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NEW DEBT ENFORCEMENT ACT SIGNIFICANTLY IMPACTS STAKEHOLDERS IN PUERTO RICO'S ENERGY & INFRASTRUCTURE SECTORS[1]

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On June 28, 2014, the Commonwealth of Puerto Rico adopted the Puerto Rico Corporations Debt Enforcement & Recovery Act, Act 71-2014 (the "Debt Enforcement Act"), enabling certain Commonwealth public corporations in financial distress to restructure their debt obligations. The Debt Enforcement Act is focused on establishing a restructuring regime for the financial obligations of the Puerto Rico Electric Power Authority ("PREPA") and the Puerto Rico Highways and Transportation Authority ("PRHTA"). The goal of the new law is to balance the interests of creditors and other stakeholders with the interest of the Commonwealth to protect its citizens and to enable the financially distressed public corporations to continue to provide essential government services such as the delivery of electricity, gas and clean water.

The Debt Enforcement Act, though, is not limited to restructuring and enforcement of debt obligations or securities. If you lent money or extended other forms of credit, or provided goods or services, to PREPA, PRHTA or other public corporations of the Commonwealth of Puerto Rico, this new law may affect you.

Many have been caught by surprise by the speed at which the Debt Enforcement Act became law. Without much fanfare or prior public hearings, the legislation was approved by the Commonwealth of Puerto Rico's House of Representatives and Senate on June 25, 2014, and signed by the Governor of the Commonwealth on June 28, 2014.[2] Section 401 provides that the Debt Enforcement Act became effective immediately and will expire on December 31, 2016 unless its effectiveness is extended by law. As described below, challenges to the constitutionality of the act have already been commenced, and more challenges undoubtedly will

[1] ©Lorraine S. McGowen is a partner in the Restructuring Group of Orrick, Herrington & Sutcliffe. This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport o represent the views of our clients or the firm. The views expressed in this alert are the views of the author herself.

[2] The Commonwealth of Puerto Rico is a self-governing commonwealth of the United States.

be filed if and when a distressed public corporation avails itself of the procedures available under the Debt Enforcement Act. Because of the speed at which the law was adopted, creditors may challenge the constitutionality of the new law on the ground that the Commonwealth failed to consider other less-burdensome alternatives.

Excluded Entities

The Debt Enforcement Act provides a framework for restructuring the obligations of certain eligible public corporations, including PREPA, the Puerto Rico Aqueduct and Sewer Authority ("PRASA") and PRHTA. A number of entities are expressly excluded from the scope of the Debt Enforcement Act, including the Commonwealth of Puerto Rico itself, its 78 municipal governments, the Government Development Bank of Puerto Rico ("GDB"), the Puerto Rico Sales Tax Financing Corporation (COFINA), the Puerto Rico Infrastructure Finance Authority (PRIFA) and the Puerto Rico Industrial Development Company, among others.

Other Potential Eligible Corporations

Besides PREPA, PRASA and PRHTA, unless expressly excluded, other public corporations are eligible for relief under the Debt Enforcement Act, including: the Puerto Rico Telephone Authority and the Puerto Rico Ports Authority.

Summary of the Forms of Relief

Under the Debt Enforcement Act, an eligible public corporation, subject to the consent of the GDB, may commence a consensual debt modification procedure under chapter 2 or a court-supervised proceeding under chapter 3. The Debt Enforcement Act provides two types of procedures to address an eligible public corporation's debt burden. Under chapter 2 of the Act, an eligible public corporation can seek a consensual debt modification procedure that will culminate in a recovery program. Alternatively, the public corporation could seek a court-supervised procedure that would culminate in an orderly debt enforcement plan. The eligible public corporation can seek relief under either chapter 2 or chapter 3 either simultaneously or sequentially.[3] If the eligible public corporation does not itself seek relief, the GDB, at the Governor's request, may seek relief on behalf of the public corporation under the Debt Enforcement Act. The Senate bill indicates that eligible entities are expected to try chapter 2 before turning to chapter 3, but the Debt Enforcement Act does not contain such admonition. No other party may commence an involuntary proceeding against an eligible public corporation under the Debt Enforcement Act.

[3] The Puerto Rico Corporations Debt Enforcement and Recovery Act, Act 71-2014; references in this article are to Commonwealth S. 1164 dated June 25, 2014 (Debt Enforcement Act) (English Text), at 158 and section 112.

