



Helms-Burton Title III Comes to Life

What Businesses with Cuba Operations Need to Know and What May Come Next

Practice Update

April 17, 2019

For the first time in 23 years, the United States government announced on April 17, 2019, its intention to activate Title III of the Cuban Liberty and Solidarity Act of 1996, popularly known as Helms-Burton. This unprecedented move means that certain individuals whose property was confiscated by the Cuban government beginning in 1959 will—as of May 2, 2019—be able to sue in U.S. federal courts anyone who “traffics” in (i.e. derives any economic benefit whatsoever from) the property in question.

Given the complex nature of Helms-Burton and the fact that Title III had been suspended by every presidential administration for consecutive six-month periods since its enactment in 1996, many companies have questions about what the activation means and how it could affect their interests.

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Akerman's Cuba practice has been at the forefront of U.S.–Cuba relations for more than 20 years, and recently teamed up with Akerman litigators and government affairs professionals to identify key issues, explain what Title III activation means, and assess how events could unfold moving forward.

What is Helms–Burton?

Named for its United States Senate and House of Representatives sponsors, former Sen. Jesse Helms (R-SC, deceased) and former Rep. Dan Burton (R-IN), the law's principal objectives were to:

1. Codify the U.S. embargo on Cuba in law, thereby making it more difficult for future presidents to modify the sanctions without consent from congress;
2. Lay out explicit conditions that must be met before the embargo can be lifted (e.g. no Castros in power in Cuba);
3. Discourage foreign businesses from doing business in Cuba by allowing U.S. property claimants to sue them in American courts for “trafficking” in their confiscated property.

While the law was not expected to pass when it was first introduced in 1995, Fidel Castro's February 1996 decision to shoot down two U.S. civilian aircraft engaged in humanitarian and other activities over the Florida Straits, prompted then President Bill Clinton to reconsider and sign the bill into law in March of 1996.

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Why is Title III Making Headlines Now?

The United States has taken a harder line against Cuba since the inauguration of President Donald Trump in 2017. The administration has placed restrictions on U.S. travel to Cuba and created a list of Cuban commercial entities with which American companies can no longer conduct business.

Title III of Helms-Burton creates a private cause of action that allows Americans to sue in U.S. courts foreign companies that engage in business activities in Cuba that are completely legal under the laws of their home countries, Cuba's laws, and international law. Concern over the broad extraterritorial application of U.S. law that Helms-Burton envisioned was sufficiently objectionable to close U.S. allies (e.g. Canada, Mexico, Spain, and the United Kingdom) that President Clinton insisted before signing that lawmakers authorize the executive branch to suspend the right to bring an action under Title III for periods of up to six months. Successive Democratic and Republican administrations thereafter did suspend Title III's provisions for consecutive six months periods. Those suspensions will end on May 2, effecting a major departure from longstanding U.S. foreign policy.

Do Companies Operating in Cuba Face Liability?

Companies operating in Cuba are rightfully concerned that the activation of Title III will create new legal exposure for them in U.S. courts. More alarmingly, the Trump Administration has moved beyond a more limited partial activation and will now allow claimants to commence legal action against anyone who "traffics" in "confiscated" property—U.S. companies included.

The good news for potential defendants is that there are plausible defenses against Title III lawsuits. For instance:

- Foreign defendants may argue that they lack sufficient contacts with the United States, and therefore that U.S. federal courts lack personal jurisdiction to adjudicate a suit brought by U.S. claimants;
- Defendants located in Canada, Mexico, Spain, or other jurisdictions that have passed so-called “blocking legislation” may discover that any cooperation with U.S. courts on Helms-Burton-related lawsuits is expressly prohibited by, and remedies are available under, their home country laws;
- Defendants with operations in Cuba that use property that may be subject to a Title III claim, but operate in certain specific sectors—mainly travel services and telecommunications—may be exempted from Title III lawsuits.

The bottom line is that there are a number of potential defenses and countermeasures to protect against Title III lawsuits. Individuals and businesses that believe they could be the subject of legal action under Title III should consult legal counsel to determine the degree of exposure. It may be possible to take low-cost preventive actions that mitigate any exposure to Title III lawsuits.

Claimants' Courses of Action

Property claimants who want to sue for damages under Title III will need to undertake a careful analysis of potential claims. Helms-Burton creates a private cause of action for two broad categories of property claimants:

1. Certified: So-called “certified claims” apply to U.S. persons and companies who were American citizens or otherwise subject to the jurisdiction of the United States at the time that their property was confiscated and who submitted claims that were evaluated and certified by the U.S. Justice Department’s Foreign Claims Settlement Commission (“FCSC”). Such claims enjoy special status under both U.S. and international law.

2. Uncertified (a.k.a. Cuban American) Claims: So-called “uncertified” claims apply to individuals and companies who were Cuban (or nationals of other countries, but not the U.S.) at the time that their property was confiscated and who later became naturalized or incorporated in the United States.

Other considerations for plaintiffs include how much the property was worth at the time of the confiscation, whether legal chain of ownership can be demonstrated, identification of those “trafficking” in the claimants’ property, among many others. Potential claimants wanting to explore possible remedies under Title III should consult a legal advisor.

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What Comes Next

U.S.–Cuba relations have been deteriorating steadily since 2017, a trend that has accelerated recently in response to developments in Venezuela. In addition to this week’s Title III announcement, the White House also moved on Wednesday to curtail U.S. travel to Cuba and limit the cash remittances that Cuban Americans can send to their families on the island. First steps for companies that are concerned about Title III should include:

1. A review of commercial activities in Cuba to determine potential exposure to Title III claims;
2. A review of applicable statutory exemptions from Title III lawsuits;
3. For non-U.S. companies, a review of possible protections under the laws of their home countries.

Please contact Akerman's Cuba practice with any questions you may have or to request further details of recent Cuba policy developments.

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