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CLIENT ALERT

Banks Beware: A Second Round of Significant Extraterritorial Sanctions Looms

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July 10, 2019, was the first instance of plaintiffs setting their sights on a new set of targets in the string of cases under Title III of Helms Burton— financial institutions.

Although yesterday's complaint was directed at Société Générale, S.A., the case should cause concern for any financial institution ("FI"), especially those non-U.S. FIs that found themselves in the string of U.S. sanctions-enforcement cases dating back to December 2005—sometimes referred to as the "stripping cases." They are known as such because the banks removed—or stripped—references to sanctioned geographies to more-easily process transactions through U.S. correspondent banks. The U.S. penalized non-U.S. FIs heavily for that activity in what some would call an extraterritorial exercise of sanctions enforcement, and now those same FIs may find themselves penalized again.

The penalties this time look to be coming from private suits brought under a newly activated portion of a law designed to toughen the Cuba sanctions program. As we described in our briefing about the activation of Helms-Burton Title III, this newly available cause of action allows plaintiffs to bring complaints for damages against U.S. and non-U.S. companies that "traffic" in property confiscated by the Castro government in Cuba. So far, those claims have focused on entities that provide travel-related services to property confiscated soon after the revolution in 1959 (e.g., docks and hotel properties).

Although we are watching those cases closely, the truth is that those defendants will likely rely, at least in part, on an exemption for lawful travel contained in Title IV, Section 4 of the Act. In this most-recent case, we should learn more about what courts will make of Title III, because the plaintiffs are not focusing on a defendant with such a defense. In addition, the plaintiffs are not citing "lawful" dealings as the basis for the claim. Instead, their complaint brings back to light Société Générale's history of dealings for which it ultimately paid more than a billion dollars in penalties to settle potential violations of U.S. sanctions laws and regulations.

In the July 10 complaint, the plaintiffs are alleging that they have a claim to 10.5% of the equity of Banco Nacional de Cuba ("BNC") based on their never being compensated for the taking of Banco Nuñez (including the real property on which the branches were located) in 1960 and its absorption into BNC. Plaintiffs claim that Société Générale's commercial dealings with BNC amount to trafficking in their interest. Although the plaintiffs cite a number of figures quantifying Société Générale's commercial activity with BNC (many in the eleven-figures), it is important that they allege damages based on the value of the interest at the time of its taking ($7.8 million), compounded for interest and including treble damages. Using that formula, the plaintiffs arrive at roughly $792 million estimated damages.

That damage calculation is significant, because, in theory, these plaintiffs could bring a nearly identical complaint against any bank that "trafficked" in their interest by engaging in even-more-limited commercial dealings with BNC—lawfully or not. Although the plaintiffs go to great length to dig up a long record of Société Générale's settled potential violations related to such dealings in their complaint, it does not necessarily make any difference whether the commercial dealings were lawful, or whether there were billions of dollars' worth of activity. The crux of the claim is that the plaintiffs had an interest and Société Générale trafficked in that interest, thus, plaintiffs desire relief based on statutory calculations tied only to the value of their interest in 1960. Consequently, any bank engaged in commercial dealing with BNC—where there is also some U.S. jurisdictional tie allowing them to be brought into U.S. court—could be next and could face identical damage calculations.

It does not take much imagination to see that the next likely string of defendants in these cases is likely to be the banks in the stripping cases. That is because the details of their commercial dealings with BNC are laid out in the public record as part of their settlements. Those settlements provide easily obtainable evidence of the transactions or alleged "trafficking."

We are watching all of the Title III litigation closely. Some of it may surprise us; some definitely will not.
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