

## CLIENT ALERT

### White House Hints It May Allow Lawsuits Over Cuban-Confiscated Properties

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On January 16, 2019, the Trump administration signaled a possible major shift in its policy toward Cuba by announcing it was considering allowing the suspension of Title III of the Helms-Burton Act to lapse, thereby opening the floodgates to litigation over property confiscated by Fidel Castro and the Cuban government 60 years ago.

#### History of the Act

The Helms-Burton Act, formally titled the Cuban Liberty and Democratic Solidary Act (a/k/a the Libertad Act), was signed into law in 1996 with the goal of increasing pressure on Cuba for peaceful democratic change. The Act codified the United States embargo in place at the time on trade and financial transactions with Cuba and required the President to produce a plan for providing economic assistance to a transition government. Additionally, the Act aimed to punish non-U.S. companies doing business in Cuba. Title III created a private cause of action authorizing U.S. nationals to file suit in U.S. courts against persons or companies that may be trafficking in and profiting from properties confiscated by the Cuban government following the 1959 socialist revolution. U.S. claimants that had their claims certified by the Foreign Claims Settlement Claims Commission may also be able to seek treble damages for their claims.

The Helms-Burton Act was not well received in the international community, however. Both the European Union and Canada quickly announced their opposition, arguing that the provisions violated international trade treaties by punishing foreign companies for doing business outside of the U.S. The EU went so far as to bring a case at the World Trade Organization. At the time, the U.S. threatened to invoke the “national security exception” that is contained in the WTO treaty texts, but following negotiations between the U.S. and the EU, the suit was dropped in 1998.

Although Title III could have kept many lawyers busy throughout the U.S., Cuba, and beyond, the provision never actually took effect. The Act granted the President authority to suspend the lawsuit provision for consecutive six month periods if necessary to expedite a transition to democracy in Cuba and if doing so was in the national interest. Every president since President Clinton has relied on and exercised this suspension authority. In 2013, President Obama delegated the power to suspend the provision to his Secretary of State, who then continued to suspend the provision each time it came up.

#### Rumblings of Change

The Trump administration first had to weigh in on the provision in July 2017. Then Secretary of State Rex Tillerson delegated the decision to his Under Secretary who in turn suspended Title III. In recent months though, the administration has hinted that it may break from more than 20 years of tradition and allow lawsuits to be brought under Title III. In November 2018, White House National Security Adviser John Bolton remarked that the administration planned to give the provision “serious review.” In the most definitive move yet, earlier this month the administration suspended Title III for only 45 days until March 18, 2019 and

urged any person doing business in Cuba to consider whether they were “[abetting this dictatorship](#)” by trafficking in confiscated property.

### **What To Expect**

Although no official changes have been made, the Trump administration has vowed to be tougher on Cuba. Invoking Title III would permit Americans with claims to confiscated property in Cuba to attempt to sue companies whose business in and with Cuba today are connected to these properties, creating a potential risk for companies that do business in Cuba and which may also be subject to the jurisdiction of courts in the U.S.

So what does this mean for potential claimants and companies doing business in Cuba? It really depends on their situation. For the last 60+ years, people have believed that change in Cuba and/or change in U.S. policy towards Cuba was potentially imminent. And since Helms-Burton was enacted and came into (as of now still suspended) force, there have been some changes in Cuba and some changes in U.S. policy toward the island that is located only 90 miles away. Nevertheless, 60 years later, the embargo persists and claimants whose property was confiscated by the Cuban Government remain uncompensated.

Rumors that the suspension of Title III might end circulate every few years, but usually not so publicly and never from such highly placed sources. Could this time be different? – The answer is yes.

If you have or believe you may have claims to property confiscated by the Cuban Government on or after January 1, 1959, should you start dusting off old documents and trying to determine who, if anyone, may be trafficking in property in which you may have a claim?

If you are a company doing business in or with Cuba, or with Cuban products (such as nickel, timber, sugar, etc.), should you examine whether you are potentially subject to civil jurisdiction in the U.S. such that you could be sued as a defendant under Title III of Helms-Burton?

If you are the EU, should you start dusting off the old WTO complaint against the U.S.? And what might that mean if the Trump administration invokes the national security clause?

If you are Cuba and worried that such threats might stifle further foreign investment, should you “come to the table” to try to make a deal with the Trump administration?

The answer to all of these questions is of course – it depends. It depends on what you think the Trump Administration might do. It depends on whether you think the Trump Administration might be willing to break with decades of tradition. It depends on the magnitude of your potential claims and exposure. It also depends on whether there is anything that you might be able to do about it.

Are these answers satisfying and/or do they bring increased certainty to your everyday or business relations concerning Cuba? The answer is of course no. But for the last 60+ years, U.S. relations with Cuba have been impacted both because of and despite that uncertainty.

If you would like to discuss your particular situation with regard to potential claims as either a potential plaintiff or defendant under Title III, please reach out to your regular Crowell & Moring attorney or one of the POCs listed on this post.

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For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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