

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

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In re:

PROMESA
Title III

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

No. 17 BK 3283-LTS

THE COMMONWEALTH OF PUERTO RICO,
et al.,

(Jointly Administered)

Debtors.¹

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In re:

PROMESA
Title III

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

No. 17 BK 4780-LTS

PUERTO RICO ELECTRIC POWER
AUTHORITY,

This document relates only to
17 BK 4780 and shall also be
filed in 17 BK 3283

Debtor.

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OPINION AND ORDER DENYING URGENT MOTION OF FOMB TO
CONFIRM APPOINTMENT OF A CHIEF TRANSFORMATION OFFICER (DOCKET ENTRY NO. 361)

¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (“HTA”) (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (“ERS”); and (v) Puerto Rico Electric Power Authority (“PREPA”) (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747) (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

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LAURA TAYLOR SWAIN, United States District Judge

Before the Court is an urgent motion, filed on October 26, 2017, by the Financial Oversight and Management Board for Puerto Rico (the “FOMB,” or the “Oversight Board”), seeking entry of an order confirming the appointment and authority of a Chief Transformation Officer (“CTO”) for the debtor Puerto Rico Electric Power Authority (“PREPA”) (docket entry² no. 361 (the “Motion”). This Court has jurisdiction of this matter pursuant to 48 U.S.C. § 2166(a).

The FOMB seeks court confirmation of its appointment of Noel Zamot as CTO of PREPA with all the powers of a chief executive officer, reporting to the FOMB. (Motion ¶ 4.) The FOMB asserts that a PREPA CTO is necessary in the wake of Hurricane Maria, particularly given the historical challenges that have “degraded [PREPA’s] financial and operating condition” over the last several years. (Motion ¶¶ 18-25.) The Ad Hoc Group of PREPA Bondholders (the “Ad Hoc Group”), the National Public Finance Guarantee Corporation (“National”), Scotiabank de Puerto Rico (“Scotiabank”), the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF”), U.S. Bank National Association (“U.S. Bank”), the PREPA Governing Board (“Governing Board”), Assured Guaranty Corp. (“Assured”), and Syncora Guarantee Inc. (“Syncora”) (collectively, the “Opposing Parties”) oppose the FOMB’s Motion. The Instituto de Competitividad y Sostenibilidad Economica de Puerto Rico (“ISCE”) has filed papers in support of the appointment of a CTO, and the Puerto Rico Energy Commission (“PREC”) has filed comments to the Motion raising broader policy coordination issues.

² All docket entries refer to case no. 17 BK 4780, unless otherwise specified.

The Court heard oral argument on the Motion on November 13, 2017 (the “November 13th Hearing”). The Court has carefully reviewed and considered all of the submissions made in connection with this Motion, including the arguments presented at the November 13th Hearing and, for the following reasons, the Motion is denied. This Opinion and Order memorializes and expands upon the brief oral ruling delivered by the Court at the close of the November 13th Hearing.

BACKGROUND

PREPA is an instrumentality of the Commonwealth of Puerto Rico (the “Commonwealth,” or “Puerto Rico”) created pursuant to the laws of Puerto Rico. See Puerto Rico Electric Power Authority Act, 22 L.P.R.A. §§ 191-218. Under Commonwealth law, PREPA’s operations are overseen by the PREPA Governing Board, a group of nine individuals, six of whom are appointed by the Governor of Puerto Rico. 22 L.P.R.A. § 194. The PREPA Governing Board is empowered to appoint an Executive Director who is responsible for the “general supervision” of PREPA’s operations and employees. See id.

The proposed CTO would essentially displace the PREPA Executive Director and Governing Board by assuming “management and control of the business and affairs of PREPA.” (Docket entry no. 414-1, ¶ 3.) Among other powers and duties, the CTO would have the power to sign all PREPA contracts; supervise and direct all PREPA employees; develop and implement a power restoration plan; finalize and implement an industry modernization strategy for the power sector; oversee the administration of federal funds; and revise and implement the PREPA fiscal plan. (Id. ¶¶ 3-4.) The CTO would be compensated by, and report directly to, the FOMB. (Id. ¶¶ 6-7.) Under the FOMB’s proposal, PREPA’s Executive Director would be required to report to the CTO, bypassing the PREPA Governing Board and the Governor. (Id. ¶ 8.) The

FOMB-appointed CTO's tenure would last until the effective date of a confirmed plan of adjustment for PREPA. (Id. ¶ 9.)

The FOMB contends that the broad powers granted to it by the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101-2241 (“PROMESA”), necessarily subsume the power to act as a “chief executive officer” overseeing both long term strategic planning and day-to-day management of PREPA. (Docket entry no. 413 (the “Reply”), ¶ 2.) The FOMB argues that, collectively, PROMESA Titles I and II, along with sections 301(c)(7), 305, and 315 of the statute, bestow upon the FOMB “quintessential managerial, business, and executive” powers that allow it to direct any activities incidental to the execution of certified fiscal plans, approved budgets and, ultimately, a plan of adjustment. (Reply ¶¶ 18-33.) The Opposing Parties assert that nothing in PROMESA gives the FOMB the power to insert a CTO into PREPA's organizational structure. Several Opposing Parties have also proposed alternative and ancillary relief. (See, e.g., docket entry no. 376, at 10-13; docket entry no. 377, at 15-20; docket entry no. 379, ¶¶ 4-7, 16; docket entry no. 390, ¶ 2.) The FOMB argues that these additional requests are procedurally improper and should accordingly be denied.

DISCUSSION

The issue at the heart of the FOMB's Motion is whether PROMESA grants the FOMB authority to unilaterally displace a statutorily-created management structure and direct the executive functions of a Title III debtor—in this case, PREPA. The Court notes that this is an issue of first impression, and that there is no provision of Commonwealth law authorizing the creation of a PREPA CTO, and no explicit provision in PROMESA for such a position. Any power to take over direct management of PREPA through a CTO in the context of these PROMESA Title III proceedings must, therefore, be implied from the express provisions of

PROMESA Titles I, II, and/or III. For the following reasons, the Court finds no basis for such a broad power in any of the provisions relied upon by the FOMB as authority for its appointment of the CTO.

PROMESA Titles I and II

In the absence of a direct provision permitting the FOMB to create new territorial governance structures or redefine existing ones, the FOMB argues that PROMESA indirectly grants it “many broad powers” that “render[] it impossible for any entity other than the Oversight Board to exercise the powers of a chief executive officer without the Oversight Board’s consent.” (Reply ¶ 2.) Among other things, the FOMB points out that it has the power to develop and certify its own fiscal plans and budgets under PROMESA sections 201(d)(2), 201(e)(2), and 202(e)(4); the power to make certain budget reductions under section 203(d); and the power to review new legislation for compliance with the certified fiscal plan under section 204(a). The FOMB further asserts that it has the power to “control all old and new contracts,” which is “tantamount to the power to control virtually everything PREPA does,” under PROMESA section 204(b)(2) and section 365 of the Bankruptcy Code, which is incorporated by PROMESA section 301(a); the power to “install an agent to obtain . . . every piece of information PREPA possesses” under PROMESA section 104(c); the power to incur and control all old and new PREPA debt under section 207; and the power to “[b]ar the Governor and Legislature from enacting and enforcing any law” that the Oversight Board determines is contrary to the purposes of PROMESA under section 108(a)(2).³ (See Reply ¶¶ 2, 5, 12, 19-21,

³ The FOMB further cites its express power under PROMESA section 104(h) to enforce certain specific anti-strike and anti-lockout provisions of existing Commonwealth labor laws, PROMESA section 104(k)’s grant of authority to “seek judicial enforcement of [the FOMB’s] authority to carry out its responsibilities under this Act,” and its powers to: issue subpoenas

Appendix C.) The FOMB asserts that, taken together, these provisions lead to the inescapable conclusion that it has broad executive and managerial authority over PREPA's operations and organizational structure, which empowers the FOMB to appoint a CTO. However, when read carefully and in the context of the statute as a whole, none of the Title I and II provisions cited by the FOMB provides it with the authority it claims here.

The primary mechanism through which fiscal plans and instrumentality budgets are developed under PROMESA sections 201 and 202 looks first to the territorial government, not the FOMB, for origination and refinement. While the FOMB can certify its own fiscal plan and budget under certain circumstances, it may only do so after an interactive process with the territorial government does not yield a plan or budget that is acceptable to the FOMB. See PROMESA § 201(d)(2) (allowing the FOMB to develop a fiscal plan only “if the Governor fails to submit” an acceptable plan within the time specified by the FOMB); id. § 202(e)(4) (allowing the FOMB to develop an instrumentality budget only “[i]f the Governor fails to develop an Instrumentality Budget that is a compliant budget by the day before the first day of the fiscal year”). If the FOMB develops and certifies its own fiscal plan and/or budget under these circumstances, the Commonwealth's government is deemed to have accepted the FOMB's plan or budget. See id. §§ 201(e)(2); 202(e)(3).

Even though the FOMB is empowered to monitor and enforce compliance with the instrumentality's certified budget or fiscal plan under PROMESA section 203, responsibility

under section 104(f); enter into contracts to carry out its responsibilities under section 104(g); investigate selling and disclosure practices under section 104(o); institute hiring freezes under section 203(d)(2)(B)(i); and review certain rules and regulations for compliance with the FOMB's policies under section 204(b)(5). (See Reply ¶¶ 2, 12, 19-21, Appendix C.) The Court reaches the same conclusions as to the import of these provisions individually and collectively as it does with respect to the provisions of Titles I and II discussed in the text.

rests in the first instance with the territorial government to prepare reports and respond to requests for information from the FOMB. See id. §§ 203(b), 203(c). The power to make budget reductions arises only after the Governor has failed to correct an inconsistency identified by the FOMB between the Commonwealth’s projected and actual performance in relation to a previously-certified budget. See id. § 203(d). The FOMB’s power under PROMESA section 204 to review new legislation and executive acts is likewise tied to the Commonwealth government’s initial responsibility to present certifications as to lack of significant inconsistency with the approved fiscal plan, and to respond to requests by the Oversight Board for information and explanation. See id. § 204(a)(5) (permitting the FOMB to act to ensure that the enactment or enforcement of new legislation will not adversely affect compliance with the fiscal plan only “[i]f the territorial government fails to comply with a direction given by the Oversight Board to” provide a missing estimate or certification, or correct a significant inconsistency).

Similarly, the FOMB’s negative power to review contracts under section 204(b) is limited to “certain contracts,” and is granted to enable the FOMB to ensure that those contracts “promote market competition and are not inconsistent with the approved [f]iscal [p]lan.” Id. § 204(b)(2). By denying approval, the FOMB can prevent the Commonwealth or an instrumentality from going forward with a proposed course of action, but nothing in section 204(b) affirmatively grants the FOMB the power to “control virtually everything PREPA does.” (See Reply ¶ 5.)⁴ The Court need not attempt to map the boundaries of the FOMB’s contracting-related power at this juncture, but the plain language of section 204(b) makes clear that it cannot be read to reach any and all contracts. Although the FOMB could conceivably use its power

⁴ Similarly, the power to assume or reject executory contracts on the debtor’s behalf with the Court’s approval under Bankruptcy Code section 365 does not give the FOMB absolute control over all of PREPA’s actions. See 11 U.S.C. § 365.

under section 204(b) to create bureaucratic obstacles to hobble PREPA's day-to-day functions, such actions would be irresponsible in this Court's view, and would be directly contrary to the sense of Congress expressed in section 204(b)(3). See PROMESA § 204(b)(3) (“[A]ny policies established by the Oversight Board . . . should be designed to make the government contracting process more effective, to increase the public's faith in this process, to make appropriate use of the Oversight Board's time and resources, to make the territorial government a facilitator and not a competitor to private enterprise, and to avoid creating any additional bureaucratic obstacles to efficient contracting.”).

