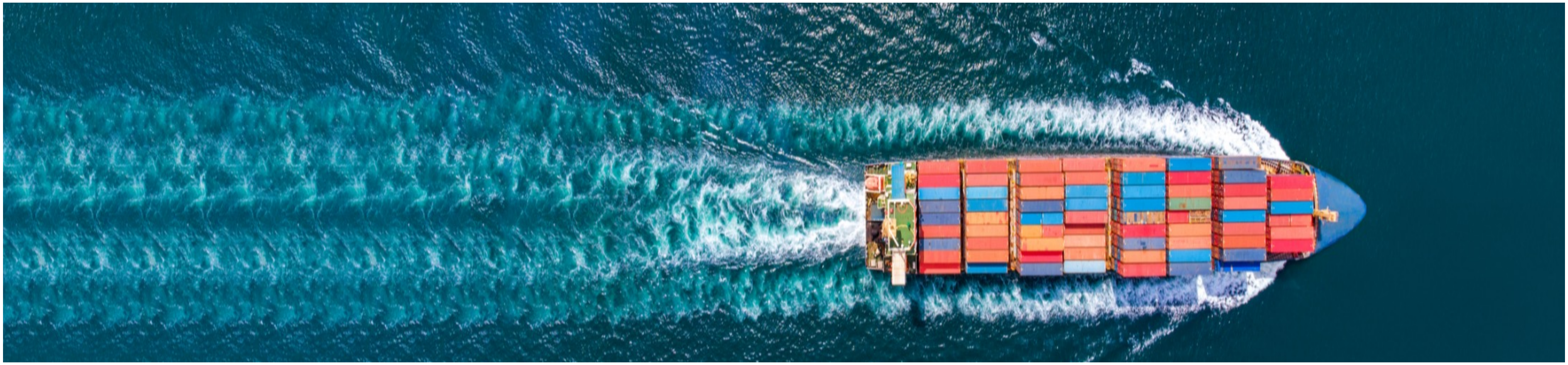

Seward & Kissel LLP

Sanctions Related to the Russian Oil Price Cap

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Timeline of Key Events

- **June 3, 2022:** EU passes its sixth sanctions package which includes a prohibition for EU operators to insure or finance the transport of crude oil or petroleum products from Russia to third countries, going into effect Dec. 5, 2022 for crude oil and February 5, 2023 for petroleum products.
- **September 2, 2022:** G7 issues a statement announcing the price cap and maritime services exception.
- **September 9, 2022:** OFAC issues a Preliminary Guidance on the implementation of the maritime services ban and price cap exception.
- **September 29, 2022:** EU proposes 8th sanctions package against Russia which includes a Russian-oil price cap.
- **October 6, 2022:** EU approves 8th sanctions package which marks the beginning of the implementation of the price cap within the EU.

EU Passes its 6th Sanctions Package

- On June 3, 2022, the EU adopted its sixth package of restrictive measures against Russia.
- This package included a prohibition on the direct or indirect purchase, import, or transfer into the EU of crude oil or petroleum products originating in Russia or being exported from Russia. The package also prohibits EU operators from insuring and financing the transport of such goods to third countries.
- The ban on the importation of crude oil is contemplated to go into effect on December 5, 2022, and the ban on maritime transportation of petroleum products on February 5, 2023.
- While the EU's ban on importing Russian seaborne crude oil remains, the recently passed 8th sanctions package modifies this ban (as noted below) by permitting European operators to undertake and support the transport of Russian oil to third countries, provided its price remains under the cap.

The G7 Announces its Price Cap Policy

- On September 2, 2022, the G7 Finance Ministers announced their intention to finalize and implement a comprehensive prohibition of services which will enable maritime transportation of Russian-origin crude oil and petroleum products globally.
- Under the plan, the provision of such maritime services would only be available if the oil and petroleum products are purchased at or below a price cap.
- The price cap is designed to reduce Russian revenues and Russia's ability to fund its war of aggression in Ukraine, while limiting the impact of Russia's war on global energy prices—especially for low- and middle-income countries.
- Through the price cap, the G7 seeks to establish a broad coalition to maximize the cap's effectiveness and encourages all countries that still seek to import Russian oil and petroleum products to commit to doing so only at prices at or below the price cap.

The G7 Announces the Price Cap (cont'd)

- The G7 stated that the first price cap is to be set at a level based on a range of technical inputs and will be decided by the full coalition in advance of implementation in each jurisdiction.
- The G7 envisioned that the implementation of the price cap will be based on a recordkeeping and attestation model and aims to ensure consistent implementation across jurisdictions.
- The goal of the recordkeeping and attestation model is to limit possibilities for circumventing the price cap regime, while also minimizing the administrative burden for market participants.

EU Passes its 8th Sanctions Package

- In addition to OFAC's actions as detailed below, on October 6, 2022, the EU passed its 8th sanctions package against Russia.
- This package lays the basis for the required legal framework to implement the oil price cap envisaged by the G7.
- While the EU's ban on importing Russian seaborne crude oil fully remains, the price cap would allow European operators to undertake and support the transport of Russian oil to third countries, provided its price remains under the pre-determined cap.
- The EU noted that its implementation of the price cap is being "closely coordinated" with G7 partners, and would take effect from December 5, 2022 for crude and from February 5, 2023 for refined petroleum products, after a further decision by the Council.

