# (NO MORE) EXILE ON MAIN STREET: FINDING A HOME FOR SMALL BUSINESS DEBTORS UNDER THE "SMALL BUSINESS REORGANIZATION ACT OF 2019"

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It's gonna be the death of me
Yeah, it's the graveyard watch
Running rights on the rocks
I've taken all of the knocks
And you ain't given me no quarter

Soul Survivor – The Rolling Stones (Exile on Main Street)

## I. WHAT IS CHANGING FOR SMALL BUSINESS DEBTORS

The Rolling Stones sang about hard knocks in 1972 on their album titled "Exile on Main Street." [1] Since the enactment of the Bankruptcy Code in 1978, Main Street Chapter 11 debtors have also sung the blues based on the difficulty of obtaining relief for small businesses in Chapter 11.

Now change is coming to Main Street. At least, it is coming to the less fortunate sons and daughters of Main Street.

This is in the form of the Small Business Reorganization Act of 2019 (H.R. 3311), passed by the House of Representatives and the Senate and signed by President Trump on August 23, 2019 ("SBRA"). The SBRA added a new Subchapter V to Chapter 11 of the Bankruptcy Code.

Prior to passage of the SBRA, a gap existed under the Bankruptcy Code for debt relief payment plans for small business debtors. Small business entities and many individuals did not qualify for relief under Chapter 13, and the requirements and costs of relief under Chapter 11 were often prohibitive. The SBRA now provides a form of potential relief for debtors who were "too big" for Chapter 13 but "too small" for Chapter 11.

[1] In 1972, the Rolling Stones were living in "tax exile" in the south of France. There they recorded the seminal album "Exile on Main Street." The album initially received mixed reviews, but eventually it became revered. It includes perennial concert favorites including "Tumbling Dice" and "Happy."

The need for legislative reform to aid Main Street debtors was highlighted by one of the sponsors of the bill in the U.S. House of Representatives:

> Our districts depend on its small businesses, where constituents shop local and support their neighbors. They are convenience stores, restaurants, and pharmacies. Those who endeavor to open and run a small business are proud of their work and their standing in our communities. When they are forced to close, it has a great impact on the communities these businesses call home.

Representative Ben Cline, 6th District, Virginia, June 19, 2019 Press Release on the Introduction of H.R. 3311.

The impact of the SBRA on Main Street businesses also was noted by Samuel Gerdano, Executive Director of the American Bankruptcy Institute:

> The Small Business Reorganization Act is a breakthrough for Main Street businesses to finally have the restructuring tools now available only to large companies.

There are many notable changes to the Chapter 11 process as applied to Subchapter V debtors. The deadlines are different, some requirements are less onerous, and the limitations on retention of professionals are relaxed. Drawbacks, however, do exist.

## II. WHO CAN BE A SUBCHAPTER V DEBTOR?

First things first – who can be a Subchapter V debtor? Like many things, the Bankruptcy Code supplies the answer. In order to qualify for Subchapter V, a debtor must first qualify as a "small business debtor" and elect to be treated under Subchapter V. 11 U.S.C. § 103(i) (as amended by SBRA).

### A. Definition of "Small Business Debtor" and "Small Business Case"

The Code permits a "person" who meets several requirements to be a "small business debtor." First, a "person" under Bankruptcy Code § 101(41) includes any "individual, partnership, and corporation." Courts consider LLCs and LLPs to be a "person." *See* 2 Collier on Bankruptcy ¶ 101.41 (citing *In re ICLNDS Notes Acquisition, L.L.C.*, 259 B.R. 289 (Bankr. N.D. Ohio 2001)). So these type of entities may qualify as a small business debtor as well.

In order to qualify as a "small business debtor," the debtor must be engaged or have been engaged in commercial or business activities or be an "affiliate" [2] of such a small business that is a debtor in a bankruptcy case. Colliers espouses what appears to be the uncontroversial view that the pre-SBRA definition of a small business does not exclude a potential debtor who is no longer operating such business (and thus no longer engaged in commercial or business activities). 2 Collier on Bankruptcy ¶ 101.51D. This requirement does not appear to have changed in the revised definition under the SBRA.

The new definition of "small business debtor" does not contain a requirement that the debtor's recent income be from business activities. Thus, it is possible for a debtor who incurred debt from business activities to file a small business case even if the business is no longer operating and the debtor has no recent business income.

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[2] The Bankruptcy Code defines an "affiliate" as:

**(A)** entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

**(i)** in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

**(ii)** solely to secure a debt, if such entity has not in fact exercised such power to vote;

**(B)** corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

**(i)** in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

**(ii)** solely to secure a debt, if such entity has not in fact exercised such power to vote;

**(C)** person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

**(D)** entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

Bankruptcy Code § 101(2).

The small business debtor must have "aggregate noncontingent liquidated[3] secured and unsecured debts as of the date of the filing of the petition … in an amount no more than $2,725,625."[4] Bankruptcy Code § 101(51D). The cap (or debt limit) does not include debts owed to affiliates or insiders. A small business debtor does not include "any member of a group of affiliate debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,725,625 (excluding debt owed to 1 or more affiliates or insiders)." Bankruptcy Code § 101(51D)(B)(i) (as amended).

This debt limit is the same amount as under the pre-SBRA definition of a small business debtor. Under the new definition, however, there is a new requirement for qualification as a small business debtor. At least 50% of the debt must now arise from the "commercial or business activities of the debtor." SBRA § 4(a)(1)(B)(i)(II). [5]

This new requirement (that a percentage of the debt constitutes "business debt") is similar to a requirement for eligibility under Chapter 12.[6] A debtor cannot qualify for relief under Chapter 12 unless at least 50% of its debt arose out of a "farming operation." But a debtor cannot qualify for relief under Chapter 12 as a family farmer unless the debtor also satisfies the requirement that at least 50% of recent income is from a farming operation.[7]

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[3] The language is the same as that setting the debt limits for Chapter 13. *See* Bankruptcy Code § 109(e). An individual must have "noncontingent, liquidated" debts less than specified amounts in order to qualify for relief as a Chapter 13 debtor. A body of case law exists interpreting those terms in the Chapter 13 setting. The Courts likely will interpret the debt limits for Subchapter V in the same manner. For a discussion of "noncontingent debts" and "liquidated debts" in this context, *see* Drake, Bonapfel, and Goodman, Chapter 13 Practice and Procedure § 12:80. *See also In re Leggett*, 335 B.R. 227 (Bankr. N.D. Ga. 2005) (Bonapfel, J.) (interpreting 11th Circuit authority and determining guaranty debt as noncontingent due to the existence of a pre-existing default by the primary obligor on the debt).

[4] The debt limit number is not static and will be subject to periodic adjustment like certain other monetary amounts including the debt limits in Chapter 13. Bankruptcy Code § 104(a).

[5] Citations to provisions of the SBRA are made as such: "SBRA § ___."

[6] *See* Bankruptcy Code § 101(18).

[7] *See* Bankruptcy Code § 101(18)(a) related to family farmers and § 101(19A) related to family fishermen. The small business definition does not contain the additional requirement found in both § 101(18)(a) (family farmers) and § 101(19A) (family fisherman) that requires at least 50% of the income to be received from farming or fishing during the prior year (or during the 2nd and 3rd taxable years preceeding).

An entity that is subject to reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 is ineligible to qualify as a small business debtor.

Finally, a debtor does not qualify as a small business debtor if the "primary activity is owning single asset real estate." Bankruptcy Code § 101(51D) (as amended by SBRA). This is an important change from the prior definition. Prior to the SBRA, the definition of a small business debtor excluded "a person whose primary activity is the business of owning or operating real property or activities incidental thereto." Now, a debtor in the real estate business may qualify as a small business debtor as long as they are not a single asset real estate[8] debtor. Thus, Congress has evidenced the intent to allow individuals or entities owning multiple real estate parcels to file a small business case.

As just described, the SBRA excludes a debtor from relief as a small business debtor if the debtor "is in the business of owning single asset real estate." Bankruptcy Code § 101(51D)(A) (as amended by SBRA). But what if the debtor doesn't simply "own" a single real estate asset but also operates and/or manages a single real estate asset?

At first glance it appears that a person who operates, as well as owns, single asset real estate may be eligible to file a small business case.[9]

Courts will refer to the definition of "single asset real estate" in Bankruptcy Code § 101. The Bankruptcy Code defines "single asset real estate" as real estate "on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto." Bankruptcy Code § 101(51B) (emphasis added). If a debtor operates a business out of a single real estate asset, then the debtor should qualify as a small

[8] See Bankruptcy Code § 101(51B) for the definition of "single asset real estate."
[9] *Compare* former § 101(51D) (excluding "a person whose primary activity is the business of owning or operating real property or activities incidental thereto") *with* amended § 101 (51D) (excluding "a person whose primary activity is the business of owning single asset real estate")(emphasis added).

business debtor. On the other hand, if the debtor merely "manages" a single real estate asset, the debtor may be ineligible for a small business case.

### B. Election of Subchapter V Treatment

New Subchapter V of Chapter 11 is voluntary. The debtor must affirmatively elect that the subchapter applies. Prior to the SBRA, a small business debtor made a determination by checking the "small business" box on the voluntary petition.[10] Here, however, the debtor must both indicate that it is a "small business debtor" and that it elects to proceed under Subchapter V.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States issued Proposed Rules and Official Form Amendments on October 16, 2019 (the "Amended Rules").[11] One of the changes to the forms relates to Form 101, the petition.