Similar principles animate the PROMESA provisions defining the FOMB's powerful role in the development and certification of fiscal plans and budgets under PROMESA sections 201 and 202. These foundational documents provide blueprints for revenues, expenses, debt, and capital resources, and they are used to substantiate methods for responsible financial management. The FOMB's authority to withhold approval and to make recommendations clearly gives it significant leverage to guide and to cabin the expectations of the Commonwealth entities responsible for proposing and refining the plans and budgets. But nothing in the fiscal plan, budgeting, and enforcement provisions of PROMESA sections 201, 202, 203, and 204 suggests that the FOMB is the principal body empowered to manage PREPA's day-to-day functions, or that it has direct authority to alter PREPA's reporting structure and install a CTO. Although the FOMB's fiscal plan and budgeting powers give it a strong and substantially determinative voice in overall strategy regarding the Commonwealth's revenues, expenses, and general direction for responsible financial management, they do not imply that the FOMB's role includes detailed operational planning or direct executive authority over the implementation of those plans and budgets.

This distinction is borne out in other provisions of PROMESA, which limit the FOMB's authority to exercise the type of plenary executive power it asserts in the instant Motion. For example, PROMESA authorizes the Governor, and not the FOMB, to initiate disciplinary action against territorial officers for intentionally reporting false or misleading information. See PROMESA § 104(1). Likewise, PROMESA authorizes the FOMB to make "recommendations" to the territorial government on matters relating, inter alia, to the "the structural relationship of departments, agencies, and independent agencies within the territorial government." Id. § 205(a)(2). If such recommendations are made, the Commonwealth's government can reject them after providing an explanation to the FOMB, the President, and Congress. Id. § 205(b).⁵

The degree of unilateral power that Congress has granted to the FOMB stands in contrast to the powers Congress granted to the District of Columbia Financial Control Board (the "D.C. Board") under the District of Columbia Financial Responsibility and Management Assistance Act of 1995. The D.C. Board was empowered, for example, to essentially declare significantly inconsistent legislative acts null and void unilaterally, and to pre-review every contract the D.C. government proposed to execute. In drafting PROMESA section 204, Congress declined to include such provisions. See H.R. Rep. No. 114-602, at 111 (2016) ("[PROMESA] establishes a board that is robust but reasonable. Its powers are far less potent than the powers the Congress conferred upon the board that it established for the District of

⁵ The FOMB argues that section 201(b)(1)(K) of PROMESA, which provides that a fiscal plan "shall" adopt "appropriate recommendations submitted by the Oversight Board under section 205(a)," effectively permits it to override an objection by the Commonwealth by incorporating any and all recommendations into its own fiscal plan. The statutory structure is ambiguous in this regard, particularly in its use of the qualifier "appropriate." It is unnecessary for the Court to resolve this issue at this juncture, since there is no fiscal plan in place that even purports to require a restructuring of management and reporting authority within PREPA.

Columbia in Public Law 104-8”); id. at 113 (“An earlier version of PROMESA . . . required the oversight board to review every legislative act enacted by the Puerto Rico government and to make a determination—in the board’s sole discretion—about whether each act was consistent with the certified fiscal plan [I]f the board determined that the act was significantly inconsistent with the fiscal plan, the board was required to declare the act “null and void.” This was essentially the procedure in place for the District of Columbia under Public Law 104-8”); id. at 114 (“Section 204(b) authorizes—but does not require—the board to establish a policy to review certain contracts [c]ompare this to Public Law 104-8 . . . which authorized the oversight board to pre-review every contract proposed to be executed by the District of Columbia government.”). Congress also forewent provisions that would have allowed a Congressionally-created entity to appoint an emergency manager with all the powers of a board of directors for any territorial public corporation whose expenditures exceeded its revenues for at least two consecutive years. See S. 2381, 114th Cong. § 322(a)(5) (2016). Instead, Congress created a PROMESA Oversight Board with significant leverage in the form of guidance, gatekeeping, and enabling powers that would in essence provide guardrails for the territorial government on its journey to fiscal credibility and responsibility. Congress did not grant the FOMB the power to supplant, bypass, or replace the Commonwealth’s elected leaders and their appointees in the exercise of their managerial duties whenever the Oversight Board might deem such a change expedient. See H.R. Rep. No. 114-602, at 112 (2016) (“[T]he oversight board . . . will provide guardrails for the Puerto Rico government, but will not supplant or replace the territory’s elected leaders, who will retain primary control over budgeting and fiscal policymaking.”). Indeed, the only reference to a chief executive in PROMESA is in the statute’s definition of the office of Governor. See PROMESA § 5(12).

The remaining provisions cited by the FOMB do not create a framework empowering the FOMB to exercise the broad, chief executive role the FOMB claims in its Motion. The power to access information under PROMESA section 104(c) does not imply a grant of managerial authority. To the contrary, section 104(c) recognizes the separate institutional existence of instrumentalities like PREPA, and requires their leadership to grant the FOMB's requests for access. See id. § 104(c)(2) ("The head of the entity of the territorial government responsible shall provide the Oversight Board with such information and assistance (including granting the Oversight Board direct access to automated or other information systems) as the Oversight Board requires under this paragraph."). Nothing in section 104(c) authorizes the FOMB's unilateral takeover of management and information systems, or sanctions FOMB-directed changes in PREPA's command structure.

The same is true of PROMESA section 207, which requires the territorial government to obtain the FOMB's consent prior to issuing new debt or entering into certain transactions with respect to its debt. See id. § 207. The plain language of section 207 does not suggest that the FOMB can alter the management and reporting structure of PREPA. It may well be that the FOMB finds itself in a position to incentivize the Commonwealth or its instrumentalities to agree to operational measures they dislike in order to gain the FOMB's consent, but such leverage is not tantamount to a grant of chief executive officer status.

The FOMB also relies on PROMESA section 108(a), which preserves the autonomy of the FOMB by prohibiting the Governor and Legislature from exercising control over the FOMB, or enacting rules and policies that would impair or defeat the purposes of PROMESA. See id. § 108(a). Section 108(a) serves as a restraint on territorial officials, but it does not provide an affirmative grant of authority to the FOMB to take any and all actions it

believes are necessary to further its role under PROMESA. Nor, contrary to the Oversight Board's argument that the government lacks standing even to object to the FOMB's Motion, does section 108 prevent the Governor from participating in the instant motion practice and seeking court determinations regarding the FOMB's authority under PROMESA.

PROMESA Title III

The FOMB's assertion that Title III creates or reinforces direct managerial power granted by Titles I and II rings hollow as well. PROMESA section 303 reserves the territory's political and governmental powers to the territory or "any territorial instrumentality thereof," subject only to Titles I and II. See id. § 303.⁶ As the Court has explained, nothing in Titles I and II permits the FOMB to displace local government structures and authority by declaration. Similarly, sections 305 and 306 do not empower the FOMB to interfere unilaterally with the debtor's political and governmental powers, or with the debtor's property or revenues. Section 306 is a jurisdictional provision, and does not confer any powers on the FOMB. See id. § 306. Section 305 restrains territorial government concessions of authority or property without the FOMB's consent, and serves as a defense against third party invasions of the same. See id. §

⁶ To the extent that the FOMB argues that PREPA does not exercise political or governmental power covered by section 303, the Court finds the FOMB's position inconsistent with the plain language of PROMESA. Section 5(19) of PROMESA broadly defines a territorial instrumentality as "any political subdivision, public agency, instrumentality—including any instrumentality that is also a bank—or public corporation of a territory, and this term should be broadly construed to effectuate the purposes of this Act." PROMESA § 5(19). The Riefkohl case cited by the FOMB, which dealt with Eleventh Amendment immunity, does not support the FOMB's argument, and in fact affirmatively characterizes PREPA as a governmental agency maintained to carry out public purposes. See Riefkohl v. Alvarado, 749 F. Supp. 374, 375 (D.P.R. 1990) ("That PREPA has at its core a public objective cannot be denied.").

305. It does not authorize the FOMB to interfere proactively with PREPA's governance structure.

The FOMB also invokes its PROMESA status as a trustee and debtor representative under Title III as sources of implied operational management authority. However, the language and context of Title III make it clear that the trustee and representative status provided to the FOMB by Title III are granted in relation to the Bankruptcy Code provisions specifically adopted by PROMESA, and are conferred for the purpose of the prosecution of the Title III proceedings. They are not stand-alone grants of executive operational authority.

Section 301(c)(7) of PROMESA provides that references to the term "trustee," as used in Bankruptcy Code provisions incorporated into PROMESA, are to be read as references to the FOMB with one exception that is not relevant here. The Title III powers granted to the FOMB are powers of a trustee arising from a debtor-creditor relationship in the exercise of structuring its debts. Although a trustee in bankruptcy may exercise certain fiscal powers, the FOMB's status as a trustee under PROMESA does not collapse management of the debtor's affairs with management of the Title III proceeding. Notably, Congress did not make the FOMB an operating trustee by incorporating section 1104 of the Bankruptcy Code. See PROMESA § 301(a). Nor did Congress incorporate Bankruptcy Code section 1107, which pertains to a debtor in possession, or section 1108, which authorizes the trustee to operate the debtor's business. See 11 U.S.C. §§ 1107, 1108. By only selectively incorporating certain chapter 11 provisions, Congress gave neither the FOMB nor the territorial debtor acting alone the full range of authority of a chapter 11 debtor in possession. Rather, Congress chose to grant the FOMB more limited trustee powers, which are nonetheless crucial to the achievement of readjustment. For instance, the FOMB is empowered to assume and reject contracts, avoid certain obligations, and enter into

credit arrangements. See 11 U.S.C. §§ 365, 506(c), 544, 545, 547, 548 549(a), made applicable by PROMESA § 301(a). PROMESA requires a debtor to work alongside the FOMB and divides the debtor's authority by putting key restructuring tools in the hands of the FOMB, while preserving the elected government's operational control and voice in management and strategic decisions.

PROMESA's grant of trustee status to the FOMB thus does not empower the FOMB to sweep the elected government aside. That is not to say that the FOMB's Title III powers are not pivotal. The FOMB is the only entity that can propose a plan of adjustment and exercise certain fiscal powers within the Title III proceeding. See PROMESA §§ 301(a), 312(a). A feasible plan of adjustment must, however, be premised on a functioning and credible government structure that will execute the plan of adjustment long after the FOMB is dissolved. That is doubtless one reason that PROMESA leaves the elected government in place and does not suspend it in favor of direct management by the FOMB.

Section 315(a) of PROMESA authorizes the FOMB to take actions necessary to prosecute the debtor's case. These actions include: filing a petition under PROMESA section 304, submitting or modifying a plan of adjustment under sections 312 and 313, or otherwise generally submitting filings in relation to the case. See id. § 315(a). These enumerated actions do not imply a general power to manage PREPA's daily operations, or alter its management and reporting structure. Section 315(b), which denominates the Oversight Board as representative of the debtor in the Title III, grants the FOMB authority to speak and act for the debtor in the Title III debt adjustment process. But the title of representative does not, by itself, necessarily implicate the power to control the debtor's operations. Since Titles I to III, read in their totality,

do not implicate such authority either, the FOMB's reliance on its "representative" status as a source of ultimate executive authority is unavailing.

Based on its careful review of PROMESA, and after consideration of the parties' arguments, the Court finds that there is no express provision within PROMESA and its incorporated Bankruptcy Code provisions, nor any inferential grant of power, that authorizes the FOMB to impose changes in structure or reporting lines within PREPA by appointing a CTO, or to exercise the authority of a chief executive officer, much less to delegate that authority to an agent of the FOMB. The structure established by Titles I and II, alongside the reservation of territorial power in section 303, requires the FOMB and the territorial government to work together to establish a fiscally responsible path forward that is acceptable to the FOMB. Congress might have chosen to make the FOMB's job easier in the short term by granting it direct control and disabling the Commonwealth government's ability to dissent, but it did not do so. Congress deliberately divided responsibility and authority between the two.

