

# Client Alert

April 2019

## Trump Administration Will Authorize Lawsuits under Title III of the Helms-Burton Act Starting on May 2, 2019

What Happened: Today, the Trump Administration notified Congress that it will activate Title III of the Helms-Burton Act on May 2, 2019, thereby allowing US nationals that hold Title III claims to file suit in US federal court against persons “trafficking” in property “confiscated” by the Cuban government, and becoming the first presidential administration to not suspend Title III since its enactment in 1996.

The Bottom Line: On May 2, 2019, foreign and US companies that “traffic” in “confiscated” property subject to a claim by a US national will be at risk of suit in federal court by US nationals seeking compensation for the use or benefit of their confiscated property. Multinationals doing business with or in Cuba should analyze whether steps are necessary to mitigate the threat of potential lawsuits under Title III, as well as analyze the limitations of Title III’s application. All claimants seeking to file Title III claims shall pay a \$6,700 filing fee and claimants whose claims are not certified by the Foreign Claims Settlement Commission and seek increased damages shall serve written notice on the target companies to notify them of their intention to sue.

### The Full Story

The Helms-Burton Act (also known as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996) codifies US sanctions against Cuba and grants US nationals with claims to property “confiscated” by the Cuban government the right to file suit in US federal courts against persons “trafficking” in such property. Title III of the Helms-Burton Act, which allows for such lawsuits against companies using or benefitting from confiscated property had, until recently, always been essentially disabled because every presidential administration had routinely suspended Title III provisions for six-month periods since its enactment in 1996. This changed on March 19, 2019, when the Trump administration authorized, for the first time, for US nationals to file lawsuits against certain Cuban entities (and sub-entities) on the “Cuba Restricted List”. The Trump administration also became the first to suspend Title III for shorter than 6-month periods: first for 45 days, then for 30 days, and most recently, for two weeks (the current suspension), from April 18, 2019 until May 1, 2019.

Today, Secretary of State Michael Pompeo notified Congress that beginning on May 2, 2019, US nationals (including those that have become US nationals subsequent to the confiscation of property) will be authorized to sue individuals or entities in U.S. federal court for “trafficking” in property “confiscated” from such US nationals by the Cuban government, pursuant to Title III. There are currently at least 6,000 certified claims maintained by the Foreign Claims Settlement Commission (**FCSC**) (worth roughly \$8 billion dollars) held by US nationals. This is not a comprehensive list of all confiscated property subject to a claim, and with the law taking effect on May 2nd, claims are expected to rise.

Any person that “traffics” in property “confiscated” by the Cuban Government on or after January 1, 1959, could be subject to suit. The implementation of Title III could have a significant effect on all companies engaged in business with or in Cuba (e.g., those involved in tourism and mining), many of which are European, Canadian and US companies. Importantly, unlike the Cuban entities against which Title III lawsuits were already authorized as mentioned above, multinational companies are much more likely to have assets within US jurisdiction that could be in danger of being seized as a result of litigation. Title III provides for claims amounting to the full value of the confiscated property and the possibility of treble damages (e.g.,

for US nationals with claims certified by FCSC or for claimants who provide adequate written notice to defendants and such a defendant does not stop trafficking in such a claimant's confiscated property within 30 days of such notice), notwithstanding the economic benefit actually derived by the defendant.

Given that this is the first time a presidential administration allows Title III lawsuits, there is substantial uncertainty as to how the statute will be interpreted by US courts. While the definition of "trafficking" is broad, including purchasing, receiving, using, transferring, or otherwise acquiring confiscated property, as well as engaging in a commercial activity using or otherwise benefiting from confiscated property, there are limitations to Title III that narrow its application. For example, generally, a company's involvement in the delivery of international telecommunications, trading of securities publicly held or traded, and use of property incident to lawful travel to Cuba does not constitute "trafficking" under the statute and is, therefore, not grounds for a claim. Moreover, Title III actions may not be brought more than two years after a company has stopped "trafficking" in the confiscated property and the confiscated property must be valued in excess of \$50,000.

Other limitations may exist on the enforcement front, with the European Union (**EU**), Mexico and Canada reviving "blocking statutes" as a counter-measure against the effects of US extraterritorial sanctions, such as the Helms-Burton Act. For example, in 2018, the EU revived the blocking statute that it had initially created in response to the Helms-Burton Act's enactment, in response to US sanctions on Iran. This statute would also apply to the Helms-Burton Act. Generally, the EU blocking statute would (i) prohibit EU persons and companies (**EU Persons**) from complying with the Helms-Burton Act and EU courts from enforcing judgments stemming from the same (with few exceptions due to limited waivers), (ii) require EU Persons to report to the European Commission any harms faced as a result of the Helms-Burton Act's sanctions and (iii) provide a cause of action for EU Persons to recover damages endured as a result of Helms-Burton Act enforcement. Mexico and Canada have similar statutes. Such blocking statutes put companies in a conflict between compliance with the same and with US sanctions.

Companies doing business with or in Cuba should analyze whether there are any impending lawsuits and whether steps are necessary to mitigate such lawsuits under Title III; this analysis includes, for example, an understanding of the limitations of Title III's potential application, identification of commercial relationships that could be deemed as "trafficking", preparation of a response in the event of threatened or actual litigation and monitoring and diligence of relationships in connection with any business with or in Cuba. Defendants may receive notice in writing of a claimant's intention to sue when a non-certified claimant seeks increased damages (e.g., treble damages), which access to such increased damages shall depend, among other things, on such notice including a statement of intention to pursue a claim under Title III, a demand that the company cease "trafficking" in that person's property, and a copy of the Attorney General's summary of the provisions of and remedies available under Title III.

The Latin American group at Hunton Andrews Kurth LLP will continue to closely monitor related developments on this issue and the broader US sanctions regime for Cuba. In the meantime, please contact us if you have any questions or would like further information.

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