

# **A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019**

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**APPENDIX A**           **Lists of Sections of Bankruptcy Code and Title 28 Affected or Amended By The Small Business Reorganization Act of 2019**

**APPENDIX B**           **Summary of SBRA Interim Amendments to The Federal Rules of Bankruptcy Procedure To Implement SBRA**

# A Guide to the Small Business Reorganization Act of 2019

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## I. Introduction

The Small Business Reorganization Act of 2019 (the “SBRA”), signed by the President on August 23, 2019, enacts a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195, and makes conforming amendments to several sections of the Bankruptcy Code and to statutes dealing with appointment and compensation of trustees in title 28.<sup>1</sup> SBRA also revises the definitions of “small business case” and “small business debtor” in § 101(51C) and § 101(51D), respectively.<sup>2</sup> It takes effect on February 19, 2020, 180 days after its enactment. Appendix A is a chart that lists sections of the Bankruptcy Code that SBRA affects and summarizes the changes.

The purpose of SBRA is “to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs.”<sup>3</sup> A sponsor of the legislation stated that it

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<sup>1</sup> Section 3 of SBRA also enacts changes relating to prosecution of preference actions under 11 U.S.C. § 547 and to venue for certain proceedings brought by a trustee. These amendments apply in all bankruptcy cases.

SBRA § 3(a) amends § 547(b) to require that a trustee seeking to avoid a preferential transfer must exercise “reasonable due diligence in the circumstances of the case” and must take into account a party’s “known or reasonably knowable” affirmative defenses under § 547(c).

SBRA § 3(b) amends 28 U.S.C. § 1409(b) to provide that a trustee may sue to recover a debt of less than \$ 25,000 only in the district where the defendant resides. Prior to the amendment, the amount (as adjusted under 11 U.S.C. § 104 as of April 1, 2019) was \$ 13,650.

<sup>2</sup> Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code.

<sup>3</sup> Report of Committee on the Judiciary, House of Representatives, Report 116-171, 116<sup>th</sup> Cong., 1<sup>st</sup> Sess., on Small Business Reorganization Act of 2019, at 1, available at <https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf>. [Footnote continues on next page.]

allows small business debtors “to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business” which “not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.”<sup>4</sup>

It is likely that SBRA will have a significant impact. A preliminary estimate is that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would qualify as a small business debtor and that about 25 percent of individuals in chapter 11 cases would qualify as a small business.<sup>5</sup>

New subchapter V applies in cases in which a small business debtor elects its application. In the absence of an election, the existing provisions of chapter 11 that govern a small business debtor continue to apply with one change. SBRA amends § 1102(a)(3) to provide that no committee of unsecured creditors is appointed in any case of a small business debtor unless the court orders otherwise.

Subchapter V resembles chapter 12 in some ways. It provides for a trustee in the case while leaving the debtor in possession of assets and control of the business. The trustee has oversight and monitoring duties and the right to be heard on certain matters. In some cases, the trustee may make disbursements to creditors.

But subchapter V differs from chapter 12 in significant ways. For example, whereas chapter 12 confirmation standards (§ 1225) are similar to those in chapter 13 (§ 1325),

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For a summary of small business reorganizations under the Bankruptcy Code, see Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 No. 10 BANKRUPTCY LAW LETTER (October 2019) at 1-4.

<sup>4</sup> Statement of Rep. Ben Cline, quoted in House Report 116-171, *supra* note 3 at 4.

<sup>5</sup> Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 No. 10 BANKRUPTCY LAW LETTER (October 2019) at 5-6, *discussing* Bob Lawless, *How Many New Small Business Chapter 11s?*, Credit Slips (Sept. 14, 2019), <https://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html>. Professor Brubaker points out that the percentage may ultimately be higher because existing law provided incentives for a debtor to avoid qualification as a small business debtor and because debtors who might not have filed under current law because of its obstacles might now do so.

subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a). Unlike chapter 12, subchapter V does not provide for a codebtor stay.

Enactment of SBRA requires revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) has authority to make changes in the Official Forms prior to the effective date of the SBRA. Changes to the Bankruptcy Rules, however, take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require.

To take account of the new law, the Rules Committee has made changes to the Official Forms and has promulgated interim rules (the “Interim Rules”) that amend the Federal Rules of Bankruptcy Procedure.<sup>6</sup> The changes to the Official Forms are effective as of the effective date of SBRA. The Rules Committee has recommended that each judicial district adopt the Interim Rules as local rules or by general order. Appendix B summarizes the changes that the Interim Rules make.

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<sup>6</sup> The proposed amendments were submitted for public comment on October 3, 2019. The public comment period expired on November 13, 2019. See the “Proposed Amendments for Public Comment” page of the Courts’ public website at <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment>.

