

(H. B. 959)

(No. 42-2021)

(Approved September 16, 2021)

AN ACT

To amend subsection (b) of Section 5 and the title, the first paragraph, and subsection (s) of Section 8 of Act No. 2-2017, known as the “Puerto Rico Fiscal Agency and Financial Advisory Authority Act”; amend Section 205, eliminate paragraphs (xvi) and (xvii), and renumber paragraphs (xviii) through (xxiv) as (xvi) through (xxii) of subsection (a) of Section 206 of Act No. 5-2017, as amended, known as the “Puerto Rico Financial Emergency and Fiscal Responsibility Act”; and amend Section 12 of Act No. 34-2014; repeal Act No. 33 of December 7, 1942, in order to strengthen the constitutional prerogatives of the Legislative Assembly to approve the General Budget and include this Branch in the Fiscal Plan approval process; provide for the expiration of any prior legislative authorizations for the issuance of debt obligations and, for such purposes, define the scope of Acts Nos. 34-2014, 45-2013, 47-2013, 242-2011, and 74-2007; comply with the legislative duties to guarantee the sound administration of the democratic system of government and ensure the wellbeing of the people of Puerto Rico; and for other related purposes.

STATEMENT OF MOTIVES

The constitutional design of Puerto Rico is based on the republican form of government adopted by the Constitution of the United States of America (USA). Under this framework, the powers are divided into three main branches, to wit, the Judicial Branch, the Executive Branch, and the Legislative Branch, for the purpose of implementing a separation of powers that prevents the concentration of power in a single entity. This government framework defines the responsibilities of each Branch and enables the implementation of a system of checks and balances thus allowing for effective oversight.

The Legislative Assembly has the “power and duty to oversee the execution of the public policy and the conduct of department heads through the exercise of its vast powers which involve: investigation, summoning, public hearings, appropriation of funds and approval of the General Budget Costs.” *Hernández Agosto v. Romero Barceló*. 112 D.P.R. 407, 408 (1982). Furthermore, with regard to its oversight duty, the Supreme Court has held that “the reasonable and necessary resources, plus the same opportunities, must be provided at all critical stages of the legislative process.” *Hernández Torres v. Gobernador*, 129 DPR 824, 846 (1992); *Rexach Benítez v. Gobernador*, 119 D.P.R. 521, 536 (1987) (Negrón García, dissenting opinion). This power is the unequivocal manifestation of the investigation power which furthers the discharge of nondelegable duties such as the informed control of the legislative process.

The importance of the investigative power of the Legislative Branch is such that the Supreme Courts of the United States and Puerto Rico have recognized it as an inherent power of the legislative function. Our Supreme Court has always stressed that “the power of inquiry was a sequel to, and an indispensable part of the very power to legislate.” *Peña Clos v. Cartagena Ortiz*, 114 D.P.R. 576, 587 (1983). For an example of the transcendence and vastness of this power, *see*, for example, *Tenney v. Brandhove* 341 U.S. 367 (1951); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Killbourn v. Thompson*, 103 U.S. 168 (1880); *Pueblo v. Pérez Casillas*, 117 D.P.R. 380, 395 (1986); *Banco Popular v. Corte de Distrito de San Juan*, 63 D.P.R. 66, 80 (1944).

The preparation, establishment, and implementation of the General Budget of Puerto Rico is the result of the legislative process. Thus, it is evident that the Legislative Assembly has another inherent power: the power to prepare and approve the General Budget. It can be no other way given that the legislative process is the *raison d’être* of the Legislative Branch.

The democratic nature of our republican form of government originated in the Constitutional Convention which was the precursor of our Legislative Assembly. Thus, the Legislative Branch is the only Branch that is exclusive to democratic systems of government, because its processes are initiated, directed, and completed by its members who directly represent the People of Puerto Rico.

