CLE MATERIALS

FIA Forum: Commodities 2024

Commodity Derivatives: Volatility, Liquidity, Regulation and Enforcement

16 September 2024 - 18 September 2024
The Houstonian • Houston, TX

Sanctions / Export Controls Panel
18 September 2024
10:25 am - 10:55 am
Forest Ballroom

Moderator

Eric Kadel, Partner, Sullivan & Cromwell LLP

Speakers

Shelley Park, Associate General Counsel, Vitol

Maura Rezendes, Partner, A&O Shearman

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**ENFORCEMENT INFORMATION FOR September 9, 2014**

**Information concerning the civil penalties process is discussed in OFAC regulations governing the various sanctions programs and in 31 C.F.R. part 501. On November 9, 2009, OFAC published as Appendix A to part 501 Economic Sanctions Enforcement Guidelines. *See* 31 C.F.R. part 501, app. A. The Economic Sanctions Enforcement Guidelines, as well as recent final civil penalties and enforcement information, can be found on OFAC's Web site at http://www.treasury.gov/ofac/enforcement.**

**ENTITIES – 31 C.F.R. 501.805(d)(1)(i)**

**Zulutrade, Inc. Settles Potential Liability for Apparent Violations of Multiple Sanctions Programs:** Zulutrade, Inc. (Zulutrade), a Delaware-incorporated entity registered with the Commodities Futures Trading Commission (CFTC), has agreed to pay $200,000 to settle potential civil liability for apparent violations of: the Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. part 560;[1] the Sudanese Sanctions Regulations (SSR), 31 C.F.R. part 538; and Executive Order 13582 (E.O. 13582) of August 17, 2011, "Blocking Property of the Government of Syria and Prohibiting Certain Transactions With Respect to Syria."[2] Zulutrade's settlement with OFAC is being coordinated with Zulutrade's primary regulator, the CFTC, which is concluding its own enforcement action against Zulutrade for violations of CFTC rules arising out of the same pattern of conduct.

OFAC determined that Zulutrade did not voluntarily self-disclose the apparent violations, and that the apparent violations constitute a non-egregious case. The base penalty for the apparent violations was $844,090,000.

Zulutrade is a CFTC-registered Introducing Broker and Commodity Trading Advisor that operates an electronic trading platform which allows its customers to automatically place currency foreign exchange (FX) trades with broker-dealers through Zulutrade's platform. Over a number of years beginning in 2009, Zulutrade maintained accounts for over 400 persons in Iran, Sudan, and Syria, and exported services to these customers by placing FX trades via its platform. Zulutrade also originated eight funds transfers totaling $10,264.36 destined for two individuals located in Iran. Zulutrade failed to screen or otherwise monitor its customer base for OFAC compliance purposes at the time of the apparent violations. This failure was the result of a lack of awareness regarding U.S. sanctions regulations. The CFTC has coordinated with OFAC to ensure commitments by Zulutrade to enhance its sanctions compliance capabilities.

The settlement amount reflects OFAC's consideration of the following facts and circumstances, pursuant to the General Factors under OFAC's Economic Sanctions Enforcement Guidelines, 31 C.F.R. part 501, app. A. OFAC considered the following to be aggravating factors: Zulutrade

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[1] On October 22, 2012, OFAC changed the heading of 31 C.F.R. part 560 from the Iranian Transactions Regulations to the ITSR, amended the renamed ITSR, and reissued them in their entirety. See 77 Fed. Reg. 64,664 (Oct. 22, 2012). For the sake of clarity, all references herein to the ITSR shall mean the regulations in 31 C.F.R. part 560 in effect at the time of the activity, regardless of whether such activity occurred before or after the regulations were renamed.

[2] On May 2, 2014, OFAC amended the Syrian Sanctions Regulations and reissued them in their entirety in order to implement various Executive orders, including E.O. 13582. See 79 Fed. Reg. 25,414 (May 2, 2014).

acted recklessly in maintaining accounts for, and placing FX trades on behalf of, persons subject to U.S. sanctions without undertaking any measures to comply with OFAC regulations; Zulutrade, including its senior management, had reason to know of the conduct that led to the apparent violations; Zulutrade's actions caused harm to U.S. sanctions program objectives; and Zulutrade did not have an OFAC compliance program in place at the time of the apparent violations. OFAC considered the following to be mitigating factors: Zulutrade is a small company with limited business operations; Zulutrade has taken remedial action in response to the apparent violations; Zulutrade has not received a penalty notice or Finding of Violation in the five years preceding the earliest date of the transactions giving rise to the apparent violations; and Zulutrade substantially cooperated with OFAC's investigation.

For more information regarding OFAC regulations, please visit: http://www.treasury.gov/ofac.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

**February 3, 2023**
**Revised on: December 20, 2023**

# OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil and Petroleum Products of Russian Federation Origin

## Contents

## I. OVERVIEW OF THE DETERMINATIONS AND THE PRICE CAP

The United States is part of an international coalition, including the G7, the European Union, and Australia, that have agreed to prohibit the import of crude oil and petroleum products of Russian Federation origin (the "Price Cap Coalition"). These countries, home to many best-in-class financial and professional services, have also agreed to implement a policy with regard to a broad range of services as they relate to the maritime transport of crude oil and petroleum products of Russian Federation origin. This policy is known as the "price cap policy."

This document, originally issued on February 3, 2023, provides guidance on the implementation of the price cap policy for both crude oil of Russian Federation origin ("Russian oil") and petroleum products of Russian Federation origin ("Russian petroleum products").

On December 20, 2023, OFAC updated this document to provide additional guidance for certain service providers. This guidance outlines new expectations for those service providers to 1) receive attestations within a specified timeframe for each lifting or loading of Russian oil or Russian petroleum products, and 2) retain, provide, or receive itemized ancillary cost information as required. To continue benefiting from the safe harbor detailed below, OFAC expects U.S. service providers to be in compliance with this updated guidance by February 19, 2024.

The price cap policy is intended to maintain a reliable supply of crude oil and petroleum products to the global market while reducing the revenues the Russian Federation earns from oil after its own war of choice in Ukraine inflated global energy prices.

To implement the price cap policy for Russian oil, OFAC issued a determination pursuant to Executive Order (E.O.) 14071 ("Prohibitions on Certain Services as They Relate to the Maritime Transport of Crude Oil of Russian Federation Origin") (the "crude oil determination"). To implement the price cap policy for Russian petroleum products, OFAC also issued an additional determination pursuant to E.O. 14071 ("Prohibitions on Certain Services as They Relate to the Maritime Transport of Petroleum Products of Russian Federation Origin") (the "petroleum products determination").