On December 5, 2019, the Advisory Committee on Bankruptcy Rules proposed Interim Amendments to the Federal Rules of Bankruptcy Procedure (“Interim Rules”) to address provisions of SBRA for adoption in each judicial district by local rule or general order and the promulgation of new Official Forms. The proposed Interim Rules and Official Forms reflected changes in response to comments received. *Report of the Advisory Committee on Bankruptcy Rules* (Dec. 5, 2019), available at [www.uscourts.gov/sites/default/files/december\\_5\\_2019\\_bankruptcy\\_rules\\_advisory\\_committee\\_report](http://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report).

On December 19, 2019, the Committee on Rules of Practice and Procedure approved the Interim Rules, recommended their local adoption, and approved the new Official Forms. The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts.

The Interim Rules are located on the [pending rules page](#) of the courts’ public website (uscourts.gov) until February 19, 2020 (the SBRA’s effective date), when they are relocated to the [current rules page](#). The new Official Forms are posted on the [pending forms page](#) of the website until February 19, 2020, when they are relocated to the [table](#) of Official Bankruptcy Forms.

SBRA does not repeal existing provisions that govern small business debtors in chapter 11 cases, and those provisions continue to apply to small business debtors who do not elect to proceed under subchapter V. The existence of two sets of provisions in chapter 11 for small business debtors requires terminology to distinguish them. The Rules Committee proposes to call cases under the existing provisions “small business cases” and to call cases of electing debtors “cases under subchapter V of chapter 11.”

This terminology is technically accurate. Under the SBRA amendments, a “small business debtor” is not necessarily a debtor in a “small business case.” Rather, a “small business case” is only a case under chapter 11 in which a small business debtor has not elected application of subchapter V. In other words, a small business debtor that has elected application of subchapter V is *not* in a small business case.

The technical distinction is important for at least one reason. Section 362(n) makes the automatic stay inapplicable in certain circumstances when the debtor in the current case is or was a debtor in a pending or previous small business *case*. Because a subchapter V debtor is not in a small business *case*, § 362(n) will not apply in a later case of the subchapter V debtor.

Bankruptcy judges and lawyers will inevitably adopt shorthand expressions to distinguish the three types of cases that are now possible under chapter 11: a non-small business case; a subchapter V case for a small business debtor who elects it; and a non-subchapter V small business case – a “small business case” – for one who does not. These materials refer to a non-small business case as a “standard” chapter 11 case; to the case of an electing small business debtor as a “sub V case;” and to the case of a non-electing small business debtor as a “non-sub V case.” And, of course, debtors are either “standard,” “sub V” or “non-sub V.”

## **II. Overview of Subchapter V Provisions**

For electing small business debtors, subchapter V has these important features: (1) it modifies confirmation requirements; (2) it provides for the participation of a trustee (the “sub V trustee”) while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) it changes several administrative and procedural rules; and (4) it alters the rules for the debtor’s discharge and the definition of property of the estate with regard to property an individual debtor acquires postpetition and postpetition earnings (which has implications for operation of the automatic stay of § 362(a)).

This Part provides an overview of these provisions. Later Parts discuss these and other provisions in more detail.

### **A. Changes in Confirmation Requirements**

Only the debtor may file a plan.

The court may confirm a plan even if all classes reject it. Moreover, the “fair and equitable” requirement for “cramdown” confirmation does not include the absolute priority rule. Instead, the plan must comply with a new projected disposable income requirement (applicable in cases of entities as well as those of individuals). The cramdown requirements for a secured claim are unchanged. (Part VIII).

A plan may modify a claim secured only by a security interest in the debtor’s principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with the small business of the debtor. Such modification is not permitted in standard or non-sub V chapter 11 cases or in chapter 12 or 13 cases. (Section VII(B)).

## **B. Subchapter V Trustee and Debtor in Possession**

Subchapter V provides for the debtor to remain in possession of assets and operate the business with the rights and powers of a trustee, unless the court removes the debtor as debtor in possession. (Part V).

The United States Trustee appoints the trustee. The role of the trustee is to oversee and monitor the case, to appear and be heard on specified matters, to facilitate a consensual plan, and to make distributions under a nonconsensual plan confirmed under the cramdown provisions. (Part IV).

## **C. Case Administration and Procedures**

Subchapter V modifies the usual procedures in chapter 11 cases in several respects.

No committee of unsecured creditors. A committee of unsecured creditors is not appointed unless the court orders otherwise. (SBRA also makes this the rule in a non-sub V case.) (Section VI(A)).

Required status conference and report from debtor. The court must hold a status conference within 60 days of the filing “to further the expeditious and economical resolution” of the case. Not later than 14 days before the status conference, the debtor must file a report that details the efforts the debtor has undertaken and will undertake to achieve a consensual plan of reorganization. (Section VI(C)).

Time for filing of plan. The debtor must file a plan within 90 days of the date of entry of the order for relief, unless the court extends the time based on circumstances for which the debtor should not justly be held accountable. The existing requirements in a small business case that a plan be filed within 300 days of the filing date (§ 1121(e)) and that confirmation occur

within 45 days of the filing of the plan (§ 1129(e)) do not apply in a sub V case. (Section VI(D)).

