

## In Unprecedented but Mostly Symbolic Move, State Department Allows Some Claims under Title III of the Libertad Act

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On March 4, 2019, the U.S. State Department **announced** that, for the first time, it would permit actions under Title III of the **Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996**, Pub. L. 104-114 (the “**Libertad Act**”), which authorizes U.S. nationals that own claims to property confiscated by the Cuban government to sue for damages any person who traffics in such property. The State Department’s determination, which is effective March 19, 2019, is limited in scope, and permits such lawsuits to be brought only against Cuban entities and subentities associated with Cuba’s military, intelligence, and security services and named on the State Department’s **Cuba Restricted List**. The right to bring claims against all other persons remains suspended for an additional period of 30 days, through April 17, 2019, as the State Department continues to consider whether such claims should be permitted. As discussed in more detail below, allowing such claims to proceed against the entities included in the Cuba Restricted List is unlikely to have much practical significance. If the State Department were to permit such claims more broadly, however, it would create potentially substantial risks for companies doing business in both the United States and Cuba.

Enacted in 1996, Title III of the Libertad Act creates a civil remedy for U.S. nationals with claims to property confiscated by the Cuban government after January 1, 1959, authorizing such U.S. nationals to file suit in U.S. district court against any person that “traffics” in such property, defined broadly to include any transfer or commercial use of such property, with limited exceptions. This provision was intended to discourage non-U.S. companies from doing business in Cuba by exposing them to damages in the United States if their business in Cuba involves confiscated properties. However, it has never gone into effect, as administrations of both parties have consistently determined that suspending the effective date of Title III is necessary to the national interests of the United States and will expedite a transition

to democracy in Cuba, and have routinely extended that suspension for 6-month intervals as provided for under the Libertad Act. In January of this year, the Trump administration for the first time **suspended** the effective date of Title III for less than the full 6-month period, instead providing for a 45-day suspension in order to permit the State Department to conduct a review of the right to bring action under Title III in light of the national interests of the United States and efforts to expedite a transition to democracy in Cuba and include factors such as the “Cuban regime’s brutal oppression of human rights and fundamental freedoms and its indefensible support for increasingly authoritarian and corrupt regimes in Venezuela and Nicaragua.” This period has now been followed by an even shorter suspension period, as well as the allowance of claims against Cuba Restricted List Entities.

While framed by the State Department as a measure to increase pressure on Cuba, including with respect to its human rights record and support for the Maduro regime in Venezuela, it is not clear how permitting suits to proceed against Cuba Restricted List Entities, which generally do not do business or have property in the United States, is likely to affect the Cuban government’s behavior. In a **background briefing** concerning the partial suspension, a senior State Department official made clear the limited nature of the determination, noting that it would not permit suits against European or other third-country companies currently doing business in Cuba. However, the same official also emphasized that the State Department encourages any person who is doing business in Cuba to reconsider whether they are trafficking in confiscated property, and would be assessing the extent to which the shorter 30-day suspension of Title III affects such persons’ calculus in that regard. The official did not prejudge or forecast what the Secretary’s decision would be following the conclusion of the 30-day suspension period.

A decision by the State Department to allow claims under Title III to proceed against third-country companies doing business in Cuba would likely engender significant diplomatic opposition, including from U.S. allies and partners, and could potentially result in the revival of the European Union’s 1996 **challenge** to the Libertad Act in World Trade Organization dispute proceedings. Historically, the U.S. government has been sensitive to such concerns, as evidenced by its consistent suspensions of Title III across multiple administrations spanning more than two decades. Whether the current administration will continue this course remains to be seen.