comply with the price cap requirements.

Unlike the price cap for Russian crude oil, there are two price caps for Russian petroleum products: the “Discount to Crude” cap and the “Premium to Crude” cap. Each time a new price cap for Russian petroleum products is set, OFAC will issue a new determination pursuant to EO 14071 to replace the previous determination. Shipping, freight, customs, and insurance costs are not included in the price caps and must be invoiced separately and at commercially reasonable rates. While shipping and insurance are Covered Services, these costs are distinct from the price cap on Russian petroleum products. OFAC will view the billing of commercially unreasonable shipping, freight, customs, or insurance costs as a sign of potential evasion of the price cap.

The price cap applies from the embankment of maritime transport of Russian petroleum products (e.g., when the petroleum products are sold by a Russian entity for maritime transport) through the first landed sale in a jurisdiction other than the Russian Federation (through customs clearance). The price cap therefore does not apply to any additional onshore sales once the Russian petroleum products have cleared customs in a jurisdiction other than the Russian Federation. If, however, after clearing customs, the Russian petroleum products are taken back out on the water (i.e., using maritime transport) without being substantially transformed outside of the Russian Federation, the price cap still applies. Once Russian petroleum products are substantially transformed in a jurisdiction other than the Russian Federation, they are no longer considered to be of Russian Federation origin, and thus the price cap no longer applies. OFAC will only consider blending operations to be substantial transformation if a blending operation results in a tariff shift of the Russian petroleum product (e.g., a change in the applicable Harmonized Tariff code).

OFAC will *not* consider petroleum products to be of Russian Federation origin, solely because such articles contain a de minimis amount of petroleum products left over from a container or tanker. For the purposes of assessing whether petroleum products are 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, the Guidance states that “financing” under Covered Services for purposes of the Petroleum Products Determination does *not* include foreign exchange transactions, the clearing of commodities futures contracts, and the processing or clearing of payments by intermediary banks that do not have any direct relationship with the person providing services related to the maritime transport of the Russian petroleum products (i.e., the person is a non-account party) as it relates to the transaction.

For purposes of the Petroleum Products Determination, “petroleum products” mean articles defined at Harmonized Tariff Schedule of the United States (“HTSUS”) heading 2710. Articles subject to the Premium to Crude price cap include gasoline, motor fuel blending stock, gasoil and diesel fuel, kerosene and kerosene-type jet fuel, and vacuum gas oil. Articles subject to the Discount to Crude price cap include naphtha, residual fuel oil, and waste oils. Specifically, articles defined at the following subheading/suffixes are subject to the Premium to Crude price cap:

2710.12.15	2710.19.11.15	2710.19.11.06	2710.19.24	2710.20.10.07
2710.12.18	2710.19.11.25	2710.19.11.07	2710.19.25	2710.20.10.08
2710.19.06.05	2710.19.11.50	2710.19.11.08	2710.19.26	2710.20.10.11
2710.19.06.15	2710.19.11.02	2710.19.11.11	2710.20.10.02	2710.20.10.13
2710.19.06.25	2710.19.11.03	2710.19.11.13	2710.20.10.03	2710.20.10.14
2710.19.06.30	2710.19.11.04	2710.19.11.14	2710.20.10.04	
2710.19.06.35	2710.19.11.05	2710.19.16	2710.20.10.05	

All other articles defined in HTSUS heading 2710 are subject to the Discount to Crude price cap.

U.S. persons providing Covered Services must ensure that refiners or other purchasers in third countries that have not prohibited the import of Russian petroleum products provide documentation demonstrating that the Russian petroleum products were purchased at or below the relevant price cap. OFAC guidance establishes a “safe harbor” designed to shield U.S. service providers from strict liability for those who comply in good faith with such recordkeeping and attestation process. OFAC enforcement actions will be taken against service providers who inadvertently deal in the purchase of Russian petroleum products sold above the relevant price cap owing to falsified or erroneous records provided by those who act in bad faith or make material misrepresentation. To be afforded this safe harbor, U.S. persons providing Covered Services must retain relevant records for five years, reject participating in evasive transactions or transactions that violate the Petroleum Products Determination, and report such transactions to OFAC.

OFAC divides parties providing Covered Services into three “tiers” of actors and to qualify for the safe harbor, actors must comply with the following:

Actor Tier	Scope	Safe Harbor Compliance Requirements	Risk-Based Due Diligence Recommendations
Tier 1 Actors	Actors who regularly have direct access to price information in the ordinary course of business, such as commodities brokers and traders.	Retain documents showing that Russian petroleum products was purchased at or below the relevant price cap. Such documentation may include invoices, contracts, or receipts/proof of payment.	Updating terms and conditions of contracts, updating invoice structure to include itemized price for petroleum products purchase (excluding shipping, freight, customs and insurance costs), providing guidance to staff.
Tier 2 Actors	Actors 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.	To the extent practicable, request and retain documents that show that Russian petroleum products were purchased at or below the relevant price cap. When not practicable to request and receive such information, obtain and retain	Providing guidance (e.g., risk-based compliance policies and procedures) to trade finance department/relationship managers/compliance staff, updating requests for information (e.g., trade or transaction information

		customer attestations, in which the customer commits that for the service being provided, the Russian petroleum products were purchased or will be purchased at or below the relevant price cap.	showing the origin of articles, date and unit price) or sanctions questionnaire templates.
Tier 3 Actors	Actors who do not regularly have direct access to price information in the ordinary course of business, such as insurers, P&I clubs, ship owners and flagging registries.	Obtain and retain customer attestations, in which the customer commits that for the service being provided, the Russian petroleum products were purchased or will be purchased at or below the relevant price cap (e.g., as part of their annual insurance policy renewal process or updates to their insurance policies). This can be done through a sanctions exclusion clause written into or already included into policies or contracts.	Updating policies and terms and conditions, updating sanctions questionnaire templates, providing guidance to staff.

While OFAC has confirmed its broad authority to take action against actors that evade the price cap, it has stated that it will not pursue penalties against U.S. service providers that comply with the safe harbor requirements outlined in the Guidance. For that reason, it is important for persons providing Covered Services to take immediate measures to comply with price cap requirements of Russian petroleum products, which include conducting a risk assessment review of customers, contracts and transactions, updating insurance policies and sanctions-related compliance programs, providing sanctions-related trainings, amending sanctions-related questionnaires and attestations, and modifying contractual terms and conditions.

GLs

GL 56A expands the authorization in GL 56 to also permit transactions otherwise prohibited by the Petroleum Products Determination related to the importation of petroleum products into the Republic of Bulgaria, the Republic of Croatia, or landlocked European Union Member States as described in Council Regulation (EU) 2022/879 of June 3, 2022.

The authorization in GL 57A is expanded to include transactions otherwise prohibited by the Petroleum Products Determination that are ordinarily incident and necessary to vessel emergencies related to the health or safety of the crew or environmental protection, including safe docking or anchoring, emergency repairs, or salvage operations.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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