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Practice Update

Cuba Update: COVID-19, Economic Reforms, and Helms-Burton Title III Developments

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The Cuban government recently announced reforms designed to spur private sector growth on the island, amidst ongoing efforts to begin lifting restrictions on daily life imposed in response to the emergence of the novel coronavirus earlier this year. The Trump Administration has continued in recent months efforts to further sanction the Cuban regime, most recently through the addition of Cuban financial services company FINCIMEX, which may adversely affect the flow of remittances to the Cuban people. Meanwhile, a series of recent federal court decisions in the United States may pose new challenges for plaintiffs seeking to bring law suits against U.S. and foreign companies that do business in Cuba under Title III of the Cuban Liberty and Democratic Solidarity Act of 1996 (a.k.a. Helms-Burton).

COVID-19 Reopening

The Cuban government responded to the emergence of the island's first reported COVID-19 cases in March by swiftly ending international flights and imposing a strict nationwide lockdown. Despite a surge in early cases, Cuban health officials moved quickly to enact coronavirus testing and contact tracing measures, which apparently succeeded in preventing wide scale transmission.

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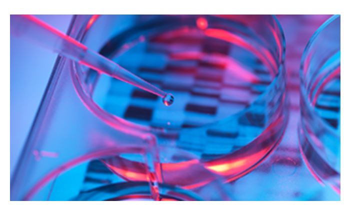

- As of July 30, 2020, most of Cuba's 15 provinces have no reported COVID-19 cases. The country's total reported caseload since the arrival of the virus is 2,597 of which 1,517 have occurred in Havana. Of these cases, 2,326 have been resolved and 87 patients have died.
- In June 2020, Cuban President Miguel Díaz Canel announced details of the country's three-phase reopening plan, which is being implemented on a province-by-province basis, based on epidemiological data.
- As of July 20, 2020, all provinces and municipalities except Havana and neighboring Mayabeque have entered phase III, under which day-to-day activities are largely unrestricted. Havana remains in phase I due to ongoing local transmission but is meeting most benchmarks required to enter phase II.
- Under phases II and III, the Cuban government plans to reopen the country to international travelers, at first limited only to hotels and resorts operating at limited capacities in Cuba's offshore islands (*Cayos*). Commercial flights are expected to recommence when Havana enters phase III. All travelers arriving from overseas will have their temperature taken upon arrival and will be given COVID-19 tests.

Economic Reform Measures

The Cuban economy is expected to contract sharply in 2020, due to the impact of the global pandemic and the loss of revenue from international travel and tourism. In July 2020, the Cuban government announced a series of economic reforms designed to boost domestic agricultural production, revamp inefficient state-owned enterprises, increase consumer access to imported goods, and promote additional private economic activity.

The measures include:

- The establishment of a new network of retail stores where otherwise scarce imported consumer goods will be available to the general public for purchase in U.S. dollars;
- The elimination of a nationwide 10 percent surcharge on the exchange of U.S. dollars for domestic Cuban currency. This change will effectively increase the purchasing power of U.S. dollars on the island and represents a de facto 10 percent devaluation of Cuban currency;
- The creation of a new category of U.S. dollar-denominated checking accounts at consumer banks where Cubans will be able to deposit savings held in foreign currency and receive cash transfers and/or payments for goods and services from abroad; and
- The creation of a new legal framework for the formation of small-, medium-, and micro-enterprises. Thus far, Cuba's private sector economy has been largely limited to the legal equivalent of sole proprietorships (so-called *cuenta propistas* — "self-employed" workers), which has limited the growth of the island's private economy. The proposed changes would allow for the creation of legal business entities equivalent to limited liability companies and allow such entities to engage in international commerce (i.e. imports/exports).

Helms-Burton Act

In May 2019, the Trump Administration ceased suspensions of Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act (Title III or Helms-Burton Act). The Act allows certain individuals, whose property was allegedly confiscated after 1959 by the Cuban government, to bring suit in U.S. federal courts against anyone who "traffics" in the property in question. Title III broadly defines "trafficking" to include incurring any benefit from the use of the property, and make defendants liable for up to three times the value of the subject property, in addition to attorneys' costs and fees.