The effect of the crude oil determination and the petroleum products determination is to authorize U.S. persons to provide certain services as they relate to the maritime transport of Russian oil and Russian petroleum products (the "covered services"), as long as such crude oil or petroleum products are purchased at or below a certain price (the "price cap"). The covered services are:

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

**In short, the crude oil determination and the petroleum products determination authorize U.S. persons to provide covered services if the Russian oil or Russian petroleum products are purchased at or below the relevant price cap.** As explained further in this document, OFAC has established a safe harbor process, so that U.S. service providers can provide covered services without concern that they will be penalized for inadvertently violating U.S. law or regulation. U.S. service providers that comply in good faith with this safe harbor process, as set forth in this document, will not face OFAC penalties.

The crude oil determination took effect at 12:01 a.m. eastern standard time on December 5, 2022. The

petroleum products determination took effect at 12:01 a.m. eastern standard time on February 5, 2023.

As stated in the crude oil determination and further explained in Frequently Asked Question (FAQ) 1094, crude oil of Russian Federation origin that was loaded onto a vessel at the port of loading prior to 12:01 a.m. eastern standard time, December 5, 2022, and unloaded at the port of destination prior to 12:01 a.m. eastern standard time, January 19, 2023, is not subject to the crude oil determination. Consequently, U.S. service providers can continue to provide covered services with respect to crude oil of Russian Federation origin purchased at any price, provided that the crude oil was loaded onto a vessel at the port of loading for maritime transport prior to 12:01 a.m. eastern standard time, December 5, 2022, and unloaded at the port of destination prior to 12:01 a.m. eastern standard time, January 19, 2023.

As stated in the petroleum products determination and explained further in FAQ 1109, Russian petroleum products that are loaded onto a vessel at the port of loading prior to 12:01 a.m. eastern standard time, February 5, 2023, and unloaded at the port of destination prior to 12:01 a.m. eastern daylight time, April 1, 2023, are not subject to the petroleum products determination. Consequently, U.S. service providers can continue to provide covered services with respect to Russian petroleum products purchased at any price, provided that the Russian petroleum products are loaded onto a vessel at the port of loading for maritime transport prior to 12:01 a.m. eastern standard time, February 5, 2023, and unloaded at the port of destination prior to 12:01 a.m. eastern daylight time, April 1, 2023.

The crude oil determination and the petroleum products determination do not authorize the import of Russian oil or Russian petroleum products into the United States, which is prohibited pursuant to E.O. 14066.

## II. KEY COMPONENTS AND DEFINITIONS

**The price caps**

The price caps for Russian oil and Russian petroleum products are set after technical exercises conducted by the Price Cap Coalition. For Russian petroleum products, there are two price caps: the "Discount to Crude" cap and the "Premium to Crude" cap (see the "Price Cap on Petroleum Products of Russian Federation Origin").

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 caps on Russian oil and Russian petroleum products. Please see below for guidance on when a price cap "starts" and "stops." OFAC would view the billing of commercially unreasonable shipping, freight, customs, or insurance costs as a sign of potential evasion of the price cap.

The following is an example of a permissible transaction:

> A U.S. trading company purchases Russian oil at or below the price cap from a Russian Federation company. The trading company arranges for maritime transport of that Russian oil to a refiner in a jurisdiction that has not prohibited the importation of Russian oil. The trading company prepares and maintains documentation showing that the Russian oil was purchased at or below the price cap and which lists separate and commercially reasonable shipping, freight, customs, and insurance costs. The refiner pays the trading company a total price not to exceed the price cap price plus the shipping, freight, customs, and insurance costs. To be afforded the "safe harbor," the U.S. trading company retains the records related to this transaction for a period of five years.

When a new price cap for Russian oil or Russian petroleum products is set, the Secretary of the Treasury, in

consultation with the Secretary of State, will issue a new determination pursuant to E.O. 14071, to replace the previous determination, and publish it in the *Federal Register*. If a price cap changes, OFAC intends to authorize a period for covered services providers to complete the provision of services engaged for the maritime transport of Russian oil or Russian petroleum products purchased in accordance with the previous price cap.

**When does a price cap "start" and "stop"?**

A price cap applies from the embarkment of maritime transport of Russian oil or Russian petroleum products (e.g., when the crude oil or 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).

This means that once the Russian oil or petroleum products have cleared customs in a jurisdiction other than the Russian Federation, the price cap does not apply to any further onshore sale.

If, however, after clearing customs, the Russian oil or 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. This means any covered services, as listed in the crude oil determination or the petroleum products determination, can only be provided by U.S. service providers if such Russian oil or Russian petroleum products are sold at or below the relevant price cap.

However, for Russian crude oil, once it is substantially transformed (e.g., it is refined or undergoes other substantial transformation such that the product loses its identity and is transformed into a new product having a new name, character, and use) 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 (even if the refined oil is further exported using maritime transport). Thus, a refiner in a jurisdiction that has not banned the import of Russian oil can purchase crude oil at or below the price cap and rely on U.S. service providers for services related to the maritime transport of that crude oil. In addition, such a refiner can subsequently refine the crude oil and then export the refined oil via marine transport, including with the use of U.S. service providers, without that refined oil being subject to the price cap. OFAC does not consider blending of crude oil alone to be substantial transformation for the purposes of the crude oil determination.

For Russian petroleum products, once those 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. For the purposes of the petroleum products determination, 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 would not consider crude oil or petroleum products to be of Russian Federation origin solely because such articles contain a *de minimis* amount of crude oil or petroleum products left over from a container or tank (e.g., a "tank heel," or unpumpable quantity of substance that cannot be removed from the container without causing damage to the container).

For the purposes of assessing whether crude oil or 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. Crude oil that transits through a pipeline in the Russian Federation that is loaded and certified with a certificate of origin verifying that the crude is of non-Russian Federation origin (e.g., Kazakh-origin oil transported through the Caspian Pipeline Consortium or the Atyrau-Samara pipelines) would not be considered of Russian Federation origin and thus would not be subject to the crude oil determination.

**Covered articles**

For the purposes of the crude oil determination, "crude oil" means articles defined at Harmonized Tariff Schedule of the United States ("HTSUS") subheading 2709.00.

For the purposes of the petroleum products determination, "petroleum products" means articles defined at 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 at 2710 are subject to the **Discount to Crude** price cap.

**Covered services**

For the purposes of the crude oil determination and the petroleum products determination, OFAC defines covered services according to the following descriptions as each relates to the maritime transport of Russian oil or Russian petroleum products:

- **Trading/commodities brokering**: Buying, selling, or trading commodities and/or brokering the sale, purchase, or trade of commodities on behalf of other buyers or sellers.