OFAC Announces Maritime Services Ban

- In the United States, the U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC") issued its preliminary guidance on the Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil on September 9, 2022.
- The preliminary guidance provided notice to the market of an impending ban on services related to the maritime transportation of Russian Federation origin crude oil and petroleum products.
- Like the EU, the ban on maritime transportation of crude oil will go into effect on December 5, 2022, and the ban on maritime transportation of petroleum products on February 5, 2023.
- OFAC announced that it anticipates publishing further guidance on which services will be subject to the maritime services policy.

OFAC Announces Price Cap Exception to the Ban

- Notwithstanding the ban, OFAC also announced it anticipates issuing a determination pursuant to Executive Order 14071 that will permit the exportation, re-exportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of services related to the maritime transportation of seaborne Russian oil, if the seaborne Russian oil is purchased at or below the price cap.
- Therefore, importers and refiners that purchase seaborne Russian oil at or below the price cap can reliably continue to receive maritime services related to that oil, and service providers in countries implementing the maritime services policy can provide those services for shipments of seaborne Russian oil sold at or below the price cap.
- OFAC noted that it will issue additional guidance on implementation, including how the level of the price cap will be published and updated.

OFAC Reaffirms Prohibition on Imports of Russian Oil to the United States

- Under Executive Order 14066, the United States imposed a prohibition on the importation into the United States of Russian Federation origin crude oil; petroleum; and petroleum fuels, oils, and products of their distillation.
- In the preliminary guidance OFAC noted that this prohibition will remain in place alongside the U.S. price cap.
- OFAC noted, however, that the ban on U.S. imports does not restrict the importation of Russian Federation origin crude oil; petroleum; and petroleum fuels, oils, and products of their distillation into other countries besides the United States.

OFAC Announces Recordkeeping & Attestation Requirements

- OFAC announced that the implementation of the price exception will rely on a recordkeeping and attestation process that allows each party in the supply chain of seaborne Russian oil to demonstrate or confirm that oil has been purchased at or below the price cap.

- This recordkeeping and attestation process is in addition to standard due diligence a service provider may have in place for sanctions risk.

- OFAC confirmed that the recordkeeping and attestation process is designed to create a “safe harbor” for service providers from liability for breach of sanctions in cases where service providers inadvertently deal in the purchase of seaborne Russian oil above the price cap due to, for example, falsified records provided by bad actors.

OFAC Announces Recordkeeping & Attestation Requirements

- As part of its preliminary guidance, OFAC has published different types of recordkeeping and attestation requirements for different maritime services actors, depending on those persons' access to price information.
- OFAC has published a rubric that identifies Tier 1, Tier 2 and Tier 3 actors who may have differing levels of access to price information, with corresponding differences in the kinds of information sufficient to satisfy the recordkeeping and attestation "safe harbor."

Tier 1, Tier 2 and Tier 3 Actors

- **Tier 1 Actors:** Tier 1 actors are those persons who regularly have direct access to price information in the ordinary course of business, including refiners, importers, commodities brokers, traders and customs brokers.
    - Tier 1 actors should retain and share, as needed, documents that show that seaborne Russian oil was purchased at or below the price cap, and may need to provide attestations to Tier 2 or Tier 3 actors.
    - Documentation may include invoices, contracts, or receipts/proof of accounts payable.

Tier 1, Tier 2 and Tier 3 Actors

- **Tier 2 Actors:** Tier 2 actors are those persons who are sometimes able to request and receive price information from their customers in the ordinary course of business, such as financial institutions providing trade finance or "shippers."
  - Tier 2 actors should, when practicable, request, retain and share, as needed, price information (when practicable) or attestations received from Tier 1 actors (when direct receipt of price information is not practicable).
  - Documentation may again include invoices, contracts, or receipts/proof of accounts payable, or a price cap attestation.

Tier 1, Tier 2 and Tier 3 Actors

- **Tier 3 Actors:** Tier 3 actors are those persons who do not regularly have direct access to price information in the ordinary course of business, such as insurance brokers, insurers, reinsurers, and protection and indemnity (P&I) clubs.
    - Tier 3 actors should obtain and retain customer attestations from Tier 1 or Tier 2 actors, in which the customer commits to not purchase seaborne Russian oil above the price cap,
    - Documentation could include an attestation, for example, included as a required element of a customer's annual insurance policy in the case of a P&I club.

Records Retention; Recommendations for Risk-Based Compliance

- OFAC has identified that, whether a Tier 1, Tier 2, or Tier 3 actor, OFAC expects those actors to retain all relevant records for five years.
- OFAC has also set out recommendations for risk-based measures for compliance:
  - Tier 1 actors should consider updating the terms and conditions of their contracts, or update their invoice structure to include an itemized price for oil that excludes shipping, freight or customs costs.
  - Tier 2 actors should consider providing guidance to their staff, updating requests for information or sanctions questionnaire templates, or updating bill of lading templates to include counterparty attestations
  - Tier 3 actors should consider updating their policies and related terms and conditions, and providing guidance to their staff.