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Consensual Debt Relief (Chapter 2 Proceeding)

The objective of a chapter 2 proceeding is to obtain acceptance of a consensual workout by holders of affected debt instruments that culminates in a recovery program. Amendments to the debt instruments may include interest rate adjustments, maturity extensions, debt relief or other revisions. In exchange for the consensual modifications to the debt instruments, the debtor will formulate and commit to a recovery program that provides financial and operational adjustments necessary to allow the entity to become financially self-sustaining.

To initiate a Chapter 2 proceeding, an eligible entity files a notice of "suspension period" on its website. The notice will state which obligations are the subject of the chapter 2 proceeding (the "affected debt instruments"). A holder of an affected debt instrument will be stayed from exercising any of its remedies or taking any enforcement action. The suspension period may last for a period of 270 days or longer depending upon how long it takes for an order approving the consensual debt transaction to become final and nonappealable.[4] Under section 205 of the Debt Enforcement Act, the suspension period will end on the earlier of:

- 270 days after commencement of suspension period, but may be extended for one additional period of 90 days if the public corporation and holders of at least 20% of the aggregate amount of the affected debt instruments in at least one class of affected debt instruments consent to the extension,

- 60 days after denial of consensual debt relief transaction, unless otherwise provided for in the order denying the application for an approval order, or

- the date the approval order becomes final and nonappealable.

The consensual debt relief transaction in a chapter 2 proceeding may be approved by the court only where at least 50% of the amount of the affected debt in the particular class participates in a vote or consent solicitation and, of those who cast a vote, at least 75% of the amount of the affected debt approves the proposed debt relief transaction. If so approved by the consenting creditors and the court, under the Debt Enforcement Act the debt relief transaction will bind all affected creditors within the applicable class.

The standard for court approval of a debt relief transaction is very narrow. The court will enter an approval order approving the debt relief transaction, which will become effective immediately, if the court determines that:

- the proposed amendments, modifications, waivers or exchanges proposed in the debt relief transaction are consistent with the objectives of chapter 2, and

- the voting procedure was conducted in a manner consistent with chapter 2.

[4] Of course, the suspension period could be much shorter as well, if the chapter 2 proceeding is dismissed, or the parties are able to quickly reach an agreement on the terms of the debt relief transaction. As this is a new law with no comparable precedent, it is difficult to estimate how long such a proceeding will last.

The Senate bill indicates that the consensual debt relief transaction is "designed to be efficient and expedient in light of the consensual nature of the transaction".[5]

Judicial Debt Enforcement Proceeding (Chapter 3 Proceeding)

The second avenue for debt relief (a chapter 3 proceeding) involves the commencement of a judicial debt enforcement proceeding. The eligible public corporation, with the approval of the GDB, may file a petition with the court seeking to formulate an orderly debt enforcement plan that will "maximize distributions to creditors consistent with the execution of vital public functions."[6] In a chapter 3 proceeding, the eligible public corporation will be able "to defer debt repayment and to decrease interest and principal to the extent necessary to enable [it] to continue to fulfill its vital public functions."[7] Collective bargaining agreements may be modified or rejected and trade debt may be reduced if necessary.[8] The Senate bill indicates that:

> [T]he underlying premise of chapter 3 is that it must serve as an orderly debt enforcement mechanism that makes creditors better off than they would be if they all simultaneously enforced their claims immediately.[9]

In order to file a chapter 3 petition, the public corporation must satisfy certain eligibility requirements:

- it must be insolvent defined as currently unable to pay valid debts as they mature while continuing to perform public functions or at serious risk of being unable, without further legislative acts and without financial assistance from the Commonwealth or the GDB, to pay valid debts as they mature while continuing to perform public functions;

- it must be ineligible for relief under the Bankruptcy Code, Title 11 U.S.C. (the "Bankruptcy Code"), because it is not a "municipality" eligible to file under chapter 9; and

- it must be a government unit ineligible to file under chapter 11 of the Bankruptcy Code.

Upon the filing of the petition, an automatic stay is imposed which prevents creditors from taking or continuing any action against the debtor or its property to create, perfect or enforce liens or to collect debts. Chapter 3 provides for judicial approval of a debt enforcement plan if at least one class of impaired debt has voted to accept the plan by a majority of all votes cast in such class and if two-thirds of the aggregate amount of impaired debt in such class is voted. In

[5] Debt Enforcement Act at 162.
[6] Debt Enforcement Act at 165.
[7] Debt Enforcement Act at 163.
[8] Id.
[9] Debt Enforcement Act at 164.

this regard, the voting for approval of a debt enforcement plan mirrors the voting requirements for approval of a plan under chapter 11 of the Bankruptcy Code.

