Memorandum: New Sanctions on Cuba Announced April 17, 2019

On April 17, the Trump administration announced a new round of sanctions targeting Cuba. The administration will allow lawsuits against anyone trafficking in Americans' confiscated property in Cuba, including U.S. companies. It will also impose new restrictions on non-family travel, cap remittances to $1,000 per quarter, end "u-turn" financial transactions through U.S. banks, and add new entities to the State Department's restricted list.

Activation of Titles III and IV of the Helms-Burton Act

The Cuban Liberty and Democratic Solidarity Act (LIBERTAD Act), commonly referred to as the Helms-Burton Act after its sponsors, is a core statutory pillar of the U.S. embargo on Cuba.

Title III allows U.S. nationals whose property was seized by the Cuban government after 1959 to sue for damages in the U.S. court system. After the Cuban Revolution, the new regime nationalized property regardless of ownership, and many Cubans who fled the revolution and emigrated to the U.S. were among those whose property was seized. In a unique departure from the norms of sovereignty and in opposition to international law, Title III affords claimant rights to Cuban Americans who were Cuban citizens at the time their property was confiscated.

President Bill Clinton was the first to suspend Title III after facing opposition from U.S. allies whose companies were doing business in Cuba, and every administration since had waived its activation for a period of six months at a time. With the activation of Title III, claimants can now file suits against any company, U.S. or foreign, that profits from using their property.

Currently, there are 5,913 certified claims of seized American property in Cuba. Based on the number of living Cuban Americans whose property was seized, the State Department estimates there could be a flood of up to 200,000 claims when Title III goes into effect on May 2.

Title IV directs the State Department to deny visas to any foreign nationals who traffic in confiscated property or are corporate officers or shareholders of involved entities. It has never been suspended, but the administration stated it will ramp up investigations for potential visa denials.

Effect: It is unclear how many lawsuits Title III will generate in practice. Conditions in the statute governing what type of property is eligible for a claim limit the population of potential suits. The conditions limit claims eligibility for property valued under $50,000 at the time of confiscation, residential property, and property incident to lawful travel to Cuba.

If there is indeed a flood of litigation resulting from Title III activation, it will burden the U.S. court system and fail its objectives. Cuba has compensated other foreign nationals for their confiscated property, but the severing of diplomatic ties between the U.S. and Cuba in 1961 stalled compensation for Americans. Negotiating with the Cuban government through high-level diplomatic channels would have been much more likely to achieve compensation than Title III lawsuits, as has happened with Canada, Spain and other European countries.

Title III suits could also have significantly damaging effects on the U.S.-Cuba relationship, U.S. businesses, and relations with our allies. Future attempts to encourage legal business with Cuba could now be much more difficult. Over the past four years, we've seen strengthened commercial ties between the U.S. and Cuba. But U.S. companies, already wary of assuming the risks associated with business in Cuba during the Trump administration, are unlikely to subject themselves to potential lawsuits when the long-term benefits of business on the island are difficult to quantify and dependent on politics. In turn, this could have a chilling effect on the broader effort to continue normalizing relations.

Titles III affects any companies currently operating in Cuba on confiscated property, as well as companies that indirectly profit from such "trafficking." As U.S companies are not exempt from Title III suits, they may face a slew of lawsuits and are unlikely to expand operations in Cuba despite their past success on the island.

In addition, implementing Title III lets the Cuban government off the hook for the confiscation of property. Now American and European companies will be compensating American property claimants and not the Cuban government.

Venezuela

In Venezuela, the U.S. has implemented a policy of democracy promotion by recognizing National Assembly President Juan Guaido as Venezuela's head of state. It is critical to maintain a unified front with key allies, especially the EU and Canada, in rejecting Nicolas Maduro as illegitimate. Fueling a trade war with our allies would at best create unhelpful tension within the coalition and at worst compromise our multilateral strategy to bring political change to Venezuela.

