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State Department Will Allow Suits Against Private Cuban Investors on May 2, 2019

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April 18, 2019 – On April 17, 2019, Secretary of State Michael Pompeo announced that the United States would not extend its waiver of Title III of the Liberty and Democratic Solidarity Act (“Libertad Act”), also popularly known as the Helms-Burton Act. The move is the climax of months of saber rattling toward the Cuban government for its continued support of the Nicolás Maduro administration in Venezuela.

Background and Recent Waivers

As we previously summarized, Title III of the Act provides United States citizens who had their property confiscated after the Cuban Revolution a right of action against third parties “trafficking” in that property. Specifically, the Act allows plaintiffs to seek treble damages against foreign companies currently profiting from the property.

Since the Act became law in 1996, every president since President Clinton has issued a continuous series of waivers (each up to six months long) that blocked Title III from becoming effective. On January 16, 2019, the Trump Administration signaled that it was considering breaking this practice and allowing Title III to become effective. Nevertheless, the Trump Administration State Department until now has continued issuing the waivers, while also warning that full implementation of Title III remained on the table. Effective March 19, 2019, the State Department allowed Title III to become effective as to Cuban government entities on the State Department’s List of Restricted Entities and Sub-entities Associated with Cuba (known as the Cuba Restricted List), but waived Title III for actions against private foreign companies. On April 3, 2019, the State Department issued the most recent waiver applicable to private foreign companies, which runs through May 1, 2019. On April 17, 2019, however, Sec. Pompeo announced that no further waivers would be forthcoming, and Title III would become fully effective on May 2, 2019.

Linked to Support for Maduro

The Trump Administration has made clear that its decision to decline to waive Title III is linked to Cuba's support of Nicolás Maduro in Venezuela. In announcing the decision to allow Title III to become effective, Sec. Pompeo specifically noted, "The Cuban regime has for years exported its tactics of intimidation, repression, and violence. They've exported this to Venezuela in direct support of the former Maduro regime. Cuban military intelligence and state security services today keep Maduro in power." If the State Department determines that the Cuban government has materially changed its support of the Maduro administration, it is possible that it could again waive Title III actions. Notably, the Libertad Act allows the President to suspend Title III even after it has become effective if doing so would be "necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." (However, any subsequent re-suspension of Title III would not affect suits filed prior to the re-suspension.)

Sec. Pompeo's announcement came on the same day as the Office of Foreign Assets Controls ("OFAC") ratcheted up pressure on Venezuela and Nicaragua with new sanctions on the [Central Bank of Venezuela](#), Nicaraguan bank [Banco Corporativo SA \(BanCorp\)](#), and associated individuals. Together with Cuba, Venezuela and Nicaragua make up what the Trump Administration previously referred to as the "Troika of Tyranny."

Preparing for Private Actions

The right of action under Title III contains several limitations that narrow the scope of permissible suits. Perhaps most importantly, U.S. parties who were eligible to file claims with the U.S. Foreign Claims Settlement Commission ("FCSC") but failed to do so, or who filed and were denied certification by the FCSC, are not entitled to the Title III right of action.

To date, the FCSC has certified 5,913 claims as valid, which are collectively worth \$8 billion with interest. The potential risk to foreign companies doing business in Cuba – including oil companies, agricultural companies (including tobacco and sugar), hotels, and resorts – could be substantial. As an initial step, companies who may have exposure should conduct a search of property records to determine if any U.S. parties owned the property involved in their business prior to the Cuban Revolution, and if so, cross-reference those names against the FCSC's [list of claims](#).

Whether any of the claimants will actually file suit and whether they will be able to collect from the foreign private companies remain to be seen. On April 17, 2019, after Sec. Pompeo's announcement, the European Union and Canada issued a [joint statement](#) saying they were prepared to defend their companies' interests in Cuba, including through an action before the World Trade Organization ("WTO"). (The EU and Canada challenged Title III before the WTO in 1996 when Helms-Burton was first enacted, but suspended that litigation after the U.S. waived implementation of Title III). According to the statement, "The EU and Canada consider the extraterritorial application of unilateral Cuba-related measures contrary to international law. We are determined to work together to protect the interests of our companies in the context of the WTO and by banning the enforcement or recognition of foreign judgements based on Title III, both in the EU and Canada." In addition, the EU and Canada – as well as Mexico – have so-called "blocking" legislation that could make it more difficult for U.S. claimants to discover necessary information or to enforce a judgment, and, significantly, provides their companies with a cause of action to counter-sue the U.S. claimants to recover any damages the companies are required to pay.

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