- **Financing**: A commitment for the provision or disbursement of any debt, equity, funds, or economic resources, including grants, loans, guarantees, suretyships, bonds, letters of credit, supplier credits, buyer credits, and import or export advances. For the purposes of the crude oil determination and the petroleum products determination, the term "financing" does ***not*** include the processing or clearing of payments by intermediary banks. *Please see below for more details.*

- **Shipping**: Owning or operating a ship for the purpose of carrying or delivering cargo and/or freight transportation; chartering or sub-chartering ships to deliver cargo or transport freight; brokering between shipowners and charterers; and serving as a shipping/vessel agents.

- **Insurance**: The provision of insurance, reinsurance, or protection and indemnity ("P&I") services; satisfying claims related to underwriting insurance policies that protect policyholders against losses that may occur as a result of property damage or liability; assuming all or part of the risk associated

with existing insurance policies originally underwritten by other insurance carriers, including the reinsurance of a non-U.S. insurance carrier by a U.S. person; and liability insurance for maritime liability risks associated with the operation of a vessel, including cargo, hull, vessel, P&I, and charterer's liability.

- **Flagging**: Registering or maintaining the registration of a vessel with a country's national registry of vessels. This definition does not include the deflagging of vessels transporting Russian oil or Russian petroleum products sold above the price cap.

- **Customs brokering**: Assisting importers and exporters in meeting requirements governing imports and exports. This definition does not include legal services or assisting importers and exporters in meeting the requirements of U.S. sanctions.

The following services are not covered by the crude oil determination or the petroleum products determination:

- Medical evacuation or other emergency services for crew members.

- Health, travel, or liability insurance for crew members.

- Classification, inspection, bunkering, and pilotage.

If a service provider is unsure whether its services are covered by the crude oil determination or the petroleum products determination, that service provider should contact the OFAC Compliance Hotline at 1-800-540-6322 or email OFAC_Feedback@treasury.gov.

**Processing, clearing, or sending of payments by intermediary banks**

The processing, clearing, or sending of payments by banks is not included in the definition of "financing" for the purposes of the crude oil determination and the petroleum products determination where the bank (1) is operating solely as an intermediary and (2) does not have any direct relationship with the person providing services related to the maritime transport of the Russian oil or Russian petroleum products (i.e., the person is a non-account party) as it relates to the transaction. Thus, the crude oil determination and the petroleum products determination do not impose any new prohibitions or requirements related to the processing, clearing, or sending of payments by intermediary banks.

Similarly, services with respect to foreign exchange transactions and the clearing of commodities futures contracts are outside the scope of "financing."

In addition, Russia-related General License (GL) 8H authorizes certain transactions related to energy involving certain designated Russian financial institutions, including the Central Bank of the Russian Federation.

## III. SAFE HARBOR

**Overview of safe harbor**

This 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 or Russian petroleum products shipped via maritime transport to demonstrate or confirm that the Russian oil or Russian petroleum products have been purchased at or below the 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 oil or Russian petroleum products provide documentation showing that the Russian oil or Russian petroleum products were purchased at or below the

relevant price cap.

Service providers are generally divided into three "tiers" of actors. To be afforded the safe harbor, actors must comply with the following:

- **Tier 1 Actors**: Actors who regularly have direct access to price information in the ordinary course of business, such as commodities brokers and oil traders, are "Tier 1 Actors." To be afforded the safe harbor, Tier 1 Actors must retain documents showing that Russian oil or Russian petroleum products were purchased at or below the relevant price cap, including itemized ancillary cost information (e.g., shipping, insurance, and freight costs). Such documentation may include invoices, contracts, or receipts/proof of payment.

- **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, are "Tier 2 Actors." To be afforded the safe harbor, Tier 2 Actors must, to the extent practicable, request and retain documents that show that Russian oil or Russian petroleum products were purchased at or below the relevant price cap, including itemized ancillary cost information. When not practicable to request and receive such information, Tier 2 Actors must obtain and retain customer attestations, in which the customer commits that for the service being provided, the Russian oil or Russian petroleum products were purchased or will be purchased at or below the relevant price cap. Certain Tier 2 Actors should obtain attestations within 30 days of a counterparty's lifting or loading of Russian oil or Russian petroleum products (e.g., calling at a port in the Russian Federation or performing a ship-to-ship transfer to load Russian oil or Russian petroleum products).

- **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, shipowners, and flagging registries, are "Tier 3 Actors." To be afforded the safe harbor, Tier 3 Actors must obtain and retain customer attestations, in which the customer commits that for the service being provided, the Russian oil or Russian petroleum products were purchased or will be purchased at or below the relevant price cap. As explained in greater detail later in this guidance, most Tier 3 Actors should obtain attestations each time a counterparty loads or lifts Russian oil or Russian petroleum products, (e.g., calling at a port in the Russian Federation or performing a ship-to-ship transfer to load Russian oil or Russian petroleum products). These Tier 3 Actors should also require counterparties to share additional information upon request, including itemized ancillary costs such as freight and insurance costs. Examples of triggers for requests for additional information (including ancillary cost information) include if a Tier 3 Actor becomes suspicious about a possible violation in the course of their own due diligence or if a Tier 3 Actor receives information about a suspected violation (i.e., from open source reporting or a request from relevant authorities). Reinsurers can use a sanctions exclusion clause in their policies or contracts.

This "safe harbor" for service providers through the recordkeeping and attestation process is designed to shield such service providers from strict liability for breach of sanctions in cases where service providers inadvertently deal in the purchase of Russian oil or 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 misrepresentations. For example, where a service provider without direct access to price information reasonably relies on a customer attestation, and retains the attestation, that service provider will not be held liable for sanctions violations attributable to those acting in bad faith who cause a violation of the crude oil determination or the petroleum products determination, or an evasion of OFAC sanctions.

To be afforded the safe harbor, U.S. service providers must retain relevant records for five years, in accordance with 31 CFR § 501.601.

U.S. persons providing covered services are required to reject participating in an evasive transaction or a transaction that violates the crude oil determination or the petroleum products determination, and report such a transaction to OFAC, in accordance with 31 CFR § 501.604.

For all persons providing covered services, a customer's or counterparty's refusal or reluctance to provide the necessary documentation or attestation should be considered a red flag that may indicate the entity has purchased Russian oil or Russian petroleum products above the relevant price cap.

**Due diligence**

As part of the safe harbor, OFAC expects that U.S. service providers will continue to implement and perform the standard due diligence practices that are customary for their industry and for their role in a particular transaction.

**Specific guidance per tier**

**Tier 1:**

- **Traders and commodities brokers**: To be afforded the safe harbor, traders and commodities brokers must maintain and retain information showing that Russian oil or Russian petroleum products for maritime transport were purchased at or below the relevant price cap, including itemized ancillary cost information as relevant for a given contract or transaction. This could take the form of invoices, contracts, receipts/proof of payment, or other documentation that shows price information.
    - For "Free on Board" (FOB) trades, an itemized record should be kept for all known costs negotiated at the start of the trade transaction, and for "Cost, Insurance, and Freight" (CIF) trades, an itemized record should be kept for all known costs negotiated at the start of the trade transaction, port dues and services charges at the point of loading/export, and relevant insurance and freight costs. Itemized ancillary costs may vary across other trade contracts and terms but should include at least those negotiated at the start of the trade transaction.