It is notable here that the FOMB has not asserted that PREPA is non-compliant with a certified fiscal plan or budget. The post-hurricane fiscal plan and budgeting process were only recently announced by the FOMB, on October 31, 2017. PREPA's proposal is due on December 22, 2017, with certification or recommendations by the FOMB to be made by January 12, 2018. But serious collaborative work, drawing upon all available wisdom and expertise, cannot await this timetable. Every day and every minute counts for American citizens who are living in darkness and danger on the island. At this crucial juncture, the FOMB and the government must work together respectfully, candidly, and cooperatively within their roles, as defined by Commonwealth law and by PROMESA, to earn the confidence of outside funding sources and to forge informal consensus on a path forward that may then be embodied in a fiscal

plan and budget. These duties are solemn ones, and are critical for the residents of Puerto Rico, creditors, insurers, government agencies, and contractors involved in the reconstruction process, and for the prospects of these Title III proceedings and the future of Puerto Rico itself.

With talented individuals working in good faith on both sides, the joint structure created by PROMESA is one that can create sound, long-lasting change in which all can have confidence going forward. That is the challenge and the expectation. The power sharing structure created by PROMESA is also fraught with the potential for mutual sabotage. The FOMB could repeatedly stymie plans proposed by the government, disapprove contracts, deny access to credit, and invoke myriad other barriers to progress. Territorial authorities could provoke such actions by acting irresponsibly or by refusing to adopt sensible recommendations that might not have been the first choice for those in local government, but which can, through work with the FOMB, garner outside government and market support. And, while section 108 of PROMESA does not preclude the government from pushing back and seeking court determinations regarding the FOMB's interpretations of PROMESA, every moment spent in complicated and expensive litigation is a moment lost for attention to the future of Puerto Rico and her people. These negative possibilities should motivate the parties to work together, quickly, for positive change.

Requests for Alternative Relief

The Court denies the various requests made by the Opposing Parties to appoint other forms of emergency managers and co-managers. These requests have not properly been raised by motion practice, and the Court need not, and does not, address their pertinence or merits. See In re W.R. Grace & Co., 2008 Bankr. LEXIS 2532, at *2 n.2 (Bankr. D. Del. Oct. 10, 2008) (“Requests for affirmative relief cannot be combined with a response to a motion.”);

Fed. R. Bank. P. 9014 (“In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought.”).

CONCLUSION

For the foregoing reasons, the FOMB’s Motion is denied in its entirety. This order resolves docket entry no. 361.

SO ORDERED.

Dated: New York, New York
November 16, 2017

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



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Ana J. Matosantos
David A. Skeel, Jr.*

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

November 15, 2019

The Honorable Wanda Vázquez Garced
Governor of Puerto Rico
La Fortaleza

Dear Governor Vázquez Garced:

We have reviewed, and write to you in connection with, Act 82-2019, Act 90-2019, and Act 138-2019, pursuant to Section 204(a) of PROMESA.

Act 82-2019

Act 82-2019 creates a “Regulatory Law for Pharmacy Benefits and Services Administrators” and establishes an “Office of the Regulatory Commissioner of Pharmacy Benefits and Services Administrators” in the Puerto Rico Department of Health (“PRDH”) to further regulate Pharmacy Benefit Managers (“PBMs”), Pharmacy Benefit Administrators (“PBAs”) and any similar entity that contracts services from pharmacies in Puerto Rico, among other purposes.

While Act 82-2019 was signed into law on July 30, 2019, the Oversight Board has not received the formal cost estimate and certification of compliance or noncompliance as required by PROMESA Section 204(a)(2).

Moreover, the Oversight Board believes that there is possible federal preemption of the subject matter covered by Act 82-2019 under the statutory provisions of Title 42 of the U.S. Code and related Code of Federal Regulations.

The Oversight Board looks forward to receiving the required cost estimate and certification of compliance or noncompliance for Act 82-2019 and requests that you provide an explanation as to why Act 82-2019 is not preempted.

Act 90-2019

Act 90-2019, among other matters, amends Article 19.150 of Act 77-1957, known as the “Insurance Code of Puerto Rico” (“Act 77-1957”), to prohibit a Medicare Advantage health

Honorable Wanda Vázquez Garced

November 15, 2019

Page 2 of 3

service organization or its representative to agree with a service provider to pay a rate lower than the one established for that year by the Centers for Medicare and Medicaid Services (“CMS”) for the services provided as Medicare Advantage. In addition, Act 90-2019 prohibits all such health service organizations or their representatives, including PBMs and PBAs, from cancelling or terminating a contract duly established with a provider or health professional without just cause.

The Oversight Board received Act 90-2019 along with the corresponding compliance certification required by PROMESA Section 204(a) (the “Compliance Certification”), past the statutorily mandated 7 business-days period. As set forth more fully below, this is not in compliance with PROMESA Section 204(a) with respect to Act 90-2019.

Act 138-2019

Act 138-2019 adds Article 31.031 and Article 31.032 to Chapter 31 of Act 77-1957 to establish that a health service organization cannot deny an application from a doctor, hospital, primary service center... or any other person authorized in Puerto Rico to provide health care services to become a provider of the same when they meet all the necessary requirements...; as well as to establish that no health insurance organization, insurer... or any other medical plan can include in any contract or stipulate with a health provider a unilateral cancelation of the contract.

The Oversight Board received Act 138-2019 and its corresponding Compliance Certification, required by PROMESA Section 204(a), past the statutorily mandated 7 business-days period.

Having reviewed Act 90-2019, Act 138-2019 and their respective Compliance Certifications, the Oversight Board concludes that the Compliance Certification for both statutes fail to provide the formal estimate of the fiscal impact as required under paragraph (2)(A) of PROMESA Section 204(a). Further, the Oversight Board is also of the opinion that the subject matters covered by Act 90-2019 and Act 138-2019 are preempted by the statutory provisions of Title 42 of the U.S. Code and related Code of Federal Regulations.

In view of the foregoing, we hereby respectfully request that a formal estimate of the impact each Act will have on expenditures and revenues, including the impact on the government’s medical health insurance plan (“Vital”), as required by PROMESA Section 204(a)(2)(A). Further, we ask for an analysis of Acts 82-2019, 90-2019 and 138-2019 in relation to the corresponding federal statutes to ascertain there are no conflicting provisions that may jeopardize the grant of federal funds to the PRDH.

Should the Oversight Board determine that you have failed to comply with our directive under Section 204(a)(4)(A), or that a law impairs or defeats the purposes of PROMESA, as determined by the Oversight Board, we reserve the right to take such actions as we consider necessary, consistent with Section 204(a)(5), including preventing the enforcement or application of Act 82-2019, Act 90-2019 and Act 138-2019.

Please submit the required information by no later than November 22, 2019.

Honorable Wanda Vázquez Garced

November 15, 2019

Page 3 of 3

Sincerely,



Natalie A. Jaresko

CC: Mr. Elí Díaz Atienza
Mr. Omar J. Marrero Díaz



GOVERNMENT OF PUERTO RICO
**Puerto Rico Fiscal Agency and Financial
Advisory Authority**

November 22, 2019

VIA EMAIL

Ms. Natalie Jaresko
Executive Director
The Financial Oversight and
Management Board for Puerto Rico
P.O. Box 192018
San Juan, PR 00919-2018

Re: Compliance with Section 204(a) of PROMESA

Dear Executive Director Jaresko:

The Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF”), is the government entity responsible for communication between the Government of Puerto Rico (the “Government”) and the Financial Oversight and Management Board for Puerto Rico (the “Board”) pursuant to the Enabling Act of the *Fiscal Agency and Financial Advisory Authority*, Act 2-2018. I hereby make reference to your letters dated November 15, 2019 addressed to the Governor of Puerto Rico, Hon. Wanda Vázquez-Garced, regarding compliance with Section 204(a) of PROMESA and your review of the compliance certificates of Act 82-2019, Act 90-2019 and Act 138-2019.

To begin with, it is emphatically the public policy of the Government to comply with Section 204(a) of PROMESA. In fact, on October 25, 2019, Governor Vázquez signed Executive Order 2019-57 (the “Executive Order”) establishing streamlined procedures to comply with said Section and ordering compliance and cooperation from all agencies and dependencies in order to promptly comply with the certificates mandated by Section 204(a). In compliance with the Executive Order and Section 204(a), and since I assumed the position of Executive Director of AAFAF in August, 2019, the Government has sent 204(a) certifications to the Board for all Acts and Joint Resolutions enacted since that time.

In your first letter, you claim the Board is yet to receive compliance certificates for several Acts and Joint Resolutions that were enacted during calendar years 2018 and 2019. After review, we have determined that your letter contains factual errors. For example, you claim the Board did not receive a compliance certificate for Act 71-2019, when in fact, the

certificate was sent to the Board on August 9, 2019. As of the date of this letter, all Acts and Resolutions enacted during 2018 and 2019 have been sent to the Board.¹

Finally, in your second letter you state that for Acts 82 and 138 enacted during 2019, the Board believes there is possible federal preemption of the subject under the statutory provisions of Title 42 of the U.S. Code and related Code of Federal Regulations. Nothing in Section 204(a) of PROMESA allows the Board to request explanations from the elected government on alleged federal preemption of enacted laws. Section 204(a)(3) only allows the Board to send notifications to the elected government under limited circumstances, specifically, if no certifications are sent or, if the Board understands an enacted law is significantly inconsistent with the certified fiscal plan.

I look forward to working with the Oversight Board to further our common goals and reach consensus where possible on these important issues for Puerto Rico.

Most respectfully,



Omar J. Marrero
Executive Director

cc: Members of the Financial Oversight
and Management Board of Puerto Rico
Elí Díaz-Atienza

¹ Acts 164-167-2019 and Joint Resolutions 116-118-2019 were recently enacted and the 7 working-day statutory deadline has not passed. Also, Joint Resolutions 50-53-2018 and Joint Resolutions 36-37-2019 are resolutions providing for the budget of Puerto Rico, not subject to Section 204(a).

Appendix A

Acts enacted during calendar year 2018 pending.

Acts 2018	AAFAP comments
Act 204	See FOMB letters dated September 13, 2018 and October 26, 2018.
Act 277	Sent 11/22/19
Act 303-305	303: sent 11/18/19 304: sent 11/18/19 305: Sent 11/22/19

Joint Resolutions approved during calendar year 2018 pending.

JRs 2018	AAFAP comments
JRs 50-53	These are Commonwealth Budget resolutions not subject to Section 204(a).
JRs 121-125	All sent 11/18/19

Acts enacted during calendar year 2019 pending.

Acts 2019	AAFAP comments
Act 26	Sent 11/22/19
Act 33	Sent 11/22/19
Act 61	Sent 11/18/19
Act 63	Sent 11/20/19
Acts 71-73	Act 71: sent 8/9/19 Act 72: sent 11/20/19 Act 73: sent 11/18/19
Act 75	Sent 11/18/19
Act 77	Sent 11/18/19
Act 79	Sent 11/18/19
Act 81-82	Act 81: sent 11/18/19 Act 82: sent 11/18/19
Act 86	Sent 11/18/19
Act 100	Sent 11/18/19
Acts 103-104	Sent 11/18/19
Act 130	Sent 11/22/19
Act 156	Sent 11/13/19
Act 160	Sent 11/18/19
Act 161	Sent 11/22/19
Act 162	Sent 11/22/19

Joint Resolutions approved during calendar year 2019 and not submitted to FOMB for review.

JRs 2019	AAFAF Comments
JRs 36-37	These are Commonwealth budget resolutions not subject to Section 204(a).
JR 98	Sent 11/18/19

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



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Ana J. Matosantos
David A. Skeel, Jr.*

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

December 18, 2019

Omar J. Marrero
Executive Director
Puerto Rico Fiscal Agency and
Financial Advisory Authority

Dear Mr. Marrero:

We acknowledge receipt of your letter dated November 22, 2019 regarding (1) compliance with Section 204(a) of PROMESA with respect to certain laws and joint resolutions enacted in 2018 and 2019 and (2) issues raised by the Oversight Board with respect to Acts 82, 90, and 138 of 2019, all in response to our letters dated November 15, 2019.