No disclosure statement. Section 1125, which states the requirements for a disclosure statement in connection with a plan and regulates the solicitation of acceptances of a plan, does not apply in a sub V case, unless the court orders otherwise. Although no disclosure statement is required, the plan must include: (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. (Sections VI(B), VII(B)).

No U.S. Trustee fees. A sub V debtor does not pay U.S. Trustee fees. (Section VI(E)).

## **D. Discharge and Property of the Estate**

### **1. Discharge**

If the court confirms a consensual plan, a sub V debtor (including an individual debtor) receives a discharge under § 1141(d)(1)(A) upon confirmation. The provision in § 1141(d)(5) for delay of discharge in individual cases until completion of payments does not apply in a sub V case. In the case of an individual, the § 1141(d)(1)(A) discharge does not discharge debts excepted under § 523(a). § 1141(d)(2). One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C). (Section X(A)).

If the court confirms a cramdown plan, § 1141(d) does not apply, and confirmation does not result in a discharge. Instead, new § 1192 provides for a discharge, which does not occur until the debtor completes plan payments for a period of at least three years or such longer time not to exceed five years as the court fixes. (Section X(B)).

Under new § 1192, the discharge in a cramdown case discharges the debtor from all debts specified in § 1141(d)(1)(A) and all other debts allowed under § 503 (administrative expenses),

with the exception of: (1) debts on which the last payment is due after the first three years of the plan or such other time not exceeding five years as the court shall fix; and (2) debts excepted under § 523(a). (Section X(B)).

Under § 362(c)(2), the automatic stay remains in effect after confirmation of a cramdown plan until the case is closed or dismissed, or the debtor receives a discharge.

## **2. Property of the estate**

Section 1115 provides that, in an individual chapter 11 case, property of the estate includes assets that the debtor acquires postpetition and earnings from postpetition services. Section 1115 does not apply in a subchapter V case. New § 1181(a).

If the court confirms a plan under the cramdown provisions of new § 1191(b), however, property of the estate includes (in cases of both individuals and entities) postpetition assets and earnings. New § 1186(a). (Part XI(B)).

## **III. Debtor’s Election of Subchapter V and Revised Definition of “Small Business Debtor”**

### **A. Debtor’s Election of Subchapter V**

Subchapter V applies in cases in which a small business debtor elects them. If a small business debtor does not make the election, the current provisions of Chapter 11 governing small business cases apply.

The operative statutory provision is new § 103(i).<sup>7</sup> New § 103(i) provides:

Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of title 11 shall apply.

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<sup>7</sup> SBRA inserted new subsection (i) in § 103 and renumbered existing subsections (i) through (k) as (j) through (l). SBRA § 4(a)(2).

The statute does not state when or how the debtor makes the election. Bankruptcy Rule 1020(a) currently requires a debtor to state in the petition whether it is a small business debtor. In an involuntary case, the Rule requires the debtor to file the statement within 14 days after the order for relief. The case proceeds in accordance with the debtor's statement unless and until the court enters an order finding that the statement is incorrect.

Interim Rule 1020(a) adds the requirement that the debtor state in the petition whether the debtor elects application of subchapter V and provides that the case proceed in accordance with the election unless the court determines that it is incorrect.

In an involuntary case, the debtor must state whether it is a small business debtor and make the election within 14 days after the order for relief. Interim Rule 1020.

Revisions to the Official Forms for voluntary chapter 11 cases require the debtor to state whether it is a small business debtor and whether it does or does not make the election.<sup>8</sup> Revised Official Forms also provide for creditors to receive notice of the debtor's statement that it is a small business and of the election that the debtor makes.<sup>9</sup>

Bankruptcy Rule 1020(b) requires an objection to a debtor's statement as to whether it is a small business debtor within 30 days after the later of the conclusion of the § 341(a) meeting or amendment of the statement. Interim Rule 1020(b) makes the same requirement applicable to the statement regarding the election.

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<sup>8</sup> Official Form 101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); Official Form 102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).

<sup>9</sup> Official Form 309E2 is the form for individuals or joint debtors under subchapter V, and Official Form 309F2 is the form for corporations or partnerships under subchapter V. Existing Official Forms 309E (individuals or joint debtors) and 309F (corporations or partnerships) are renumbered as 309E1 and 309F1. Both new forms contain the same information as the existing notices but provide additional information applicable in subchapter V cases.

The new forms require inclusion of the trustee and the trustee's phone number and email address. The new notices state that the debtor will generally remain in possession of property and may continue to operate the business and advise that, in some cases, debts will not be discharged until all or a substantial portion of payments under the plan are made.

Bankruptcy Rule 1009(a) gives a debtor the general right to amend a voluntary petition, list, schedule, or statement “as a matter of course at any time before the case is closed.” A question is whether a debtor may amend the small business designation or the subchapter V election that the voluntary petition includes.

