

May 1, 2019

PRESIDENT TRUMP RAMPS UP CUBA SANCTIONS CHANGES — ALLOWS LITIGATION AGAINST NON-U.S. COMPANIES CONDUCTING BUSINESS IN CUBA

To Our Clients and Friends:

Frustrated by Cuba's continued support of the Maduro regime in Venezuela, the Trump administration announced on April 17, 2019 that it will permit U.S. individuals and companies to initiate litigation against foreign individuals and companies that have past or present business in Cuba involving property that the Cuban government confiscated in 1959. The administration made its announcement in a speech delivered by the president's national security advisor John R. Bolton, who framed the administration's decision in characteristically colorful rhetoric: "The 'troika of tyranny'—Cuba, Venezuela, and Nicaragua—is beginning to crumble...The United States looks forward to watching each corner of this sordid triangle of terror fall."^[1] The same day, the Trump administration also announced several other significant changes to U.S. policy toward Cuba, including blocking "U-turn" financial transactions to cut off Cuba's access to dollar-denominated transactions, limiting nonfamily travel to the island, imposing caps on the value of personal remittances, and enforcing visa restrictions regarding alien traffickers of property confiscated by Cuba.

I. Title III of LIBERTAD to Become Effective on May 2, 2019

On April 17, 2019, President Trump lifted long-standing limitations on American citizens seeking to sue over property confiscated by the Cuban regime after the revolution led by Fidel Castro six decades ago.

Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996,^[2] commonly known as the Helms-Burton Act, authorizes current U.S. citizens and companies whose property was confiscated by the Cuban government on or after January 1, 1959 to bring suit for monetary damages against individuals or entities that "traffic" in that property. The policy rationale for this private right of action was to provide recourse for individuals whose property was seized by the Castro regime. As part of the statutory scheme, Congress provided that the President may suspend this private right of action for up to six months at a time, renewable indefinitely. In the past, Presidents of both parties have consistently suspended that statutory provision in full every six months. That will change tomorrow, May 2, 2019, when the suspension will be effectively lifted.

A. Background

The Trump administration has been moving towards this development for some time. In November 2018, Bolton stated that the suspension of Title III's private cause of action would be given a "very serious review." The administration's subsequent renewals of the suspension were increasingly limited

in scope and duration. When the suspension expired in early January 2019, it was renewed for 45 days (far short of the usual six months).[3] In March 2019, the U.S. State Department announced that it intended to allow U.S. citizens and companies to bring suit in U.S. federal court against entities and sub-entities on the Cuba Restricted List,[4] a U.S. State Department compilation of Cuban entities that the U.S. Government considers to be “under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services personnel.” The remainder of the suspension was extended another 30 days on March 4, 2019, and then another two weeks on April 3, 2019.[5] Finally, on April 17, 2019, Secretary of State Michael Pompeo announced that the Title III suspension would not extend past today’s expiration date.[6]

B. Analysis

What the suspension of Title III means in practice depends upon the interpretation of a number of key terms. The term “property” under LIBERTAD is all-encompassing: it applies to any present, future, or contingent interest in real, personal, or mixed property. Any “person” that “traffics” in such property is liable to the U.S. citizen whose property was confiscated.

LIBERTAD defines “person” as a natural person or entity, including an agency or instrumentality of a foreign state. The term “traffics” is defined as any person who knowingly and intentionally:

- (1) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
- (2) engages in a commercial activity using or otherwise benefiting from confiscated property, or
- (3) causes, directs, participates in, or profits from, trafficking [] by another person, or otherwise engages in trafficking [] through another person[7]

On its face, the covered activity here is exceptionally broad. It is broad enough to capture both direct commercial transactions involving confiscated property and also companies doing business with other companies engaged in such transactions. Indeed, the “trafficking” definition theoretically captures actors only tangentially tied to the confiscated property. For example, if the seller of confiscated property uses the proceeds from the sale to then purchase goods unrelated to that property, it would appear that the provider of those goods could be considered a “trafficker.”

LIBERTAD exempts certain activities from its trafficking definition. Specifically, trafficking does not include the delivery of international telecommunications services to Cuba, transactions incident to lawful travel to Cuba, or transactions by a person who is a citizen or resident of Cuba and who is not an official of the Cuban Government or the ruling political party in Cuba. However, these exemptions may only apply to a limited number of the many Title III claims that can reasonably be expected to be filed. The U.S. Foreign Claims Settlement Commission (“FCSC”) has certified more than 6,000 claims relating to property confiscated by the Cuban government.[8] Taking into account both certified and uncertified claims, one senior official at the State Department recently estimated that the total potential Title III claims could number as high as 200,000.[9]

Companies found liable under Title III may face significant financial consequences. The statutory scheme allows plaintiffs to choose from multiple methods of calculating damages, including by calculating the current value of the confiscated property or its value when confiscated plus interest.^[10] Plaintiffs can also recover interest, court costs, and attorney fees. In addition, plaintiffs may recover treble damages for claims certified by the FCSC. Treble damages are also available if plaintiffs provide advance notice of their claims to prospective defendants and such defendants engage in “trafficking” more than 30 days after such notice has been provided.

