

**GOVERNMENT OF PUERTO RICO  
PUERTO RICO PUBLIC SERVICE REGULATORY BOARD  
ENERGY BUREAU**

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In re:  
PUERTO RICO ELECTRIC POWER  
AUTHORITY RATE REVIEW

Case. No.: NEPR-AP-2023-0003

**PREPA'S INITIAL BRIEF IN RESPONSE TO THE LEGAL AND POLICY QUESTIONS  
IN THE "HEARING EXAMINER'S ORDER ON EXHIBITS, MISCELLANEOUS POST HEARING  
MATTERS, AND LEGAL ISSUES**

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**TO THE HEARING EXAMINER,**

**COMES NOW**, the Puerto Rico Electric Power Authority ("PREPA"), through its undersigned legal counsel, and in response to certain legal and policy questions posed in the *Hearing Examiner's Order on Exhibits, Miscellaneous Post-Hearing Matters, and Legal Issues*, and very respectfully, states and prays as follows:<sup>1</sup>

**II. PRELIMINARY STATEMENT**

1. On December 22, 2025, the Puerto Rico Energy Bureau of the Public Service Regulatory Board (the "Energy Bureau") notified the *Hearing Examiner's Order on Exhibits, Miscellaneous Post-Hearing Matters, and Legal Issues* ("Order") whereby the Hearing Examiner, Scott Hempling ("Hearing Examiner"), required the parties to address the legal and policy questions therein.

2. PREPA hereby submits its responses to certain of the questions posed in the Order, particularly those that PREPA understands to be directed to it. PREPA

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<sup>1</sup> The filing of this brief is made without waiver of, and expressly subject to, PREPA's arguments set forth in its Motion for Reconsideration and in Compliance with Resolution and Order of February 9, 2026, filed on February 21, 2026. PREPA expressly preserves all rights, positions, and objections asserted therein.

anticipates that several of the remaining questions are more appropriately addressed in the first instance by its private operators, LUMA Energy, LLC and LUMA Energy ServCo, LLC (jointly, "LUMA") and/or Genera PR, LLC. Accordingly, PREPA will address those matters, as appropriate, in its reply brief, together with any responses submitted by other stakeholders that PREPA determines warrant a reply.

3. PREPA further notes that several of the questions posed in the Order are framed in broad terms and lack sufficient factual context. Accordingly, PREPA provides the responses set forth herein based on its current understanding of the issues presented. By doing so, PREPA does not waive, and expressly reserves, its right to revise or supplement its legal positions should additional or different facts emerge in the course of these proceedings or other proceedings. PREPA also expressly reserves all rights to challenge any determinations of the Hearing Examiner or the Energy Bureau in this proceeding.

### III. RESPONSES

- A. **Question No. 3(a): Under the statutes, what is the extent of the Energy Bureau's duty, and the extent of its discretion, to use affordability as a criterion in determining (a) the revenue requirement, (b) revenue allocation, and (c) rate design?**

Regardless of how the Energy Bureau or other parties view the role of affordability in determining rates under Act No. 57-2014 (as amended by Act No. 17-2019, "Act 57"), the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA")<sup>2</sup> preempts the Energy Bureau's consideration of affordability as it pertains to PREPA's legacy debt obligations. PROMESA, as applied here, preempts the Energy Bureau from making *any* determinations as it pertains to PREPA's legacy

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<sup>2</sup> 48 U.S.C. §§ 2101-2241.

debt obligations, whether based on affordability or any other factor.<sup>3</sup> The allowance, amount, extent, priority, or treatment of PREPA's legacy debt obligations is reserved exclusively to the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board") under PROMESA Title II<sup>4</sup> and to the Oversight Board and Title III Court under PROMESA Title III.<sup>5</sup> Affordability is an appropriate factor for both the Oversight Board and the Title III Court to consider in evaluating what PREPA's current and future obligations are with respect to its legacy debt obligations.