Current Bankruptcy Rule 1020 does not address whether a debtor can amend the small business designation, and Interim Rule 1020 likewise does not address the issue of whether a delayed election should be allowed and, if so, under what circumstances.<sup>10</sup>

One problem with permitting a debtor to change the election is that deadlines for conducting a status conference<sup>11</sup> and for filing a plan<sup>12</sup> run from the date of the order for relief. The Advisory Committee in its Report observed, “Should a court exercise authority to allow a delayed election, it is likely that one of the court’s prime considerations in ruling on a request to make a delayed election would be the time restriction imposed by subchapter V. . . .”<sup>13</sup>

## **B. Revised Definitions of “Small Business Debtor” and “Small Business Case”**

Under current law, paragraph (A) of § 101(51D) defines a “small business debtor” as a person (1) engaged in commercial or business activities, (2) excluding a debtor whose principal activity is the business of owning or operating real property, (3) that has aggregate noncontingent liquidated secured and unsecured debts<sup>14</sup> as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$ 2,725,625,<sup>15</sup> (4) in a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or the court has determined that

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<sup>10</sup> The Advisory Committee Note to Interim Rule 1020 states, “The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.”

<sup>11</sup> See section VI(C).

<sup>12</sup> See section VI(D).

<sup>13</sup> *Report of the Advisory Committee on Bankruptcy Rules* at 3 (Dec. 5, 2019), *supra* note 6.

<sup>14</sup> Debts owed to one or more affiliates or insiders are excluded from the debt limit.

<sup>15</sup> The amount is revised every three years. § 104. The current amount became effective to cases filed on or after April 1, 2019.

the committee is not sufficiently active and representative to provide effective oversight of the debtor.

Paragraph (B) of current § 101(51D) excludes any member of a group of affiliated debtors that has aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

SBRA does not change the requirement that the debtor be engaged in “commercial or business activities” or the aggregate debt limit, but it modifies each of the other requirements. SBRA § 4(a)(1).

First, revised paragraph (A) of § 101(51D) requires that 50 percent or more of the debt must arise from the commercial or business activities of the debtor.<sup>16</sup>

Second, amended § 101(51D)(A) excludes a debtor engaged in owning or operating real property from being a small business debtor only if the debtor owns or operates single asset real estate.<sup>17</sup>

Third, the requirement that no committee exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in the case of a small business debtor unless the court orders otherwise.)

Finally, the amendment adds two additional types of debtors to those that paragraph (B) excludes from being a small business debtor. One exclusion is for a corporate debtor subject to the reporting requirements under § 13 or 15(d) of the Securities Exchange Act of 1934. New

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<sup>16</sup> For a family farmer, 50 percent of the debts must arise from a farming operation. § 101(18)(A). In addition, 50 percent of the debtor’s income must be received from the farming operation. *Id.* The same percentages apply in the definition of a family fisherman who is an individual. § 101(19A)(A). For a family fisherman that is a corporation or partnership, the debt relating to the fishing operation must be 80 percent, and more than 80 percent of the value of its assets must be related to the fishing operation. § 101(19A)(B).

<sup>17</sup> 11 U.S.C. § 101(51B) defines “single asset real estate” as “real property constituting a single property of project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.”

§ 101(51D)(B)(ii). The other is for a corporate debtor subject to the reporting requirements of those sections that is an affiliate of a debtor. New § 101(51D)(B)(iii).<sup>18</sup>

SBRA amends the definition of “small business case” in § 101(51C) to exclude a subchapter V debtor. Thus, a “small business case” is a case in which a small business debtor has *not* elected application of subchapter V. In other words, the case of a sub V debtor is *not* a “small business case,” even though a sub V debtor necessarily is a “small business debtor.”

## IV. The Subchapter V Trustee

### A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases. New § 1183(a).<sup>19</sup> The trustee is a standing trustee, if the U.S. Trustee has appointed one, or a disinterested person that the U.S. Trustee appoints. SBRA § 4(b) amends 28 U.S.C. § 586 to make its provisions for the appointment of standing chapter 12 and 13 trustees applicable to the appointment of standing sub V trustees. The court has no role in the appointment of the trustee.<sup>20</sup>

The United States Trustee Program is selecting a pool of persons who may be appointed on a case-by-case basis in sub V cases rather than appointing standing trustees.<sup>21</sup>

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<sup>18</sup> Issues exist with regard to the effect of the language in the amendment relating to the exclusion of public corporations. See Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 No. 10 BANKRUPTCY LAW LETTER (October 2019) at 7. Because the issue is of limited or no interest to most practitioners and judges, the issue is beyond the scope of these materials. The author will address the issues if they arise and readers must do likewise.

<sup>19</sup> SBRA § 4(a)(3) amends § 322(a) to provide for a sub V trustee to qualify by filing a bond in the same manner as other trustees.