Relations with our Allies

Companies based in Europe and Canada are among the top foreign investors in Cuba. Mexico, Canada, and the U.K. all have laws prohibiting their companies from complying with Title III suits. The European Union has stated it will revive its WTO challenge against Title III. The result could be retaliatory measures that allow litigation against U.S. companies. These legal tensions could also spill over into other aspects of bilateral relationships with U.S. allies, as in Venezuela.

Empower our Adversaries

By pursuing a policy of isolation, the U.S. has already left a vacuum in Cuba for adversarial influence, particularly from Russia and China. As business with U.S. companies becomes less viable for the Cubans, they will increasingly turn to our adversaries, who offer them favorable credit terms and invest in high-profile projects.

Human Rights

Finally, isolation rarely allows for improvements in human rights, and Cuba is no exception. Strained relations with our allies will only escalate this problem. Without a multilateral effort to hold the Cuban government accountable, the U.S. will have a harder time pushing Cuba toward greater freedom. United States policy is condemned on the national stage at the U.N. every year, where nearly every member nation has voted against the U.S. embargo on Cuba for the last 27 years. The Cuban government is responsible for their poor record and behavior on human rights, but these actions by the United States do not help.

Limits on Remittances to Cuba

The administration has imposed a cap on Americans' ability to send donative, or general/non-emigration remittances, to the island. U.S. nationals may now only send $1,000 per quarter, per person, to people living in Cuba. President Obama had removed donative remittance caps entirely in 2015 after lifting limits on family remittances in 2009. Donative remittance caps were $2,000 per quarter under President Bush.

Effect: The Havana Consulting Group estimates that between $1.4 and $4 billion is sent to Cuba from the United States annually since the U.S. removed limits on remittance amounts. Because so many Cuban private sector entrepreneurs or *cuentapropistas* depend on remittances from relatives and friends in the United States, this policy change will force *cuentapropistas* to find an alternate vehicle for capital at a time when reduced U.S. travel has already dealt a huge blow to Cuban private sector revenue.

Restriction on U-turn Transactions

The administration announced it will end U-turn financial transactions in which one party is a Cuban national or the government of Cuba. U-turn transactions occur when parties outside the United States transfer funds that must pass through a U.S. financial institution before being redirected to the recipient of the transfer. The most common reason to use a U-turn transaction is when funds transfers are denominated in U.S. dollars.

Effect: Reinstating the restriction on U-turn transactions will result in foreign banks incurring substantial fines for processing Cuban transfers in U.S. dollars. U.S. financial institutions will be effectively spared from the consequences of this policy change because they had not been processing U-turn transactions. But this new regulation is an addition to a complicated web of financial sanctions that discourage the global business community from investing in Cuba.

Impending Regulatory Changes

The administration stated it intends to "restrict non-family travel" to Cuba but stopped short of issuing explicit details on its changes to travel licensing. The administration could opt to ban most non-family travel to Cuba by ceasing OFAC approval for licenses in most authorization categories, or it could require specific licenses for all categories, in which OFAC approves each trip on a case-by-case basis. Either interpretation would reverse President Obama's regulatory change that allowed travelers to self-certify their purpose for travel without acquiring a license before the trip.

The State Department has also indicated it will add five new entities to its Cuba Restricted List. It has announced the Cuban airline Aerogaviota as one addition, but the others have not been listed. U.S. nationals and companies are prohibited from engaging in direct financial transactions with entities on the Cuba Restricted List.

Effect: While we do not yet know the full impact of additional travel restrictions, any attempt to reduce the number of U.S. travelers to Cuba will negatively affect Cuba's private sector and Cuban civil society. *Cuentapropistas*, or self-employed Cubans, and their families greatly depend on American travelers to stay in business and have already seen as much as a 40 percent drop in revenue since the administration's last iteration of travel regulations.

Particularly disruptive would be a specific license requirement for group people-to-people travel, the authorization used by U.S. cruise passengers. This alone could diminish the number of American travelers to Cuba dramatically.