**Tier 2:**

- **Financial institutions**: To be afforded the safe harbor, U.S. financial institutions providing financing related to the maritime transport of Russian oil or Russian petroleum products must request and retain price information (to the extent practicable) or a signed attestation from their customers (when direct receipt of price information is not practicable).
    - *Transaction-Specific Financing*: Financial institutions providing transaction-specific trade finance related to the maritime transport of Russian oil or Russian petroleum products should implement appropriate and reasonable risk-based policies and procedures within sanctions compliance programs to confirm that that the price does not exceed the relevant price cap. Financial institutions providing trade finance routinely collect trade documentation to manage financial and compliance risks. Such information may contain trade or transaction information showing the origin of articles, date, and unit price. If obtaining such documentation is not practicable in the ordinary course of business, financial institutions must obtain and retain signed attestations from their downstream customers or subcontractors that the Russian oil or Russian petroleum products were purchased at or below the relevant price cap to be afforded the safe harbor.

- *General Financing*: Financial institutions providing customers with non-transaction specific financing related to the maritime transport of Russian oil or Russian petroleum products should also implement appropriate and reasonable, risk-based policies and procedures within sanctions compliance programs to confirm that that the price does not exceed the relevant price cap. Financial institutions must obtain and retain signed attestations from their downstream customers or subcontractors that for the service being provided, the Russian oil or Russian petroleum products were or will be purchased at or below the relevant price cap to be afforded the safe harbor.

- **Ship/vessel agents**: To be afforded the safe harbor, ship/vessel agents must request and retain price information (to the extent practicable) or a signed attestation from their customers (when direct receipt of price information is not practicable) each time a vessel lifts or loads Russian oil or Russian petroleum products. This attestation must be obtained within 30 days of each lifting or loading of Russian oil or Russian petroleum products. If, in the ordinary course of business, a ship/vessel agent has access to or can request price information, then the ship/vessel agent must request and retain that information to be afforded the safe harbor. If obtaining such information is not practicable in the ordinary course of business, ship/vessel agents must obtain and retain signed attestations in which the customer commits that for the service being provided, the Russian oil or Russian petroleum products were or will be purchased at or below the relevant price cap to be afforded the safe harbor. For example, a ship/vessel agent representing the interests of a shipowner (who is a Tier 3 Actor) may not in the ordinary course of business have access to or be able to request price information, and thus must obtain and retain an attestation within 30 days of a counterparty's lifting or loading of Russian oil or Russian petroleum products.

- **Customs brokers:** To be afforded the safe harbor, customs brokers must request and retain price information (to the extent practicable) or an attestation from their customers (when direct receipt of price information is not practicable) each time a vessel lifts or loads Russian oil or Russian petroleum products. This attestation must be obtained within 30 days of each lifting or loading of Russian oil or Russian petroleum products. If, in the ordinary course of business, a customs broker has access to or can request price information, then the customs broker must request and retain that information to be afforded the safe harbor. If obtaining such information is not practicable in the ordinary course of business, customs brokers must obtain and retain signed attestations within 30 days of a counterparty's lifting or loading of Russian oil or Russian petroleum products.

The responsibility is on the Tier 2 Actor's counterparty to provide an attestation within 30 days of lifting or loading Russian oil or Russian petroleum products. If a Tier 2 Actor discovers that a counterparty lifted Russian oil or Russian petroleum products and failed to provide an attestation to the Tier 2 Actor within the 30-day period, the Tier 2 Actor should request one immediately.

A Tier 2 Actor that requests an attestation or information from a counterparty as described in this guidance would not face an OFAC enforcement action due to the counterparty's refusal to provide the requested information. To be afforded safe harbor, the Tier 2 Actor must disclose to OFAC their counterparty's refusal to provide an attestation or requested information and cease doing business with this counterparty.

**Tier 3:**

- **Shipowners/carriers:** Shipowners or other carriers who perform the transportation of cargo (who do not in the ordinary course of business have information regarding the pricing of the underlying cargo) must obtain and retain an attestation from their customer/contractual counterparty regarding compliance with the price cap to be afforded the safe harbor. This attestation must be obtained prior to each loading or lifting of Russian oil or Russian petroleum products. In addition, shipowners or other carriers must require their Tier 1 Actor counterparties to share additional information upon request.

Such information should include, at a minimum, ancillary itemized cost information (e.g., freight, insurance, and other ancillary costs aside from the underlying cost of the Russian oil or Russian petroleum products).

- **Insurers/P&I clubs:** Insurers and P&I clubs can be afforded the safe harbor by receiving a signed attestation each time a vessel lifts or loads Russian oil or Russian petroleum products. This attestation must be obtained within 30 days of each lifting or loading of Russian oil or Russian petroleum products. In addition, these actors must require their counterparties (i.e., the shipowner or manager) to obtain and share additional information beyond an attestation upon request. Such information should include, at a minimum, itemized ancillary cost information (e.g., freight, insurance, and other ancillary costs aside from the underlying cost of the Russian oil or products). This information would be passed "up the chain" to the insurer or P&I club from the shipowner's Tier 1 counterparty upon request, through the shipowner.

    - An insurer or P&I club may in the ordinary course of business, such as a claims investigation, request additional information from customers, including additional attestations or price information. A party's refusal to provide such information should be considered a red flag for potential sanctions evasion.

- **Reinsurers:** Reinsurers can be afforded the safe harbor through the use of sanctions exclusion clauses in policies or contracts, including pre- existing sanctions exclusion clauses. Alternatively, or in addition to sanctions exclusion clauses, these actors can be afforded the safe harbor through the use of clauses that exclude coverage for activities related to the maritime transport of Russian oil or Russian petroleum products purchased above the price cap. These actors can also use signed attestations, should they so choose.

    - Although these actors may wish to update their policies to include price-cap-specific clauses, this is not required to be afforded the safe harbor. A standard sanctions exclusion clause is sufficient to be afforded the safe harbor, per the guidance in FAQ 102.

    - An insurer or reinsurer may in the ordinary course of business, such as a claims investigation, request additional information from customers, including additional attestations or price information. A party's refusal to provide such information should be considered a red flag for potential sanctions evasion.

- **Flagging registries:** Flagging registries can be afforded the safe harbor by receiving a signed attestation within 30 days of a vessel lifting or loading Russian oil or Russian petroleum products. Flagging registries can require by contract, regulation, or other enforceable means that their customers will be de-flagged if they fail to provide required documentation or violate the crude oil determination or the petroleum products determination.