Question 13 of the form asks: "Are you filing under Chapter 11 of the Bankruptcy Code and are you a small business debtor?"

The amended form includes an updated response and a wholly new answer:

- ☐ Yes. I am filing under Chapter 11, I am a small business according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
- ☐ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

[10] Under Bankruptcy Rule 1020 if the debtor does not state that it is a small business debtor and no party in interest objects prior to 30 days after the conclusion of the meeting of creditors, the case shall proceed as a standard Chapter 11 unless the Court later finds that the debtor's statement was incorrect. *See* Federal Rule of Bankruptcy Procedure 1020.

[11] A copy of the Amended Rules and Forms can be found at http://www.ganb.uscourts.gov/news/public-notice-regarding-proposed-interim-bankruptcy-rules-and-amendments-official-forms-related. As explained in the cover letter to the Chief Judges of the District Courts and all Judges of the Bankruptcy Court, the proposed Amended Rules based upon the Small Business Reorganization Act of 2019 will have to be adopted by local rules or by general order in each judicial district. The committees will then promulgate conforming rules under the Rules Enabling Act, 28 U.S.C. § 2071-77. This process takes up to three years.

As shown, the Bankruptcy Code under the SBRA provides alternatives for a debtor that meets the definition of "small business debtor." A small business debtor may proceed under Subchapter V or as a small business debtor under the previous (old) provisions of Chapter 11.

Small business debtor treatment existed under the Bankruptcy Code prior to the SBRA. A non-subchapter V small business debtor has a 180-day exclusive period to file a plan but a "hard stop" deadline to file a plan within 300 days. *See* Bankruptcy Code § 1121(e)(2). The Court is required to confirm (or not) a plan by a small business debtor within 45 days of the filing of the plan (although this deadline has been routinely extended). These and other comparisons between standard Chapter 11 cases (and small business cases that are not Subchapter V cases) and Subchapter V cases will be discussed in more detail throughout this paper.

In conclusion, a debtor may still constitute a small business debtor but not elect for Subchapter V to apply. Alternatively, a debtor may designate itself as a small business debtor and elect that Subchapter V applies. Debtors and their attorneys will need to weigh the options and determine the best type of Chapter 11 for each small business debtor.

## III. RIGHTS AND DUTIES OF A SUBCHAPTER V DEBTOR

### A. Debtor's Powers as a DIP: Standard Chapter 11 Debtor, Small Business Debtor, and Subchapter V Debtor

Certain authority of a Chapter 11 debtor, small business debtor and a Subchapter V debtor is the same. Each debtor is authorized to have all of the rights and perform all of the functions of a trustee under Bankruptcy Code § 1106 except sub-sections (a)(2), (3), and (4).[12] Each debtor is authorized to continue in business. The authority to conduct business is provided

[12] Bankruptcy Code § 1106(a)(2) requires a trustee to file schedules if the debtor has not done so. Sub-section (a)(3) requires the trustee to investigate the acts and financial condition of the debtor. Sub-section (a)(4) requires a trustee to file a statement of its investigation. Bankruptcy Code § 1107 empowers a debtor-in possession with all the duties and powers of a trustee except for these 3 duties. The debtor is required to file its schedules. So requiring a debtor-in possession to do so would be duplicative, and requiring a debtor-in possession to investigate itself and file a report would be of questionable value.

by Bankruptcy Code § 1108 (for a chapter 11 and small business debtor) and by new § 1184 (for a Subchapter V debtor).[13]

### B. Reporting Requirements of a Standard Chapter 11 Debtor, Small Business Debtor, and Subchapter V Debtor

A Chapter 11 debtor (including a small business debtor) has certain reporting requirements. Specifically, a debtor-in-possession must file monthly operating reports that reflect the debtor's income, expenses and other financial information. A small business debtor also has additional reporting requirements. A small business debtor must file its most recent balance sheet, a cash flow statement (typically a P&L), and a "statement of operations" within seven days of the order for relief. Bankruptcy Code § 1116(1)(A) & (B).

All of these reporting requirements apply to a Subchapter V debtor. New § 1187 (making all of the DIP's duties in § 1116 applicable to a Subchapter V debtor). Specifically, a Subchapter V debtor is required to file periodic operating reports. New § 1187(b). A Subchapter V debtor is also required to file the small business debtor financial reports within 7 days of the order for relief. New § 1187(a). So the SBRA does not relieve a Subchapter V debtor of any of the substantial reporting requirements imposed upon a Chapter 11 debtor.

### C. U.S. Trustee Fees

A Subchapter V debtor has one substantial advantage over a debtor in a standard Chapter 11 and a non-subchapter V small business case. This relates to the U.S. Trustee fees. The SBRA eliminates the requirement to pay fees to the United States Trustee in a Subchapter V case.

The statutory requirement to pay U.S. trustee fees is in 28 U.S.C. § 1930(a)(6)(A). It provides that "a quarterly fee shall be paid to the United States trustee, . . . in each case under chapter 11 of title 11 . . . until the case is converted or dismissed, which ever occurs first." The

[13] Sections of the Bankruptcy Code added by the SBRA are referred to herein as "new § ____."

SBRA amended this language to read: "under chapter 11 of title 11, other than subchapter V." SBRA § 4 (b)(3).

### D. Creditors' Committees

One principal benefit of proceeding under the new Subchapter V is the elimination of a creditors' committee. Attorneys practicing in Chapter 11 are all familiar with creditor committees. In a Chapter 11 case, "the United States Trustee shall appoint a committee of creditors holding unsecured claims…." Bankruptcy Code § 1102(a)(1).[14]

Under the pre-SBRA Bankruptcy Code, however, in a non-Chapter V small business Chapter 11, the "Court may order that a committee of creditors not be appointed" if a party makes such a request. Bankruptcy Code § 1102(a)(3).

The SBRA changed the requirements regarding appointment of a creditors' committee in both a non-subchapter V small business case and in a Subchapter V case. The SBRA provides that a "committee may not be appointed in a small business case or a Subchapter V case" unless the Court orders it.[15] Bankruptcy Code § 1102(3) (as amended). The Court may order the appointment of a committee in a small business case or a Subchapter V case "for cause."[16] *Id.*

The presumption that a creditors' committee is not appointed in either a small business case or a Subchapter V case is helpful because it aligns with the typical small business case

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[14] A creditor committee is empowered to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor." Bankruptcy Code § 1103(c)(2). A committee is also authorized to "participate in the formulation of a plan" and advise creditors as to the plan. Bankruptcy Code § 1103(c)(3). A committee may employ attorneys and accountants. Bankruptcy Code § 1103(a). These committee professionals add a layer of administrative expense to a Chapter 11 case.

[15] *Compare* Bankruptcy Code § 1102(a)(3) ("On request of a party in interest in a case in which the debtor is a small business debtor and for cause, the court may order that a committee of creditors not be appointed") *with* Bankruptcy Code § 1102(a)(3) (as amended by the SBRA) ("Unless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under Subchapter V of this chapter.").

[16] Cases concerning appointment of a committee "for cause" in a small business case under the Code are scant. *See, e.g.*, *In re Haskell Dawes, Inc.*, 199 B.R. 867 (Bankr. E.D. Pa. 1996) (appointing creditor's committee over the debtor's request to excuse such requirement).

where the economics do not support the expense of a committee and creditors may not be interested in forming a committee.

### E. Disclosure Statements

A standard Chapter 11 debtor must provide creditors a disclosure statement in order to solicit acceptance of a plan. Bankruptcy Code § 1125(b). The purpose of the disclosure statement is to provide creditors "adequate information" to make an informed decision on the plan. The Court must approve the disclosure statement before the debtor may distribute it to solicit votes on the plan. *Id.* A debtor's attorney must draft two different documents: the disclosure statement and the plan of reorganization.

The process of obtaining approval of a disclosure statement creates inherent cost and delay. The debtor must provide 28 days notice of the hearing on the disclosure statement. *See* Bankruptcy Rule 2002(b). The debtor must also provide another 28-day notice of hearing on confirmation of the plan. So it takes at least two months for the process (not including additional time gaps based upon the court's available hearing dates). Litigation over whether the disclosure statement contains "adequate information" also may occur thereby adding additional legal cost to the administration of the case.

More abbreviated options exist for a small business debtor. Bankruptcy Code § 1125(f) sets forth a small business Chapter 11 debtor's disclosure requirements. Under that subsection, the court has three options. The Court may: (1) determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary; (2) approve a disclosure statement submitted on standard forms approved as official forms; or (3) conditionally approve a disclosure statement subject to final approval at a later hearing and combine the hearing on the disclosure statement with the hearing on the plan.

In the past, a small business debtor often filed both a plan and disclosure statement and requested conditional approval of the disclosure statement. The Court then conditionally approved the disclosure statement without the necessity of a hearing. Once the Court

conditionally approved the disclosure statement, the plan was distributed to creditors for a vote. This shortened process saved small business debtors the additional cost of two hearings and a two-step process. This procedure is still available for a small business debtor that does not elect treatment as a Subchapter V debtor.

As just described, a small business debtor has more streamlined disclosure statement options than a standard Chapter 11 debtor. Subchapter V further simplifies them.

A debtor under new Subchapter V is not required to file a separate disclosure statement at all. The SBRA merely requires the plan to include certain information that a separate disclosure statement normally contains.