The power to control and design the General Budget through the legislative process has been recognized as a power of the Legislative Branch even before the Constitution of the Commonwealth of Puerto Rico integrated it into our system of government. In this regard, our Supreme Court held that:

It is clearly the legislative province to keep a general control over the expenditure of the public funds [...] so long as no money is paid out without a previous appropriation for that purpose. While it thus holds the purse strings, it controls the whole subject as completely as its proper functions under the constitution demand.

Ortiz Reyes v. MacLeod, 56 D.P.R. 871, 876 (1940).

In *Ortiz Reyes*, the Supreme Court of Puerto Rico upheld the creation of government positions in the budget bill, provided, that such positions were included as part of the ordinary expenses of government departments. *Id.*, at pp. 877-878. The budget approval process should follow the “preexisting legislative rules [and be submitted] to an active review by the representatives of the People, that is the Legislative Assembly’s authority. The participation of the Legislative Assembly during this process ensures that the public programs adopted have a real and effective democratic foundation.” [Translation supplied] *Presidente de la Cámara v. Gobernador*, 167 D.P.R. 149, 176-177 (2006) (Rodríguez Rodríguez, dissenting opinion).

While it is clear that the Governor has the constitutional duty to report to the Legislative Assembly the state of the Commonwealth, which includes revenues and budget projections, the Legislative Branch’s authority over budgetary issues is

broader. Legislative participation is established as a *sine qua non* requirement for the approval of the Island's Budget within the code of laws of Puerto Rico.

The 18th Legislative Assembly approved a series of measures through which it relinquished several of its main legislative prerogatives in perpetuity. Its inherent power to prepare and oversee all matters pertaining to the General Budget of Puerto Rico was affected after relinquishing these prerogatives through measures such as Act No. 2-2017, known as the "Puerto Rico Fiscal Agency and Financial Advisory Authority Act"; Act No. 3-2017 known as the "Act to Address the Economic, Fiscal, and Budget Crisis to Guarantee the Operations of the Government of Puerto Rico"; and Act No. 5-2017, as amended, known as the "Puerto Rico Financial Emergency and Fiscal Responsibility Act," among others.

Act No. 2-2017, *supra*, created the Puerto Rico Fiscal Agency and Financial Advisory Authority (FAFAA) and provides all that pertains to its duties and powers. The Act establishes FAFAA as the executive entity responsible for assisting the Chief Executive and Governor of Puerto Rico in implementing the Puerto Rico Oversight, Management and Economic Stability Act, Pub. L. 114-187 (PROMESA). More specifically, FAFAA is the government entity responsible for the collaboration, communication, and cooperation between the Government of the Commonwealth of Puerto Rico and the Fiscal Oversight Board (FOMB), imposed under PROMESA.

Among PROMESA's multiple provisions, it is worth noting that it establishes as a requirement the preparation of a Fiscal Plan that is consistent with the revenue projections of the General Fund and other special revenue budget items, as well as with any notices of violation issued by the FOMB in response thereto. The Fiscal Plan establishes the parameters for future economic and government reforms. PROMESA requires that such projections be notified to the Governor so that the Governor may, subsequently, prepare a draft of the budget that is consistent with

such revenue projections. During this process, the FOMB and the Governor, with the help of FAFAA shall prepare the Fiscal Plan that shall be subsequently notified to the Legislative Assembly. The Legislative Branch shall then approve the General Budget subject to the Plan.

The parameters of the Fiscal Plan are legally binding. As a result, the FOMB is empowered to file a claim in Federal Court for any noncompliance with or deviation from its guidelines. PROMESA explicitly authorizes the FOMB to, among other things, appear before the Federal Court to prevent the implementation of approved legislation and to request the imposition of the government reforms recommended through said Plan. In other words, a Fiscal Plan certified by the FOMB becomes legally binding without the participation of the elected officials. Therefore, to include the Legislative Assembly in the process of designing the Fiscal Plan is a democratic matter. Said participation partially compensates for the fact that our system of government was altered by the approval of PROMESA.