<sup>20</sup> Section 1104, which governs the appointment of a trustee in a non-sub V case, does not apply in sub V cases. New § 1181(a). In a sub V case, therefore, the U.S. Trustee’s appointment of the trustee is not subject to the court’s approval as it is under § 1104(d).

<sup>21</sup> See Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP’s Implementation of the HAVEN Act and the SBRA*, 38 AMER. BANKR. INST. J. (October 2019) at 12.

The appointment of a sub V trustee in each case instead of a standing trustee appears to be contrary to the expectations of proponents of the SBRA. In his testimony in support of the legislation on behalf of the National Bankruptcy Conference, retired bankruptcy judge A. Thomas Small stated, “There will be a standing trustee in every subchapter V case who will perform duties similar to those performed by a chapter 12 or chapter 13 trustee.” Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference at 2, *available at* <https://www.fjc.gov/publications/small-business-reorganization-act>.

## **B. Role and Duties of the Subchapter V Trustee**

The role of the sub V trustee is similar to that of the trustee in a chapter 12 or 13 case. New § 1183 enumerates the trustee's duties. Section 1106, which specifies the duties of the trustee in a standard chapter 11 case, does not apply in sub V cases. New § 1181(a). New § 1183, however, makes many of its provisions applicable in some circumstances.

As in chapter 12 and 13 cases, the debtor remains in possession of assets and operates the business. If the court removes the debtor as debtor in possession under new § 1185(a), the trustee operates the business of the debtor. New § 1183(b)(5).

### **1. Trustee's duties to supervise and monitor the case and to facilitate confirmation of a consensual plan**

In general, the role of the trustee is to supervise and monitor the case and to participate in the development and confirmation of a plan. This role arises from several provisions that are the same as those in chapter 12 cases, with some significant additions.

First, the sub V trustee has the duty to "facilitate the development of a consensual plan of reorganization." New § 1183(b)(7). No other trustee has this duty, although a chapter 13 trustee has the duty to "advise, other than on legal matters, and assist the debtor in performance under the plan." § 1302(b)(4). One practitioner has suggested that the sub V trustee should be a "financial wizard" who can work with all parties on cash flows, interest rates, payment requirements, and "all the numbers puzzles that comprise a plan," and that the statutory goal of a consensual plan suggests that the trustee also fill a mediation role.<sup>22</sup>

Second, the trustee must appear and be heard at the status conference that new § 1188(a) requires. New § 1183(b)(3). Although § 105(d) (which does not apply in a sub V case, new

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<sup>22</sup> Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38 AMER. BANKR. INST. J. (Nov. 2019) at 8.

§ 1181(a)) provides for a status conference in any case on the court's own motion or on the request of a party in interest, it does not require one. Thus, a status conference is not required in any other type of case. Section VI(C) discusses the status conference.

Finally, the trustee must appear and be heard at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate. New § 1183(b)(3). A chapter 12 trustee has the same responsibilities. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(b)(2).

Although the responsibility of the sub V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor's property, business, and financial condition, a sub V trustee, like a chapter 12 trustee, does not have the duty to investigate the financial affairs of the debtor. Section 704(a)(4) imposes such a duty on a chapter 7 trustee, and it is a duty of a chapter 13 trustee under § 1302(b)(1). A trustee in a standard chapter 11 or a non-sub V case has a broad duty of investigation under § 1106(a)(3), unless the court orders otherwise.

The court may, however, impose the investigative duties that § 1106(a)(3) specifies on the sub V trustee. Under new § 1183(b)(2), the court (for cause and on request of a party in interest, the sub V trustee, or the U.S. Trustee) may order that the sub V trustee perform certain duties of a chapter 11 trustee under § 1106(a). The specified duties are: (1) to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, the desirability of its continuance, and any other matter relevant to the case of formulation of a plan (§ 1106(a)(3)); (2) to file a statement of the investigation, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or

irregularity in the management of the affairs of the debtor or to a cause of action available to the estate, and to transmit a copy or summary of it to entities that the court directs (§ 1106(a)(4)<sup>23</sup>); and (3) to file postconfirmation reports as the court directs (§ 1106(a)(7)).

The same procedures apply to a chapter 12 trustee's duty to investigate under § 1202(b)(2).

## **2. Other duties of the trustee**

New § 1183(b) imposes other duties that chapter 12 and 13 trustees have in their cases.

Like chapter 12 and 13 trustees under §§ 1201(b)(1) and 1302(b)(1),<sup>24</sup> a sub V trustee under new § 1183(b)(1) has the duties of a trustee under § 704(a): (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine proofs of claim and object to allowance of any claim that is improper, if a purpose would be served (§ 704(a)(5)); (3) to oppose the discharge of the debtor, if advisable (§ 704(a)(6)); (4) to furnish information concerning the estate and the estate's administration that a party in interest requests, unless the court orders otherwise (§ 704(a)(7)); and (5) to make a final report and to file it (§ 704(a)(9)).