    - The responsibility is on the flagging registries' counterparty (i.e., the shipowner or manager) to provide the flagging registry with an attestation within 30 days of lifting or loading Russian oil or petroleum products. If the flagging registry discovers that a customer has lifted Russian oil or Russian petroleum products and failed to provide an attestation within the 30-day period, the flagging registry should request one immediately.

The responsibility is on the Tier 3 Actor's counterparty to provide the Tier 3 Actor with an attestation either prior to or within 30 days of each lifting or loading Russian oil or Russian petroleum products. If the Tier 3 Actor discovers that a counterparty lifted Russian oil or Russian petroleum products and failed to provide an attestation within the appropriate timeframe, the Tier 3 Actor should request one immediately.

A Tier 3 actor that requests an attestation or information from a counterparty as described in this guidance would not face an OFAC enforcement action due to the counterparty's refusal to provide the requested information. To be afforded safe harbor, the Tier 3 must disclose to OFAC their counterparty's refusal to provide an attestation or requested information and cease doing business with this counterparty.

**Table of safe harbor documentation**

| Category | Actors | Requirement to be afforded safe harbor | Examples of information or documentation | Recommendations for risk-based measures for compliance |
|---|---|---|---|---|
| Tier 1 — Actors with direct access to price information | Commodities brokers/traders | Retain price information, including itemized ancillary costs, and provide information/ attestation to Tier 2 or Tier 3, as needed and upon request | Invoices, contracts, receipts/proof of payment | Updating terms and conditions of contracts, updating invoice structure to include itemized price for oil or petroleum products purchase (and separately indicating shipping, freight, customs, and insurance costs), providing guidance to staff |
| Tier 2 — Actors sometimes able to request price information | Financial institutions providing trade finance, customs brokers, ship/vessel agents | Request and retain price information, including itemized ancillary cost information (to the extent practicable) or attestation from Tier 1 or customer/ counterparty (when direct receipt of price information is not practicable) | Invoices, contracts, receipts/proof of payment; price cap attestation | Providing guidance to trade finance department/ relationship managers/ compliance staff, updating requests for information (RFIs) or sanctions questionnaire templates; Updating information collection structure to receive per-voyage attestations from counterparties as needed |
| Tier 3 — Actors without direct access to price information | Insurers, P&I clubs, ship owners/carriers, flagging registries | Receive per-voyage attestation from Tier 1 or Tier 2 or customer/ counterparty; Require counterparties to share requested itemized ancillary cost information as needed | Attestation per lifting/loading of Russian oil or Russian petroleum products; documentation of requirement that counterparties share information upon request; clause within policy that excludes coverage for activities related to the maritime transport of Russian oil or Russian petroleum products purchased above the price cap | Updating information collection structure to receive per-voyage attestations from counterparties; updating policies, contracts, and terms and conditions; providing guidance to staff |

| | | | | |
|---|---|---|---|---|
| | Reinsurers | Receive attestation from Tier 1 or Tier 2 or customer/ counterparty regarding compliance with the price cap | Sanctions exclusion clause within policy, clause within policy that excludes coverage for activities related to the maritime transport of Russian oil or Russian petroleum products purchased above the price cap, price cap attestation | Updating policies and terms and conditions, providing guidance to staff |

**Sample attestation**

Service providers are not required to use a particular form of attestation to be afforded the safe harbor. For certain service providers, such as reinsurers, the safe harbor can also be afforded through the use of a sanctions exclusion clause within an annual policy, or a clause excluding coverage for activities related to the maritime transport of Russian oil or Russian petroleum products purchased above the price cap.

As an example, an attestation could include some variation on the following language, signed by an authorized representative of the customer/counterparty:

> *[Party to the contract/service] confirms that for [the service being provided], [party to the contract/service] is in compliance with the Russian price cap framework and any other restrictions on oil and/or petroleum products of Russian Federation origin applicable to [party to the contract/service].*
>
> *[Party to the contract/service] attests that:*
>
> *[Party to the contract/service] has received and retained price information demonstrating that the oil or petroleum products of Russian Federation origin is/was purchased at or below the cap; or*
>
> *Where not practicable to request and receive such information, [party to the contract/service] has obtained a signed attestation that the oil or petroleum products of Russian Federation origin is/was purchased at or below the cap; or*
>
> *[Party to the contract/service] has received a signed attestation that the purchase of oil or petroleum products is/was done pursuant to a license or a derogation.*
>
> *[Signature of the Customer]*

## IV. COMPLIANCE

The recordkeeping and attestation process described above is intended to create a "safe harbor" from strict liability for violations of the crude oil determination or the petroleum products determination in cases where service providers, owing to falsified or erroneous records provided by illicit actors or other deceptive tactics, inadvertently violate the crude oil determination or the petroleum products determination by providing covered services for Russian oil or Russian petroleum products purchased above the relevant price cap.

OFAC would not pursue a penalty against a U.S. service provider that reasonably relies on the documentation

or attestations described above, unless the U.S. provider knew or had reason to know that such documentation was falsified or erroneous or that the Russian oil or Russian petroleum products were purchased above the relevant price cap. For example, where a U.S. service provider without direct access to price information reasonably relies in good faith on a customer attestation (and, as described above, requests additional information if appropriate), that service provider will not be penalized for potential sanctions breaches attributable to the conduct of an actor who causes that U.S. person to unknowingly violate the crude oil determination or the petroleum products determination.

To be afforded the safe harbor, U.S. service providers must retain relevant records for five years, in accordance with 31 CFR § 501.601.

Any person who evades, avoids, causes a violation of, or attempts to violate the crude oil determination or the petroleum products determination is likewise in violation of the prohibition and could be subject to civil or criminal enforcement action. For example, persons that make purchases of Russian oil or Russian petroleum products above the price cap and that knowingly rely on U.S. service providers who provide covered services, or persons that knowingly provide false information, documentation, or attestations to such a service provider will have potentially violated the crude oil determination or the petroleum products determination and may be a target for an OFAC enforcement action. Other such examples could include using side deals to obfuscate the "real" purchase price paid by an intermediary or the ultimate consignee, or otherwise engaging in deceptive activity to deal in Russian oil or Russian petroleum products purchased above the relevant price cap.

OFAC has broad authority to take action against actors that evade the price cap. As this guidance makes clear, good-faith actors, including shipowners and other service providers, can use attestations to be afforded the safe harbor, so that they will not face penalties if someone causes them to inadvertently violate the crude oil determination or the petroleum products determination. Safe harbor from enforcement against violations of the crude oil determination or the petroleum products determination will be afforded to shipowners and service providers that act in good faith. OFAC intends to focus its enforcement responses on those actors who willfully violate or evade the price cap.

