

VIA E MAIL

September 4, 2012

The Honorable David S. Cohen  
Under Secretary for Terrorism and Financial Intelligence

The Honorable Adam J. Szubin  
Director, Office of Foreign Assets Control

U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

RE: Implementation of Section 218 of the Iran Threat Reduction and Syria Human Rights Act of 2012 and Payment Issues Related to Humanitarian Transactions

Dear Sirs:

This letter is submitted on behalf of the undersigned trade associations and a number of attorneys that advise clients on compliance with U.S. sanctions laws and regulations to provide the Department of the Treasury with some important points to consider in drafting a regulation or other vehicle to implement Section 218 (the “*U.S. parent liability provision*”) of the recently enacted Iran Threat Reduction and Syria Human Rights Act of 2012 (the “*ITR Act*”).<sup>1</sup> We have also included comments regarding payment issues associated with humanitarian transactions involving Iran.

While many non-U.S. companies that are owned by U.S. companies have ceased doing business in Iran or are in the process of withdrawing from Iran, Section 218 of the ITR Act is written broadly and has a potentially far-reaching effect, and is likely to create a great deal of uncertainty for companies seeking to comply with U.S. law. As discussed below, we hope that the Department of the Treasury and the Office of Foreign Assets Control (“*OFAC*”) will consider the issues discussed below and the practical impact on U.S. and non-U.S. companies active in international trade and investment that wish to remain compliant with this provision and other aspects of U.S. sanctions laws and regulations on Iran.

Outlined below are a number of key considerations that we respectfully suggest that OFAC take into account with respect to section 218 of the ITR Act:

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<sup>1</sup> Public Law 112-158, the Iran Threat Reduction and Syria Human Rights Act of 2012, was passed by Congress on August 1, 2012 and signed into law by President Obama on August 10, 2012.

- **Nature of the U.S. Parent Liability Provision.** Given the broad impact the U.S. parent liability provision will have on a wide range of non-U.S. companies that are owned or controlled by U.S. companies, many of them engaged in licensed, exempt or otherwise permissible transactions involving Iran, we suggest that to the extent possible OFAC issue an implementing regulation in either draft or interim final form, providing a period of public comment. Many companies actively seeking to comply with section 218 will likely face significant challenges in doing so, including the potentially contradictory requirements of the blocking and data protection statutes and regulations of other countries seeking to restrict the application of U.S. sanctions law to companies based in these countries. While we understand that the ITR Act requires section 218 to be implemented within 60 days after it was enacted, issuing the rule in draft or interim final form will allow affected companies to have time to determine how this law will impact their operations and to advise OFAC of these issues in a far more detailed manner than is now known.
- **Scope of the Prohibition.** The phrase “any person subject to the jurisdiction of the Government of Iran,” can be interpreted in a number of ways. We recommend that its scope be clearly specified in the implementing regulations. We believe that this phrase should be interpreted not to cover private Iranian entities that are not owned or controlled or otherwise affiliated with the government of Iran. In particular, we believe it will be appropriate, and important, to clearly indicate that, consistent with past OFAC interpretations, this phrase does not cover Iranian individuals located outside Iran.
- **Medicine, Medical Devices and Agricultural Commodities.** OFAC regularly issues specific licenses for the sale of medicine, medical devices and agricultural commodities from the United States to Iran and has authorized by general license the sale of food and other nutritional products from the United States to Iran. OFAC also regularly issues specific licenses authorizing the reexport of U.S.-origin humanitarian goods by non-U.S. companies. These sales are not only mandated by Congress in TSRA,<sup>2</sup> a policy reaffirmed in subsequent statutes including CISADA,<sup>3</sup> but serve a humanitarian purpose and help mitigate the negative impact of sanctions on citizens of Iran. The U.S. parent liability provision should not be implemented in a manner that would have a chilling effect on the sale by non-U.S. persons of U.S. origin and non-U.S. origin medicine, medical devices and agricultural commodities to Iran. In particular, U.S. parent companies should not be penalized if their non-U.S. subsidiaries provide the same humanitarian medicine, medical devices and agricultural commodities from third countries to Iran.

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<sup>2</sup> The Trade Sanctions Reform and Export Enhancement Act of 2000, Title IX of Public Law 106-387 (commonly referred to as “TSRA”).

<sup>3</sup> The Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, Public Law 111-195 (“CISADA”).