Under new § 1183(b)(4), the sub V trustee also has the same duty as chapter 12 and 13 trustees to ensure that the debtor commences timely payments under a confirmed plan (§§ 1202(b)(4), 1302(b)(5)).

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<sup>23</sup> Section 1106(a)(4)(B) directs a chapter 11 trustee to transmit the copy or summary to any creditors' committee, equity security holders' committee, and indenture trustee. Committees do not exist in a small business case unless the court orders otherwise under § 1102(a)(3) as amended, and a small business debtor is unlikely to have an indenture trustee as a creditor.

<sup>24</sup> Chapter 12 (§ 1202(b)(1)) and chapter 13 (§ 1302(b)(1)) trustees also have the duty of a chapter 7 trustee under § 704(a)(3) to ensure that the debtor performs the debtor's intentions under § 521(a)(2)(B) to surrender, redeem, or reaffirm debts secured by property of the estate. The imposition of this duty in chapter 12 and 13 cases is curious in that § 521(b)(2)(B) applies only in chapter 7 cases. SBRA does not impose this anomalous duty on the sub V trustee.

The U.S. Trustee has the duty to monitor and supervise subchapter V cases and trustees, 28 U.S.C. § 586(a)(3).<sup>25</sup> The U.S. Trustee Program expects to develop uniform procedures for reporting by sub V trustees to enable U.S. Trustees to evaluate and monitor them.<sup>26</sup>

### **3. Trustee's duties upon removal of debtor as debtor in possession**

Under new § 1185(a), the court may remove the debtor as debtor in possession, as it may in chapter 12 cases (§ 1204). If the court does so, the sub V trustee has the duties of a trustee specified in paragraphs (1), (2), and (6) of § 1106. New § 1183(b)(5).<sup>27</sup> A chapter 12 trustee has the same duties under § 1202(b)(5).<sup>28</sup> New § 1183(b)(5) specifically directs the sub V trustee to operate the debtor's business when the debtor is not in possession.

Under paragraph (1) of § 1106(a), the trustee must perform the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a). These duties are: (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine and object to proofs of claim if a purpose would be served (§ 704(a)(5)); (3) to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise (§ 704(a)(7)); (4) to file reports (§ 704(a)(8)); (5) to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee (§ 704(a)(9)); (6) to provide required notices with regard to domestic support obligations (§ 704(a)(10)); (7) to perform any obligations as the administrator of an employee benefit plan (§ 704(a)(11)); and (8) to use

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<sup>25</sup> SBRA § 4(b)(1)(A) amended 28 U.S.C. § 586(a)(3) to include sub V cases within the types of cases that the U.S. Trustee supervises.

<sup>26</sup> See Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP's Implementation of the HAVEN Act and the SBRA*, 38 AMER. BANKR. INST. J. (October 2019) at 12.

<sup>27</sup> New § 1183(b)(5) also requires the sub V to perform duties specified in § 704(a)(8). The specification of the duty is duplicative because the § 704(a)(8) duty is one of the duties listed in § 1106(a)(1) that the sub V trustee must perform.

<sup>28</sup> A chapter 12 trustee in this situation also has the trustee's duty under § 1106(a)(7) to file postconfirmation reports. The court may impose this duty on a sub V trustee under § 1183(b)(2), as earlier text discusses.

reasonable and best efforts to transfer patients from a health care business that is being closed (§ 704(a)(12)).

Paragraph (2) of § 1106(a) requires the trustee to file any list, schedule, or statement that § 521(a)(1) requires if the debtor has not done so. Paragraph (6) requires the trustee to file tax returns for any year for which the debtor has not filed a tax return.

## **C. Trustee's Disbursement of Payments to Creditors**

### **1. Disbursement of preconfirmation payments and funds received by the trustee**

Paragraphs (a) and (c) of new § 1194 contain provisions dealing with the trustee's disbursement of money prior to confirmation. It is not clear, however, how they can have any operative effect because nothing in subchapter V requires preconfirmation payments to the trustee or authorizes the court to require them.

New § 1194(a) states that the trustee shall retain any "payments and funds" received by the trustee until confirmation or denial of a plan. Although the statute by its terms is not limited to preconfirmation payments and funds, the paragraph's direction for their disbursement based on whether the court confirms a plan or denies confirmation indicates that it deals only with money the trustee receives prior to confirmation.