OFAC Announces New Blocking, Rejecting and Reporting Requirements

- OFAC advised that U.S. persons will be required to reject participating in an evasive transaction or a transaction that violates the maritime services policy and price exception, and report such a transaction to OFAC.
- OFAC recognizes that—although not every service provider may have access to all information about a transaction involving seaborne Russian oil—OFAC recommends that service providers review the information available to them for potential red flags.

OFAC Identifies Red Flags for Evasion

- Persons providing services related to the maritime transportation of seaborne Russian oil in compliance with the price exception should be vigilant about red flags which may indicate possible evasion, including:
  - evidence of deceptive shipping practices;
  - refusal or reluctance to provide requested price information;
  - unusually favorable payment terms, inflated costs, or insistence on using circuitous or opaque payment mechanisms;
  - indications of manipulated shipping documentation;
  - newly formed companies or intermediaries, especially if registered in high-risk jurisdictions; and
  - abnormal shipping routes.

Enforcement of the Price Cap

- OFAC noted that enforcement is likely to cut across borders and be an international effort among all implementing coalition countries, including by sharing information.
- Actors in the maritime services supply chain who falsify documentation or attempt to evade or avoid the price cap will be targets of sanctions enforcement by OFAC or other authorities.
- Actors in the maritime services supply chain who do not implement OFAC's guidance or who recklessly deal in seaborne Russian oil without taking steps to implement a risk-based compliance program including the recordkeeping and attestation requirements are also potential targets of a sanctions enforcement action if they inadvertently engage in a prohibited transaction.

Sanctions Enforcement Risks and Open Issues

- **Vigorous Enforcement Expected:** OFAC has said it seeks to engage with the industry and is not looking to play a “gotcha” game, but nevertheless has emphasized that vigorous enforcement of this policy is anticipated.
- **Risks for U.S. and Non-U.S. Persons**
  - U.S. actors are subject to the maritime services ban and will need to address the recordkeeping and attestation process by the applicable upcoming deadlines in line with any additional guidance OFAC will propose.
  - Non-U.S. actors remain subject to exposure under OFAC’s sanctions regime. Secondary sanctions are not contemplated, but non-U.S. persons continue to have exposure by virtue of “causing” liability and designation risk.
- **Contradictory Policy Goals and Complex Structure**
- **What Does an Attestation Look Like?**

Compliance Recommendations

- **Framework for OFAC Compliance Commitments**
  - Organizations subject to U.S. jurisdiction, as well as foreign entities that conduct business in or with the United States, U.S. persons, or using U.S.-origin goods or services, should employ a **risk-based approach** to sanctions compliance by developing, implementing, and routinely updating a sanctions compliance program (SCP).
  - As noted by OFAC, SCPs will vary depending on a variety of factors, including "a company's size and sophistication, products and services, customers and counterparties, and geographic locations" but each SCP should incorporate five essential components: "(1) management commitment; (2) risk assessment; (3) internal controls; (4) testing and auditing; and (5) training."
  - OFAC will consider favorably subject persons that had effective SCPs at the time of an apparent violation.

Compliance Recommendations

- **Guidance to Address Illicit Shipping and Sanctions Evasion Practices**
  - The U.S. State Dept., U.S. Coast Guard, and OFAC jointly advised the maritime industry in May 2020 on “approaches to aid in further tailoring due diligence and sanctions compliance policies and procedures.”
  - Identified areas of compliance focus include: (1) institutionalize sanctions compliance programs; (2) establish AIS best practices; (3) monitor ships throughout the entire transaction lifecycle; (4) know your customer and counterparty; (5) exercise supply chain due diligence; (6) update contractual language; (7) engage in industry information sharing.

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Bruce G. Paulsen is co-chair of Seward & Kissel's Litigation Group, chair of the Chambers-ranked Sanctions Practice Group and has been a partner since 2002. He was named as a member of Legal 500's "Hall of Fame" in 2022 and as one of the global Top 10 Maritime Lawyers by Lloyd's List, in December 2020. Legal 500 2022 reported that Bruce "is an industry veteran, and first class in his knowledge and performance."

Bruce specializes in handling complex commercial and maritime disputes. Bruce handles finance and securities-related disputes in the shipping industry as well as traditional maritime disputes, lien claims and environmental matters. He also has substantial expertise in the area of international trade sanctions; has been deeply involved in handling piracy issues before U.S. government agencies and is highly experienced in the recognition and enforcement of arbitration awards.

Further, Chambers USA 2022 reported that Bruce "has particular expertise in finance and securities litigation in the shipping industry and acts for a wide variety of clients including bondholders, secured lenders, shipowners and charterers." Legal 500 USA 2022 described Bruce as "at the very top of his field."

Bruce has written and lectured frequently on litigation, arbitration, bankruptcy, piracy and sanctions issues, and is highly engaged, on a pro bono basis, in non-profit governance. He is also a contributor to Seward & Kissel's Maritime Blog.

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Questions?

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