## V. LICENSING

**General Licenses**

*Sakhalin-2*

GL 55A authorizes, through 12:01 a.m. eastern daylight time June 28, 2024, all transactions prohibited by the crude oil determination related to the maritime transport of crude oil originating from the Sakhalin-2 project ("Sakhalin-2 byproduct"), provided that the Sakalin-2 byproduct is solely for importation into Japan.

*EU derogations*

GL 56A authorizes certain transactions related to the importation of Russian oil or Russian 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.

Specifically, Council Regulation (EU) 2022/879 contains three derogations:

- As of 5 December 2022 until 31 December 2024 for Bulgaria, to execute contracts concluded before 4 June 2022, or of ancillary contracts necessary for the execution of such contracts, for the purchase, import or transfer of seaborne crude oil (CN 2709 00) and of petroleum products (CN 2710) originating in Russia or exported from Russia.

- As of 5 February 2023 until 31 December 2023 for Croatia, to purchase, import or transfer of vacuum gas oil falling under CN 2710 19 71 originating in Russia or exported from Russia, if no alternative supply of vacuum gas oil is available and Croatia has notified the European Commission, which has not objected.

- As of 5 December 2022 for a landlocked EU Member State, if the supply of crude oil by pipeline from Russia is interrupted for reasons outside the control of that EU Member State, for seaborne crude oil from Russia falling under CN 2709 00 to be imported into that EU Member State, until the supply is resumed or until the Council of the EU decides to terminate this exemption with regard to that EU Member State, whichever is the earliest.

U.S. persons engaging in transactions described in these derogations in Council Regulation (EU) 2022/879 do not need to seek a separate OFAC license, as GL 56A authorizes such activity.

As with all OFAC GLs, GL 56A only authorizes against authorities administered by OFAC. GL 56A only authorizes activity otherwise prohibited by section 1(a)(ii) of E.O. 14071. GL 56A does not relieve those relying on the general license of any requirements of any other Federal law or regulation, or laws or regulations of other jurisdictions. Persons seeking further guidance about the scope of the derogations of Council Regulation (EU) 2022/879 listed above, or whether those derogations are in effect, should consult with EU or relevant Member State authorities.

*Emergency services for vessels*

GL 57A authorizes all transactions prohibited by the crude oil determination or the petroleum products determination that are ordinarily incident and necessary to address vessel emergencies related to the health or safety of the crew or environmental protection, including safe docking or anchoring, emergency repairs, or salvage operations.

This GL only authorizes the offloading of Russian oil or Russian petroleum products if that offloading is ordinarily incident and necessary to address vessel emergencies as described in GL 57A. It does not authorize any transactions related to the sale of Russian oil or Russian petroleum products in violation of the crude oil determination or the petroleum products determination.

**Specific licensing**

In the event that a U.S. person becomes aware that they are providing a covered service related to Russian oil or Russian petroleum products that were purchased above the relevant price cap, the U.S. person must stop providing the covered service and contact OFAC. Persons subject to other jurisdictions that have imposed prohibitions on services related to the maritime transport of Russian oil or Russian petroleum products should seek appropriate guidance and/or authorization in those jurisdictions.

In certain cases, U.S. persons who comply with the attestation process may subsequently discover that someone has caused them to inadvertently provide covered services for Russian oil or Russian petroleum products purchased above the relevant price cap. U.S. persons that seek to continue to provide covered services prohibited by the crude oil determination or the petroleum products determination should contact OFAC and request a specific license to continue providing covered services. To apply for a specific license, please go to OFACs License Application Page. Specific license requests will be considered on a case-by-case basis.

If you have additional questions, we encourage you to contact the OFAC Compliance Hotline at 1-800-540-6322 or email OFAC_Feedback@treasury.gov.

# OFAC

Office of Foreign Assets Control

## Opening Securities and Futures Accounts from an OFAC Perspective

### Introduction

The Treasury Department's Office of Foreign Assets Control (OFAC) is responsible for administering and enforcing economic and trade sanctions based on U.S. foreign policy, national security, and economic goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. All U.S. persons, including securities and futures firms, such as investment advisers, broker-dealers, futures commission merchants, introducing brokers in commodities, commodity pool operators, and commodity trading advisors, are subject to the requirements of OFAC. The guidance below is intended to assist such firms when evaluating new clients and investments or transactions by such clients.

### Account Opening Review

OFAC recommends that every securities and futures firm establish and maintain an effective OFAC compliance program. In the event of an OFAC violation, both the adequacy of a company's transaction processing system, as well as its overall OFAC compliance program, are taken into consideration when determining the severity of potential enforcement actions. Generally, at the time of account opening, there are two specific stages that warrant caution: (i) the client acceptance process, and (ii) the selection of new investments or transactions. Prior to entering into an advisory or brokerage relationship with a client, securities and futures firms should screen the new client's identification information, as well as the customer's proposed transaction(s), against OFAC's Specially Designated Nationals and Blocked Persons list ("SDN list") [which is available at www.treas.gov/offices/enforcement/ofac/sdn/index.shtml], and applicable OFAC sanctions programs. Securities and futures firms should maintain adequate documentation about the results of their screening in order to illustrate their efforts to comply with OFAC regulations. Periodic checks of "non-accountholders" (e.g., beneficiaries, guarantors, or principals) may also be necessary, depending upon each firm's specific risk profile.

### OFAC Compliance and CIP requirements

A strong OFAC compliance program consists of procedures that are similar to those found in a brokerage firm's Customer Identification Program ("CIP"). Firms should use risk-based measures for verifying the identity of each new customer who opens an account. In establishing procedures, firms should identify and consider their size (e.g., total assets under management), their location, their customer base, the types of accounts they maintain, the methods by which accounts can be opened (e.g., in person or non face-to-face), and the types of identifying information available for each customer. Firms should also assess risks posed by each customer and transaction, asking questions such as:

- *Is the customer regulated by a Federal functional regulator, widely known, or listed on an exchange?*
- *Has the firm had any previous experience with the customer or does it have prior knowledge about the customer?*
- *Is the firm facilitating a U.S. person's investment in a foreign issuer or other company that conducts business in a sanctioned country?*
- *Is the customer located in a high-risk foreign jurisdiction that is considered to be poorly regulated or in a known offshore banking or secrecy haven?*
- *Is the customer located or does it maintain accounts in countries where local privacy laws, regulations, or provisions prevent or limit the collection of client identification or beneficial ownership information?*

Despite similarities between compliance with OFAC and compliance with CIP requirements, there are differences between the two. In this regard, FinCEN, in guidance issued separately with the SEC and CFTC, has stated that, with respect to an omnibus account established by an intermediary, a securities broker-dealer or a futures commission merchant is not required to look through the intermediary to the underlying beneficial owners of the omnibus account for purposes of complying with CIP requirements.[1] A "customer" is defined in the relevant CIP rules as "[a] person that opens a new account." OFAC regulations, however, apply to all property and interests in property of a sanctions target within the possession or control of a U.S. person. That would include shares held in omnibus accounts on behalf of a sanctioned party. In some cases, it may be prudent for a firm to obtain beneficial ownership information for certain types of accounts. Some accounts, such as those opened by non-U.S. persons or entities located in high risk jurisdictions, may present a higher risk of sanctions violations. If a foreign financial institution is a new client trying to establish an omnibus account, then the risks associated with the new account may warrant additional OFAC due diligence. That may include conducting a risk-based assessment of the nature of the foreign financial institution's business, the market that it serves, and the nature of the foreign firm's customer base.