If a plan is confirmed, new § 1194(a) directs the trustee to disburse the funds in accordance with the plan. If a plan is not confirmed, the trustee must return the payments to the debtor after deducting administrative expenses allowed under § 503(b), any adequate protection payments, and any fee owing to the trustee. The provision is effectively the same as the

provisions that govern disbursement of preconfirmation payments in chapter 12 and 13 cases. §§ 1226(a), 1326(a)(2).<sup>29</sup>

Provisions for a trustee's disbursement of preconfirmation funds make sense in a chapter 13 case because a chapter 13 debtor must begin making preconfirmation payments to the trustee, adequate protection payments to creditors with a purchase-money security interest in personal property, and postpetition rent to lessors of personal property within 30 days of the filing of the chapter 13 case. § 1326(a). If the court denies confirmation in a chapter 13 case, therefore, it is possible that the chapter 13 trustee will be holding money that the debtor paid.

No such provisions for preconfirmation payments exist in a sub V case.<sup>30</sup> Subchapter V contains no requirement for the debtor to make preconfirmation payments to the trustee, secured creditors, or lessors, and nothing in subchapter V authorizes the court to require the debtor to make preconfirmation payments to the trustee.

Nevertheless, paragraph (c) of new § 1194 authorizes the court, prior to confirmation and after notice and a hearing, to authorize the trustee to make payments to provide adequate protection payments to a holder of a secured claim. But a court can hardly require a sub V trustee to make adequate protection payments as new § 1194(c) contemplates if the trustee has no money to make them.

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<sup>29</sup> The chapter 12 provision, § 1226(a), does not specifically provide for fees of a trustee who is not a standing trustee and does not permit a deduction for adequate protection payments. The fees of a non-standing chapter 12 trustee, however, are allowable as an administrative expense and as such are within the scope of the deduction.

The chapter 13 provision, § 1326(b)(2), does not specifically provide for fees of the chapter 13 trustee. It does provide for the trustee to deduct adequate protection payments.

A standing chapter 13 trustee collects a percentage fee as the debtor makes payments. 28 U.S.C. § 586(e)(2); *see* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 17:5 (2019 ed.). Thus, the funds a standing chapter 13 trustee has upon denial of confirmation are net of the trustee's fee that has already been paid. A non-standing chapter 13 trustee's fee is included in the deduction because it is an administrative expense.

<sup>30</sup> Chapter 12 also does not contain provisions for preconfirmation payments to the trustee.

Perhaps it is arguable that the new § 1194(a) and (c) provisions impliedly authorize the court to require a debtor to make preconfirmation payments to the trustee, particularly if the court orders the trustee to make adequate protection payments. But the concept of the sub V debtor remaining in possession of its assets and operating its business properly includes the debtor retaining control of its funds. It is, therefore, more appropriate (and simpler) for a court to require the debtor, not the trustee, to make whatever adequate protection or other payments the court orders.

## **2. Disbursement of plan payments by the trustee**

Whether the sub V trustee makes disbursements to creditors under a confirmed plan depends on the type of confirmation that occurs. Under new § 1194(b), the trustee makes payments under a plan that is confirmed under the cramdown provisions of new § 1191(b), unless the plan or confirmation order provides otherwise. If a consensual plan is confirmed under new § 1191(a), however, the trustee's services terminate under new § 1183(c) upon "substantial consummation," and the debtor makes plan payments. Part IX discusses payments under the plan.

## **D. Termination of Service of the Trustee and Reappointment**

### **1. Termination of service of the trustee**

When termination of the trustee's service occurs depends on whether the court confirms a consensual plan under new §1191(a) or confirms a plan that one or more impaired classes of creditors have not accepted under the cramdown provisions of new § 1191(b).

When the court confirms a consensual plan under new § 1191(a), the trustee's service terminates upon substantial consummation,<sup>31</sup> which ordinarily occurs when distribution commences. New § 1183(c).

Confirmation of a plan under the cramdown provisions of new § 1191(b), however, does not terminate the trustee's service. As just discussed, the trustee continues to serve and makes payments under the plan as new § 1194 requires.

Part IX further discusses these provisions.

Termination of the service of the sub V trustee also occurs, of course, upon dismissal of the case or its conversion to another chapter.<sup>32</sup>

## **2. Reappointment of trustee**

New § 1183(c)(1) provides for the reappointment of a trustee after termination of the trustee's service in two circumstances. It applies only when the court has confirmed a consensual plan under new § 1191(a) and the trustee's service has been terminated upon substantial consummation because, if cramdown confirmation has occurred under new § 1191(b), the trustee continues to serve and no reappointment is ever necessary.

First, new § 1183(c)(1) permits reappointment of the trustee if necessary to permit the trustee to perform the trustee's duty under new § 1183(b)(3)(C) to appear and be heard at a hearing on modification of a plan after confirmation.

The reason for this provision is unclear. Reappointment is only necessary when the court has confirmed a consensual plan under § 1191(a) and the trustee's service has terminated upon

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<sup>31</sup> Section IX(A) discusses substantial consummation in the context of payments under a consensual plan.

<sup>32</sup> Section 701(a) directs the U.S. trustee to appoint an interim trustee promptly after entry of an order for relief under chapter 7. In a converted case, the U.S. Trustee may appoint the trustee serving in the case immediately before entry of the order for relief.