A plan in a Subchapter V must include "(A) a brief history of the business operations of the debtor; (B) a liquidation analysis; and (C) a projection with respect to the ability of the debtor to make payment under the proposed plan of reorganization." New § 1190. These new plan provisions are intended to take the place of the more onerous and comprehensive disclosures typically contained in a disclosure statement.[17]

For a "Main Street" business, the three-pronged requirement (that is: (a) describe its business operation, (b) provide a liquidation analysis, and (c) provide a feasibility *pro forma*) is certainly simpler. Yet this truncated information is sufficient information for a creditor to make an informed decision on the plan.

The court has the discretion to require a Subchapter V debtor to file a disclosure statement. New § 1181(b) ("Unless the court for cause orders otherwise, . . . 1125 of this title do[es] not apply in a case under this subchapter."). If the court does "order otherwise" under §

[17] A disclosure statement must provide "adequate information" as defined in § 1125—i.e. "information of a kind, and in sufficient detail, as far as reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records including a discussion of the potential material federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interest in the case, that would enable such hypothetical investor of the relevant class to make an informed judgement about the plan." Bankruptcy Code § 1125(a)(1). *See also In re Metrocraft*, 39 B.R. 567 (Bankr. N.D. Ga. 1984) (Drake, J.).

1181(b), the provisions of 1125(f) that govern small business debtors (as described above) apply. New § 1187(c). Thus, the court may allow the plan to serve as the disclosure statement. The court may also allow a disclosure statement in a form approved by the court or under 28 U.S.C. § 2075.

Finally, Bankruptcy Code § 1125(f)(3) allows the court to conditionally approve a disclosure statement and combine the hearing on the disclosure statement and the hearing on the plan. This seems the most likely outcome for a Subchapter V case where the court orders a disclosure statement to be filed.

The SBRA does not state any circumstances under which the Court should order a Subchapter V debtor to file a disclosure statement.

## IV. A SUBCHAPTER V TRUSTEE

### A. Trustees in Subchapter V Cases

One of the biggest additions under new Subchapter V is appointment of a trustee. New § 1183(a) and amendments to 28 U.S.C. § 586(b) authorize the appointment of a standing trustee in the same way as those under Chapters 12 and 13. Section 1183(a) also permits the United States Trustee to appoint trustees on a case-by-case basis as long as the proposed trustee is disinterested. The United States Trustee may also serve as the trustee. The rights and powers of a Subchapter V debtor will be discussed in more detail below.

### B. Changing the Status Quo in Chapter 11 and Subchapter V cases (Removal of the Debtor as Debtor-in-Possession)

The standard for removal of a debtor in possession is identical for a standard Chapter 11 debtor and non-Subchapter V small business debtor. Bankruptcy Code § 1104. The court may remove a debtor-in-possession "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause." *Id.* (emphasis added). The court may also order

the appointment of a trustee if it is "in the interests of creditors, equity…, or other interests of the estate…." Bankruptcy Code § 1104(a)(2).

The standard for removal of a Subchapter V as debtor-in-possession features changes to the old statutory language. The first change is that the best interest of creditors, equity, or the estate does not constitute a basis for removal of a debtor as debtor-in-possession and appointing a trustee with such duties and powers. See new § 1185(a).

The second change is the removal of the words "or similar cause." New § 1185(a). Although it is interesting that the SBRA removed the phrase, it is unlikely to be significant given that the court may remove a debtor-in-possession "for cause, including" the multiple enumerated examples. *See* 7 Collier on Bankruptcy ¶ 1104.02 (giving examples of "cause" including failure to keep records; conflicts of interest of debtor's management; irreconcilable conflicts between the debtor and creditor; or the failure to provide information to the United States trustee).

The third change is a structural change regarding treatment of a Subchapter V small business debtor in Chapter 11. The court may remove a Subchapter V debtor-in-possession "for failure to perform the obligations of the debtor under a plan confirmed under this subchapter." New § 1185(a). For both standard Chapter 11 debtors and non-Subchapter V small business debtors, once a plan of reorganization is confirmed, neither a trustee nor an examiner may be appointed. *See* Bankruptcy Code § 1104(a) (allowing for the appointment of a trustee "[a]t any time after the commencement of the case but before confirmation of a plan"); and § 1104(c) (allowing for the appointment of an examiner "at any time before the confirmation of a plan."). Under new Subchapter V, the debtor-in-possession may be removed post-confirmation. This is the only place in the Bankruptcy Code that permits such an action.

A Subchapter V debtor may be removed as debtor-in-possession after the plan is confirmed "for failure to perform" under the confirmed plan. New §1185(a). This assuredly includes a failure to make payments under the confirmed plan. So if the debtor defaults on its

plan payments, then a creditor may request the appointment of a trustee and removal of the Debtor as DIP.

If the court orders the removal of the debtor as debtor-in-possession, the trustee must perform certain duties.[18] New § 1183(b)(5). Upon removal of the debtor as DIP, the Subchapter V trustee is specifically empowered to operate the debtor's business. New § 1183(b)(5). However, even if the debtor is no longer a DIP, the trustee is still not empowered to file a plan because only a debtor may file a plan under Subchapter V. New § 1189(a).

An examiner may be appointed in a standard Chapter 11 case and a small business case. Bankruptcy Code § 1104(c). However, an examiner cannot be appointed in a Subchapter V case. *See* New § 1181(a) (§ 1104 is inapplicable in Subchapter V).

### C. Reinstatement of Debtor as Debtor-in-Possession in Chapter 11 and Subchapter V Cases

Where the Court has appointed a trustee in standard cases the Court may terminate the trustee and "restore the debtor to possession and management of the property of the estate and operation of the debtor's business." Bankruptcy Code § 1105. The standard for reinstatement of a Subchapter V debtor-in-possession is similar although the statutory language differs.

Bankruptcy Code § 1105 provides that "[a]t any time before confirmation of a plan" the court may "restore the debtor to possession and management of the property of the estate and of the operation of the debtor's business." This Code provision applies to standard Chapter 11 debtors and non-Subchapter V small business debtors. With respect to Subchapter V debtors, new §1185 provides simply that "the court may reinstate the debtor in possession."

[18] Upon removal of the debtor as DIP, the SBRA requires a trustee to perform the duties required by Bankruptcy Code § 704(a)(2)(5),(6),(7), & (9).These duties include accounting for all property received, examining and objecting to claims, opposing the debtor's discharge (if advisable), furnishing parties information regarding the estate, and making a final report and final account. Upon removal of the debtor as DIP, the court may also order the trustee to perform the duties set forth in Bankruptcy Code § 1106(a)(3), (4), & (7). These are the duties, in substance, to investigate the debtor and its business, to make a report of such investigation, and to file post-confirmation reports.

Colliers states factors appropriate for consideration of restoration of the debtor as: "(1) the existence of new evidence potentially undercutting the rationale for appointing a trustee, (2) a change in conditions making a trustee no longer in the best interest of the estate, and (3) new circumstances that eliminate the reason for the trustee's appointment in the first place." 7 Collier on Bankruptcy ¶ 1105.02. The language of new § 1185 does not suggest a different result in Subchapter V cases.

**D. Duties of the Trustee**

The duties of the trustee in a standard Chapter 11 and a non-subchapter V small business case assume that a trustee has been appointed for cause, and correspondingly the debtor-in-possession has been removed. In the Subchapter V context a trustee will be appointed as a matter of course. Thus, the duties of the trustee are significantly different.

As Chapter 11 attorneys know, the trustee in a standard Chapter 11 or non-Subchapter V small business case will operate the business and otherwise fulfill the duties of the former debtor-in-possession. *See* Bankruptcy Code § 1106.

A Subchapter V trustee has certain proscribed duties. A Subchapter V trustee has some of the standard trustee duties set forth in Bankruptcy Code § 704. Like a trustee in a standard Chapter 11, a Subchapter V trustee must: account for any property received, examine proofs of claim (if such an examination serves a purpose), oppose the debtor's discharge (as necessary), furnish information regarding the estate and its administration as requested by the parties, and make a final report and accounting. *See* new § 1183(b) adopting Bankruptcy Code § 704(a)(2), (5), (6), (7) & (9). The court may order a Subchapter V trustee to perform the duties set forth in Bankruptcy Code § 1106(a)(3), (4), & (7). Such duties generally are as follows: to investigate the debtor and its business, file a report of such investigation, and file any necessary post-confirmation reports. New § 1183(b)(2).

The SBRA sets forth other trustee duties specific to Subchapter V cases. A Subchapter V trustee must "appear and be heard at the [initial] status conference." New § 1183(b)(3). The

Subchapter V trustee must also attend any hearings on secured property valuation, plan confirmation, post-confirmation plan modification, and asset sales. New § 1183 (b)(3)(A)-(D). The trustee is required to "facilitate the development of a consensual plan of reorganization." New §1183(b)(7). In the event a cramdown plan is confirmed, the Subchapter V trustee is obligated "to ensure that the debtor commences making timely payments" under the plan. New § 1183(b)(4).

The Subchapter V trustee does not have the broad duty to investigate the debtor and its business like a trustee appointed for cause in a standard Chapter 11.[19]

The duties of the Subchapter V trustee are similar but not identical to the duties of a Chapter 12 trustee. There are two relevant differences.

The first is that the Chapter 12 trustee, but not the Subchapter V trustee, is required to perform the duties specified in § 704(a)(3). This subsection states that the trustee shall "ensure that the debtor shall perform his intentions as specified in section 521(a)(2)(B)." Section 521(a)(2)(B) provides that a debtor shall file a statement of intent to reaffirm or surrender secured property.[20] This duty of a Chapter 12 trustee does not apply to a Subchapter V trustee because a debtor under Chapter 11, whether a small business debtor or not, is not required to file a statement of intentions.[21]

The second distinction between a Chapter 12 trustee and Subchapter V trustee is that the Subchapter V trustee may file post-confirmation reports if authorized to do so by the Court.[22]

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[19] *Compare* new § 1183(b) (duties of a Subchapter V trustee) with § 1106(a)(3) (trustee shall "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business," etc.