The Energy Bureau's November 13 Resolution and Order implicitly recognized that it should not address the affordability of legacy debts in ruling that no testimony or cross-examination would be permitted on the role of legacy debt in any practicability analysis.<sup>6</sup> The Energy Bureau should, therefore, strike any parties' attempt to undermine its prior order and refrain from making affordability findings related to PREPA's legacy debt obligations.

**B. Question No. 4(a): Does PROMESA preempt the Energy Bureau from creating a placeholder rider with a zero amount?**

As the Energy Bureau found in the July 31 Provisional-Rate Order:

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<sup>3</sup> See PREPA'S Motion to the Energy Bureau to Vacate Hearing Examiner's Orders Regarding Consideration of Legacy Bond Debt in Rate Case, *In re P.R. Elec. Power Auth. Rate Review*, Case No. NEPR-AP-2023-0003 (P.R. Energy Bureau Nov. 10, 2025); PREPA's Response to Hearing Examiner's Orders Regarding Consideration of Legacy Obligations in Rate Case Hearing, *In re P.R. Elec. Power Auth. Rate Review*, Case No. NEPR-AP-2023-0003 (P.R. Energy Bureau Oct. 27, 2025); PREPA's Motion in Compliance with the Hearing Examiner's September 19th Order Regarding Rate Case Panels and PREPA's Objections to the Consideration of Repayment of Any Legacy PREPA Obligations and "Legacy Debt Rider", *In re P.R. Elec. Power Auth. Rate Review*, Case No. NEPR-AP-2023-0003 (P.R. Energy Bureau Sept. 26, 2025).

<sup>4</sup> 48 U.S.C. §§ 2141–2147. The Hearing Examiner previously recognized that the "effect of [fiscal plan] certification is to establish fiscal parameters, expenditure limits, budget caps, all of which will be binding on PREPA and on [the Energy Bureau] . . ." Tr. of Hr'g at 6:19-22, *P.R. Energy Comm'n v. Fin. Oversight & Mgmt. Bd. for P.R.* (*In re Fin. Oversight & Mgmt. Bd. for P.R.*), Adv. Pro. No. 18-00021-LTS (D.P.R. Apr. 2, 2018), Dkt. No. 74.

<sup>5</sup> 48 U.S.C. §§ 2161–2175.

<sup>6</sup> Resolution and Order, *In re P.R. Elec. Power Auth. Rate Review*, Case No. NEPR-AP-2023-0003, at 2 (P.R. Energy Bureau Nov. 13, 2025) (holding that no testimony or cross-examination would be permitted on the role of legacy debt in any practicability analysis).

“In the current legal context, with PREPA in bankruptcy under Title III of PROMESA, PREPA is under a stay of debt payments and currently has no enforceable obligation to pay its legacy debts.”<sup>7</sup>

And, as *PREPA's Brief on Rate Design*<sup>8</sup> and *PREPA's Reply Brief on Rate Design*<sup>9</sup> established, there is no legal or practical reason for the Energy Bureau to create a placeholder rider (the “LDR”) with a zero amount. Any nominal advantages are outweighed by the drawbacks. There is also no evidence in the record on which the Energy Bureau can formulate such a rider and no evidence as to what it would be comprised of other than a blank “piece of paper.”<sup>10</sup> Therefore, the Energy Bureau can appropriately avoid the legal question of whether PROMESA preempts the Energy Bureau from creating a placeholder rider with a zero amount by deciding not to implement such a rider on the grounds that it is unwarranted.