As previously stated, Section 204(a) of PROMESA requires the submission to the Oversight Board of all laws not later than 7 business days after the law is enacted, together with a formal estimate of its impact and a certification of compliance or non-compliance. As you recognize, the government did not submit the required documentation concerning the laws and joint resolutions referenced in the Oversight Board's November 15 letter until November 22, 2019, which was after the required submission period. We must insist that these requirements be fulfilled on a timely basis and just as importantly, be incorporated as part of the legislative process and not left for after enactment of legislation.

Your letter, in its Appendix A, states that Joint Resolutions 50-53 of 2018 and Joint Resolutions 36 and 37 of 2019 are Commonwealth budget resolutions and are not subject to Section 204(a) of PROMESA. These statements are contrary to PROMESA. As previously mentioned, Section 204(a) applies to "any law" duly enacted. Joint Resolutions are laws enacted by the Commonwealth and, as such, are subject to Section 204(a) requirements. Please provide immediately the required documentation for Joint Resolutions 50-53 of 2018 and Joint Resolutions 36 and 37 of 2019 and cease and desist any implementation of these Joint Resolutions until after the Board has received and reviewed the documentation required under Section 204(a)(2) and provided you its written conclusions.

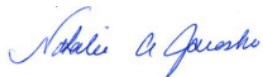
Mr. Omar J. Marrero
December 18, 2019
Page 2 of 2

Regarding our request for an analysis of federal statutes for possible conflicting provisions regarding Acts 82-2019, 90-2019, and 138-2019, we understand your position is that Section 204(a) of PROMESA restricts the Oversight Board from requesting explanations regarding whether enacted laws are preempted by federal laws, specifically as requested for Acts 82-2019 and 138-2019. We point out the Government and the Oversight Board must cooperate to make sure the measures required to comply with the certified Fiscal Plan are implemented, and actions inconsistent with the Fiscal Plan are avoided. To that end, if an enacted law negatively impacts the Commonwealth's budget because of conflicts with federal statutes, the law would not be consistent with the certified Fiscal Plan. Even though a Section 204(a) certificate for Act 82-2019 was submitted, it is our understanding the estimate is not "formal" and not accurate because it provides only an "approximate impact" of the law on the Department of Health's budget. Furthermore, the \$475,131.47 "approximate impact" provided in the certificate, is dramatically at odds with other authority on the subject; specifically, the Health Insurance Administration's recent testimony at the public hearing that Act 82-2019 would increase the Government's health plan budget by \$27 million. As such, the Oversight Board has concerns the "approximate impact" is not accurate.

In view of the foregoing, we hereby respectfully request that a formal estimate of impact, as well as a certificate of consistency or inconsistency with the certified Fiscal Plan, be provided as required by Section 204(a) of PROMESA for Joint Resolutions 50-53 of 2018 and Joint Resolutions 36 and 37 of 2019. Further, we ask you to comply with our request for an analysis as to whether federal law conflicts with Acts 82-2019, 90-2019, and 138-2019, and whether any conflicts jeopardize the grant of federal funds.

Please submit the required information by no later than December 27, 2019.

Sincerely,



Natalie A. Jaresko

CC: Mr. Elí Díaz Atienza

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



José B. Carrión III
Chair

Members

*Andrew G. Biggs
Carlos M. García
Arthur J. González
José R. González
Ana J. Matosantos
David A. Skeel, Jr.*

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

April 27, 2020

Mr. Omar J. Marrero Díaz
Executive Director
Fiscal Agency and Financial Advisory Authority
Government of Puerto Rico

Dear Mr. Marrero Díaz:

In 2019, the Commonwealth passed three laws pertaining to health care on the island: Acts 82-2019, 90-2019 and 138-2019 (the “Three Laws”). On November 15, 2019 and December 18, 2019, the Oversight Board asked AAFAF for an analysis of the Three Laws to determine whether any provisions jeopardize the grant of federal funds to the Puerto Rico Department of Health (“PRDH”) (the “Requested Analysis”). Twice, AAFAF failed to provide this information, and instead claimed incorrectly the Oversight Board was requesting a federal preemption analysis of the Three Laws. In its letter dated February 18, 2020, the Oversight Board again asked AAFAF for the Requested Analysis, as the Three Laws could potentially imperil the Commonwealth’s receipt of federal funds, making clear it was not asking for a preemption analysis. The Oversight Board asked for a response by February 21, 2020, but has received no response.

PROMESA Section 204(a)(2)(A) requires the Governor to submit “a formal estimate prepared by an appropriate entity of the territorial government with expertise in financial management of the impact, if any, that the law will have on expenditures and revenues.” Any complete formal estimate must take into account any impact on future inflows or outflows of funds, including monies from the federal government. As Judge Swain recently ruled in the Law 29 matter, these estimates must cover the fiscal impact of these laws over the entire period covered by the 2019 Fiscal Plan. *Opinion and Order Granting in Part the Oversight Board’s Motion for Summary Judgment, Fin. Oversight & Mgmt. Bd. for P.R. v. Vázquez Garced*, Adv. Proc. No. 19-00393 [ECF No. 107] (Apr. 15, 2019). Accordingly, we request again that the Government provide complete formal estimates for the Three Laws, pursuant to Section 204(a)(2)(A), including the Requested Analysis.

As the Government has so far failed to confirm that its analysis took into account germane factors pertaining to the Three Laws and their impact on federal funding, we have conducted our own analysis. After reviewing each act and its necessary consequences, we have the following

questions regarding the financial assumptions on which the laws appear to be based and the implications of those assumptions and laws and we request the required formal estimates to address them:

Act 82

- Does AAFAF expect the pharmacy reimbursement floor (i.e., the lowest Pharmacy Benefit Manager (“PBM”) reimbursement sufficient to offset fully the pharmacy’s acquisition cost) to have a downstream effect on PBM or Managed Care Organization (“MCO”) rates on a Per Member Per Month (“PMPM”) basis?
- How will the potential impact from increases in PMPM rates be mitigated to maintain compliance with the Certified Commonwealth Fiscal Plan?

Act 90

- Does AAFAF anticipate the reimbursement floor (i.e., the level of payments by Medicare Advantage plans to providers that equal the Medicare Fee For Service rates) will increase costs of Medicare Advantage Plans for the federal government?
- Has AAFAF considered the potential for increased costs to cause higher Part B premiums in Puerto Rico?

Act 138

- What mechanisms does AAFAF anticipate will be established to enforce this provision? How will situations in which MCOs and providers cannot reach agreement on contract rates be mediated?
- Does AAFAF anticipate enactment of non-participating provider laws (“Non-Par”) to regulate payments when MCOs and providers are unable to come to an agreement?
- Given anticipated enforcement mechanisms, does AAFAF expect this law to cause higher MCO PMPM rates?
- How will potential impact from increases in PMPM rates be mitigated to maintain compliance with the Certified Commonwealth Fiscal Plan?

Please provide the necessary formal estimates, including the information requested above, no later than May 8, 2020. Moreover, with your May 8, 2020 response, we request that you confirm that the Three Laws have not yet been implemented and will not be implemented until this issue is resolved.

Pursuant to PROMESA section 108(a)(2), the Governor and Legislature are each enjoined from, among other things, implementing any statute or rule that impairs or defeats the purposes of

Mr. Omar J. Marrero Díaz

April 27, 2020

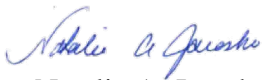
Page 3 of 3

PROMESA as determined by the Oversight Board. To avoid any misunderstanding, please be advised the Oversight Board has determined implementation of any of the Three Laws prior to satisfaction of the requirements of Section 204 would impair and defeat the purposes of PROMESA, such as preventing implementation of new laws prior to satisfaction of the requirements of Section 204.

Finally, in her April 15, 2020 opinion, Judge Swain affirmed Section 204(a) authorizes the Oversight Board to move for the nullification of legislation where the Commonwealth has failed to comply with PROMESA. Accordingly, the Oversight Board reserves the right to take such actions as it deems necessary, consistent with Sections 104(k), 108(a) and 204(a)(2), including seeking remedies for preventing the enforcement of the Three Laws.

As always, we look forward to continuing to work together for the benefit of the people of Puerto Rico.

Sincerely,



Natalie A. Jaresko

CC: Mr. Antonio Pabón Batlle



GOVERNMENT OF PUERTO RICO
Puerto Rico Fiscal Agency and Financial
Advisory Authority

VIA ELECTRONIC MAIL

May 8, 2020

Ms. Natalie A. Jaresko
Executive Director
The Financial Oversight and Management Board for Puerto Rico
P.O. Box 192018
San Juan, Puerto Rico 00919-2018

Re: Response to your letter dated as of April 27, 2020 regarding Acts 82, 90, and 138 of 2019 (the “Letter”);

Dear Ms. Jaresko:

Reference is made to the Letter wherein you requested revised section 204(a) certifications for Acts 82, 90, and 138 of 2019, three recently enacted healthcare acts (the “Healthcare Acts”). In the Letter, the Board claims that new certifications are necessary for the Healthcare Acts inasmuch as that “there is possible federal preemption of the subject matter covered by Act 82-2019” and “the subject matters covered by Act 90-2019 and Act 138-2019 are preempted by the statutory provisions of Title 42 of the U.S. Code and related Code of Federal Regulations.”¹ However, as hereby explained, no revised certifications are necessary, and the Board’s threat to invalidate the Healthcare Acts under PROMESA section 108(a) as impairing the purposes thereof is misplaced.

Section 204(a) requires that the Government provide only a “formal estimate . . . of the impact, if any, that the law will have on expenditures and revenues.”² Thus, section 204(a) does not require the Government to anticipate every possible scenario. Rather, all that is required is a “good faith” effort to determine the financial effects of a new law and the new law’s consistency with the existing fiscal plan.³

In light of the foregoing, we are convinced that the Government’s section 204(a) certifications for the Healthcare Acts easily satisfy such statutory requirement. The section

¹ Letter from N. Jaresko to Hon. Wanda Vázquez Garced (Nov. 15, 2019), at 1–2.

² 48 U.S.C. § 2144(a)(2)(A) (emphasis added).

³ *The Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced (In re The Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, Adv. Proc. No. 19-00393 (LTS), 2020 WL 1873380, at *7 (D.P.R. Apr. 15, 2020) (“Congress expected the Governor and the relevant territorial entity to comply with the statutory predicates in good faith.”) (quoting *The Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced (In re The Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, 403 F. Supp. 3d 1, 13 (D.P.R. 2019)).





GOVERNMENT OF PUERTO RICO

Puerto Rico Fiscal Agency and Financial Advisory Authority

204(a) certifications of the Healthcare Acts were prepared by the Puerto Rico Office of Management and Budget, which is the Government agency primarily responsible for managing the Government's finances and budgetary matters. Each of the certifications describes the estimated effect of the applicable law on the Government's expenditures and revenues. For example, the Act 82 certification states that it will have an "approximate impact of \$475,131.47 in the Department of Health's budget" but will be "implemented using budgeted resources," such that a formal request for reprogramming is not required. In addition, the Act 90 and Act 138 certifications conclude that there is "no impact on expenditures and revenues." All of the certifications conclude that the Healthcare Acts are "not significantly inconsistent with the New Fiscal Plan for Puerto Rico." To the extent such certifications include all of the required elements under section 204(a)(2) and were provided in good faith, the Government has fully satisfied the applicable PROMESA's requirements.

As to the Board's speculation regarding preemption by or potential conflicts with federal law, we believe there is no need for the Government to respond thereto.⁴ *First*, this is a legal—not financial or budgetary—issue that is not the proper subject of a section 204(a)(2) certification. In such regard, nothing in PROMESA requires the Government to provide the Board with a legal opinion. Moreover, section 204(a)(2) is focused solely on financial and budgetary concerns, requiring the certification to describe only the "impact" on "expenditures and revenues"⁵—not legal issues. Furthermore, to evidence the Congressional intent behind section 204(a)(2) certifications, we just need to look at who is responsible to prepare the certification; a government entity "with expertise in budgets and financial management"⁶.