Unlike a chapter 2 consensual debt relief transaction, the court will appoint a statutory creditors' committee in a chapter 3 debt enforcement proceeding to represent the interest of the affected creditors. The role and powers of the creditor's committee are more constrained than the role and powers of a committee in a chapter 9 or 11 case under the Bankruptcy Code. Under chapter 3 of the Debt Enforcement Act, a committee may appear and be heard on any issue relating to:

- eligibility
- adequate protection
- new borrowing by the petitioner
- transfer of assets or allocation of proceeds of transfer
- the plan, but only as to matters regarding how the plan affects the committee's constituents

While the committee may conduct a reasonable investigation into the petitioner's legal and financial ability to increase distributions under the plan for the committee's constituents, the committee does not have standing to commence an action either directly on its own behalf or derivatively on behalf of the petitioner or its creditors.

A chapter 3 debt enforcement proceeding enables the public corporation to modify its debt obligations, as follows:

- collective bargaining agreements may be modified or rejected under certain circumstances
- trade debt can be reduced when necessary
- pledged revenues can be used to sustain the public corporation, and need not be turned over to creditors if necessary to increase the future revenues to pay creditors
- secured claims can be modified over the objection of the holders of the affected debt if the plan provides that holders of affected secured claims will retain the liens securing their claims to the extent of the allowed amount of such claims; and either
    - the holder receives on account of its secured claim immediate or deferred cash payments totaling at least the value of its interest in the collateral; or

  - the plan provides for the transfer of any property that is subject to liens, free and clear of liens, with such liens attaching to the net proceeds of such transfer

- unsecured claims (including deficiency claims of affected secured debt) can be restructured over the objection of holders of the affected debt if the plan is in the best interest of creditors and maximizes the amounts distributable to unsecured creditors to the extent practicable, subject to the petitioner's obligations to fulfill its public functions

Under the Debt Enforcement Act, certain classes of creditors and claims are expressly protected from impairment under a chapter 3 plan. These include:

- allowed and unavoidable unsecured claims of individuals for prepetition wages, salaries or commissions, vacation, severance, and sick leave pay or other similar employee benefits (except to the extent the claims arise out of a transaction that is avoidable as a fraudulent conveyance under section 131 of the Debt Enforcement Act)

- certain critical vendor debt

- amounts owed for goods received by, or services rendered to, the petitioner within 30 days before the filing of a petition under chapter 3

- noncontingent, undisputed, matured claims not scheduled on the list of affected debt

- claims owed to another public corporation (if claims are for goods or services provided by the public corporation to the petitioner)

- claims of a Commonwealth entity for money loaned, or other financial support, to the petitioner during the 60 days before the petition or claims of the GDB for reimbursement under section 134 of the Debt Enforcement Act;

- debts owing to the United States of America

- any credit incurred or debt issued by a public sector obligor between the commencement of the suspension period and the filing of the chapter 3 petition, if the chapter 3 petition is filed up to 6 months after the suspension period has elapsed

- administrative expenses accruing prior to the effective date of the plan

Additionally, assets backing employee retirement or post-employment benefits remain inviolable under chapter 3.

Constitutional Challenges to the Debt Enforcement Act

The Commonwealth of Puerto Rico clearly recognized and anticipated that the Debt Enforcement Act would face many challenges. In that regard, the Commonwealth provided its

arguments on the constitutionality of the Debt Enforcement Act. The Senate bill states that the Commonwealth has the police power to enact orderly debt enforcement and recovery statutes when facing an economic emergency, based on the power conferred on the Commonwealth under the Commonwealth's constitution and enabling statutes. The Commonwealth asserts that it may enact its own laws, as long as the law does not conflict with the Commonwealth's constitution, the constitution of the United States or applicable federal law. The Commonwealth asserts that the Debt Enforcement Act is constitutional because the United States Supreme Court has held that States may enact their own laws for entities Congress has not rendered eligible under applicable federal law. The Debt Enforcement Act provides that if an affected creditor demonstrates that its contractual rights are substantially impaired by a chapter 2 or chapter 3 proceeding, the impairment will be allowed only if the petitioner demonstrates that the impairment is a reasonable and necessary means to advance a legitimate government interest, and the creditor "fails to carry the burden of persuasion to the contrary".[10]

The Commonwealth anticipated that constitutional challenges would be asserted against the enforceability of the Debt Enforcement Act on the grounds of:

