

## U.S. policy reversal allows suits in U.S. courts and visa denials, for “trafficking” in confiscated property in Cuba

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*Client Alert*

Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton) allows U.S. persons to bring an action in U.S. federal court to seek damages for “trafficking” in property confiscated by the Cuban government after the 1959 revolution. However, Title III has never had practical effect, because this right of action has been suspended by all U.S. administrations since that right was codified in 1996.

In a major policy change, the Trump Administration announced that it will no longer suspend the right to sue, thereby allowing lawsuits in U.S. court beginning on 2 May 2019. It has also announced that it will exercise its authority under Title IV of Helms-Burton to deny entry into the United States to those found to have confiscated or have trafficked in confiscated property of a U.S. national, or who are corporate officers, principals or shareholders of an entity involved in confiscating or trafficking in such confiscated property.

### **Background**

Section 302(a)(1) of Title III of Helms-Burton creates the right to bring an action in U.S. federal courts against “any person” who has “trafficked” in property confiscated by the Cuban government on or after 1 January, 1959. The statute authorizes the president to suspend the right to sue for periods of up to six months. Historically, administrations have consistently exercised that authority.

The Trump Administration signaled a change in posture when it announced on 16 January that it would extend the suspension for forty-five days rather than the maximum authorized six months. Then on 4 March Secretary Pompeo for the first time in the history of Title III partially lifted the suspension, allowing Title III claims against Cuban entities or sub-entities identified by name on the State Department’s List of Restricted Entities and Sub-entities Associated with Cuba (known as the Cuba Restricted List) to proceed. The Administration then announced on 17 April that the Title III suspension would be lifted in its entirety.

As a result, effective 2 May, U.S. citizens may bring lawsuits against any person, including U.S. or non-U.S. natural persons and corporate persons, who intentionally “traffic” in property confiscated by the Cuban government.

### **Conduct that is actionable under Title III**

“Traffics” is defined to include instances in which a person knowingly and intentionally without permission from any U.S. national with a claim to the property:

- **Disposes of confiscated property:** Sale, manage, or profits from any of the same
- **Obtains or holds an interest in confiscated property:** Purchase, lease, receive, use, possess, or profits from any of the same
- **Engages in commercial activity using confiscated property**
- **Otherwise benefits from confiscated property**

This is a broad definition. In allowing suit against parties that “benefit” from or “use” confiscated property, Title III opens the door to suits against persons who make contact with confiscated property that falls short of ownership or leasing.

### **Conduct that falls outside Title III**

Helms-Burton includes some limited exceptions to the definition of “traffics.” Dealings in confiscated property that do not create liability under Title III include:

- The delivery of international telecommunication signals to Cuba;
- The trading or holding of publicly traded securities, unless the trading is with or by a Specially Designated National;
- Transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; and
- Transactions and uses of property by a person who is both a citizen and resident of Cuba and not an official of the Cuban government or the ruling political party.

The definition of “trafficking” has not yet been tested in U.S. court. Beginning on 2 May 2019, the courts will have an opportunity to assess and rule upon the scope of Title III. Once a lawsuit is filed, the decision will be fully in the hands of the courts.

### **Statute of limitations**

The claim may not be brought more than two years after the trafficking has ended. Even if a company stops engaging in the trafficking conduct today, it remains liable for claims brought within the next two years. A company that ceased doing business in Cuba more than two years ago potentially faces more limited exposure, although determining when the trafficking ceased and therefore when statute of limitations clock started to run will be a matter for the courts to decide on a case-by-case basis.

### **Assets at stake**

According to the State Department, the Foreign Claims Settlement Commission (FCSC), an agency with the U.S. Department of Justice, has certified nearly 6,000 claims of property confiscated in Cuba for a value of approximately US\$2 billion. With interest, the value of those claims is now estimated to be approximately US\$8 billion. There could be thousands of

additional claims worth tens of billions of dollars that the FCSC could certify if the State Department established a new certification period in which claimants decided to pursue certain property claims. The money damages are the greater of the FCSC certified claim, the amount determined by a special master where there is no certified claim, or the fair market value of the property, which may be tripled, plus attorneys' fees and court costs.

### **Immigration denials**

Relatedly, the U.S. has announced that it will enforce Title IV of Helms-Burton, that allows U.S. authorities to deny or withdraw visas from those tied to trafficking in confiscated American property. Under Section 401 of Title IV, the Secretary of State is required to deny visas to, and the Attorney General is required to exclude from the United States, any "alien" who the Secretary of State determines has "confiscated" or "trafficked in confiscated property." Following such determinations, corporate officers, controlling shareholders as well as the immediate family members (spouses and minor children) of the officers and shareholders, could be denied visas or otherwise denied entry in the United States. Because the United States has not enforced this provision of Helms-Burton for over 20 years, and because enforcement is discretionary to the government, the breadth and scope of possible enforcement of Title IV remains uncertain.

For further information regarding Helms-Burton Title III lawsuits or the Title IV U.S. immigration implications, please contact any of the lawyers identified below.

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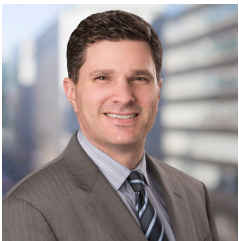
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