However, if the Energy Bureau proceeds to formulate a LDR, even a placeholder could be preempted. PROMESA preempts Energy Bureau actions that pertain to the allowance, amount, extent, priority, or treatment of PREPA's legacy debts that are inconsistent with (1) PREPA's certified fiscal plan under Title II of PROMESA or (2) any determinations of the Title III court. The Oversight Board has

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<sup>7</sup> See Resolution and Order on Establishment of Fiscal Year 2026 Provisional Rates and Fiscal Year 2026 Provisional Budget, *In re P.R. Elec. Power Auth. Rate Review*, No. NEPR-AP-2023-0003, at 31–32 (P.R. Energy Bureau July 31, 2025). While Act 57 appears to authorize the Energy Bureau to consider legacy debt to “guarantee that PREPA meets its obligations to bondholders,” Act 57, § 6.3(m), at this time, the obligation to bondholders is *nothing*. PREPA's fiscal plan explicitly prohibits its collections on account of legacy debt. See *February 2025 Fiscal Plan for the Puerto Rico Electric Power Authority* at 118 (available at <https://drive.google.com/file/d/1WksRhtfmoLvaZFb-5pUNkFXGEi3t6vp/view?usp=sharing>) (the “Fiscal Plan”). Further, the Bondholder's claims are currently barred by the automatic stay. See 11 U.S.C. § 362 (as incorporated by 48 U.S.C. § 2161 (a)). Only upon a ruling on the treatment of legacy debt in the Title III court, consistent with a certified fiscal plan, will any obligations arise.

<sup>8</sup> *PREPA's Brief on Rate Design, In re P.R. Elec. Power Auth. Rate Review*, Case No. NEPR-AP-2023-0003 (P.R. Energy Bureau Feb. 17, 2026).

<sup>9</sup> *PREPA's Reply Brief on Rate Design, In re P.R. Elec. Power Auth. Rate Review*, Case No. NEPR-AP-2023-0003 (P.R. Energy Bureau Mar. 3, 2026).

<sup>10</sup> Dec. 16, 2025 Hr'g Tr. at 265:14–266:11.

made clear that this applies even to a placeholder LDR; the Oversight Board informed PREPA of its view that:

. . . any authority of [the Energy Bureau] under territorial law to establish, approve, or compel a “Legacy Debt Rider” **of any kind** or otherwise seek to direct or influence the amount of PREPA’s repayment of legacy debt obligations is preempted.<sup>11</sup>

This provides another reason the Energy Bureau should refrain from authorizing a LDR until a confirmed Title III plan of adjustment (which, by statute, must be consistent with PREPA’s then-certified fiscal plan) defines PREPA’s obligations. Until then, creating any LDR—even at zero—would invite unnecessary litigation (at PREPA’s expense) for no justifiable purpose.

The preemption doctrine establishes that federal law prevails over state laws or regulations when Congress expressly preempts state law or when an inconsistency arises between state and federal law.<sup>12</sup> The Supreme Court has held that state (and by extension, territory) law can be preempted by a federal law when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>13</sup> When considering what constitutes a sufficient obstacle for conflict preemption to arise, courts look to whether a federal law’s “operation within its

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<sup>11</sup> See November 7, 2025, communication from counsel for the Oversight Board, attached hereto as Exhibit A (emphasis added).

<sup>12</sup> U.S. Const. art. VI, cl. 2 (“the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); see, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (“State action may be foreclosed by express language in a congressional enactment . . . [or, *inter alia*,] implication because of a conflict with a congressional enactment.”); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“[E]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.”). Preemption doctrine’s treatment of state law extends to territory law, as well. See *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 323 (1st Cir. 2012) (“For preemption purposes, the laws of Puerto Rico are the functional equivalent of state laws.”); *Centro de Periodismo Investigativo v. Fin. Oversight & Mgmt. Bd. for P.R.*, CIVIL NO. 17-1743, 2018 WL 2094375, at \*8 n.15 (D.P.R. May 4, 2018) (same). With this in mind, the remainder of this brief, for purposes of clarity, will use the case law’s treatment of state law under the preemption doctrine interchangeably with territory law.

<sup>13</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

chosen field . . . [is] frustrated and its provisions be refused their natural effect.”<sup>14</sup> Thus, to the extent that there is conflict between territory law and PROMESA, territory law must give way under both express and conflict preemption.