Even though PROMESA establishes that the Governor is the one who participates in this exchange with the FOMB, it does not prohibit or rule out the participation of the Legislative Branch in such process. The design of PROMESA is based on the premise that there is constant collaboration and communication between both branches of government. While far from prohibiting it, Act No. 2 delegates this power solely to FAFAA and reduces the role of the Legislative Assembly to a very small part during the Budget legislation process. In practical terms, the Governor and the Board establish the parameters that shall later govern the Legislative Assembly when approving not only the budget, but any other legislative measure.

For the purpose of integrating itself and collaborating during the process of creating, supervising, and overseeing the Fiscal Plan and the General Budget, this Legislative Assembly deems it necessary to refocus the aforementioned delegation

of powers in order to introduce safeguards that ensure a Fiscal Plan and General Budget with a democratic design. The constitutional mandate for collaboration is more important than ever in view of the electoral mandate for diversity and oversight.

Act No. 5-2017 grants the Governor the unilateral authority to direct, through executive orders, the issuance of debt obligations, the reprogramming of funds, the sale of assets, and other actions without the intervention of the Legislative Assembly. This statute confers broad emergency powers to the Governor in order for the Governor to be able to address and resolve the financial emergency of the Commonwealth of Puerto Rico. However, four years have elapsed since its approval and the fiscal problems have not abated and the financial emergency continues to impair the rendering of essential services to the citizens of Puerto Rico.

The emergency powers conferred to the Governor include the power to “authorize the borrowing of money by a government entity within the Executive Branch” and “approve or disapprove of the issuance of debt obligations of a government entity within the Executive Branch.” While both powers are contingent upon a declaration of financial emergency, Act No. 5, *supra*, grants the Governor broad powers to decree, via executive orders, states of emergency of up to six (6) consecutive months. The power to issue debt obligations was also granted through other legislative measures that are no longer in effect and whose implementation would contravene the provisions of PROMESA. The issuance of debt obligations requires the approval of Puerto Rico’s elected officials who must consent to the issuance of such debt.

The role of the Legislative Assembly is to formulate the rules regarding the various aspects of our society while always honoring the will of the People. Therefore, while performing its role, a Legislative Assembly is prohibited from

binding future Legislative Assemblies in perpetuity. Otherwise, a Legislative Assembly whose term has expired would have the power to limit the exercise of the democratic will of future Legislative Assemblies. Considering that this Legislative Assembly's mission is one of collaboration and oversight, we deem it necessary to amend Acts Nos. 2-2017, 5-2017, and 34-2014 to facilitate the exercise of the legislative prerogatives concerning the representation of the People during the process of governing, pursuant to its democratic mandate, while rendering ineffective the previously described inappropriate delegations.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Section 1.- Subsection (b) of Section 5 of Act No. 2-2017, as amended, is hereby amended to read as follows:

“Section 5.- Purposes, Authorities, and Powers of the Authority.

(a) ...

(b) To such effect, the Authority is hereby empowered to collaborate in conjunction with the Governor of Puerto Rico and his representatives in the creation, execution, supervision, and oversight of any Fiscal Plan and any Budget within the Executive Branch, as such terms are defined in PROMESA. The Governor, on his own motion or through the Authority, shall notify the Legislative Assembly of any revenue projection that has been notified to or by the Financial Oversight Board, as well as of any Notice of Violation or related documents, as defined in PROMESA, so that the Legislative Assembly is informed of the creation and approval process of any Fiscal Plan, whether or not it has been adjusted, when it notifies the Board of any proposal. The notification required under this Section shall be sent to the Presiding Officers of the Legislative Assembly. Likewise, the Authority shall be the government entity charged with supervising, executing, and administering the Fiscal Plan approved and certified in accordance with PROMESA and shall ensure that all the entities of the Executive Branch comply

with the duly approved Fiscal Plan. In that sense, the Authority shall develop a comprehensive operational, managerial and/or administrative audit program aimed at overseeing compliance by every entity of the Executive Branch with the Fiscal Plan approved in accordance with PROMESA. The Legislative and Judicial Branches shall be the only branches responsible for overseeing compliance by their respective entities with any Fiscal Plan certified in accordance with PROMESA.

