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COVID-19 – Bill to regulate the Insolvency Proceeding (Concurso Mercantil) under an Emergency Regime in the Commercial Insolvency Law (Ley de Concursos Mercantiles)

On April 30, the Parliamentary Group of the *Partido Revolucionario Institucional* (PRI) submitted in the Senate a "Bill by which the Fifteenth Title "*Emergency Insolvency Regime*" is added to the Commercial Insolvency Law (*Ley de Concursos Mercantiles*)" related to the declaration of the sanitary emergency due to force majeure generated by the COVID-19 (the "Initiative").

The Initiative attributes its authorship to the *Barra Mexicana, Colegio de Abogados, A.C.* with the intention of accelerating up the insolvency proceeding (*concurso mercantil*) as a result of the extraordinary emergency affecting the commercial, business, and jurisdictional environments. With good reasons, the Initiative recognizes that there are industries and sectors of the economy that have practically come to hold for several weeks, resulting in significant financial damages.

The insolvency proceeding (*concurso mercantil*) has had as its main objective, and as a matter of public interest, to preserve the ongoing of the companies, and to prevent that a general breach in regards to payment obligations, may jeopardize the continuity of commercial entities and of other companies with which they maintain a business relationship.

The Initiative aims to offer any company, whether *PYME* (*small and mid-size enterprise*) or not, to place an insolvency proceeding on a fast-track, as a tool to keep companies in operation (and with it, the chains of production), through an expedited procedure which may significantly limit the time and formalities of the process.

Emergency Insolvency Regime

The Emergency Insolvency Regime, according to the Initiative, would apply to the extent "unforeseen material adverse effects or force majeure event, or a declaration of emergency, sanitary contingency, or natural disaster, at a regional or national level, aggravates the economic situation of the country or a region and affecting individuals or legal entities". The application of the Emergency Insolvency Regime presented by the Initiative will be available for as long as said emergency subsists, and up to the following six months.

The main features proposed in the Initiative are:

- A voluntary request by a company, in the format to be designed by the Federal Institute of Commercial Insolvency Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*, "IFECOM") with a declaration under penalty of perjury, disclosing that finds itself in the cases of generalized non-compliance with payment obligations established in the Law, will be sufficient to allow the formal initiation of the insolvency process, without having to prove a general breach of its obligations.

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- The insolvency procedure may be carried out through email entirely, without the requirement of physical submission, (notwithstanding the limitations that affect the Federal Judiciary in regard to technological advancements).
- The Judge will **automatically** accept the filing, and without the need of summons, and will issue a judgment declaring insolvency within three days.
- Under the Emergency Insolvency Regime, it will not be necessary to verify general non-compliance through a short-form audit (*visita*).
- Among the particularities of the declaration of insolvency under the Emergency Insolvency Regime, **which will not admit any appeal**, is that the relevant judgment must contain:
 - (i) The prohibition of the company to carry out any sale or encumbrances of its main assets;
 - (ii) The prohibition to make payments of obligations which became due prior to the date of issuance of the judgment, as well as order not to proceed against guarantors, and/or joint obligors;
 - (iii) The lifting of asset attachments that may be carried out in regard to the company's bank accounts; and
 - (iv) The prohibition to modify or revoke administrative concessions and construction agreements which the company considers essential for its business (the Initiative does not distinguish whether if it refers to public or private contracts).
- Tax credits will be given the treatment of common unsecured credits, and the resulting insolvency plan will be mandatory to the internal revenue service (SAT).

Conclusions

The Initiative seeks to address the adverse implication of the emergency, and attempts to anticipate situations of pronounced lacks of liquidity of companies in Mexico in all sectors (irrespective of the size of the company). Notwithstanding the simplicity it seeks for, it seems to negatively affect the rule of law by its failure of defining basic concepts.

The supplementary application established in the Initiative for matters not foreseen in the Insolvency Proceeding under an Emergency Regime, remits to the general provisions of the Commercial Insolvency Law that will be applied. Consequently, the Initiative as currently drafted leaves open many questions in regard to the Emergency proceed.

Furthermore, the attempted removal of several provisions of the Federal Tax Code (*Código Fiscal de la Federación*) would seem to materially affect the collection efforts of the federal tax authorities.

Finally, it is relevant to point out that the Initiative establishes that the Federal Judiciary Council (*Consejo de la Judicatura Federal*) will designate the district courts "with experience in insolvency proceedings" in order for them to be designated as those specialized in proceedings under the Emergency Insolvency Regime. However, very few district judges have the experience and the interest in handling insolvency matters.

To consult the complete text of the Initiative please click [here](#).

Should you have additional questions, please reach us at contacto@ritch.com.mx, so we may direct your query to the team members of the restructuring and insolvency practice.