Second, even if there were such an obligation, the analysis the Board requests would shed no light on whether the laws at issue are significantly inconsistent with whatever fiscal plan should be guiding Puerto Rico's spending going forward. In its most recent status report to the Title III Court, the Board acknowledged that "the COVID-19 pandemic has reshaped the economic landscape of the world, including Puerto Rico" and "the Oversight Board must assess this new and changing landscape, beginning with the development of a revised Commonwealth fiscal plan and budget."⁷ As a result, the May 9, 2019 Fiscal Plan for the Commonwealth (the

⁴ The Board's November 15, 2019 letter raised the issue of "possible federal preemption," and your December 18, 2019 letter acknowledges that PROMESA "restricts the Oversight Board from requesting explanations regarding whether enacted laws are preempted by federal laws." The April 27, 2020 letter's use of the word "conflicts" instead of "preemption" does not alter the fact that the Board seeks, in substance, a preemption analysis. And whether phrased as a "preemption" or "conflicts" analysis, the request remains legal in nature.

⁵ 48 U.S.C. § 2144(a)(2)(A).

⁶ *Id.*

⁷ Status Report of the Financial Oversight and Management Board for Puerto Rico Regarding the COVID-19 Pandemic and Proposed Disclosure Statement Schedule, *In re The Fin. Oversight & Mgmt. Bd. for Puerto Rico*, Case No. 17-03283-LTS (D.P.R. May 1, 2020) [ECF No. 13018].



GOVERNMENT OF PUERTO RICO

Puerto Rico Fiscal Agency and Financial Advisory Authority

most recent certified plan) will change in a matter of weeks, as the Board acknowledged, and must be revised to reflect Puerto Rico's new, post-pandemic economic reality.

Moreover, even if the Healthcare Acts' consistency with the May 2019 Fiscal Plan were still meaningful, the preemption analysis the Board has requested would still serve no meaningful purpose under PROMESA. If the Oversight Board were correct that the Healthcare Acts were preempted, those laws would be nullified and have no effect whatsoever.⁸ In other words, assuming the laws were preempted, the effect on the fiscal plan—in whatever form it takes after its current revisions—would be zero. As I have explained in prior letters to you, the ultimate decision on whether a law is preempted rests with the courts, not with the Government or the Oversight Board. *See, e.g., Altria Group, Inc. v. Good*, 555 U.S. 70 (2008).

For similar reasons, the Healthcare Acts do not “impair or defeat the purposes of” PROMESA under section 108(a). The Oversight Board's purpose under PROMESA is “to provide a method for a covered territory to achieve *fiscal responsibility and access to the capital markets*.”⁹ Judge Swain found Act 29 unenforceable in large part because she determined it would “deprive[] the Commonwealth of hundreds of millions of dollars, . . . thereby diminishing market access.”¹⁰ In contrast, the Oversight Board has identified *no* fiscal effect from the three Healthcare Acts that would be inconsistent with the currently operative May 2019 Fiscal Plan.

I look forward to working with the Oversight Board to further our common goals and reach consensus during these unprecedented times as we continue battling the threat of the COVID-19 pandemic.

Very truly yours,

Omar J. Marrero Diaz
Executive Director

C. Antonio Pabón Battlle

⁸ *See Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 92 (1st Cir. 2013) (noting that where a federal law preempts state law, “the Supremacy Clause nullifies state laws that interfere with, or are contrary to, federal laws enacted by Congress”) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210–11, 6 L.Ed. 23 (1824)) (internal quotations omitted).

⁹ 48 U.S.C. § 2121(a) (emphasis added).

¹⁰ *See The Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced*, 2020 WL 1873380, at *11.

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



José B. Carrión III
Chair

Members

Andrew G. Biggs
Carlos M. García
Arthur J. González
José R. González
Ana J. Matosantos
David A. Skeel, Jr.

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

April 30, 2020

Mr. José F. Ortiz Vazquez
Chief Executive Officer
Puerto Rico Electric Power Authority

Dear Mr. Ortiz Vázquez:

We have recently been informed that, due to the social distancing measures implemented as a result of the COVID-19 pandemic, the Puerto Rico Electric Power Authority (“PREPA”) has suspended any work related to its the vegetation management program. As you are aware, tree trimming and other vegetation control activities are indispensable for maintaining an optimal performance standard, reducing customer outage frequency and increasing operational efficiency. Vegetation management is also a crucial component of emergency preparedness and response and allows a utility to be better prepared for atmospheric events such as hurricanes.

As we approach a new hurricane season, the Oversight Board strongly believes PREPA should take all necessary actions to strengthen the transmission and distribution system, including reinitiating its vegetation management program. While we recognize that these are not normal times, it is PREPA’s responsibility to implement the actions necessary to protect the integrity of the system and ensure they continue to be implemented.

We also recognize that employee health and safety is of the utmost importance and must be accounted for. To that end, when reinitiating its vegetation management program, PREPA must make certain its employees and contractors follow the necessary health and safety protocols and procedures to ensure the safety of all employees involved in this effort.

We look forward to working with you for the benefit of the people of Puerto Rico.

Sincerely,

Natalie A. Jaresko

CC: Mr. Omar Marrero Díaz
PREPA Governing Board

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



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Ana J. Matosantos
David A. Skeel, Jr.

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

May 11, 2020

The Honorable Wanda Vázquez Garced
Governor of Puerto Rico

The Honorable Thomas Rivera Schatz
President of the Senate of Puerto Rico

The Honorable Carlos J. Méndez Núñez
Speaker of the House of Representatives of Puerto Rico

Dear Governor Vázquez Garced, President Rivera Schatz, and Speaker Méndez Núñez:

We have reviewed Act 176-2019 and are writing you pursuant to Section 204(a) of PROMESA.

Act 176-2019, among other matters, amends Section 9.1 of Article 9 of Act 8-2017¹ and Article 2.04 of Act 26-2017² to restore vacation and sick leave days to public employees to pre-Act 26-2017 levels.

The Oversight Board received Act 176-2019 along with the Governor's corresponding PROMESA Section 204(a) "certification of compliance" (the "Compliance Certification") on December 26, 2019, attached hereto as Exhibit 1. The Oversight Board hereby notifies you that the Compliance Certification for Act 176 was not accompanied by the estimate required under paragraph (2)(A) of Section 204(a).

The Compliance Certification states Act 176-2019 increases the rate of vacation and sick leave accumulation, but concludes the law has no impact on expenditures as it "merely adjusts the accretion of vacation and sick days for public employees, but while strictly adhering to the liquidation prohibitions established in the 2019 New Fiscal Plan for Puerto Rico and Act 26-2017." Even if that is correct, the estimate fails to account for Act 176's impact on employee

¹ Act 8-2017 is also known as the "Government of Puerto Rico Human Resources Administration and Transformation Act."

² Act 26-2017 is also known as the "Fiscal Plan Compliance Act."

The Honorable Wanda Vázquez Garced
The Honorable Thomas Rivera Schatz
The Honorable Carlos J. Méndez Núñez
May 11, 2020
Page 2 of 2

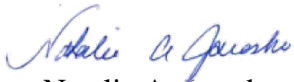
productivity, given that it permits employees to take more vacation days during the year. For example, if full-time employees utilize all of the additional days Act 176 makes available to them (12-21 days depending on employee group), there could be a productivity loss of approximately five percent, which in Fiscal Year 2021 is akin to losing the full-time equivalent production of 2,400 public employees. The Compliance Certification's estimate, by failing to account for this impact of Act 176, is deficient.

Accordingly, the Oversight Board directs you, pursuant to Section 204(a)(4)(A), to provide a complete formal estimate by May 19, 2020 taking lost productivity into account.

Pursuant to PROMESA Section 108(a)(2), the Governor and Legislature are each enjoined from, among other things, implementing any statute or rule that impairs or defeats the purposes of PROMESA as determined by the Oversight Board. To avoid any misunderstanding, please be advised the Oversight Board has determined implementation of Act 176-2019 prior to satisfaction of the requirements of Section 204 would impair and defeat the purposes of PROMESA, such as preventing implementation of new laws prior to satisfaction of the requirements of Section 204.

Should you fail to comply timely with this directive, the Oversight Board reserves the right to take such actions as it considers necessary, consistent with Sections 204(a)(5) and 108(a)(2), including preventing and seeking remedies for the enforcement or application of Act 176-2019.

Sincerely,



Natalie A. Jaresko

CC: Mr. Omar J. Marrero Díaz



OGP



DEPARTAMENTO DE HACIENDA
GOBIERNO DE PUERTO RICO

FAFAA

Certificate of New Law Pursuant to 48 U.S.C. §2144(2)(B)

Legislative Measure Number:

- Act No. 176-2019 ("Act 176"), herein attached.

Estimated Impact of the Legislative Measure on Expenditures and Revenues:

- Act 176 amends Act 8-2017, known as the "Government of Puerto Rico Human Resources Administration and Transformation Act", and Act 26-2017, known as the "Fiscal Plan Compliance Act", in order to allow government employees to accrue 2.5 vacation days and 1.5 sick days per calendar month.
- The accrual caps for vacation and sick days remain at 60 and 90 days respectively. Additionally, Act 176 does not alter the prohibition established in Act 26-2017, with regard to the liquidation of vacation days accumulated in excess of the 60 days statutory limit.
- As prior to its enactment, government employees may only liquidate vacation days when there is a cessation from service. Act 176 does not allow public employees the liquidation of sick days.
- In addition, every governmental entity and instrumentality is required to formulate and manage a personnel vacation plan for each calendar year, which shall be strictly complied with by all employees, in order to ensure that said employees do not accumulate excess vacation days, while ensuring that the services provided by the corresponding governmental entities and instrumentalities are not interrupted.
- Consequently, insofar as Act 176 merely adjusts the accretion of vacation and sick days for public employees, but while strictly adhering to the liquidation prohibitions established in the 2019 New Fiscal Plan for Puerto Rico and Act 26-2017, we conclude that Act 176 has no impact on expenditures.
- Act 176 has no impact on revenues.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 176 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.



EXHIBIT 9

GOVERNMENT OF PUERTO RICO
**Puerto Rico Fiscal Agency and Financial
Advisory Authority**

VIA ELECTRONIC MAIL

May 19, 2020

Ms. Natalie A. Jaresko
Executive Director
The Financial Oversight and Management Board for Puerto Rico
P.O. Box 192018
San Juan, Puerto Rico 00919-2018

**Re: *Your letters dated as of May 11, 2020 regarding Acts 176-2019 and 181-2019
(the “Letters”);***

Dear Ms. Jaresko:

The purpose of this letter is to respond to your Letters regarding Acts 176-2019 and 181-2019 (the “Acts”), which, with all due respect, we believe are counterproductive and undermine the Government’s efforts to work cooperatively with the Financial Oversight and Management Board (the “Board”) for the people of Puerto Rico.

For the reasons explained herein, we are of the opinion that the Board’s efforts to prohibit legislation that complies with the operative fiscal plan and budget is at odds with PROMESA and the Title III Court’s orders. Let’s discuss.

Act 176-2019

Act 176-2019 amends section 9.1 of Act 8-2017 and section 2.04 of Act 26-2017 to allow government employees to accrue an additional 2.5 vacation days and 1.5 sick days per calendar month, while maintaining the existing 60-day cap on vacation days and 90-day cap on sick days. The corresponding letter contends that the compliance certificate for Act 176-2019 is deficient because it “fails to account for Act 176’s impact on employee productivity.” A requirement inexistent within the legal contours of PROMESA.