(c) ...

(d) ...”

Section 2.- The title, the first paragraph, and subsection (s) of Section 8 of Act No. 2-2017, as amended, are hereby amended to read as follows:

“Section 8.- Authority to Oversee Compliance with the Certified Budget and the Fiscal Plan Approved Pursuant to PROMESA; Legislative Assembly Prerogative of Oversight.

For the purpose of ensuring compliance with, and the enforcement of, the Fiscal Plan approved and the Budget certified, pursuant to PROMESA, there is hereby conferred upon the Authority, and the Authority may have and may exercise, all the rights and powers that are necessary or convenient to achieve such purposes, including the following:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

- (j) ...
- (k) ...
- (l) ...
- (m) ...
- (n) ...
- (o) ...
- (p) ...
- (q) ...
- (r) ...

(s) The Authority, in conjunction with the Department of the Treasury and the Office of Management and Budget, may establish by regulations or administrative order its position or establish a commission to coordinate the policies and processes relating to liquidity and cash management for any entity of the Government of Puerto Rico. To such effect, the Authority may, pursuant to PROMESA and the provisions of this Act, establish by administrative order which of the unused Budget items of any entity of the Executive Branch, at the end of each fiscal year, shall be credited to the Budget of the corresponding entity of the Executive Branch for the subsequent fiscal year or years or allocated as the Authority deems necessary. Under no circumstance may FAFAA intervene with the budget items appropriated to the Legislative Branch, the Judicial Branch or any other agency that is fiscally autonomous by law.

If the FOMB determines that it shall not approve a reappropriation or reprogramming of budget funds carried out pursuant to the provisions of this Act, during or after the fiscal year in question, or that it shall not evaluate a petition from the Authority to such effect because it believes it to be a matter in which it should not intervene; no entity, agency, or instrumentality of the Executive Branch may reappropriate, among agencies, the budget items appropriated under any Joint

Resolutions that are part of the General Budget of Puerto Rico. The aforementioned prohibition shall not apply to cases in which the amount of funds to be reappropriated during a fiscal year does not exceed \$20 million or to interagency transfers needed to ensure the operations of the particular entity in question.

If any provision of Act No. 3-2017, as amended; Act No. 5-2017, as amended; Act No. 147 of June 18, 1980, as amended, known as the “Office Management and Budget Organic Act”; or of any other law, that allows for the issuance of executive orders that divert funds from one government instrumentality, agency, or entity to another, or to the General Fund, is inconsistent or incompatible with this Act, the provisions of this Act shall prevail. However, the foregoing shall not apply to federal funds granted by the Federal Government or any federal instrumentality, agency or entity to any government instrumentality, agency or entity of the Executive Branch; provided, that the federal statute or regulatory provision under which such funds are earmarked, identified, or disbursed entrusts the administration and distribution thereof to the Governor or any specific entity of the Executive Branch.

FAFAA shall submit a report to the Presiding Officers of the Legislative Assembly on the transfer not later than thirty (30) days after such transfer or reappropriation has been made pursuant to this Section. The report shall include, at a minimum, the agency of origin, the agency to which the funds have been transferred, the amount of the appropriation, and the Joint Resolution under which they were appropriated, as well as the total surplus and the amount of funds transferred.

(t) ...

(u) ...

(v) ...”

Section 3.- Section 205 of Act No. 5-2017, as amended, is hereby amended to read as follows:

“Section 205.- Issuance by Government Entity of Evidence of Debt.

Nothing in this Act prohibits or prevents any government entity, whether during the Emergency Period or not, from issuing evidence of debt to consenting holders of any debt obligation, any debt instrument or other evidence of debt, in payment, renewal, or refunding of or in exchange for such consenting holder’s debt obligation, on terms that otherwise comply with this Act and any other applicable law, including, but not limited to, PROMESA. Providing such evidence may not, and shall not, constitute the issuance of new debt under the Act.