At this time the design of any LDR is undefined because there is no evidence as to whether, how, when, and to what extent any legacy debt obligations will be satisfied. And, there is no proposed form of LDR—and no information about what classes of rate-payers it would apply to (or not), what specific language it would include about the likelihood of a future rate increase, the timing of a potential rate increase, how long such a rate increase might last, or any other useful information it might contain. As such, it is impossible to predict whether a zero, placeholder LDR will be preempted.<sup>15</sup> Given the absence of any details regarding the LDR's form, the only certainty is that any LDR inconsistent with the certified fiscal plan or plan of adjustment will be preempted.<sup>16</sup>

Thus, even if the Energy Bureau could issue some form of permissible LDR, it would be susceptible to being preempted now if inconsistent with the certified fiscal plan, or later if inconsistent with a confirmed Title III plan. For example, in the event that a fiscal plan expressly disallows any legacy debt rider in the rate (as the current

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<sup>14</sup> *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941)).

<sup>15</sup> Notably, however, the Oversight Board has taken the position that any LDR would be preempted. See November 7, 2025, communication from counsel for the Oversight Board, previously submitted.

<sup>16</sup> *Roselló v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 330 F. Supp. 3d 685, 701 (D.P.R. 2018) (noting that budgets approved by the Oversight Board that are compliant with a fiscal plan have preemptive effect over Commonwealth laws); *Fin. & Mgmt. Oversight Bd. for P.R. v. Pierluisi Urrutia (In re Fin. & Mgmt. Oversight Bd. for P.R.)*, 650 B.R. 334, 341 (D.P.R. 2023) (“PROMESA empowers the Oversight Board to, among other things, certify the fiscal plans and budgets of the Commonwealth and its instrumentalities [and] override Commonwealth executive and legislative actions that are inconsistent with certified fiscal plans and budgets.” (quotations omitted)).

Fiscal Plan does<sup>17</sup>) or provides more specificity as to what the prohibition on “any kind” of legacy debt rider means, any prematurely-implemented LDR would be in direct conflict with the that fiscal plan, and therefore preempted, *even if it were set to zero*. In addition, to the extent a yet-to-be-defined LDR touches on any of the allowance, amount, extent, priority, or treatment of PREPA's legacy debts and is inconsistent with a ruling in the Title III court or a fiscal plan, it will be preempted. Setting the groundwork for that kind of fight is imprudent and unnecessary.

To be clear, if the Title III court concludes that a rate increase for the legacy debt in PREPA's plan of adjustment (consistent with the then-certified Fiscal Plan) is feasible, Bankruptcy Code § 1129(a)(6), as incorporated by 48 U.S.C. § 2161(a), requires the Energy Bureau's independent approval before the plan can be effective. The timing is critical: here, the Title III court must first conclude that the rate increase is feasible (and also consistent with the then-certified Fiscal Plan) before the Energy Bureau can act. Indeed, the Energy Bureau's own expert report warns that “developing a Legacy Debt Rider surcharge . . . would be more appropriately done after the Title III Court has determined what PREPA's Legacy Debt Obligation is.”<sup>18</sup>

**C. Question No. 4(b): Does the answer to Question No. 4(a) differ depending on whether the debt is bondholder debt or unsecured debt?**

No. The answer to Question No. 4(a) does not differ depending on whether the debt is bondholder debt or unsecured debt. At this juncture, any distinctions turn

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<sup>17</sup> See Fiscal Plan at 118 (“PREPA will not be able to impose any additional rate increases for debt service above the rates necessary to pay for the [fuel and purchased power] costs and maintenance costs.”).

<sup>18</sup> Expert Report of Ralph C. Smith & Mark Dady, *In re P.R. Elec. Power Auth. Rate Review*, No. NEPR-AP-2023-0003, at 26 (P.R. Energy Bureau Oct. 6, 2025).

on the contents of the certified fiscal plan and the future ruling of the Title III court with regard to legacy debt obligations.<sup>19</sup>

D. **Question No. 5(a): Does the just-and-reasonable standard authorize, or require, the Energy Bureau to include any pension costs in rates (either in base rates or in a rider)?**