- **Preemption**: Article I, Section 8 of the United States Constitution provides that "Congress shall have the power . . .[to] establish . . . uniform laws on the subject of Bankruptcies throughout the United States. . . "; The United States Congress has established uniform laws of bankruptcy by its enactment of the Bankruptcy Code and the Bankruptcy Code applies in the Commonwealth.[11] Chapter 9 of the Bankruptcy Code governs the filing of bankruptcy petitions by "municipalities." Section 101(40) of the Bankruptcy Code defines a "municipality" as a political subdivision or public agency or instrumentality of a State.[12] "State" is defined in section 101(52) of the Bankruptcy Code to include Puerto Rico "except for the purpose of defining who may be a debtor under Chapter 9 of [the Bankruptcy Code]."[13]

- **Impairment Of Contracts**: Article I, section 10 of the United States Constitution provides that "No State shall . . . pass any. . . Law impairing the Obligation of Contracts. . . ." (the "Contract Clause"). Despite its unequivocal language, this constitutional provision "does not make unlawful every state law that conflicts with any contract. . . ." Local Div. 589 Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 638 (1st Cir. 1981). Instead, Contract Clause claims are analyzed under a two-pronged test. The first question is "whether the state law has . . . operated as a substantial impairment of a contractual relationship." Energy Reserves Grp., Inv. V. Kan. Power & Light Co., 459 U.S. 400, 410 (1983). If the contract was substantially impaired, the court next turns to the second question and asks whether the impairment was reasonable and necessary to serve an important government purpose. U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S.

[10] Debt Enforcement Act, section 128.
[11] All federal laws have the same force and effect in the Commonwealth of Puerto Rico as in the 50 States. 48 U.S.C. § 734. (The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in the United States . . .")
[12] 11 U.S.C. § 101(40).
[13] 11 U.S.C. § 101(52).

1, 20 (1977); and see Houlton Citizens' Coal. V. Town of Houlton, 175 F.3d 178, 191 (1st Cir. 1999) (dividing the second inquiry into two subparts: whether there is a legitimate public purpose for the state action and whether the adjustment of contractual obligations is reasonable and necessary to accomplishing that purpose.)

- **Unconstitutional Taking**: Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation" ("Takings Clause"). The Takings Clause applies to the States, and to the Commonwealth of Puerto Rico, by virtue of Section 1 of the Fourteenth Amendment. Creditors are likely to assert that the public corporation's use of cash collateral (including revenues) amount to a taking without just cause.

Indeed, certain creditors who allege that they are holders of bonds issued by PREPA, have already commenced litigation in federal court in the Commonwealth of Puerto Rico in an action styled "*Franklin California Tax-Free Trust (for the Franklin California Intermediate-Term Tax Free Income Fund, et al. v. The Commonwealth of Puerto Rico"*, Case. No. 14-1518. Additional litigation in federal and state court, both in the Commonwealth and off-island will likely ensue.

Debt Enforcement Act Is Substantively Different From the Bankruptcy Code

The Senate bill for the Debt Enforcement Act indicates that the act is modeled on chapters 9 and 11 of the Bankruptcy Code, and admonishes stakeholders to refer to case-law interpreting the provisions of chapters 9 and 11 of the Bankruptcy Code, to the extent applicable, for the purpose of interpreting the provisions of chapter 3 of the Debt Enforcement Act.

If the intent was to "provide stakeholders with familiarity in a process wrought with uncertainty"[14], the Debt Enforcement Act fails. While adopting certain provisions from the Bankruptcy Code, the Debt Enforcement Act omits several key provisions that are favorable and protective of creditors' rights. These rights ensure that the burdens of a restructuring are shared amongst all stakeholders including the debtor, its creditors and other parties. Thus, the Debt Enforcement Act creates even more instability and uncertainty for creditors and stakeholders. The consequence of this uncertainty will result in significant litigation, which will only add to the cost and create delays in resolving the financial distress of these public corporations.

Examples of just a few of the provisions in the Debt Enforcement Act that are materially different than those under the Bankruptcy Code include the following:

[14] Debt Enforcement Act at 163.