[20] Specifically, § 521(a)(2)(B) states as follows: "if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate – within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph."

[21] *See* § 1107(a) (requiring a debtor-in-possession to perform the duties of the trustee, that under § 1106(a)(2), require filing of the documents required under § 521(a)(1) but not (a)(2)).

[22] "After confirmation of a plan, [the Trustee shall] file such reports as are necessary or as the courts orders." Bankruptcy Code § 1106(a)(7).

This is because the Subchapter V trustee may operate the debtor's business after confirmation while the Chapter 12 trustee may not.

### E. Termination of the Trustee's Services

The SBRA enacted new statutory provisions that govern the termination of the Subchapter V trustee's services. New § 1183(c) and 28 U.S.C. § 586 (as amended).

If the Subchapter V plan is confirmed consensually rather than crammed down, then the services of the Subchapter V trustee end upon "substantial consumation of the plan."[23] New § 1183.[24] On the other hand, a trustee's services are not terminated if the plan is crammed down. If a plan is confirmed by a cramdown, the trustee continues to serve and actually makes distributions to creditors under the plan unless the plan or confirmation order provide differently.[25]

Subchapter V builds in an incentive for debtors to confirm a consensual plan of reorganization. To the extent a trustee is entitled to fees, such will be paid out of funds that might otherwise be available to pay creditors.[26] This is a substantial incentive for a debtor to confirm a consensual plan of reorganization. It is likewise an incentive for creditors to work towards a consensual plan. This is because the debtor is only required to provide its disposable income

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[23] Substantial consummation is defined in § 1101(2) as:

(A) Transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) Assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) Commencement of distributions under the plan.

[24] Under new §1183, "[i]f the plan of the debtor is confirmed under section 1191(a) of this title the service of the trustee in the case shall terminate when the plan has been substantially consummated." (emphasis added).

[25] "If a plan is confirmed under section 1191(b) of this title, except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan." New § 1194(b). The SBRA does not specify the date for termination of a trustee where a plan is confirmed by cramdown. As stated, the trustee is expected to make distributions under the plan. Under this scenario, the trustee will presumably be discharged following completion of plan payments. If the plan provides otherwise in that the trustee will not make distributions under the cramdown plan, then the trustee may be terminated earlier, i.e., upon substantial consummation of the plan or upon occurrence of some other event.

[26] Trustee compensation is discussed below.

towards a plan. This is both a floor and a ceiling for the debtor's efforts to repay its creditors. Thus, Subchapter V provides a clear incentive for both debtors and creditors to confirm a consensual plan of reorganization.

### F. Trustee's Compensation

The SBRA provides alternative methods of appointing a trustee in Subchapter V: (a) a standing trustee similar to that in Chapters 12 and 13, and (b) a case-by-case trustee. In addition, the United States Trustee "may serve as trustee in the case, as necessary." New § 1183(a).

#### 1. Compensation of a Standing Trustee

The method for compensating a standing Subchapter V trustee in cases where a non-consensual plan of reorganization is confirmed is similar to that under Chapter 12 or Chapter 13. Under 28 U.S.C. § 586(e), a standing trustee is allowed compensation subject to a budget submitted to and approved by the United States Trustee based on maximum annual compensation and the actual, necessary expenses incurred by that individual as a standing trustee. As a result, where a Subchapter V plan is confirmed through cramdown, a standing trustee will make the distributions to creditors and receive a percentage of the distributions as a fee.

In a case where the plan is consensually confirmed (thereby terminating the standing trustee under § 1183(c) upon substantial consummation of the plan) or if the case is dismissed or converted, "the court shall award compensation to the trustee consistent with services performed by the trustee and the limits" on the trustee's compensation pursuant to 28 U.S.C. § 586(e)(1).[27] 28 U.S.C. § 586(e)(5) (as added by the SBRA) (emphasis added). How courts award compensation to a standing trustee "consistent with services performed by the trustee" remains to be determined.

[27] The limits on trustee compensation incorporated by this reference include: (a) a standing trustee's maximum annual compensation under 28 U.S.C. § 586(e)(1)(A) and (b) the cap based upon certain maximum percentage fees under 28 U.S.C. § 586(e)(1)(B).

### 2. Compensation of a Panel Trustee

In general under the Bankruptcy Code, if a standing trustee is not in place and a trustee is appointed on a case-by-case basis, then such trustees are compensated pursuant to Bankruptcy Code § 330(a) subject to limitations contained in §§ 326, 328 and 329. Congress appears to have intended that Subchapter V trustees be compensated under § 330 as well.[28]

Currently in Chapters 7 and 11, the compensation of trustees appointed on a case-by-case basis is limited to a specified percentage of the moneys they disburse as specified under § 326(a) if the amount is also reasonable under § 330(a).

As part of the SBRA Congress amended Bankruptcy Code § 326(a) to state:

> In a case under chapter 7 or 11, other than a case under subchapter V of chapter 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed [various percentages] . . . upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

11 U.S.C. § 326(a) (as amended) (emphasis added). Thus, it is clear that Subchapter V case trustee compensation is not tied to the distributions made on behalf of the estate.

Another limitation on trustee compensation in bankruptcy cases is found in § 326(b), but this limitation applies to trustees in Chapters 12 and 13. Bankruptcy Code § 326(b). The SBRA amended Bankruptcy Code § 326(b) to state:

> In a case under subchapter V of chapter 11 or chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

[28] This can be inferred by the amendment of 28 U.S.C. § 586(a)(3) to permit the United States Trustee to review and object to "applications filed for compensation and reimbursement under section 330 of title 11" filed by trustees in Subchapter V cases. SBRA § 4(b)(1)(A).

11 U.S.C. § 326(b) (as amended) (emphasis added).[29]

However, Congress did not amend the phrase "may allow reasonable compensation under section 330 of this title . . . not to exceed five percent upon all payments under the plan" in the quote above to include subchapter V trustees appointed under new § 1183(a). Thus, the maximum amount of compensation for a Subchapter V trustee may exceed five percent of all payments under the plan.

Thus, both the limitations placed on Chapter 7 and typical Chapter 11 trustees (the deescalating percentage of distributions made in the case) and the limitations on the Chapter 12 and Chapter 13 trustee (a limit of five percent of all payments under the plan) do not apply to the case Subchapter V trustee.

Thus, the only limitation on a Subchapter V trustee's fees is that they must be reasonable and for actual, necessary services and expenses. *See* Bankruptcy Code § 330(a).[30] Because Subchapter V is a Chapter 11 case, Bankruptcy Code § 330 itself does set out one limitation on Subchapter V trustees in § 330(a)(3). That section provides that:

> In determining the amount of reasonable compensation to be awarded to . . . [a] trustee under chapter 11, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> **(A)** the time spent on such services;
>
> **(B)** the rates charged for such services;
>
> **(C)** whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

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[29] As noted above, a standing trustee is compensated pursuant to 28 U.S.C. § 586(e). Thus, the first phrase of § 326(b) makes clear that a standing trustee cannot look to §§ 330 or 326 for compensation.

[30] An argument may be made that no provisions of the Bankruptcy Code provide for compensation for Subchapter V trustees. Section 330, which provides for compensation for trustees, is subject to the limitations of multiple sections, including § 326. The amendments to § 326 eliminate a Subchapter V trustee from obtaining compensation under § 326(a). So § 326(a) now applies to all trustees appointed in Chapter 11 except under Subchapter V. The amendments to § 326(b) also prevent a standing trustee under Subchapter V from being compensated under that subsection. The last sentence of § 326(b) provides the court "may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan." This section says nothing about compensation for Subchapter V trustees.

> **(D)** whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
> **(E)** with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
> **(F)** whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Bankruptcy Code, § 330(a)(3).

#### 3. Timing of Trustee Compensation

The Subchapter V trustee fee is entitled to payment as an administrative expense. Bankruptcy Code § 503(b)(3) (compensation awarded under § 330(a)). This administrative expense is entitled to priority under Bankruptcy Code § 507(a)(2). A standard Chapter 11 plan must provide for payment of this administrative expense upon the effective date of the plan. Bankruptcy Code § 1129(a)(9)(A). Therefore, a trustee fee must be paid on the plan's effective date under the standard provisions of Chapter 11. These provisions remain binding in Subchapter V where a plan is confirmed by consent under new § 1191(a). However, these provisions are overridden where a plan is confirmed by cramdown under new § 1191(b). A Subchapter V plan may be crammed down even if it provides for payment of § 507(a)(2) priority claims "through the plan." New § 1191(e). So a debtor may pay a Subchapter V trustee fee over time under a cramdown plan.

## V. PROPERTY OF THE ESTATE IN A SUBCHAPTER V CASE

Commencement of a bankruptcy case creates an estate that consists of "all legal and equitable interests of the debtor in property" upon the petition date with certain specified exceptions. Bankruptcy Code § 541(a)(1). In a Chapter 7 case and in a standard Chapter 11 case, property acquired by a debtor post-petition typically does not becomes property of the

estate.[31] BAPCPA added a new provision that only applies to individual Chapter 11 debtors. *See* Bankruptcy Code § 1115. In an individual case, estate property includes property that vested under Bankruptcy Code § 541 plus property and earnings from services acquired post-petition and "before the case is closed, dismissed, or converted…" *Id.*

Subchapter V contains a new provision that vests post-petition property in a Subchapter V debtor under certain circumstances. New § 1186.