Act 57, which creates a comprehensive framework for electric rate approval, requires the Energy Bureau to include pension costs in rates. Section 6.25(a) requires that rates be “just and reasonable” and consistent with sound fiscal and operational practices that ensure reliable service at the lowest reasonable cost.<sup>20</sup> That general standard, however, must be read together with the specific cost-recovery directive in Section 6.25(b), which requires the Energy Bureau to approve rates that:

(i) allows electric power service companies to recover all operating and maintenance costs, capital investments, financing costs, statutory costs, as well as any other cost lawfully incurred in the provision of electric power services and that, except for statutory costs, have been determined by the Bureau to be prudent, reasonable, and consistent with the sound fiscal and operating practices which help provide a reliable service at the lowest possible cost.<sup>21</sup>

The statute is mandatory. It does not grant discretion to exclude statutory costs or those that are lawfully incurred. Here, as explained below, the PayGo<sup>22</sup> pension funding constitutes payment of an expense that the Oversight Board, pursuant to

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<sup>19</sup> See response to Question No. 5(a) below distinguishing PREPA's pension obligations.

<sup>20</sup> Act 57, § 6.25(a).

<sup>21</sup> Act 57, § 6.25(b) (emphasis added).

<sup>22</sup> “PayGo” funding refers to go-forward pension obligation payments for PREPA's pensioners.

its powers under PROMESA, has directed PREPA to pay. Therefore, Section 6.25 requires its inclusion in PREPA's revenue requirement.

On February 6, 2025, Oversight Board certified PREPA's Fiscal Plan requiring pension obligations to be funded on a PayGo basis. The Fiscal Plan expressly identifies "Pension Expenses" as expenses to fund PayGo pension benefits and other post-employment benefits for retirees.<sup>23</sup> The PREPA Fiscal Plan further directs all stakeholders—including PREPA and the Energy Bureau—to take immediate action to implement a dedicated funding source.<sup>24</sup> The Fiscal Plan, therefore, does not merely acknowledge pension costs. It affirmatively requires PayGo funding as part of PREPA's operating structure.

On January 23, 2026, consistent with PREPA's Fiscal Plan, the Oversight Board certified PREPA's amended FY2026 budget, which includes approximately \$307.5 million in projected revenues allocated to pay PayGo pension funding.<sup>25</sup> This amount reflects only FY2026 funding requirements on a PayGo basis. It does not seek recovery of historical pension underfunding or legacy liabilities. Rather, it represents the net amount required to fund projected benefit payments to retirees after accounting for

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<sup>23</sup> Fiscal Plan at 97.

<sup>24</sup> *Id.* at 125 ("[A]ll stakeholders, including PREPA, AAFAF, PREPA ERS, and PREB, to take immediate action to implement a dedicated funding source during CY2025 while conclusion of the Title III case is pursued.").

<sup>25</sup> Resolution Certifying Third Revised Fiscal Year 2026 Budget for the Puerto Rico Electric Power Authority, at A-2 (Jan. 26, 2026) (available at [https://drive.google.com/file/d/1uhW54Jtj1OJH6EozY7faM\\_pwTms9LpXZ/view](https://drive.google.com/file/d/1uhW54Jtj1OJH6EozY7faM_pwTms9LpXZ/view)) ("PREPA's Certified FY2026 Budget").

expected inflows. Thus, the PayGo amount is not speculative. It is a defined, certified expenditure incorporated into PREPA's legally binding annual budget.<sup>26</sup>

Certified fiscal plans and budgets under PROMESA bind PREPA. The United States Court of Appeals for the First Circuit has held that fiscal plans and certified budgets carry mandatory legal force and preempt inconsistent Puerto Rico law.<sup>27</sup> Accordingly, PREPA is legally obligated to comply with the certified PREPA Fiscal Plan and Certified Budget's requirement for PayGo funding. Section 6.25(b), in turn, requires that rates permit recovery of all "lawfully incurred" costs. Because the certified Fiscal Plan mandates PayGo pension funding and PREPA's Certified FY2026 Budget establishes the annual amount required to satisfy that obligation, the resulting pension expense is a cost legally imposed on PREPA. Federal courts have confirmed that such fiscal plan and budget requirements are mandatory and enforceable.<sup>28</sup> The PayGo pension expense therefore constitutes a lawfully incurred cost that must be included in PREPA's revenue requirement. Properly understood, the just-and-