- **No Safe Harbor Protection for Derivative Contracts** (Debt Enforcement Act sections 205(c), 325(a))**.** The Bankruptcy Code provides special protection to parties that have entered into swap agreements, repurchase agreements and other derivative contracts, including the ability to terminate the derivative contract based upon the insolvency, bankruptcy or financial condition of a debtor (these provisions are commonly referred to as "ipso facto clauses"). Under the Debt Enforcement Act, however, there is no exception permitting a counter-party to terminate a derivative contract based on the public corporation's insolvency, financial condition or the commencement of a proceeding under the Debt Enforcement Act. Additionally, under section 365 of the Bankruptcy Code, a debtor is only able to assume or reject contracts that are "executory" (defined generally as contracts for which performance remains due by both parties). Under the Debt Enforcement Act, however, the public corporation may reject any contract, whether or not it is executory.

- **Limited Protection Against Dissipation of Cash Collateral, Including "Revenues"** (Debt Enforcement Act sections 129, 207, 323, 324)**.** Under the Bankruptcy Code, a debtor may not use cash collateral without the consent of the secured party or court order, and the court may condition the debtor's use of cash collateral on providing the secured creditor with adequate protection. The Bankruptcy Code provides special protections to creditors who hold liens on "special revenues" in cases involving chapter 9 municipalities. Under chapter 9 of the Bankruptcy Code, special revenues received by a chapter 9 debtor after the commencement of a chapter 9 case remain subject to a prepetition pledge. Additionally, the filing of a chapter 9 petition does not operate to stay the application of pledged special revenues to bondholders holding liens on the pledged revenues. Thus, an indenture trustee or other paying agent may apply pledged revenues to payments coming due or distribute the pledged revenues to bondholders without violating the automatic stay. Under the Debt Enforcement Act, however, debtor public corporation may use property, including cash collateral (such as revenues) as necessary to perform public functions. The Debt Enforcement Act contains the following provisions:

    - The court may approve the use or transfer of property without providing adequate protection of an entity's interest in the property if and when the police power justifies and authorizes the temporary or permanent use or transfer of property without adequate protection.

    - Adequate protection of a secured creditor's interest in revenues is not required if the pledge of revenues is a "net pledge" (section 207(b)), if the pledge provides that current expenses or operating expenses may be paid prior to the payment of principal, interest or other amounts owed to a creditor. The debtor public corporation will not be required to provide adequate protection to the extent that sufficient revenues are unavailable for payment of such principal, interest or other amounts after full payment of the current expenses or operating expenses.

- **Right to Prime Existing Lien on Collateral** (sections 206, 322)**.** Under the Bankruptcy Code, a debtor is able to obtain credit secured with a lien equal or senior to an existing lien only if the existing lien holder receives adequate protection. Under the Debt Enforcement Act, a public corporation may obtain credit during the chapter 2 or 3 proceeding secured by a lien equal or senior to existing liens (a "priming lien") without providing adequate protection to the entity with an interest in the collateral if the credit is necessary for the public corporation to perform its public functions.

- **Right to Sur-Charge Collateral** (Debt Enforcement Act section 129(c)). Under the Bankruptcy Code, a debtor is able to recover from a secured creditor the costs actually incurred to preserve, maintain or dispose of property, but only if the expense is for the benefit of the secured creditor. Under the Debt Enforcement Act, a debtor public corporation may recover from or use collateral for the reasonable, necessary costs and expenses of preserving, or disposing of, property, including payment of expenses incurred by the debtor public corporation pursuant to or in furtherance of the Debt Enforcement Act. The sur-charge, therefore, does not appear to be limited to actual, reasonable costs incurred to preserve, maintain or dispose of collateral for the direct benefit of the secured creditor.

If the goal of the Debt Enforcement Act, in part, was to stabilize the capital market and insulate the Commonwealth of Puerto Rico's general obligation and COFINA bonds from the financial distress of the Commonwealth's other public corporations, that goal has failed. In fact, the rating agencies have downgraded the securities issued by the Commonwealth and the public corporations, in part, because the adoption of the new law made a restructuring or default more likely.

In summary, the Debt Enforcement Act attempts to balance the obligations of its financially distressed public corporations to repay its creditors against those corporations' obligations to provide public services. Because these entities are not eligible to restructure their obligations under chapter 9 or 11 of the Bankruptcy Code, the Commonwealth attempted to develop a mechanism as a matter of "local" or "Commonwealth" law. Despite its efforts, bondholders and other creditors will not draw comfort from their familiarity or experience with the Bankruptcy Code. While some concepts may have been drawn from the Bankruptcy Code, the law is significantly different than that which exists under the Bankruptcy Code. Over the next few weeks and months, such bondholders and others will be poring over this novel and unfamiliar act to understand how the Debt Enforcement Act will affect their rights. Ultimately, the courts will interpret and determine the validity of the act.