There are a number of obstacles that Title III plaintiffs face regarding both a finding of liability and recovery on a judgment. On liability, plaintiffs may file suit at any time during the trafficking of their confiscated property and up to two years after the trafficking has ceased to occur. This two-year statute of limitations puts pressure on plaintiffs to identify and act on their potential claims quickly. Moreover, obtaining personal jurisdiction, serving process, and conducting discovery are much more difficult when foreign defendants are involved. Finally, there are aspects of Title III that may be challenged on colorable constitutional grounds, including the vagueness of the definition of “trafficking,” the extraterritorial and retroactive aspects of the remedy, and the potentially arbitrary and punitive nature of the measure of damages. The prospects for such challenges will vary depending on the particular facts and circumstances of each case.

On recovery, plaintiffs may face a situation where the non-U.S. defendant does not have any property in the United States. Enforcing a Title III judgment in a foreign jurisdiction may be difficult, particularly where the jurisdiction has a blocking or anti-enforcement statute. For example, in the European Union, Council Regulation (EC) No. 2271/96 (the “EU Blocking Statute”) provides that any “judgment of a court or tribunal . . . [or] of an administrative authority . . . giving effect, directly or indirectly, to the [Helms-Burton Act] or to actions based thereon or resulting there from, shall [not] be recognized or be enforceable in any manner.” Indeed, this particular regulation also provides for the “clawback” of any damages that were awarded in a Title III action.

II. Other Announced Changes to Cuba Policy

Alongside its decision to allow Title III claims to proceed, Bolton and Secretary of State Mike Pompeo made a number of other announcements that will have a significant impact on those engaged in Cuba-related business and travel. These include Bolton’s announcement that the United States would once again prohibit U.S. banks from processing so-called “U-Turn” financial transactions. President Obama had issued a general license permitting these transactions—which involve Cuban interests and originate from, and terminate, outside of the United States—as part of a broader set of sanctions relief issued in advance of his historic visit to Cuba in 2016. These “U-Turn” transactions enabled Cuban entities doing business with non-U.S. firms to access U.S. correspondent and intermediate banks and therefore to participate in U.S. dollar-denominated global trade. Upon the revocation of this license, U.S. banks will again be prohibited from facilitating Cuba-related transactions in this regard, and Cuban entities and companies engaged in business there will again be effectively cut off from the U.S. financial system.

As previously noted, the administration announced that it planned to impose new restrictions on nonfamily travel to Cuba. The administration has not yet detailed restrictions on this type of travel,

which Bolton described as “veiled tourism.” However, there are up to a dozen categories of travel that could soon be prohibited without a specific license. Bolton also announced the U.S. government would reimpose a cap on the amount of remittances that can be sent to Cuba at \$1,000 per person per quarter.

Finally, Pompeo announced that the administration would begin to enforce restrictions on the issuance of U.S. visas to aliens involved in trafficked property.^[11] Specifically, Title IV of LIBERTAD requires the Secretary of State to deny visas to, and the Attorney General to exclude from the United States, any alien who (1) has confiscated, or has directed or overseen the confiscation of, property a claim to which is owned by a U.S. national, (2) traffics in such property, (3) is a corporate officer, principal, or shareholder with a controlling interest in an entity that has been involved in the confiscation or trafficking of such property, or (4) is a spouse, minor child, or agent of any of the above.^[12]

III. Counter-Suits in EU and Canadian Courts

The Trump administration’s decision to end the litigation limitations under the Helms-Burton Act may cause a large number of cases to be filed in other jurisdictions and the World Trade Organization to counteract the administration’s move. On the same day that the Trump administration announced its decision to allow Title III of LIBERTAD to go into effect, Federica Mogherini, the High Representative of the EU for Foreign Affairs and Security Policy European Union, and Cecilia Malmström, the EU Trade Commission Representative, issued a joint statement that “[t]he EU will consider all options at its disposal to protect its legitimate interests, including in relation to WTO rights and through the use of the EU Blocking Statute.”^[13] As previously mentioned, the EU Blocking Statute prohibits the enforcement of U.S. courts’ judgements relating to LIBERTAD within the EU, and allows EU companies sued in the U.S. to recover any damages through legal proceedings against U.S. claimants in EU courts. The two EU representatives also joined a statement with Canada’s Minister of Foreign Affairs Chrystia Freeland noting that EU and Canadian law are aligned on these points.^[14] In both statements, the EU and Canadian representatives also threatened to sue the United States at the World Trade Organization in response.

IV. Preparing for the Flood

Any company that is now trading or has traded with Cuba during the last two years, or which benefits from trade with other parties who trade with Cuba, is now a potential target for Title III claims. Given the breadth of covered activity under Title III and the theoretical prospect of steep payouts, companies should take an expansive approach in assessing their own liability risk. To better understand this risk, companies should inventory the types of direct and indirect commercial activities they engage in which involve Cuba, and ascertain the ownership histories of any property at issue to determine if it was confiscated by the Cuban government. Companies should also scrutinize the origins of their proceeds, to determine if they stem from confiscated property or traffickers of such property. Self-assessment will also serve to mitigate reputational risk: a company sued under Title III may risk relationships with banks, customers, and other business partners who do not want to inadvertently “benefit” from proceeds of confiscated property.