A comparison of Bankruptcy Code § 1115 and new § 1186 reveals that the extent of property vested in the bankruptcy estate is the same: (1) all property under § 541, (2) all property defined in § 541 that debtor acquires between the commencement of the case and before closing, dismissal, or conversation of the case, and (3) earnings from services performed by the debtor between commencement of the case and closing, dismissal, or conversation of the case.

New section 1186, however, adds a simple phrase: "if a plan is confirmed under section 1191(b) of this title." Section 1191(b) is the SBRA cramdown provision. This conditional phrase represents a new phrase under the Bankruptcy Code regarding property of an estate in a Chapter V cramdown. It does not occur in Bankruptcy Code § 1115 (property of the estate for an individual chapter 11 debtor); § 1207 (property of the estate in Chapter 12), or § 1306 (property of the estate in chapter 13).

The obvious implication of this section is that if the plan is confirmed by cramdown, then the property of the estate available for the distributions to creditors includes post-petition income. If, however, the plan is not confirmed, then the property of the estate does not include post-petition earnings except to the extent such earnings constitute proceeds of pre-petition property (i.e. proceeds of property of the estate).[32]

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[31] Of course, proceeds of pre-petition assets do constitute estate property. Bankruptcy Code § 541(a)(6). In an individual case, earnings from such individual's post-petition services do not constitute property of the estate. *Id.* In addition, § 541(a)(5) includes certain property related to inheritances, life insurance and divorce if acquired within 180 days of the petition.

[32] *See generally* Bankruptcy Code § 541(a)(6).

## VI. TIMELINES AND INFORMATION IN A SUBCHAPTER V CASE

### A. Status Conference

While bankruptcy courts have the ability to set status conferences, both in their inherent ability to regulate the cases before them and under Bankruptcy Code § 105(d)[33], the Bankruptcy Code previously did not require the court to hold a status conference. New § 1188 requires a status conference in a Subchapter V case. Section 1188 requires that the court hold a status conference no later than 60 days after the case was filed "to further the expeditious and economical resolution of a case under this subchapter." While the court may extend the time period for holding the status conference, the court may not waive the conference altogether and may only extend the deadline to hold the conference if "the time for extension is attributable to circumstances for which the debtor should not justly be held accountable." New § 1188(b).

Additionally, at least 14 days before the status conference, the debtor is required to file a report that details the debtor's efforts, both past and future, to attain a consensual plan of reorganization.[34] Interestingly, this means that the debtor should have made some effort to obtain a consensual plan within the first 46 days of the case given that the status report is filed 14 days prior to a status conference that must be held within the first 60 days of the case.

### B. No Disclosure Statement

Bankruptcy Code § 1125 requires a standard Chapter 11 debtor-in-possession to file and obtain approval of a disclosure statement before soliciting votes on the plan. This requirement is inapplicable in Subchapter V unless the court (for cause) orders otherwise. It is hard to image a

[33] Bankruptcy Code § 105(d) provides as follows: "The court, on its own motion or on the request of a party in interest—shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case" and provides that, unless inconsistent with another provision of Title 11, the court can set deadlines for filing a disclosure statement and plan in a Chapter 11 case. Section 105(d) itself is not applicable in Subchapter V. New § 1181(a).
[34] Debtor must also serve the report on the Trustee and all parties-in-interest (i.e. the entire matrix).

reason why a court would order a Subchapter V debtor to file a disclosure statement. But, in any event, if a bankruptcy court does order a disclosure statement to be filed, the procedures provided in Bankruptcy Code § 1125(f) apply. New § 1187(c).

### C. Timing of Filing of Plan

There are two primary differences in the timing of: (a) the Subchapter V plan process as compared with (b) the standard Chapter 11 and the non-subchapter V small business Chapter 11 process.

The first is that the limited exclusive period for filing a plan is eliminated. Instead, a Subchapter V debtor is the only entity ever allowed to file a plan.[35] New § 1189.

A Subchapter V debtor's untethered exclusive right to file a plan represents a significant right of a Subchapter V debtor that a standard Chapter 11 debtor and non-subchapter V small business debtor do not have.

This significant advantage is offset by the timeline that dictates when the Subchapter V debtor must file the plan. A Subchapter V debtor must file a plan "not later than 90 days after the order for relief." New § 1189(b). This deadline may be extended "if the need for extension is attributable to circumstances for which the debtor should not be justly held accountable." *Id.*

In contrast, a standard Chapter 11 debtor has no set deadline to file a plan and a 120 day exclusive period to file a plan. The Court may also extend the exclusive period to up to 18 months after the petition date. Bankruptcy Code § 1121(b).

The Subchapter V debtor's plan deadline is much shorter than the deadline for a non-subchapter V small business Chapter 11. A non-subchapter V small business debtor has a 180 day exclusive period to file a plan. Bankruptcy Code § 1121(e)(1). A non-subchapter V small

[35] New § 1189 provides that "only the Debtor may file a plan" under Subchapter V. New § 1183(b)(7) provides that the Subchapter V trustee "shall . . . facilitate the development of a consensual plan of reorganization." "Facilitat[ing] the development" of a plan is not the same as filing and confirming a plan. Therefore the SBRA anticipates that the Trustee must play a role in the plan process but is not empowered to file a plan as plan proponent.

business debtor must file a plan within 300 days of the order for relief. Bankruptcy Code § 1121(e)(2).

A non-subchapter V small business debtor thus has a limited exclusive period and a hard deadline to file a plan. The Court may extend both these deadlines (exclusivity and the deadline to file a plan). The Court may only do so, however, if the debtor "demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time." Bankruptcy Code § 1121(e)(3)(A).

This standard has not been the subject of significant litigation, but the statutory language does indicate that such extensions may be contested. In addition, any order granting such extensions must be "signed before the existing deadline has expired" and must also impose a new deadline. Bankruptcy Code § 1121(e)(3)(B) and (C). The result is that a non-subchapter V small business debtor has a hard deadline of 300 days to file a plan unless it is extended.

One potential question is whether the Subchapter V debtor's plan deadline can be extended if the deadline has run before the request for extension is made. As noted, the deadline for a non-subchapter V small business debtor to file a plan of reorganization specifically provides that not only must the motion be made, but the extension must be granted and the order "signed before the existing deadline has expired." Bankruptcy Code § 1121(e)(3); *see also In re Florida Coastal Airlines, Inc.*, 361 B.R. 286, 290 (Bankr. S.D. Fla. 2007) (viewing the 300 day deadline as "akin to a statute of limitations" and an amended plan like an amended complaint under Bankruptcy Rule 7015).[36]

A non-subchapter V small business debtor also has a deadline to obtain confirmation of a plan. The court "shall confirm a plan that complies with the applicable provisions of this title… not later than 45 days after the plan is filed unless the time for confirmation is extended in

[36] Currently, Bankruptcy Rule 9006(b) provides generally that an extension may be granted prior to expiration of a deadline or on motion made after expiration of the deadline "where the failure to act was the result of excusable neglect." Bankruptcy Rule 9006(b)(1).

accordance with section 1121(e)(3).” Bankruptcy Code § 1129(e). If a non-subchapter V small business plan is not confirmed within 45 days after the plan is filed, some courts hold that the plan is barred from being confirmed and such failure is cause for mandatory dismissal of the case under Bankruptcy Code § 1112(b). *See In re CCT Communications, Inc.*, 420 B.R. 160, 168 (Bankr. S.D.N.Y. 2009) (failure to confirm within 45 days is cause under § 1112(b)(4)(J) and the court must dismiss); *In re Roots Rents, Inc.*, 420 B.R. 28 (Bankr. D. Idaho 2009) (same); *In re Save Our Springs (S.O.S.) Alliance, Inc.*, 393 B.R. 452, 456 (Bankr. W.D. Tex. 2008) (same); *In re Caring Heart Home Health Corp., Inc.*, 380 B.R. 908, 910-11 (Bankr. S.D. Fla. 2008) (emphasizing that excusable neglect or inadvertence for granting extensions under Bankruptcy Rule 9006(b) does not apply to the deadline under § 1129(e)); *but see In re Crossroads Ford, Inc.*, 453 B.R. 764, 768 (Bankr. D. Neb. 2011) (§ 1121(e) “does not appear to be a deadline for the debtor, but rather appears to be a mandate on the court.”). [37]

The strict 45-day deadline for a non-subchapter V small business debtor does not apply to a Subchapter V debtor. New § 1181 (stating that § 1121 . . . do[es] not apply in a case under this subchapter). The Subchapter V debtor gains significant flexibility over a non-subchapter V small business debtor in this regard. A Subchapter V debtor must file a plan within 90 days but has no fixed deadline to obtain confirmation. So the Subchapter V debtor presumably may amend the original plan and seek its confirmation at the discretion of the court without any statutorily imposed deadline.

[37] Bankruptcy Rule 9006(b)(1) provides that the court may enlarge the time for an act “to be done at or within a specified period by [the Bankruptcy Rules] or by a notice given thereunder or by order of court…” The Court may enlarge the time for taking an act when the motion for the extension is filed after the deadline has passed upon a showing of “excusable neglect.” *Id*. But the Bankruptcy Rules do not prevail over the Bankruptcy Code itself. *In re Caring Heart Homes Health Corp.*, 380 B.R. 908, 910 (Bankr. S.D. Fla. 2008) (noting that the small business provisions in the Code “include a number of traps for the unwary,” and denying a motion made under Rule 9006(b) for *nunc pro tunc* relief after the time for confirmation had expired). Therefore, the court may likely only modify and extend the plan deadlines as discussed when the Bankruptcy Code provides for such extensions.