Contrary to the implied contention, there is no requirement that the certification account for any speculative decrease in “employee productivity.” As we have explained in prior letters regarding issuance of compliance certificates for new laws, PROMESA



GOVERNMENT OF PUERTO RICO

Puerto Rico Fiscal Agency and Financial Advisory Authority

section 204(a) requires only that the Government provide a “formal estimate . . . of the impact, if any, that the law will have on *expenditures and revenues*.”¹

Consequently, the Government’s compliance certificate for Act 176-2019 does exactly that. As explained therein, “Act 176 has no impact on expenditures” because the law “merely adjusts the accretion of vacation and sick days for public employees.” Moreover, the additional vacation and sick day accruals will not affect expenditures because Act 176-2019: (i) retains existing limitations on the liquidation of vacation days, which cannot be paid until the employee no longer works for the Government and only up to the existing 60-day statutory limit; and (ii) does not allow for the liquidation of sick days at all. Under Act 176-2019, employees will be paid the same regardless of the accrual rate for vacation and sick days, and any expenditures made to departing Government employees for their unused vacation and sick days cannot exceed the limits established under Act 26-2017. The Board’s May 2019 Commonwealth Fiscal Plan provides for these expenditures, and, in such regard, Act 176-2019 does not alter them in any whatsoever.

Similarly, the Act 176-2019 compliance certificate also states that “Act 176 has no impact on revenues.” The rationale for such conclusion is quite straightforward: nothing in Act 176-2019 prevents or otherwise prohibits the Government from continuing to collect revenue in the ordinary course of its operations. The accrual of additional vacation and sick days each month has no impact on the Government’s revenue collection processes.

Nothing in PROMESA section 204(a) requires the Government to speculate about unlikely outcomes or analyze every possible effect of a law, no matter how remote. The Board’s assertion that Act 176-2019 could result in employee productivity loss of 5% (or the equivalent of losing the productivity of 2,400 public employees) is both speculative and incorrect. This could happen only if all public employees used every single accrued vacation and sick day, which does not occur in practice and is expressly prohibited under Act 176-2019, in any event. The Board ignores a key consideration in the Act 176-2019 compliance certificate: all governmental entities must create strict personnel vacation plans for each fiscal year to prevent the accumulation of excess vacation days and ensure the continuity of uninterrupted government services.² This internal control measure protects against potential abuse of the accrual policy, which appears to be the root of the Board’s

¹ 48 U.S.C. § 2144(a)(2)(A) (emphasis added).

² See Act 176-2019 Compliance Certificate (“[E]very governmental entity and instrumentality is required to formulate and manage a personnel vacation plan for each calendar year, which shall be strictly complied with by all employees, in order to ensure that said employees do not accumulate excess vacation days, while ensuring that the services provided by the corresponding governmental entities and instrumentalities are not interrupted.”).



GOVERNMENT OF PUERTO RICO

Puerto Rico Fiscal Agency and Financial Advisory Authority

employee productivity concerns. PROMESA does not mandate the analysis the Board has required *ultravires*, and the certificate for Act 176-2019 is sufficient.

Act 181-2019

Act 181-2019, enacted on December 26, 2019, provides a \$125 per month pay increase to members of the Bureau of the Fire Department of Puerto Rico. On January 23, 2020, the Government provided a formal estimate of Act 181-2019's impact on expenditures and revenues. Such estimate indicates that the cumulative annual additional expenditure resulting from this pay increase will be \$2,809,386.84, and funded through a 3% tax on fire and allied lines insurance policies.

Nevertheless, your letter contends that the foregoing certification is inadequate under PROMESA section 204(a) because the estimates are “based on hypothetical facts” and “grounded in uncertainty.” Such contention is quite shocking to say the least. By definition, an **estimate** of future expenditures and revenues is a projection based on hypothetical facts and is uncertain.³ It represents only a “rough or approximate calculation.”⁴ Section 204(a) requires nothing more.⁵ As the Title III Court recently made clear in *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, Adv. Proc. No. 19-00393 (LTS), 2020 WL 1873380 (D.P.R. Apr. 15, 2020) (the “Act 29 Order”), PROMESA section 204(a) requires only a “good faith” effort to determine the new law’s financial effects and consistency with the existing fiscal plan.⁶ The Letters do not contend—nor could they—that the

³ See *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1213 (1st Cir. 1996) (noting that the uncertain nature of “forecasts, estimates, opinions, or projections” raise the “possibility that actual results or events may turn out differently”); *In re Biogen Inc. Sec. Litig.*, 193 F.Supp.3d 5, 40 (D. Mass. 2016) (following *Shaw* and noting that statements of projected earnings and future economic performance—couched in terms of “expected” and “approximate” results—were not materially misleading even though the projections turned out to be wrong).

⁴ *Cox v. SNAP, Inc.*, 859 F.3d 304, 310 (4th Cir. 2017) (quoting Webster’s Third New International Dictionary 779 (1993)); see also *Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, & Apprenticeship, Journeyman Retraining, Educ. & Indus. Fund v. Carolina Trim LLC*, No. 17-6485 (VSB), 2020 WL 915815, at *5 (S.D.N.Y. Feb. 26, 2020) (“[A]n estimate is ‘a rough or approximate calculation.’”) (quoting Merriam-Webster.com Dictionary); *Nat’l Ass’n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1135 (D.C. Cir. 2013) (noting that “an estimate, by definition, will not accurately account for every variable.”); *Mowat Const. Co. v. Dorena Hydro, LLC*, Case No. 14-00094-AA, 2015 WL 5665302, at *8 (D. Or. Sept. 23, 2015) (“Estimate is a term that, by its very nature, connotes inexactness [and] is a mere approximation [that] precludes accuracy.”) (internal citations and quotations omitted).

⁵ See 48 U.S.C. §2144(a)(2)(A) (requiring a “formal *estimate* . . . of the impact, if any, that the law *will* have on expenditures and revenues”).

⁶ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, Adv. Proc. No. 19-00393 (LTS), 2020 WL 1873380, at *7 (D.P.R. Apr. 15, 2020) (“Congress expected the Governor and the relevant territorial entity to comply with the statutory predicates in good



GOVERNMENT OF PUERTO RICO

Puerto Rico Fiscal Agency and Financial Advisory Authority

certifications for Act 176-2019 and Act 181-2019 were prepared in anything other than good faith.

As mentioned, in compliance with Section 204(a) of PROMESA, AAFAF provided a *Section 204 Certificate* for Act 181-2019. The certificate established that the new tax established by Section 6 of said Act, would provide approximately \$6,987,360.00 in new revenue according to data corresponding to 2018 and contained in a report prepared by the Office of the Commissioner of Insurance (the “OCI”). Additionally, the new tax would have provided new revenue of \$4,119,030.00 according to insurance policies subscribed during year 2017.⁷ Furthermore, the surcharge imposed by Act 181-2019 would have produced average new revenue for \$5,714,010.00 if we take into account data ranging from 2011-2018.⁸ And, since the budgetary impact of the salary increase was estimated on \$2,809,386.84, the Government estimates Act 181-2019 could have a positive impact from a fiscal standpoint given that we can estimate that the tax increase is more than sufficient to cover for the budgetary increase.

The Section 108(a)(2) “Injunctions”

The Letters also states that “implementation of [the Acts] prior to satisfaction of all section 204 requirements would impair and defeat the purposes of PROMESA.”⁹ Since the Act 29 Order, the Board has repeated this blanket incantation in every letter to the Government alleging that a section 204(a) certification is inadequate.¹⁰ Such repeated

faith.”) (quoting *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, 403 F. Supp. 3d 1, 13 (D.P.R. 2019)).

⁷ See Exhibit 1 attached to this electronic mail.

⁸ From the report we may conclude that the new tax would have produced the following new revenue for:

- 2016: \$4,797,960.00
- 2015: \$5,273,520.00
- 2014: \$6,198,300.00
- 2013: \$5,945,550.00
- 2012: \$5,888,280.00
- 2011: \$6,502,080.00

⁹ *Id.*

¹⁰ See Letter from N. Jaresko to Hon. Wanda Vázquez Garced, Hon. Thomas Rivera Schatz, and Hon. Carlos J. Méndez Núñez Regarding Act 181-2019 (May 11, 2020), at 2; Letter from N. Jaresko to Hon. Wanda Vázquez Garced, Hon. Thomas Rivera Schatz, and Hon. Carlos J. Méndez Núñez Regarding Act 176-2019 (May 11, 2020), at 2; Letter from N. Jaresko to O. Marrero Díaz Regarding Joint Resolution 16-2020 (May 8, 2020), at 2; Letter from N. Jaresko to O. Marrero Díaz Regarding Acts 82-2019, 90-2019 and 138-2019 (Apr. 27, 2020), at 3.



GOVERNMENT OF PUERTO RICO

Puerto Rico Fiscal Agency and Financial Advisory Authority

assertions not only misread the Court’s order, but also undermine any effort to work together collaboratively.

The Court’s order requires the Board, in exercising its discretion under PROMESA section 108(a)(2), to demonstrate a “rational basis” for its determinations.¹¹ To satisfy this standard, the Board’s determination “must have a logical connection to legitimate governmental interests invoked to justify it.”¹² The determination will be overturned if it “lacks a rational basis . . . or if the decision was not based on consideration of the relevant factors.”¹³ The Board’s determinations in these recent letters fail to satisfy even this lenient standard.

As you know, the Board’s express purpose under PROMESA is “to provide a method for a covered territory to achieve *fiscal responsibility and access to the capital markets*.”¹⁴ Judge Swain found Act 29-2019 unenforceable in large part because she determined that the Act would “deprive[] the Commonwealth of hundreds of millions of dollars, . . . thereby diminishing market access.”¹⁵ Unlike the Act 29 Order, the Board’s recent letters make no attempt to identify *any* effect that would undermine fiscal responsibility or hinder Puerto Rico’s access to the capital markets:

- The May 11 letter regarding Act 176-2019 raises only unspecified concerns about employee productivity, but identifies no effect on expenditures or revenues, nor on PROMESA’s dual purposes to promote fiscal responsibility and access to the capital markets.
- The May 11 letter regarding Act 181-2019 merely contends that the Act 181-2019 compliance certificate is excessively “hypothetical” without identifying any fiscal effect the Board believes Act 181-2019 will have on the fiscal plan or budget.
- In its May 8, 2020 letter, the Board declares JR-16-2020 “unenforceable and of no effect” because, in the Oversight Board’s opinion, JR-16-2020 is inconsistent with the fiscal plan and budget. But the letter ignores that the

¹¹ *Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 2020 WL 1873380, at *12.

¹² *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987).

¹³ *Puerto Rico Tel. Co. v. T-Mobile Puerto Rico LLC*, 678 F.3d 49, 65 (1st Cir. 2012).

¹⁴ 48 U.S.C. § 2121(a) (emphasis added).

¹⁵ *Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 2020 WL 1873380, at *11.





GOVERNMENT OF PUERTO RICO

Puerto Rico Fiscal Agency and Financial Advisory Authority

Government already identified accounts to fund its proposal consistently with the Board-approved budget, such that JR-16-2020 would be fiscally neutral.

- The Board's April 27, 2020 letter regarding Acts 82-2019, 90-2019, and 138-2019 requests the Government's legal opinion regarding three healthcare laws and requests additional information to complete its analysis. Again, nothing in the letter suggests that these laws threaten Puerto Rico's fiscal responsibility or capital-markets access.

In summary, the Oversight Board's failure to identify any fiscal effect of the laws it challenges in the Letters violates PROMESA by requesting information beyond the statutory language of Section 204(a). Moreover, by declaring in a vacuum or through speculative means that laws impair and defeat the purposes of PROMESA, the Board shows that there is no rational basis for its formulaic conclusions in these matters.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Omar J. Marrero Diaz", with a long horizontal flourish extending to the right.

Omar J. Marrero Diaz, Esq.
Executive Director



**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



José B. Carrión III
Chair

Members

Andrew G. Biggs
Carlos M. García
Arthur J. González
José R. González
Ana J. Matosantos
David A. Skeel, Jr.