**Timing of Verification**

A new customer's identity should be verified before the account is opened, or within a reasonable time period after account opening. Review and verification of non-U.S. individuals and certain entities may require more time. In accordance with the firm's risk assessment regarding the particular customer, the firm may need to restrict transactions in accounts until such verification has been completed. Recognizing that some transactions may be executed and settled within a day (T+1), firms should, at a minimum, screen the names of their account holders and counter-parties against OFAC's SDN List and other sanctions programs as part of their account opening procedures.

**Reliance in the Introducing/Clearing Relationship**

In the world of anti-money laundering responsibilities, clearing firms and introducing firms often rely upon each other for certain functions. Recently, for example, FinCEN indicated that it would not take any action against a securities clearing firm for non-compliance with the CIP rule when accounts are introduced on a fully disclosed basis to a clearing firm under the following circumstances: when the functions of opening and approving customer accounts and directly receiving and accepting orders from the introduced customer are allocated exclusively to the introducing firm and the clearing firm is allocated exclusively the functions of extending credit, safeguarding funds and securities, and issuing confirmations and statements.[2] CFTC and FinCEN also have clarified that a futures commission merchant, acting as an executing broker in a give-up arrangement, does not establish a formal relationship with the commodity or option customer, and therefore is not subject to the CIP rule.[3]

OFAC, however, does not generally permit businesses, including securities and futures firms, to reallocate their legal liability to a third party with regard to the statutes that it administers. Should a business delegate its OFAC compliance responsibilities to others, it, as well as the third parties, could be held liable for any OFAC violations that occur due to the third parties' negligence.

Notwithstanding the strict liability nature of OFAC's regulations, OFAC examines the functions that securities and futures firms perform and their relative use of customer information in order to determine their overall liability in the context of enforcement cases. Every firm is encouraged to develop risk-based policies and procedures that properly monitor and mitigate sanctions risk; in fact, the presence of a robust, OFAC compliance program is a factor that OFAC considers in determining the appropriate response to an apparent OFAC violation.

11-05-08

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[1] http://www.fincen.gov/statutes_regs/guidance/pdf/futures_omnibus_account_qa_final.pdf
http://www.sec.gov/divisions/marketreg/qa-bdidprogram.htm

[2] http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2008-g002.pdf

[3] http://www.fincen.gov/statutes_regs/guidance/pdf/cftc_fincen_guidance.pdf

SULLIVAN & CROMWELL LLP

S&C memo

May 9, 2024

# New U.S. Law Extends Statute of Limitations for Sanctions Violations and Enhances Regulatory and Enforcement Focus on National Security Priorities

## Statute Doubles the Statute of Limitations for Sanctions Violations, Expands the Scope of Sanctions Programs, and Focuses on China's Technology Procurement, Iranian Petroleum Trafficking, and Fentanyl Production

### SUMMARY

On April 24, President Biden signed into law H.R. 815, a sweeping national security legislative package that—in addition to providing foreign aid funding for Ukraine, Israel, and Taiwan—includes the 21st Century Peace Through Strength Act, which contains a number of provisions implementing the Biden administration's national security priorities. As summarized below, provisions of the Act align with U.S. authorities' continued focus on China and emphasis on sanctions enforcement. In particular, the Act:

- Doubles the statute of limitations for civil and criminal violations of U.S. sanctions programs from five to 10 years—raising questions about retroactive application of the statute and whether authorities will amend current rules on corporate record-keeping practices;
- Requires additional agency reports to Congress, reflecting a focus on U.S. investments in, and supply-chain contributions to, the development of sensitive technologies used by China—a topic that has likewise been the recent focus of the Department of Justice and the Department of Commerce;
- Targets the Chinese government's alleged evasion of U.S. sanctions on Iranian petroleum products and involvement in related financial transactions by directing the imposition of sanctions; and
- Directs the President to impose sanctions aimed at curbing China's alleged involvement in fentanyl trafficking and calls for forthcoming guidance for financial institutions in filing related SARs.

## A. THE ACT EXTENDS THE STATUTE OF LIMITATIONS FOR SANCTIONS VIOLATIONS

The Act doubles the statute of limitations for civil and criminal enforcement of U.S. sanctions violations from five to 10 years. Effective immediately, the Act amends the two statutory authorities underlying all sanctions enforcement: the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA). The amendment extends that statute of limitations to "10 years after the latest date of the violation upon which" the action is based. In recent congressional testimony, a Treasury Department official advocated for the expansion of the statute of limitations to permit time for complex cross-border investigations, to signal to institutions the importance of their compliance obligations, and to deter violations.[1]

## B. THE ACT EXPANDS AUTHORITIES AIMED AT ADDRESING CHINA'S ALLEGED INVOLVEMENT IN DEVELOPMENT OF SENSITIVE TECHNOLOGIES, SANCTIONS EVASION, AND FENTANYL TRAFFICKING

The Act includes provisions from multiple pieces of previously pending national security-related legislation and demonstrates a continued focus on China, including:

- **Report on Emerging Technological Developments in China.** The Act directs the Secretary of State and Secretary of Defense to provide information to Congress on emerging technological developments in China, including information on technologies in which the Chinese military apparatus is invested and related implications for U.S. national security. Congress also requests information about Chinese-controlled or domiciled entities involved in developing such technologies, including whether they are funded through U.S. investments or are procuring components from U.S. suppliers. Although the Act does not expand enforcement powers related to technological developments in China, Congress's request for information suggests a potential interest in additional legislation in this area.
- **Iranian Petroleum Exports and Focus on China's Evasion of Sanctions Against Iran.** The Act directs the President to impose new sanctions, including on foreign persons who own or operate vessels, refineries, or foreign ports engaged in significant transactions involving Iranian petroleum products. The Act directs the Secretary of State to submit a report to Congress on China's involvement in evasion of U.S. sanctions with respect to Iranian-origin petroleum products, including an assessment of interference by China in U.S. attempts to investigate or enforce sanctions on certain Iranian petroleum product exports. The Act, in amending an existing sanctions program, also directs the President to impose sanctions on Chinese financial institutions engaged in transactions that involve the purchase of petroleum or related products from Iran.
- **Fentanyl Trafficking and Shipment of Chemicals from China.** In the Act, Congress finds that trafficking in fentanyl and fentanyl precursors presents a national security threat, and directs the President to impose sanctions against foreign persons involved in significant fentanyl trafficking. Congress cites the shipment of critical precursor chemicals from China to transnational criminal organizations, including Mexican cartels. The Act also authorizes the Treasury Secretary to impose conditions or special measures (such as additional recordkeeping requirements or prohibitions on opening certain accounts) on U.S. financial institutions involved in transmittal of funds with institutions, transactions, or accounts that have been deemed by the Treasury Secretary as a "primary money laundering concern" in connection with illicit opioid trafficking. The Act further directs the Director of the Financial Crimes Enforcement Network (FinCEN) to issue guidance to U.S. financial institutions for filing reports on suspicious transactions (SARs) related to suspected fentanyl trafficking by transnational criminal organizations.