- **Licenses and Exempt Activity.** The implementing regulation should make clear that non-U.S. persons are not prohibited from engaging in activities that are authorized by OFAC general license for U.S. persons, or from the United States (such as exports of food and nutritional products to Iran). In addition, non-U.S. persons should be eligible to apply for specific licenses, or provided with a regulatory safe harbor, to engage in activities, such as exports of medicine, medical devices and agricultural commodities, to the same extent that U.S. persons are eligible to do so. Non-U.S. persons also should be eligible for authorization or a safe harbor to conduct other activities that are generally licensed or exempt for U.S. persons, such as the activities authorized under the general licenses set out in Subpart E of the Iranian Transactions Regulations, 31 C.F.R. Part 560 (the “*ITR*”), and the exempt transactions addressed by Section 560.210 of the ITR, which include certain personal communications, humanitarian donations, imports and exports of information and informational materials, and travel.
- **Reexports of EAR99 Items.** Under current U.S. law, the Commerce Department’s Bureau of Industry and Security (“*BIS*”) has jurisdiction over the reexport of items classified as EAR99 that are reexported to Iran by non-U.S. persons, including non-U.S. subsidiaries of U.S. companies. The Export Administration Regulations (“*EAR*”) administered by BIS do not impose any restrictions or licensing requirements on reexports of EAR99 products and such reexports are not subject to OFAC restrictions when no U.S. person is involved. We therefore recommend that in implementing the U.S. parent liability provision, OFAC consult with BIS to minimize any potential inconsistency or confusion between the ITR and EAR.
- **Divestment.** Subsection (d) of the U.S. parent liability provision provides that penalties will not be imposed on a U.S. parent if it “divests or terminates its business with the [non-U.S.] entity” within 180 days after the ITR Act is signed into law. We believe that the purposes of the ITR Act (discouraging business by non-U.S. entities with Iran) would be well served by making penalties inapplicable when the U.S. parent requires its non-U.S. subsidiary to terminate any business it is doing with Iran. We also suggest that the implementing regulation should address any procedural issues related to the termination of such business, including notification requirements and licenses to carry out such termination.

Separately, we would like to take the opportunity to raise a broader point regarding the difficulties currently facing companies that have received one-year specific licenses from OFAC to sell humanitarian goods to Iran under TSRA and are engaging in transactions with Iran in accordance with general licenses issued by OFAC. With the recent expansion of financial sanctions on Iran, including the designation of Bank Tejarat and other commercial banks in Iran that had traditionally handled payments related to such licensed transactions, companies holding licenses are having great difficulty receiving payment for their licensed sales to Iran. Exporters have found that the few financial institutions in Iran that are not designated by OFAC, or are listed solely pursuant to Executive Order 13599 (and consequently are identified on the SDN list solely with the symbol [IRAN]), are small and generally do not have access to foreign currency.

Non-U.S. financial institutions are now unwilling or extremely reluctant to process payments related to TSRA and humanitarian licensed transactions, even when the goods and end-users are clearly stated on a one-year specific license issued by OFAC or subject to the general license on food and nutritional products or other general licenses. Third-country financial institutions have expressed concern in processing such payments originating from [IRAN]-identified financial institutions because the first page of each OFAC license expressly states that direct or indirect involvement of designated banks is not permitted, and these third-country financial institutions believe that the transaction may be supported by indirect transactions through a designated bank, for example for foreign exchange purposes.

We therefore request that OFAC amend the cover page of TSRA and humanitarian specific licenses related to Iran to:

- indicate these licenses are issued under Parts 544, 561 and 594 of Title 31 of the C.F.R., as well as under Parts 501 and 560;
- delete the word “indirect” from the standard language indicating that “no direct or indirect involvement” of designated Iranian banks is authorized; and
- expressly state that U.S. and non-U.S. financial institutions are permitted to engage in payments related to the licensed transactions, so long as the banks directly involved have not been designated by OFAC, or are listed solely pursuant to Executive Order 13599.

It would also be extremely helpful to licensed exporters if OFAC issued a public statement, for example a “frequently asked question” on its website, explaining that U.S. and non-U.S. financial institutions are permitted to be involved with and process payments related to licensed transactions as long as these payments do not directly involve banks designated by OFAC (other than banks listed solely pursuant to Executive Order 13599).

Alternatively, we request that OFAC consider issuing a general license authorizing persons exporting to Iran under a TSRA or humanitarian specific or general license to receive payment from a bank that is not designated by OFAC, or that is listed solely pursuant to Executive Order 13599.

We hope that these comments and recommendations will prove useful in the process of planning for the implementation of section 218 of the Iran Threat Reduction and Syria Human Rights Act of 2012 and we hope that you will consider the recommendations above regarding payment issues related to humanitarian transactions.

Respectfully submitted,

USA\*Engage

National Foreign Trade Council

American Association of Exporters and Importers

National Council on International Trade  
Development (NCITD)

cc: The Honorable Hillary Clinton  
The Honorable Eric Hirschhorn  
The Honorable Kevin Wolf