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

May 11, 2020

The Honorable Wanda Vázquez Garced
Governor of Puerto Rico

The Honorable Thomas Rivera Schatz
President of the Senate of Puerto Rico

The Honorable Carlos J. Méndez Núñez
Speaker of the House of Representatives of Puerto Rico

Dear Governor Vázquez Garced, President Rivera Schatz, and Speaker Méndez Núñez:

We have reviewed Act 181-2019 and are writing you pursuant to Section 204(a) of PROMESA.

Act 181-2019, among other things, provides a \$125 monthly salary increase to the members of the Bureau of the Fire Department of Puerto Rico, including civilians and officers, beginning July 1, 2020.

The Oversight Board received Act 181-2019 along with the Governor's corresponding PROMESA Section 204(a) "certification of compliance" (the "Compliance Certification") on January 23, 2020, attached hereto as Exhibit 1. The Oversight Board hereby notifies you that the Compliance Certification for Act 181 was not accompanied by the estimate required under paragraph (2)(A) of Section 204(a).

The Compliance Certification states Act 181-2019's salary increases amount to \$2,809,386.84 in annual payments. The Government proposes to fund this budget gap with a three percent tax on "fire and allied lines insurance policies (payable by the insurer)." In calculating hypothetical tax receipts based on 2017 and 2018 information, the Compliance Certification concludes "it is plausible that the new imposition provides sufficient resources to completely fund the salary increase" and only if "an internal reprogramming of budgeted resources is needed" will the Department of Public Safety "submit to the Financial Oversight and Management Board for Puerto Rico a formal request."

The Honorable Wanda Vázquez Garced
The Honorable Thomas Rivera Schatz
The Honorable Carlos J. Méndez Núñez
May 11, 2020
Page 2 of 2

The estimates of Act 181's financial impact are admittedly grounded in hypothetical facts and the Government's analysis is couched in uncertainty. Per the Compliance Certification disclosure, it is merely "plausible" the Government will be able to fund these shortfalls. As such, the Compliance Certification's estimate and conclusion are deficient.

Accordingly, the Oversight Board directs you, pursuant to Section 204(a)(4)(A), to provide a complete formal estimate by May 19, 2020 showing when the tax would commence to be collected, why you believe the annual tax collections in a sufficient amount from the first year of the increase are plausible, and the impacts on the fiscal plan if your projections are too optimistic.

Pursuant to PROMESA Section 108(a)(2), the Governor and Legislature are each enjoined from, among other things, implementing any statute or rule that impairs or defeats the purposes of PROMESA as determined by the Oversight Board. To avoid any misunderstanding, please be advised the Oversight Board has determined implementation of Act 181-2019 prior to satisfaction of all Section 204 requirements would impair and defeat the purposes of PROMESA, such as preventing implementation of new laws prior to satisfaction of the requirements of Section 204.

Should you fail to comply with this directive, the Oversight Board reserves the right to take such actions as it considers necessary, consistent with Sections 204(a)(5) and 108(a)(2), including preventing and seeking remedies for the enforcement or application of Act 181-2019.

Sincerely,



Natalie A. Jaresko

CC: Mr. Omar Marrero Díaz



Certification of Act 181-2019 ("Act 181")

Introduction

- The Financial Oversight and Management Board for Puerto Rico ("Oversight Board") certified the Fiscal Plan for the Government of Puerto Rico on May 9, 2019 ("Fiscal Plan") and the budget for Fiscal Year 2020 on June 30, 2019 (the "Budget").
- Pursuant to Section 204 of the *Puerto Rico Oversight, Management, and Economic Stability Act* ("PROMESA"), this certification is being submitted to the Oversight Board with respect to Act 181.

Summary of Act 181:

- Act 181 provides a monthly salary increase of \$125.00 to the members of the Fire Bureau of Puerto Rico beginning on July 1st, 2020. Said increase is equivalent to an annual sum of \$2,809,386.84.

Estimated Impact of Act 181 Upon Expenditures and Revenues:

- Act 181 purports to satisfy the salary increase for members of the Fire Bureau of Puerto Rico with a 3% tax on fire and allied lines insurance policies (payable by the insurer).
- According to data pertaining to year 2017, the tax would have produced approximately \$4,119,030.00 in new revenue. On the other hand, the tax would have provided estimated new revenue for \$6,987,360.00 according to insurance policies subscribed during year 2018. Therefore, it is plausible that the new imposition provides sufficient resources to completely fund the salary increase.
- Additionally, Act 181 provides that the fees charged by the safety inspections carried out by the Bureau are to be directed to cover for the salary increase. In case the salary increase for the members of the Fire Bureau is fully covered, Act 181 requires any excess of inspection fees to be credited to the General Fund.
- If the primary sources to cover for the salary increase are insufficient, Act 181 requires the Office of Management and Budget to allocate resources to sustain the increase for the employees.
- If an internal reprogramming of budgeted resources is needed, the Department of Public Safety will submit to the Financial Oversight and Management Board for Puerto Rico a formal request.

Determination of the Legislative Measure's Compliance with the Fiscal Plan:

- Act 181 is not significantly inconsistent with the 2019 Fiscal Plan for Puerto Rico.

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



José B. Carrión III
Chair

Members

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Arthur J. González
José R. González
Ana J. Matosantos
David A. Skeel, Jr.

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

May 21, 2020

The Honorable Wanda Vázquez Garced
Governor of Puerto Rico

The Honorable Thomas Rivera Schatz
President of the Senate of Puerto Rico

The Honorable Carlos J. Méndez Núñez
Speaker of the House of Representatives of Puerto Rico

Dear Governor Vázquez Garced, President Rivera Schatz, and Speaker Méndez Núñez:

We are writing to you pursuant to Section 204(a) of PROMESA, with respect to Act 47-2020.

Act 47-2020, among other things, amends Act 60-2019, known as the Incentives Code of Puerto Rico, to expand the scope of health professionals eligible for the tax benefits granted therein. Specifically, Act 47-2020 extends the benefits of Act 60-2019 to general medical practitioners in addition to specialists in the fields of audiology, chiropractic, and optometry.

The Oversight Board received a copy of Act 47-2020 (the “Act”) along with the Governor’s corresponding PROMESA Section 204(a) certification of compliance (the “Compliance Certification”) on May 4, 2020. The Oversight Board hereby notifies you that: (i) the Governor failed to provide the formal estimate of the impact the Act will have on expenditures and revenues, as required under Section 204(a)(2)(A); and (ii) the Compliance Certification is deficient. Judge Swain has confirmed the Oversight Board’s authority to challenge the sufficiency and accuracy of the Governor’s documentation under Section 204(a). *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico*, No. 17-3283 (LTS), 2020 WL 1873380, at *7 (D.P.R. Apr. 15, 2020); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 403 F. Supp. 3d 1, 13 (D.P.R. 2019).

The estimated financial impact of the Act contained in the Compliance Certification is not a formal estimate and is deficient. The Compliance Certification states the Act could have an estimated annual impact on revenues of \$25.7 million, which would depend on the number of “medical professionals that request” and “ultimately approved to receive [the Act’s] incentives,” as well

“the income ultimately reported by the qualified professionals.”¹ The Oversight Board understands forward-looking estimates must rely in some part on projections, but the Government’s estimate lacks even the barest specificity. The Compliance Certification lists an estimated annual impact, but then provides a number of complicating factors without including their potential effect on the estimate, and concludes by admitting the analysis is an “an educated estimate that must revised [sic] on an annual basis.” Moreover, the Compliance Certification does not indicate how the estimate was derived and whether it reflects the maximum cost of the Act, the minimum cost, or something else. Finally, while the Compliance Certification seems to assume that the “estimated annual impact,” as uncertain as that estimate is, will be constant over the period of the certified Fiscal Plan, it does not state so specifically. Given the number of variables cited in the Compliance Certification, it seems unlikely that a properly constructed formal estimate would assume identical costs in each year.

Accordingly, the Oversight Board directs you, pursuant to Section 204(a)(4)(A), to provide a complete formal estimate by May 28, 2020 identifying, among other things:

1. The total number of medical practitioners who are eligible to seek approval for the tax incentive;
2. Minimum and maximum estimates of the percentage of medical practitioners applying for this incentive;
3. The number of medical practitioners by each area of specialty or sub-specialty who are eligible to seek approval for the tax incentive;
4. Minimum and maximum estimates of these medical practitioners’ estimated income, listed by each area of specialty or sub-specialty; and
5. Minimum and maximum estimates of the Act’s impact on the certified Fiscal Plan based on the income reported by such practitioners in previous years.

The Oversight Board believes this information is necessary to prepare the formal estimate of the impact that the Act will have on expenditures and revenues pursuant to Section 204(a)(2)(A) of PROMESA. Of course, if the governmental entity with expertise in budgets and financial management that prepares the formal estimate determines additional information and data is necessary to substantiate the estimate, please provide that additional information as well.

¹ The Compliance Certification justifies the Act by citing to the current health crisis, stating: “This legislation serves the public interest by promoting the retention of professionals in the health field, such a feat is particularly relevant in light of the COVID-19 pandemic.” To the extent the Act’s purpose is to assist first responders in the wake of the COVID-19 pandemic, it is grossly overbroad. The Act provides exemptions for several classes of health practitioners – such as audiologists, chiropractors, and optometrists – whose services do not appear implicated by the COVID-19 pandemic. Retaining these professionals, while helpful, does not assist the Commonwealth in addressing the pandemic. Accordingly, even if such a policy were wise in the wake of the COVID-19 pandemic, the Act is not tailored to address such a policy. Furthermore, as noted above, no matter how worthy the purpose of the Act may be, its costs must be offset in order for the Act to be consistent with the certified Fiscal Plan.

The Honorable Wanda Vázquez Garced
The Honorable Thomas Rivera Schatz
The Honorable Carlos J. Méndez Núñez
May 21, 2020
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In addition, the Compliance Certification is itself defective. Currently, the Compliance Certification estimates the Act will decrease revenues by up to \$25.7 million *per year* but still concludes the Act is not significantly inconsistent with the Fiscal Plan. The Compliance Certification does not identify any measures to reduce spending or increase revenue from other sources to offset the decrease in revenues resulting from the Act. The Oversight Board finds it difficult to understand how the Act, which the Government itself estimates will reduce revenue by tens of millions of dollars per year, without any corresponding cut in spending or proposal to increase revenues from other sources, can be anything other than significantly inconsistent with the certified Fiscal Plan.

As required by the Fiscal Plan, to ensure revenue neutrality, the implementation of any incentive law initiatives must occur sequentially, with the Government ensuring that initiatives are paid for before revenues are reduced. Therefore, revenue reductions must be accompanied by specific offsetting savings and/or increase in revenue measures of a sufficient amount identified in the enabling legislation.

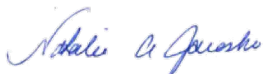
Accordingly, when the Government provides the required formal estimate on expenditures and revenues, the Oversight Board requests that the Government provide one or more proposed measures to cover the projected lost revenue as a result of the Act. The Government may propose offsetting savings and/or increases in revenues, so long as the measures to do so are consistent with the certified Fiscal Plan.

Pursuant to PROMESA Section 108(a)(2), the Governor and Legislature are each enjoined from, among other things, implementing any statute or rule that impairs or defeats the purposes of PROMESA as determined by the Oversight Board. To avoid any misunderstanding, please be advised the Oversight Board has determined implementation of Act 47-2020, prior to satisfaction of all Section 204 requirements, would impair and defeat the purposes of PROMESA. Act 47-2020, therefore, must not be implemented at this time.

Should you fail to comply with this directive, the Oversight Board reserves the right to take such actions as it considers necessary, consistent with Sections 204(a)(5), 204(c) and 108(a)(2), including preventing and seeking remedies for the enforcement or application of Act 47-2020.

We look forward to continuing to work together for the benefit of the people of Puerto Rico.