Another difference in the Subchapter V case is that there is no hard and fast limit on extensions the debtor may receive for filing of the plan. *See* new § 1189(b). New § 1189 provides only that "the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." New § 1189(b). This means that the debtor, as the sole party possessing the power to be a plan proponent, may conceivably possess an interminable exclusive term to file a plan.

This is unlike Bankruptcy Code § 1121(d). This provision limits a standard Chapter 11 debtor's exclusive period to no more than 18 months. With respect to a non-subchapter V small business case, Bankruptcy Code § 1121(e) limits the exclusivity period in a small business case to 180 days unless the court grants an extension. There is no cap on the exclusivity extensions that the court may grant a non-subchapter V small business debtor.

## VII. PLAN CONFIRMATION IN SUBCHAPTER V

### A. Contents of a Plan

The contents of a plan in a Subchapter V case, both mandatory and discretionary, are governed by new § 1190. There are several new requirements under § 1190.

The first new requirement under § 1190 is that a Subchapter V plan must contain: (1) "a brief history of the business operations of the debtor", (2) "a liquidation analysis", and (3) "projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization." § 1190(1). These three items are contained in any disclosure statement in a standard Chapter 11. But because Subchapter V provides that the debtor does not have to file a disclosure statement, it requires these three disclosures in the plan itself.

The second provision in section 1190 requires the plan to "provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as necessary for the execution of the plan." This language comes from similar provisions in Chapter 12 and 13 where debtors also fund trustees who distribute payments to creditors. *See* Bankruptcy Code §§ 1222 and 1322.

The third change set forth in Section 1190 concerns an individual debtor's right to modify a home mortgage. In a standard Chapter 11 case and a non-subchapter V small business case, an individual debtor may not modify a claim "secured only by a security interest in real property that is the debtor's principal residence."[38] Section 1123(b)(5).[39] *See* 7 Collier on Bankruptcy ¶ 1123.LH, n. 4.

New section § 1190(3), however, provides an exception to § 1123(b)(5) for a Subchapter V debtor: if a claim is secured only by the debtor's principal residence, the debtor may still modify the secured claim if the loan proceeds were "(A) not used primarily to acquire the real property; and (B) used primarily in connection with the small business of the debtor." New § 1190(3). This allows an individual Subchapter V debtor that pledged a residence as collateral for a business loan to strip down or strip off the lien on the primary residence if the primary residence is underwater. Alternatively, the Subchapter V debtor may modify the payments (interest or term) on such a loan if the loan is fully secured. Note that a traditional home mortgage (i.e. a consumer loan) is still protected and may not be modified in Subchapter V.

There are two provisions regarding plan contents that apply in other individual Chapter 11 cases but not in Subchapter V cases for individuals. New § 1181.

First, Subchapter V eliminates the confirmation requirement in § 1123(a)(8) that an individual dedicate income from post-petition services to fund the plan.[40] As noted above, the

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[38] Likewise, a Chapter 13 debtor may not modify a residential mortgage. Bankruptcy Code § 1322(b)(2). A Chapter 12 debtor may modify a claim secured only by the debtor's principal residence. *See* Bankruptcy Code § 1222(b)(2).

[39] Section 1123(b)(5) was added after the Supreme Court's ruling in *Nobleman v. American Sav. Bank*, 508 U.S. 324 (1993) to codify the Court's ruling in Chapter 11 cases. *See* 7 Collier on Bankruptcy ¶ 1123.LH, n. 4. Section 1123(b)(5) remains applicable to a debtor under Subchapter V. So presumably a Subchapter V debtor, like any other Chapter 11 debtor with a debt that is secured by their primary residence as well as other collateral, will be permitted to modify the rights of that secured creditor. *See* 7 Collier on Bankruptcy ¶ 1123.02, n. 29 (citing legislative history and case).

[40] Bankruptcy Code § 1123(a)(8) requires that a plan shall "[i]n a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after commencement of the case or other future income of the debtor as is necessary for the execution of the plan."

SBRA adds a statutory mandate to commit earnings "as is necessary for execution of the plan" in new § 1190(2).

The second provision regarding plan contents that does not apply to Subchapter V individuals relates to exempt property in plans proposed by non-debtors. Such provision is set forth in Bankruptcy Code § 1123(c). It provides as follows: "in a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease." *See* Bankruptcy Code § 1123(c). Only the debtor may propose a plan in Subchapter V. So the SBRA properly excludes this provision that relates to plans proposed by non-debtors from Subchapter V cases.

### B. Consensual Confirmation of a Plan

Subchapter V debtors must satisfy almost all of the requirements of § 1129(a) to obtain consensual confirmation of a plan. Thus, consensual confirmation of a Subchapter V plan is identical, with one exception, to consensual confirmation of a standard Chapter 11 plan of reorganization.[41]

The exception that a Subchapter V debtor does not have to satisfy is subsection (a)(15). New § 1191 ("The Court shall confirm a plan under [Subchapter V] only if all of the requirements of Section 1129(a), other than paragraph (15)… are met.").

The one exception that the debtor does not have to satisfy, § 1129(a)(15), provides:

> (15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

[41] The liquidation test still applies in Subchapter V cases. While not contained in new § 1191, that section requires that the debtor meet all of the requirements of §1129(a) other than paragraph (15) in order to confirm a consensual plan. The liquidation test is found in § 1129(a)(7). Even in the cramdown context, the debtor does not have to satisfy the requirements of § 1129(a)(8), (10), and (15), but still must meet the requirements of § 1129(a)(7). So a debtor must satisfy the liquidation test in order to confirm either a consensual or cramdown plan.

> (A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

This subsection is replaced in Subchapter V with new § 1190(2). It provides for the submission of the debtor's future earnings or other future income as is necessary for the plan.[42] Thus, in a standard Chapter 11 of an individual where all classes (but not necessarily all creditors) accept the plan, a single unsecured creditor can object and require that the debtor submit its projected disposable income for 5 years. Bankruptcy Code § 1129(a)(15); *In re Sheridan*, 391 B.R. 287, 290 (Bankr. E.D.N.C. 2008) (requiring an objection to a plan to satisfy the requirements of § 1129(a)(15); a vote to reject the plan, standing alone, is insufficient to trigger the requirements of that section).

This contrasts with the same scenario under Subchapter V where there is no requirement that the debtor provide all disposable income for five years if all classes accept. So in Subchapter V, a single dissenting unsecured creditor cannot invoke the disposable income requirement.

### C. Confirmation through Cramdown

The most transformative changes under Subchapter V arguably occur in the cramdown context.

Under the Bankruptcy Code, the court shall confirm a Chapter 11 plan if the plan proponent satisfies all of the requirements of Bankruptcy Code § 1129(a). Bankruptcy Code

[42] New section 1190(2) states that a plan "shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the Plan."

§ 1129(a)(8) requires the acceptance of all impaired classes.[43] So in order for the court to confirm a plan under sub-section (a) of § 1129, all classes must affirmatively consent to the plan by voting (each as a class) in favor of the plan. If all classes of impaired creditors do not vote to accept the plan, then the court cannot confirm the plan under subsection (a). But the court may still confirm the plan under subsection (b) of § 1129. Confirmation of a plan under subsection (b) is colloquially referred to as a "cramdown" because the court's confirmation is over the objection (or at least lack of consent) of at least one impaired class. *See* 7 Colliers on Bankruptcy ¶ 1129.03 ("In the colorful argot of bankruptcy practice, when the requirements of section 1129(b) are met, confirmation can be 'crammed down' the throat of the dissenting class.").

As will be discussed, the Subchapter V debtor is not required to obtain the consent of any creditor class in a cramdown context. Elimination of this requirement is a significant step up for a Subchapter V debtor and makes Subchapter V more akin to Chapter 12 and 13 where there is likewise no such requirement. As will also be discussed, the SBRA also eliminates the absolute priority rule from the statute as to Subchapter V debtors.

**1. Subchapter V Does Not Require an Accepting Class.**

Bankruptcy Code § 1129(a)(10) provides that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." Therefore, in order for a debtor to confirm a plan under Chapter 11 (other than under Subchapter V), the debtor must obtain the consent of at least one impaired class.

This is not an easy task in a small business case where there are often few creditors and few classes. A Chapter 11 debtor must solicit votes ("acceptances" or "rejections") on the plan

[43] Under new § 1191, the Subchapter V debtor, as plan proponent, does not have to satisfy (a)(8), but also does not have to satisfy (a)(10) and (a)(15) as well. The requirements of subsection (a)(15) are discussed above. The requirements of subsection (a)(10) are discussed below.

from all impaired classes in hopes that at least one impaired class will consent to the plan by voting (as a class) in favor of the plan.

A Subchapter V debtor does not have to leap this hurdle. The court may confirm a Subchapter V plan even if all impaired classes vote to reject the plan because a Subchapter V debtor does not have to satisfy Bankruptcy Code § 1129(a)(10).[44] The obvious implication of this is that a Subchapter V debtor is not required to obtain the acceptance of any class of claims and may confirm a plan without any creditors voting in favor of the plan so long as the debtor shows that the plan meets the remaining requirements of new § 1191(b).[45]

**2. A Subchapter V Plan May Not Discriminate Unfairly.**

In order to confirm a Subchapter V cramdown plan, the court must find that the plan "does not discriminate unfairly… with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." New § 1191(b). This language is the same as contained in Chapter 11 prior to the SBRA's creation of Subchapter V. *See* Bankruptcy Code § 1129(b)(1). Therefore, courts should construe the anti-discrimination provision in Subchapter V in the same way.