While a widely anticipated "avalanche" of Title III plaintiffs did not materialize — in part due to the high-cost of federal litigation — Akerman is currently representing several high-profile Title III defendants and keeping a close eye on these cases.

Importantly, in the last few months, courts have issued the first decisions that interpret the language of certain limitations to Title III. Specifically:

- On May 10, 2020, the Hon. Robert N. Scola, Jr., for the U.S. District Court for the Southern District of Florida, dismissed with prejudice plaintiff's amended complaint. The case was brought by Florida-based plaintiff Daniel A. González against Amazon.com, Inc. and Susshi International Inc., and raised allegations that the defendants unlawfully benefitted from the sale of charcoal products produced on a Cuban estate that once belonged to plaintiff's grandfather. Judge Scola found that, in accordance with plain language meaning of Title III, claimants must have "acquire[d] ownership" — including by inheritance — to their claim prior to the date of Title III's enactment in March 1996. Mr. González alleged that he inherited the property from his mother in 2016 and, as such, his claim was improper.

  Judge Scola's previous dismissal order on the original complaint, issued on March 10, 2020, found González's complaint deficient (among other reasons) for failure to allege that defendants "knowingly and intentionally" trafficked in the confiscated property, as required under Title III. Judge Scola ruled that plaintiff's allegations that defendants used advertisements discussing a link between the products and Cuba, "commenced, conducted, and promoted" the sale of the product, and "participated in and profited from" the Cuban Government's possession of the property were insufficient to show the required intent.
- On March 26, 2020, Judge Scola also dismissed without leave to amend a case brought by Florida-

based plaintiffs Mario del Valle, Enrique Falla, and Angelo Pou against defendants Booking.com BV, Booking Holdings, Inc., Expedia Group, Inc., Hotels.com L.P., Hotels.com GP LLC, and Orbitz, LLC, alleging that defendants trafficked in confiscated property by advertising and including hotels built on the subject property in their online booking platforms.

Judge Scola found that plaintiffs failed to allege that the Court had jurisdiction over the matter, noting that: (1) allegations of a website's accessibility in Florida and defendants' business registration in Florida did not establish that defendants were carrying on a business in Florida and were insufficient to confer specific jurisdiction; (2) allegations that a tort was committed in Florida on the basis that the plaintiffs were Florida residents and that the websites where the subject properties could be rented were accessible in Florida were insufficient in a Title III case to confer specific jurisdiction, as the trafficking occurred in Cuba; and (3) the running of a website in Florida is insufficient to establish substantial and isolated activity within Florida for the purposes of general jurisdiction.

- On July 10, 2020, the Hon. James Lawrence King of the U.S. District Court for the Southern District of Florida dismissed a lawsuit against Carnival Corporation (Carnival) brought by Florida-based plaintiff Javier Garcia-Bengochea alleging that he was owed damages under Title III for Carnival's use of property in Cuba that he had acquired through inheritance from a relative overseas.

  In dismissing the case, Judge King's ruling also found that the plain language meaning of Title III requires claimants to have "acquire[d] ownership" — including by inheritance — of their claims prior to the date of Title III's enactment. Because Mr. Garcia-Bengochea inherited the property in question in 2000, his claim was improper.

In addition to the strict statutory interpretation imposed by the courts, it is notable that the number of cases against foreign entities have been diminishing. Most recently, on July 16, 2020, in a case transferred to the United States District Court for the Southern District of New York from the Southern District of Florida, plaintiff Sucesores de Don Carlos Nuñez y Doña Pura Galvez, Inc. (acting on behalf of a number of estates) voluntarily dismissed its case against two Canadian entities (The Bank of Nova Scotia and National Bank of Canada), and a Spanish entity (Banco Bilbao Vizcaya Argentaria, S.A.). This case continues against Société Générale, S.A., a French entity that had been previously served through its wholly owned subsidiary in New York, and BNP Paribas, S.A., a French entity newly named as a defendant in the latest version of the complaint.