Sincerely,



Natalie A. Jaresko

CC: Mr. Omar Marrero Díaz



GOVERNMENT OF PUERTO RICO

Puerto Rico Fiscal Agency and Financial
Advisory Authority

VIA ELECTRONIC MAIL

May 28, 2020

Ms. Natalie A. Jaresko
Executive Director
The Financial Oversight and Management Board for Puerto Rico
P.O. Box 192018
San Juan, Puerto Rico 00919-2018

Re: *Response to May 21, 2020 Letter Regarding Act 47-2020*

Dear Ms. Jaresko:

The purpose of this letter is to respond to your May 21, 2020 letter regarding Act 47-2020 (the "Letter"). As you know, Act 47-2020 introduced technical adjustments to the Puerto Rico Incentives Code to provide tax relief to health professionals, whose personal and professional sacrifices have been integral to protecting Puerto Ricans' health, safety, and welfare during the current COVID-19 pandemic. Unfortunately, the Letter appears to reject such notion and deny our healthcare professionals this well-deserved incentive at this critical time. We also continue to believe that these letters are counterproductive to our continued collaboration and undermine our joint efforts to implement meaningful fiscal and economic solutions for the people of Puerto Rico.

In the letter, it is argued that the Government's compliance certificate for Act 47-2020 is deficient because the estimate "will reduce revenue by tens of millions of dollars per year, without any corresponding cut in spending or proposal to increase revenues from other sources" and thus cannot be "anything other than significantly inconsistent with the certified Fiscal Plan." We believe such assertion is incorrect.

Firstly, it should be pointed out that PROMESA section 204(a) requires only a certification that the new law is not *significantly* inconsistent with the operative fiscal plan. Therefore, under PROMESA, new laws *may* be inconsistent with the fiscal plan, so long as they are not "significantly inconsistent." PROMESA does not define the term "significantly," but allows the Government discretion to make the "significantly



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inconsistent” determination in good faith.¹ Here, the May 9, 2019 Commonwealth Fiscal Plan (the “May 2019 Fiscal Plan”) provides for projected revenues in excess of \$20 billion per fiscal year.² The original estimated annual revenue effect of Act 47-2020 was \$25.7 million, representing less than 0.128% of the May 2019 Fiscal Plan’s annual revenue projections. Given this limited impact on Commonwealth revenues (but substantial and meaningful benefit provided to our medical professionals), it is difficult to perceive how Act 47-2020 could be “significantly inconsistent” with the May 2019 Fiscal Plan. And even if this is disputed, the Government’s determination was based on a reasonable and good-faith estimate, which is all that section 204(a) requires.

In addition, your letter argues that the Government’s compliance certification does not provide a properly constructed “estimated annual impact” of Act 47-2020 because it “does not indicate how the estimate was derived” and will not likely be constant each year given the number of variables identified in the compliance certificate.³ As we noted in our May 19 letter, an estimate is by its very nature uncertain and based on hypothetical facts. For example, medical practitioners have until June 30, 2020 to apply for the Act 47-2020 tax incentive and the Government simply does not know how many applications it will receive, how many applicants will satisfy the law’s prerequisites, and the extent to which medical practitioner incomes have been affected (or will be affected) by the recent economic downturn. The Act 47-2020 compliance certification provided the Government’s good-faith estimate based on then-available facts, which is all that section 204(a) requires.

Although we believe that further information in support of our Act 47-2020 compliance certification is not necessary or required under PROMESA section 204(a), the Government is willing to provide the following additional information as requested in your letter in the interest of transparency:

1. According to the records and data provided by the Treasury Department, there is an approximate universe of 9,222 doctors in Puerto Rico (using data corresponding

¹ See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced* (In re *Fin. Oversight & Mgmt. Bd. for Puerto Rico*), Adv. Proc. No. 19-00393 (LTS), 2020 WL 1873380, at *7 (D.P.R. Apr. 15, 2020) (“Congress expected the Governor and the relevant territorial entity to comply with the statutory predicates in good faith.”) (quoting *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced* (In re *Fin. Oversight & Mgmt. Bd. for Puerto Rico*), 403 F. Supp. 3d 1, 13 (D.P.R. 2019)).

² While the Government acknowledges that the May 2019 Fiscal Plan is currently in the process of being revised and replaced, the May 2019 Fiscal Plan was the operative fiscal plan for the Commonwealth at the time Act 47-2020 was enacted and, therefore, must be the standard for any “significantly inconsistent” determination.

³ The Act 47-2020 compliance certificate notes that the estimated annual impact will depend on: (1) medical professional that request tax incentives; (2) medical professionals ultimately approved to receive such incentives in light of the requisites; and (3) income ultimately reported by the qualified professionals.



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to 2018). From this approximate universe, the Government estimates (using data corresponding to 2018) that around 5,137 medical practitioners could qualify for the tax incentives offered by a previous iteration to 47-2020 (Act 14-2017 and Act 60-2019).

2. Based on these estimates, the Government projects that Act 47-2020 could have an estimated impact on income for 2020 in the range of \$ 540,000.00 to \$40,100,000.00, since there are 7,188 people who could qualify, but not necessarily qualify for the tax incentives.
3. The revised estimate varies from the original Section 204 certification, since the first estimate only took into account the type of physicians not qualified in the previous laws that were incorporated into Act 47-2020 to will enjoy the exemption now in under Law 14-2017 and / or Law 60-2019. This took the average of this benefits actual to estimate the effect for those new type of professionals as it is are registered in SURI with a NAICS code representing health occupations.
4. On the other hand, this last estimate provides a more precise impact since it takes into account the taxpayer of unqualified medical practitioners from the income tax base. This considers your net income subject to tax and both the classification of this as registered in the SURI Merchants Registry with a NAICS code favored in Act 47-2020 and of all NAICS related to health professionals is considered. In addition, the occupation reported in your Income Tax return is considered to the health occupations.

The Letter further asserts that the compliance certificate is deficient because Act 47-2020's effect is "grossly overbroad" by "provid[ing] exemptions for several classes of health practitioners . . . whose services do not appear implicated by the COVID-19 pandemic . . . and does not assist the Commonwealth in addressing the pandemic." Again, this argument misapplies the statute. Under PROMESA section 204(a), the Board may challenge a compliance certification based solely on the new law's financial effect on the fiscal plan, not the public policy of the duly elected Government. While the Board and the Government can certainly discuss differences of opinion on issues of public policy, PROMESA does not grant the Board unilateral authority to prevent the implementation of new laws simply because the Board disagrees with the Government's public policy decisions. The Government's foremost responsibility is to protect the health, safety, and welfare of the people of Puerto Rico, and the Board should not act in a way that



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could be seemed by the innocent eye as an attempt to usurp these unique political and governmental powers.⁴

Finally, the Letter also continues to reiterate the blanket incantation that “implementation of Act 47-2020, prior to satisfaction of all Section 204 requirements, would impair and defeat the purposes of PROMESA,” and therefore the Government is enjoined from implementing Act 47-2020 pursuant to PROMESA section 108(a). In our May 19 letter, we explained how the Title III Court recently made clear in *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Vázquez Garced (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, Adv. Proc. No. 19-00393 (LTS), 2020 WL 1873380 (D.P.R. Apr. 15, 2020) that the Board must demonstrate a “rational basis” in exercising its discretion under PROMESA section 108(a)(2). Hence, The Board’s formulaic conclusion that Act 47-2020 impairs and defeats PROMESA’s purposes—without identifying the *significantly* inconsistent fiscal effect of the Act 47-2020 on the May 2019 Fiscal Plan (as discussed above)—shows that there is no rational basis for preventing Act 47-2020’s implementation.

As always, the Government looks forward to our continued collaboration with the Board to achieve the best possible outcomes for the people of Puerto Rico.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Omar J. Marrero Diaz", with a long horizontal flourish extending to the right.

Omar J. Marrero Diaz, Esq.
Executive Director

⁴ See PROMESA § 303.

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



José B. Carrión III
Chair

Members

*Andrew G. Biggs
Carlos M. García
Arthur J. González
José R. González
Ana J. Matosantos
David A. Skeel, Jr.*

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

June 5, 2020

Mr. Omar J. Marrero Díaz
Executive Director
Fiscal Agency and Financial Advisory Authority
Government of Puerto Rico

Dear Mr. Marrero Díaz:

We write in response to your letter, dated May 28, 2020, regarding Act 47-2020 (the “Letter”), and to reiterate the Oversight Board’s conclusions on the topic in the letter we sent a week ago.

The Letter includes a number of statements with which the Oversight Board disagrees. It would not be productive at this point to respond to each and every one. Two statements from the Letter, however, warrant a response at this time: the purported definition of “significantly” and the alleged prohibition on the Oversight Board invoking “public policy” as a basis for preventing implementation of new laws.

As to the first statement, regarding the interpretation of “significantly” in Section 204(a), the Letter inappropriately minimizes the economic impact of Act 47. The Letter estimates that the annual impact on income for 2020 is approximately \$40 million. Assuming the annual impact is consistent, the total reduction in income generated by Act 47 would be approximately \$200 million over five years. This alone is “significantly” inconsistent with the May 2019 and May 2020 fiscal plans for the Commonwealth. Moreover, the relevant analysis of the financial costs of Act 47 is its impact on the Commonwealth’s own-source revenues, in the General Fund, not on all revenues received by the Commonwealth. By comparing the estimated cost of Act 47 to all revenues received by the Commonwealth, your Letter overstates the amount of the Commonwealth’s revenue and understates the relative cost of Act 47. Viewing the costs of Act 47 in their proper context, meaning relative to the Commonwealth’s own-source revenues, demonstrates they are substantial and that the Oversight Board is justified in concluding the implementation of Act 47 would be “significantly” inconsistent with the May 2019 and May 2020 fiscal plans. We note the Government’s conclusion that Act 47 is not significantly inconsistent with the fiscal plans – despite the negative impact of hundreds of millions of dollars in reduced revenues – is difficult to reconcile with the Government’s section 204(a) certification that Act 32-2020 (related to the Bureau of the

Mr. Omar J. Marrero Díaz

June 5, 2020

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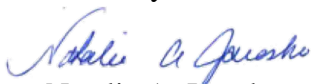
9-1-1 Emergency System) – which increases expenses of such Bureau by approximately \$450,000 per year – *is* significantly inconsistent with the fiscal plans.

As for the second statement, regarding whether the Oversight Board can invoke or rely on “public policy” as a basis for preventing the implementation of new laws, the Letter does not adequately consider the language of Section 108(a)(2) expressly granting the Oversight Board the power to determine the purposes of PROMESA, the language of Section 201 expressly granting the Oversight Board the power to determine how to accomplish numerous policy goals, and numerous rulings from the District Court and First Circuit. Both courts have already concluded that the Oversight Board has the power to certify a fiscal plan that makes policy determinations and then certify a budget that is consistent with the fiscal plan. In addition, no court has decided that the Oversight Board lacks the authority under PROMESA to prevent implementation of new laws based solely on the Oversight Board’s disagreement with the Government’s public policy decisions. Finally, as a practical matter, the Letter’s focus on “public policy” ignores Section 204(a), which empowers the Oversight Board to make a policy determination *not* to take action with respect to Act 47 if the Government “provide[s] an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate.” To date, the Government has not provided such an explanation for Act 47. Therefore, the Oversight Board’s conclusion that Act 47 is significantly inconsistent with the fiscal plan remains in place.

Ultimately, the Oversight Board strongly desires and expects the Government to revise or forego Act 47 given this letter and our letter dated May 21, 2020. Continuing to implement Act 47 as it is written, or proceeding to go forward with similarly significantly inconsistent legislation notwithstanding objections from the Oversight Board grounded in PROMESA, will lead the Oversight Board to have no choice but to seek judicial relief. The Oversight Board does not look forward to this outcome, but we are unquestionably committed to enforcing PROMESA.

We look forward to continuing to work together for the benefit of the people of Puerto Rico.

Sincerely,



Natalie A. Jaresko

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José B. Carrión III
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