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[44] New § 1191(b) provides in relevant part that "if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan," the court may confirm the plan in accordance with the remaining requirements of § 1191(b).

[45] One interesting question under Subchapter V is whether the debtor needs to solicit votes from creditors at all. In a standard Chapter 11, a debtor must solicit votes from creditors because it is required to obtain acceptance from at least one class of creditors assuming that at least one class was impaired. This is practically always the case. *See* Bankruptcy Code § 1129(a)(10). Subchapter V does not contain an (a)(10) requirement. Since this is no longer required under Subchapter V, the debtor does not need any votes in favor of the plan unless another requirement of § 1129(a) includes that requirement. Section 1129(a)(1) requires a plan to comply with "the applicable provisions of this title." While Bankruptcy Code § 1126 addresses acceptance of the plan, nothing in that section requires submission of the plan for voting by the creditors. Bankruptcy Code § 1128(a) only provides that "after notice, the court shall hold a hearing on confirmation of a plan." Theoretically a Subchapter V debtor may forgo any attempt at a consensual plan and proceed to cramdown confirmation under new § 1191(b) without soliciting votes.

The language is also the same as found in Chapters 12 and 13. *See* §§ 1222(b)(1) and 1322(b)(1). Interestingly, the anti-discrimination provisions in Chapter 12 and 13 apply to all plans. The anti-discrimination requirements in Chapter 12 and 13 are located in the Code provisions concerning "contents of a plan." The anti-discrimination provisions of Chapter 11 only appear in the cramdown provisions.[46] *See* Bankruptcy Code § 1129(b)(1) and new § 1191(b). The cramdown provisions only take effect when a class does not vote to accept the plan (and thereby has not consented to the plan). So theoretically a court may confirm a Chapter 11 plan that discriminates unfairly as long as every impaired class has accepted the plan.

#### 3. A Subchapter V Plan Must Satisfy the Fair and Equitable Requirement.

The court must also find that a Subchapter V plan "is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." New § 1191(b). Cramdown of any Chapter 11 plan requires a determination that the plan is fair and equitable. *See* Bankruptcy Code § 1129(b). While the operative language of new § 1191(b) is the same as in Bankruptcy Code § 1129(b), the result is significantly different because Congress has provided a "rule of construction" for such determination in Subchapter V cases. New § 1191(c). The implications as to secured and unsecured classes will be addressed in turn.

##### a. The Fair and Equitable Requirement Regarding Secured Claims.

Subchapter V contains the same cramdown standard for secured claims as under current law. New § 1191(c)(1) provides:

> "[f]or purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interest includes the following requirements: (1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title."

[46] *But see* Bankruptcy Code § 1123(a)(4) classification (requires the same treatment of claims within the same class absent consent). *See also* § 1122(a) (classes may only contain substantially similar claims).

Bankruptcy Code § 1129(b)(2)(A), in turn, provides that the secured creditor must be treated in one of three ways. In order for a plan to be fair and equitable to a secured creditor that did not accept the plan, the plan must provide: (i) for such secured creditor to retain its lien to the extent of its allowed claim and receive deferred cash payments totaling at least the allowed amount of its interest in property of the estate, (ii) for the sale, subject to section 363(k), of any property subject to its liens with liens to attach to the proceeds of the sale, or (iii) that the secured creditor receive the indubitable equivalent of its claim.

In short, the standard for cramming down secured creditors is the same under Subchapter V as it is in any other Chapter 11.[47]

**b. The Fair and Equitable Requirement Regarding Unsecured Claims (Abrogation of the Absolute Priority Rule).**

A major difference between a Subchapter V case and other Chapter 11 cases is the removal of the absolute priority rule from the statutory cramdown requirements. The absolute priority rule is "a senior creditor's entitlement . . . to be paid or allocated all value from the debtor before any of that value is paid or allocated to a junior class." 7 Collier on Bankruptcy ¶ 1129.03.[48]

A plan proponent must satisfy the absolute priority rule with respect to each dissenting class of creditors (i.e. each class that has not voted to accept the plan). In a cramdown of a dissenting unsecured class of creditors who have not voted (as a class) to accept the plan, Bankruptcy Code § 1129(b)(2)(B)(ii) codifies the absolute priority rule as follows:

> "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section."

[47] The disposable income requirement in new § 1191(c)(2), discussed below, also applies if a secured creditor objects. Conversely, under Chapter 12, only the Chapter 12 trustee or an unsecured creditor may object on that basis. *See* Bankruptcy Code § 1225(b)(1).
[48] Discussion of the "new value" exception to the absolute priority rule is outside the scope of this paper.

In a Subchapter V case, however, the term "fair and equitable" does not include such an absolute priority rule. *See* new § 1191(b). Instead, Subchapter V incorporates different requirements akin to Chapters 12 and 13. Rather than an absolute priority rule, Subchapter V adopts a disposable income requirement whereby all of the debtor's disposable income over a certain period is devoted to repayment of creditors.[49] This disposable income requirement is discussed next.

#### 4. The Disposable Income Requirement for Subchapter V Cramdown Confirmation.

In a consensual confirmation, the debtor need only commit the future income that is necessary to fund the plan. New § 1190(2). In a non-consensual (cramdown) confirmation, however, a Subchapter V debtor must commit its disposable income to payments under the plan.[50] A Subchapter V debtor must commit its disposable income for at least 3 years, and the commitment period cannot exceed 5 years.

Subchapter V provides another option: a Subchapter V debtor is not required to commit its disposable income for the commitment period if "the property to be distributed under the plan" during the applicable commitment period is at least as much as the debtor's disposable income. The full statutory language in the cramdown setting is as follows:

> all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

New § 1191(c)(2) (emphasis added).

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[49] *Compare* Bankruptcy Code § 1225(b)(1)(B)-(C) and § 1325(b)(1)(B).

[50] As addressed above, § 1129(a)(15) is inapplicable in a Subchapter V case. So a single dissenting creditor cannot invoke the disposable income requirement. Acceptance of the plan is determined by the vote of each class.

This disposable income requirement becomes effective in any cramdown of a Subchapter V plan (i.e. where one or more impaired class has not accepted the plan). This requirement is applicable regardless of whether the class being crammed down is secured or unsecured. New § 1191(c).

One obvious question is what standard the court will apply to determine the appropriate period for the debtor to dedicate its disposable income. The language appears to be drawn from Bankruptcy Code §§ 1222(c) and 1225(b)(1)(B)-(C).

The SBRA defines "disposable income" for purposes of a cramdown plan in § 1191(d):

> For purposes of this section, the term 'disposable income' means the income that is received by the debtor and that is not reasonably necessary to be expended—
>
> (1) for –
>
> (A) the maintenance or support of the debtor or a dependent of the debtor; or
>
> (B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or
>
> (2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.

This definition is taken from and identical to that found in Chapter 12. *See* Bankruptcy Code § 1225(b). A similar, although slightly different, definition is found in Chapter 13. *See* Bankruptcy Code § 1325(b)(2).

New § 1191(d) rather obviously and neatly breaks down into requirements for an individual debtor and a business entity debtor. For the individual, income is "disposable" if it is not needed for expenses reasonably necessary to support the debtor (and dependents) including domestic support obligations. While straightforward in concept, it calls for a case-by-case determination as to reasonableness. It does not appear to be a "one-size-fits-all" concept such as the means test.

For the business debtor, income is not "disposable" if it is needed for business expenses (i.e. "expenditures necessary for the continuation, preservation, or operation" of the business). Obviously, expenditures such as taxes, payroll, and inventory are required.

Future litigation may occur regarding discretionary expenditures such as capital improvements. Are projected expenditures to grow a business necessary for the "continuation, preservation, or operation" of the business?

The debtor can reasonably argue that small businesses are similar to sharks: if they stop swimming, they die. Therefore, capital improvements are necessary for the "preservation" of the business. Should the debtor be forced to put on hold all of the improvements that may be necessary to allow the debtor be competitive in the everchanging world of commerce?

On the other hand, creditors may reasonably argue that the debtor should not be allowed to include discretionary expenditures as the creditors are likely to be receiving less than all of their debts and creditors should not be forced to foot the bill when the debtor will reap the reward of any investment into the business.

These types of issues have been litigated in Chapter 12. For example, some Chapter 12 debtors have sought to build a reserve out of their disposable income in order to protect against lean farming years. Creditors have objected, and the courts' rulings vary.

Typically courts allow some reserve. *See, e.g.*, *In re Schmidt*, 145 B.R. 983 (Bankr. D.S.D. 1991) (permitting a reserve only if debtors can demonstrate that obtaining financing is not feasible); *In re Kuhlman*, 118 B.R. 731 (Bankr. D.S.D. 1990) (debtors bear burden of proving the amount of expenses that are reasonably necessary for their farming operation and their living expenses); *In re Young*, 103 B.R. 1021 (Bankr. S.D. Ind. 1988) (allowing a reserve); *In re Janssen Charolais Ranch, Inc.*, 73 B.R. 125 (Bankr. D. Mont. 1987) (noting in *dicta* that a reserve would be allowable).