We recommend that companies seek advice of counsel to assess the degree of exposure under Title III, identify available legal defenses, and develop strategies for minimizing risk. To the extent such potential claims are identified, counsel can assist in mapping out potential litigation strategies and monitoring the filing of legal actions in jurisdictions where a court is more likely to find personal jurisdiction over a foreign company defendant in a Title III action.

[1] NPR, Bolton Announces New Crackdown on Cuba, Nicaragua, and Venezuela, Apr. 17, 2019, *available at* <https://www.pbs.org/newshour/politics/watch-live-bolton-to-address-trump-administrations-cuba-policy-shift>. Mr. Bolton’s speech marked the 58th anniversary of the Bay of Pigs invasion, the failed 1961 attempt to overthrow Fidel Castro, Cuba’s then communist leader.

[2] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, P.L. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. §§ 6021–91) (hereinafter “LIBERTAD”).

[3] U.S. Dep’t of State, Media Note, Secretary’s Determination of 45-Day-Suspension Under Title III of LIBERTAD Act (Jan. 16, 2019), *available at* <https://www.state.gov/r/pa/prs/ps/2019/01/288482.htm>.

[4] Most transactions between the United States, or persons subject to U.S. jurisdiction, and Cuba are prohibited. Under the Obama administration, OFAC relaxed many of its sanctions on Cuba, including certain restrictions on travel and related services. Soon after assuming office, President Trump reimposed several of the Obama administration’s changes to United States sanctions policy. Most notably, the Trump administration’s new Cuba policy aimed to keep the Grupo de Administración Empresarial (“GAESA”), a conglomerate run by the Cuban military, from benefiting from the opening in U.S.-Cuba relations. On November 9, 2017, the U.S. Department of State published the “Cuba Restricted List,” consisting of Cuban entities that the U.S. Government considers to be “under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services personnel.” The U.S. sanctions on Cuba were also revised to prohibit U.S. persons and entities from engaging in direct financial transactions with entities listed on the Cuba Restricted List. Since its publication, the State Department has issued periodic updates to the list, including three updates on November 15, 2018, March 9, 2019, and on April 24, 2019. *See* 83 FR 57523 (Nov. 15, 2018); 84 FR 8939 (Mar. 9, 2019); 84 FR 17228 (Apr. 24, 2019).

[5] U.S. Dep’t of State, Media Note, Secretary Enacts 30-Day Suspension of Title III (LIBERTAD Act) With an Exception (Mar. 4, 2019), *available at* <https://www.state.gov/r/pa/prs/ps/2019/03/289864.htm>; U.S. Dep’t of State, Media Note, Secretary Pompeo Extends For Two Weeks Title III Suspension with an Exception (LIBERTAD Act) (Apr. 3, 2019), *available at* <https://www.state.gov/r/pa/prs/ps/2019/04/290882.htm>.

[6] The White House, Fact Sheets, President Donald J. Trump is Taking a Stand For Democracy and Human Rights in the Western Hemisphere (Apr. 17, 2019), *available at* <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-stand-democracy-human-rights-western-hemisphere/>.

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[7] See LIBERTAD, § 4(13).

[8] A database containing decisions rendered by the FCSC on these claims is available at <https://www.justice.gov/fcsc/claims-against-cuba>.

[9] U.S. Dep't of State, Special Briefing, Senior State Department Official on Title III of the LIBERTAD Act (Mar. 4, 2019), available at <https://www.state.gov/r/pa/prs/ps/2019/03/289871.htm>; Reuters, U.S. considering allowing lawsuits over Cuba-confiscated properties (Jan. 16, 2019), available at <https://uk.reuters.com/article/uk-usa-cuba/us-considering-allowing-lawsuits-over-cuba-confiscated-properties-idUKKCN1PA308>.

[10] See LIBERTAD, § 302(a).

[11] A similar pledge was made in a press document issued by the White House. See The White House, Fact Sheets, President Donald J. Trump is Taking a Stand For Democracy and Human Rights in the Western Hemisphere (Apr. 17, 2019), available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-stand-democracy-human-rights-western-hemisphere/>.

[12] See LIBERTAD, § 401(a).

[13] Joint Statement by Federica Mogherini and Cecilia Malmström on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act (Apr. 17, 2019), available at https://eeas.europa.eu/headquarters/headquarters-homepage/61183/joint-statement-federica-mogherini-and-cecilia-malmstr%C3%B6m-decision-united-states-further_en.

[14] Joint Statement by Federica Mogherini, Chrystia Freeland and Cecilia Malmström on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act (Apr. 17, 2019), available at https://eeas.europa.eu/headquarters/headquarters-homepage/61181/joint-statement-federica-mogherini-chrystia-freeland-and-cecilia-malmstr%C3%B6m-decision-united_en.



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