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<sup>26</sup> *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 330 F. Supp. 3d at 700 ("The power bestowed on the Oversight Board by Section 201(b)(1)(K) of PROMESA allows the Oversight Board to make binding policy choices for the Commonwealth, notwithstanding the Governor's rejection of Section 205 recommendations."); see also *Vázquez-Garced v. Fin. Oversight & Mgmt. Bd. for P.R.* (*In re Fin. Oversight & Mgmt. Bd. for P.R.*), 945 F.3d 3, 7, 7 n.4 (1st Cir. 2019) (holding that section 201 "reserv[es] to the Board the ultimate power to 'develop and submit' a fiscal plan, which is then deemed approved by the Governor" and that "Section 202 contains similar provisions for budgets").

<sup>27</sup> *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 945 F.3d at 8 ("In short, the district court concluded that PROMESA subsection 202(e)(4)(C) itself precludes the territorial government from reprogramming funds from prior fiscal years except to the extent such reprogrammed expenditures are authorized in a subsequent budget approved by the Board, and any Puerto Rico law to the contrary is preempted by virtue of PROMESA section 4. See 48 U.S.C. § 2103 ('The provisions of this chapter shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this chapter.').").

<sup>28</sup> *Id.*

reasonable standard does not merely allow the Energy Bureau to include the PayGo pension charge in rates—it requires it.

E. **Question No. 5(b): Does PROMESA preempt the Energy Bureau from including any pension costs in rates (either in base rates or in a rider)?**

PROMESA does not preempt the Energy Bureau from including pension costs in rates. To the contrary, because these costs are in PREPA's certified Fiscal Plan and certified Budget, PROMESA requires their inclusion.<sup>29</sup>

#### IV. CONCLUSION

**WHEREFORE**, PREPA respectfully requests that the Hearing Examiner take **NOTICE** of the arguments submitted herein.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 6<sup>th</sup> day of March 2026.

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<sup>29</sup> PREPA incorporates by reference sections II.B, II.C, and II.D of PREPA's Motion in Compliance with Hearing Examiner's Order Regarding PREPA Testimony and Legal Discussion on Pensions filed on November 21, 2025.

## CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE:** We hereby certify that this document was filed with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>, and notified via e-mail to the Hearing Examiner, Scott Hempling, [shempling@scotthemplinglaw.com](mailto:shempling@scotthemplinglaw.com); and to the attorneys of the parties of record, attorneys of the intervenors of record, and others: LUMA Energy, LLC and LUMA Energy ServCo, LLC; Margarita Mercado [margarita.mercado@us.dlapiper.com](mailto:margarita.mercado@us.dlapiper.com); Jan Albino, [Jan.AlbinoLopez@us.dlapiper.com](mailto:Jan.AlbinoLopez@us.dlapiper.com); Andrea Chambers, [andrea.chambers@us.dlapiper.com](mailto:andrea.chambers@us.dlapiper.com); Carlyn Clarkin, [carlyn.clarkin@us.dlapiper.com](mailto:carlyn.clarkin@us.dlapiper.com); Katiushka Bolanos, [katiushka.bolanos-lugo@us.dlapiper.com](mailto:katiushka.bolanos-lugo@us.dlapiper.com); Yahaira De La Rosa, [Yahaira.delarosa@us.dlapiper.com](mailto:Yahaira.delarosa@us.dlapiper.com); Genera PR, LLC, through: Jorge Fernández-Reboredo, [jfr@sbgblaw.com](mailto:jfr@sbgblaw.com); Gabriela Castrodad, [gcastrodad@sbgblaw.com](mailto:gcastrodad@sbgblaw.com); José J. 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