Two panels of the Eighth Circuit have split on the issue. One Eighth Circuit opinion holds that a reserve is allowed. *Hammrich v. Lovald (In re Hammrich)*, 98 F.3d 388 (8th Cir. 1996) (affirming confirmation of a plan including a reserve). A second Eighth Circuit opinion holds that a reserve is not allowed. *Broken Bow Ranch, Inc. v. Farmers Home Admin. (In re Broken Bow Ranch, Inc.)*, 33 F.3d 1005 (8th Cir. 1994) (in determining amount of net disposable income,

courts not required to leave debtor sufficient operating funds for next year and debtor may be required to borrow funds for next year). Colliers suggests that if such a reserve is necessary then the debtor should be able to extend the period for the debtor to complete its payments in order to fund a reserve at the end of the plan. *See* 8 Collier on Bankruptcy ¶ 1225.04.

#### 5. The Feasibility Test

The final requirement in order to cramdown a class is that the court must either find that the debtor will be able to make all the payments under the plan or that there is a reasonable likelihood that the debtor will be able to make the plan payments and that the plan contains appropriate remedies if the debtor fails to make the payments. New § 1191(c)(3).

## VIII. POST-CONFIRMATION MATTERS IN SUBCHAPTER V

### A. Payments under Plan

The Subchapter V trustee is tasked with distributing the payments required under the confirmed cramdown (but not consensual) Subchapter V plan.[51] New § 1194(b). On the other hand, if a plan is confirmed consensually, then the trustee is terminated upon substantial consummation, and the debtor makes the plan payments to creditors over the term of the plan. New § 1183(c).

This creates a question if the trustee has received any funds during the case prior to confirmation. In such event, the plan will presumably provide for disbursement or other treatment of such funds. New § 1194(a). New § 1194(a) provides that the "trustee shall distribute any such payments in accordance with the plan." *Id.* If no plan is confirmed, then the trustee shall return these funds to the debtor, less any administrative claim, adequate protection payment[52] and fee

[51] The plan may provide otherwise, or the court may order otherwise, but absent such events, the trustee is expected to make the plan distributions. Chapters 12 and 13 contain the same provision whereby the trustee "shall make payments to creditors under the plan" unless the plan or confirmation order provide otherwise. Bankruptcy Code §§ 1226(c), 1326(c).

[52] The Court may authorize the Subchapter V trustee to make pre-confirmation adequate protection payments to secured creditors. New § 1194(c).

owed to the trustee. New § 1194(a). Despite these provisions of the SBRA, no provisions of the SBRA require or dictate terms of pre-confirmation payments to the Subchapter V trustee.

### B. Modification of a Plan

#### 1. Modification Before Confirmation

As in a standard Chapter 11, a Subchapter V debtor may modify a plan at any time prior to confirmation so long as it continues to meet the requirements of Bankruptcy Code §§ 1122 and 1123. A Subchapter V debtor does not have to satisfy Bankruptcy Code § 1123(a)(8) (requirement of submission of an individual's earnings from personal services). New § 1181(a). However, another provision of the SBRA does require a Subchapter V debtor to submit future income necessary to fund the plan. New § 1190(2).

#### 2. Post-Confirmation Modification

A Subchapter V plan may be modified after confirmation, but the governance of any such modification depends on whether the plan was confirmed consensually or by cramdown. *See* new § 1193.

If a plan is confirmed consensually under new § 1191(a), then the debtor may modify the plan only before "substantial consummation" of the plan.[53] The Court must confirm the plan modification based upon a determination that "circumstances warrant the modification." Id. The plan, as modified, must comply with the requirements of Bankruptcy Code § 1122 (classification of claims or interests) and Bankruptcy Code § 1123 (contents of plan). The SBRA provides that creditors are deemed to have accepted or rejected the modification based on their prior vote. New § 1193(d). This provision deems even the creditor whose rights are being modified (and adversely affected) as retaining their vote under the prior plan unless the creditor affirmatively

[53] The SBRA also provides that the U.S. Trustee may reappoint the Subchapter V trustee to be heard in conjunction with any plan modification. New § 1183(c)(1). However, the Subchapter V trustee is terminated upon substantial consummation of a consensual plan. And a plan confirmed by consent cannot be modified after substantial consummation. Therefore, it is difficult to discern the circumstances where the U.S. Trustee will be in a position to "reappoint" a trustee in relation to a post-confirmation modification of a plan confirmed consensually under new § 1191(a).

changes its vote. As a practical matter, this means that the plan will be deemed accepted unless creditors affirmatively change their vote.

The requirements for modification of a cramdown plan are different. The time for modification is not cut off by "substantial consummation" of the plan. New § 1193(c) provides that a Subchapter V cramdown plan may be modified at any point during the pendency of the plan, either before or after substantial consummation. However, the court must find that the "circumstances warrant" the modification and that the modification satisfies the cramdown requirements of new § 1191(b). New § 1193(c).

### C. Discharge

Whether a plan is confirmed consensually or by cramdown affects the timing of the discharge in Subchapter V as well. If a plan is confirmed consensually (under new § 1191(a)), a Subchapter V debtor is entitled to an immediate discharge upon confirmation of the plan.[54] This is like the discharge granted an entity in Chapter 11 in that it occurs upon confirmation. The immediate discharge under a consensual Subchapter V plan is granted to both an entity debtor and an individual debtor.

If a plan is confirmed by cramdown (under new § 1191(b)), the debtor does not receive a discharge until the end of the plan when payments are completed.[55] New § 1192. This is like the discharge in a standard individual Chapter 11. Bankruptcy Code § 1141(d)(5) ("upon completion of all payments under the plan").

Distinctions exist between: (a) a discharge in a standard Chapter 11 and consensual Subchapter V plan (under Bankruptcy Code § 1141) and (b) a Subchapter V cramdown discharge (under new § 1192). The first is that the discharge in a cramdown Subchapter V

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[54] This is because Bankruptcy Code § 1141(d)(1)-(4) applies to a consensual plan in Subchapter V. *See* new § 1181(c).

[55] If the plan is confirmed by means of cramdown under § 1191(b), the debtor is not entitled to a discharge until "completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed five years as the court may fix. . . ." New § 1192.

discharges all administrative claims that are "provided for in the plan." New § 1192. This is presumably because such administrative claims have been paid by the time the discharge is entered three to five years after confirmation.[56] Secondly, a Subchapter V discharge does not include any long-term debts that remain to be satisfied after the final payments under the plan.[57] New § 1192.[58]

An individual Subchapter V debtor is not discharged from debts set forth in § 523(a).[59] Bankruptcy Code § 1141(d)(2) (as applicable to consensual plans); and new § 1192 (as to cramdown plans). There is no superdischarge in Subchapter V as in Chapter 13 under Bankruptcy Code § 1328.

## IX. MISCELLANEOUS CHANGES UNDER THE SBRA

### A. Transactions with Professionals

One helpful change in the Subchapter V context relates to professionals. Of course, professionals in a standard Chapter 11 are disqualified from employment in a Chapter 11 if they are not "disinterested." Bankruptcy Code § 327(a). A professional is not "disinterested" if such professional is owed money on a pre-petition claim.[60] The rule is modified in a Subchapter V case. If the professional is owed a pre-petition balance of less than $10,000, the existence of such pre-petition claim is not a disqualifier for that professional's employment in a Subchapter V case. New § 1195.

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[56] This is something that administrative claimants need to take into account.

[57] Debts excluded from discharge in a Subchapter V cramdown include any debt "on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court." New § 1192.

[58] Interestingly, the discharge exceptions for corporate debtors in § 1141(d)(6) (fraud or misrepresentation falling within § 523(a)(2)(A) or (B) of a debt owed to the government or based on a fraudulent tax return) are not incorporated into the exceptions to discharge under § 1192.

[59] There is a subtle difference in that § 1141(d) provides that debts excepted from discharge under § 523 are not dischargeable, whereas new § 1192 provides that debts excepted from discharge under § 523(a) are not dischargeable. While the discharge under new § 1192 does not expressly include § 523(c) (setting a deadline for creditors to assert a claim under § 523(a)(2), (4), or (6)), this should not make an ultimate difference as § 523(c) is applicable to Subchapter V as well as all other Chapter 11 cases. *See* Bankruptcy Code § 103(a).

[60] A creditor of the debtor is not disinterested. Bankruptcy Code § 101(14)(A).

### B. Preferences

The SBRA amends § 547(b) to provide that the trustee may only file preference actions "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmatives defenses under subsection (c)." The SBRA also amends 28 U.S.C. § 1409(b), which requires that a trustee file a preference action against a noninsider only in the district court for the district where the defendant resides. Under the current statute, the trustee is required to do so if the alleged preference is $13,650 or less.[61] The amendment raises the amount to $25,000. This change to the Code applies in all cases (including Chapter 7 and standard Chapter 11 cases). The change is not limited to Subchapter V cases.

## X. CONCLUSION

The new Small Business Reorganization Act of 2019 provides a new Subchapter V within Chapter 11 for financially distressed small businesses. The SBRA represents an effort by Congress to fill a void in the Bankruptcy Code that existed as a practical matter for small businesses located down on Main Street, U.S.A. These distressed businesses and business persons could not afford or otherwise navigate the complexities of Chapter 11 as it existed. New Subchapter V affords these type businesses an alternative form of relief.

[61] SBRA Sec. 3 provides that "$10,000" shall be struck and "$25,000" shall be inserted. However, the original $10,000 has been amended several times pursuant to 11 U.S.C. § 104. Most recently the amount was set at $13,650.