Any statutory provision included in any law, regulation, joint resolution, or executive or administrative order authorizing the Governor, the Secretary of the Treasury, or any other head of agency to issue debt, bonds, or obligations of any kind is hereby repealed. This shall apply to laws such as Acts Nos. 34-2014, 45-2013, 47-2013, 242-2011, and 74-2007, as amended, among others.”

Section 4.- Paragraphs (xvi) and (xvii) of Section 206 of Act No. 5-2017, as amended, are hereby eliminated and paragraphs (xviii) through (xxiv) are hereby renumbered as (xvi) through (xxii).

Section 5.- Section 12 of Act No. 34-2014, as amended, is hereby amended to read as follows:

“Section 12.- The authority to issue refinancing bonds conferred by any legislation in effect that is inconsistent with the provisions of Section 2 of Article VI of the Constitution of the Commonwealth of Puerto Rico is hereby repealed.”

Section 6.- Act No. 33 of December 7, 1942, is hereby repealed.

Section 7.- Severability.

This Act is hereby approved in the exercise of enforcing the constitutional prerogatives of the Legislative Branch, as conferred by Article III of the Constitution of the Commonwealth of Puerto Rico.

However, if any clause, paragraph, subparagraph, sentence, word, letter, article, provision, section, subsection, title, chapter, subchapter, heading, or part of this Act were held to be void or unconstitutional, the ruling, holding, or judgment to such effect shall not affect, impair, or invalidate the remainder of this Act. The effect of said holding shall be limited to the clause, paragraph, subparagraph, sentence, word, letter, article, provision, section, subsection, title, chapter, subchapter, heading, or part of this Act thus held to be void or unconstitutional.

If the application to a person or a circumstance of any clause, paragraph, subparagraph, sentence, word, letter, article, provision, section, subsection, title, chapter, subchapter, heading, or part of this Act were held to be void or unconstitutional, the ruling, holding, or judgment to such effect shall not affect or invalidate the application of the remainder of this Act to such persons or circumstances where it may be validly applied.

It is the express and unequivocal will of this Legislative Assembly that the courts enforce the provisions and application thereof to the greatest extent possible, thus honoring the constitutional mandates, even if it renders ineffective, voids, invalidates, impairs, or holds to be unconstitutional any part thereof, or even if it renders ineffective, invalidates, or holds to be unconstitutional the application thereof to any person or circumstance. This Legislative Assembly would have approved this Act regardless of any determination of severability that the Court may make.

Section 8.- Effectiveness.

This Act shall take effect upon its approval.

CERTIFICATION

I hereby certify to the Secretary of State that the following **Act No. 42-2021 (H. B. 959)** of the **2nd Regular Session** of the **19th Legislative Assembly of Puerto Rico**:

AN ACT amend subsection (b) of Section 5 and the title, the first paragraph, and subsection (s) of Section 8 of Act No. 2-2017, known as the “Puerto Rico Fiscal Agency and Financial Advisory Authority Act”; amend Section 205, eliminate paragraphs (xvi) and (xvii), and renumber paragraphs (xviii) through (xxiv) as (xvi) through (xxii) of subsection (a) of Section 206 of Act No. 5-2017, as amended, known as the “Puerto Rico Financial Emergency and Fiscal Responsibility Act”; and amend Section 12 of Act No. 34-2014; repeal Act No. 33 of December 7, 1942, in order to strengthen the constitutional prerogatives of the Legislative Assembly to approve the General Budget and include this Branch in the Fiscal Plan approval process; provide for the expiration of any prior legislative authorizations for the issuance of debt obligations and, for such purposes, define the scope of Acts Nos. 34-2014, 45-2013, 47-2013, 242-2011, and 74-2007; comply with the legislative duties to guarantee the sound administration of the democratic system of government and ensure the wellbeing of the people of Puerto Rico; and for other related purposes.

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, on this 29th day of September, 2023.

Mónica Freire-Florit, Esq.
Director