- **Prohibition on Applications Controlled by China and Other Foreign Adversaries.** The Act makes it unlawful for any entity to distribute, maintain, or update a "foreign adversary controlled application," including a website, desktop, mobile, or "augmented or immersive reality" application, in the United States. The Act defines such applications as those operated by TikTok, ByteDance, China, Russia, Iran, or North Korea.

## IMPLICATIONS

### THE EXPANSION OF THE STATUTE OF LIMITATIONS FOR SANCTIONS VIOLATIONS RAISES IMPORTANT ENFORCEMENT AND COMPLIANCE QUESTIONS

The Act raises a number of questions about how the extended limitations period will impact criminal and regulatory investigations and related record-keeping requirements.

For example, the Bank Secrecy Act's recordkeeping requirements generally require banks to retain records for five years. OFAC record-keeping requirements also currently impose a five-year record retention obligation. The Act does not alter these requirements, though we may soon see expansion of these requirements to align with the Act.

As another example, it remains unclear if authorities may seek to apply the new statute of limitations period retroactively. While application of the statute retroactively in criminal actions would raise serious constitutional questions, it is unclear whether OFAC may seek to apply the statute retroactively in the civil enforcement context.[2]

We note as well that the expansion of the limitations period will reduce the need for sanctions enforcement authorities to seek agreements with institutions under investigation to toll the statute of limitations—a process that companies sometimes use to try and narrow the scope of investigation or to otherwise demonstrate cooperation in support of future leniency arguments.

Finally, the extension of the statute of limitations is likely to be an important tool for U.S. authorities pursuing corporate sanctions enforcement as a top priority. Deputy Attorney General Lisa Monaco has noted that the Department is pursuing sanctions-related corporate investigations in industries including fin tech, banking, and defense, and cautioned that national security risks should be at the top of every company's compliance risk chart.[3] (*See* Sullivan & Cromwell's *Critical Insights* podcast for additional information on DOJ's focus on corporate resolutions in the national security and sanctions enforcement space.) In connection with passage of the Act, a Treasury Department official emphasized that the longer statute of limitations is needed for complex cross-border investigations, and that extension of the statute will, among other things, signal to covered entities the importance being placed on compliance with sanctions programs.[4]

## THE ACT EXPANDS REGULATORY AND ENFORCEMENT POWERS IN LINE WITH RECENT EMPHASIS BY U.S. AUTHORITIES ON NATIONAL SECURITY PRIORITIES

Many provisions of the Act dovetail with significant cases and initiatives announced by the Department of Justice and other U.S. authorities in recent months. These developments continue to signal that financial institutions and other companies should be sensitive to this national security focus in designing compliance programs and assessing risks.

For example, Congress's provision requiring information about technology being used by China's military, the companies developing that technology, and any U.S. investment in those companies or involvement in the supply chain to those companies is consistent with other efforts by the U.S. government to disrupt the flow of strategic technology to China. In particular, the Disruptive Technology Strike Force is a strike force led by the Department of Justice and the Department of Commerce aimed at using the export control laws to block China and other countries deemed foreign adversaries from acquiring sensitive technologies. The Strike Force was launched last year, and in recent weeks the Department of Justice has touted its success, including highlighting four recent cases aimed at disrupting the transmission of sensitive technology to China.[5]

As another example, the Act's focus on addressing alleged efforts by China to thwart U.S. enforcement of Iranian petroleum sanctions is consistent with the recent unsealing of three federal criminal cases charging sanctions and money laundering violations and alleging that Chinese government-affiliated companies and persons engaged in schemes to traffic and sell Iranian oil.[6]

Finally, the Act's focus on China's alleged connection to fentanyl trafficking and direction to FinCEN to distribute guidance on filing related SARs is consistent with the Department of Justice's recent focus on prosecuting China-based companies distributing fentanyl precursor chemicals and engaging in related money laundering.[7] The forthcoming guidance from FinCEN, which may include red flag indicators, will be important in helping financial institutions understand the warning signs for transactions or accounts that may otherwise appear to involve a legitimate Chinese chemical company.

Ultimately, the Act broadens U.S. regulators' ability to bring new enforcement actions amid an aggressive enforcement climate with a strong focus on national security priorities.

* * *

## ENDNOTES

1 Senate Banking, Housing and Urban Affairs Committee Hearing, Countering China: Advancing U.S. National Security, Economic Security, and Foreign Policy (May 31, 2023).

2 Recently, Congress, as part of the 2021 National Defense Authorization Act (NDAA), similarly extended the statute of limitations for the SEC to seek disgorgement from five to 10 years. *See* Sullivan & Cromwell's memo on the SEC's statute of limitations extension here. Unlike the Act, which does not clarify whether it applies to pending cases, the NDAA explicitly extended the longer limitations period to cases "pending" on the date of its passage.

3 Dep't of Justice, Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime (March 2, 2023), available here; Dep't of Justice, Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (Oct. 4, 2023), available here.

4 *Supra* note 1.

5 Dep't of Justice, Disruptive Technology Strike Force Efforts in First Year to Prevent Sensitive Technology from Being Acquired by Authoritarian Regimes and Hostile Nation-States (Feb. 16, 2024), available here.

6 Dep't of Justice, Justice Department Announces Terrorism and Sanctions-Evasion Charges and Seizures Linked to Illicit, Billion-Dollar Global Oil Trafficking Network That Finances Iran's Islamic Revolutionary Guard Corps and Its Malign Activities (Feb. 2, 2024), available here.

7 *See, e.g.*, Dep't of Justice, Justice Department Announces Eight Indictments Against China-Based Chemical Manufacturing Companies and Employees (Oct. 3, 2023), available here; Dep't of Justice, Justice Department Announces Charges Against China-Based Chemical Manufacturing Companies and Arrests of Executives in Fentanyl Manufacturing (June 23, 2023), available here.

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