

Client Alert

November 2018

Using Cuban Confiscated Property, White House Considering Allowing Lawsuits Under Helms-Burton Act

What Happened: On November 1, 2018, National Security Advisor John Bolton confirmed that the White House will undertake “a very serious review” and use a “fresh set of eyes” on the enforcement of Title III of the Helms-Burton Act, thus allowing certain US nationals to sue in US federal court companies using or benefiting from properties confiscated from such US nationals by the Cuban government.

The Bottom Line: Although it remains uncertain whether the Trump administration will take the step of not waiving Title III, if in fact does not waive it, foreign and US companies that “traffic” in “confiscated” property subject to a claim by a US national would be at immediate risk of suit in federal court by US nationals seeking compensation for the use or benefit of their confiscated property. Amid the uncertainty, multinationals doing business in Cuba should analyze whether steps are necessary to mitigate against potential lawsuits under Title III, as well as the limitations of its potential application.

The Full Story

In 1996, Congress passed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (commonly known as the Helms-Burton Act, which is codified in various sections of 22 U.S.C.) to strengthen the United States embargo against Cuba. Titles III and IV of the Helms-Burton Act specifically restrict businesses’ ability to do business with or in Cuba. Title III authorizes US nationals with claims to “confiscated” property in Cuba to file suits in US courts against persons “trafficking” in such property. Title IV grants the US government the authority to deny visas and exclude from the United States persons (including executives of entities and their family members) who “traffic” in such confiscated property. While Title IV has been in effect, Title III has, since its enactment, been routinely suspended for six-month periods by the executive branch. This has essentially disabled the effect of Title III. The most recent six-month suspension was renewed in August of 2018.

On November 1, White House National Security Advisor John Bolton said that the White House will give a “very serious review” regarding whether to further suspend Title III of the Helms-Burton Act. If it were to take this step, US nationals (including those that have become US nationals subsequent to the confiscation) could be allowed to sue multinationals in US federal court pursuant to Title III for “trafficking” in property “confiscated” by the Cuban government from such US nationals. Currently, there are at least 6,000 certified claims maintained by the Foreign Claims Settlement Commission worth roughly \$8 billion held by US nationals. This is not a comprehensive list of all confiscated property subject to a claim.

If Title III were to be enabled by the current administration, any person that “traffics” in property which was “confiscated” by the Cuban government on or after January 1, 1959, could be subject to suit. Title III defines “trafficking” to include purchasing, receiving, using, transferring or otherwise acquiring confiscated property, as well as engaging in a commercial activity using or otherwise benefiting from confiscated property. It is unclear how the statute would be interpreted by US courts. Importantly, there are additional limitations to Title III that would narrow its application, if it were to be enabled.

In sum, although even Ambassador Bolton states that he does not know whether the Trump administration will allow for Title III lawsuits, he has made it clear that the White House is going to take a comprehensive look. It remains to be seen whether past consideration, which militated in favor of waiver, outweighs the administration's other consideration to pressure what it has referred to as the "troika of tyranny" in order to waive Title III in early 2019. Amid the uncertainty, companies doing business in Cuba should analyze whether steps are necessary to mitigate against potential lawsuits under Title III, as well as the limitations of its potential application.

The Latin America group practice at Hunton Andrews Kurth LLP will continue to closely monitor related developments in the US sanctions regime with respect to Cuba. Please contact us if you have any questions or would like further information regarding US sanctions against Cuba.

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