Sections 1202 and 1302 provide for a standing trustee to serve in cases under those chapters, if one has been appointed, or for the U.S. Trustee to appoint a disinterested person to serve as trustee.

substantial consummation. After substantial consummation of a consensual plan, § 1193(b) provides that the debtor cannot modify it. Perhaps the purpose of the reappointment provision is to make sure that someone appears at the hearing to point this out to the court if a debtor attempts to modify a confirmed consensual plan after its substantial.

Second, new § 1183(c) permits reappointment of the trustee if necessary to perform the trustee's duties under new § 1185(a). New § 1185(a) provides for the removal of the debtor in possession, among other things, for "failure to perform the obligations of the debtor under a plan confirmed under this chapter." Because new § 1185(a) contemplates the postconfirmation removal of the debtor in possession, a trustee must be available to take charge of the assets and the business. Section XII(C) further discusses the postconfirmation removal of the debtor in possession.

#### **E. Compensation of Subchapter V Trustee**

If the trustee in a sub V case is a standing trustee, the trustee's fees are a percentage of payments the trustee makes to creditors under the same provisions that govern compensation of standing chapter 12 and chapter 13 trustees.

If the sub V trustee is not a standing trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of § 330(a), without regard to the limitation in § 326(a) on compensation of a chapter 11 trustee based on money the trustee disburses in the case. As section IV(E)(2) discusses, some observers expect that technical amendments will

impose a limit on compensation of five percent of payments under the plan, which is the rule for a non-standing chapter 12 or 13 trustee.

### **1. Compensation of standing subchapter V trustee**

For a standing trustee, amendments to § 326 require compensation under 28 U.S.C. § 586. SBRA §4(a)(4). As amended, § 326(a) excludes a subchapter V trustee from its provisions governing compensation of a chapter 11 trustee, and § 326(b) provides that the court may not allow compensation of a standing trustee in a subchapter V case under § 330.

Under SBRA's amendments to 28 U.S.C. § 586(e), SBRA § 4(b)(1)(D), the U.S. Trustee Program establishes the compensation for a standing trustee under subchapter V in the same manner it does for standing chapter 12 and 13 trustees. Existing provisions of 28 U.S.C. § 586(e) that apply in chapter 12 and 13 cases are extended to cover subchapter V standing trustees. Thus, the standing subchapter V trustee receives a percentage fee (as fixed by the U.S. Trustee Program) from all payments the trustee disburses under the plan.

If the service of a standing trustee is terminated by dismissal or conversion of the case or upon substantial consummation of a consensual plan under new § 1181(a) (as section IX(A) discusses, the trustee does not make payments under a consensual plan), new 28 U.S.C. § 586(e)(5) provides that the court "shall award compensation to the trustee consistent with the services performed by the trustee and the limits on the compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]." The limits require reference to the standing trustee's maximum annual compensation, 28 U.S.C. § 586(e)(1)(A), and to the maximum percentage fee, 28 U.S.C. § 586(e)(1)(B).

## 2. Compensation of non-standing subchapter V trustee

Questions have arisen concerning the provisions of the new statute for compensation of a subchapter V trustee who is not a standing trustee.

Section 330(a) permits the court to award compensation to trustees. Sections 326(a) and (b) impose limits on compensation of trustees. SBRA does not amend § 330(a), but it does amend §§ 326(a) and (b).

Under a “plain meaning” interpretation of these provisions as amended, a non-standing sub V trustee is entitled to “reasonable compensation for actual, necessary services rendered” and “reimbursement for actual, necessary expenses” under § 330(a), and §§ 326(a) and (b) do not impose any limits on compensation.

Some bankruptcy experts who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error. The drafters of subchapter V intended that provisions for compensation of non-standing sub V trustees be the same as those for non-standing chapter 12 and 13 trustees.

Specifically, § 326(b) limits compensation of a non-standing chapter 12 or chapter 13 trustee to “five percent upon all payments under the plan.” Although the drafters intended this limitation to apply to compensation of sub V trustees, the language of the SBRA amendments to § 326(b) do not make this limitation applicable to a non-standing sub V trustee.<sup>33</sup> Observers

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<sup>33</sup> A full understanding of the issue requires further elaboration.

Section 330(a) provides for the allowance of compensation to “trustees,” subject to § 326 (and other sections). SBRA does not amend § 330(a).

Under current law, § 326(a) limits the compensation of a chapter 11 (and chapter 7) trustee to a percentage of moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor.

Current § 326(b) deals with compensation of trustees in chapter 12 and 13 cases in two ways. First, it provides that a standing chapter 12 or 13 trustee is not entitled to compensation under § 330(a); instead, a standing chapter 12 or 13 trustee receives compensation, and collects percentage fees, under 28 U.S.C. § 586(e). Second, § 326(b) limits the compensation of a non-standing chapter 12 or 13 trustee to “five percent upon all payments under the plan.” The exact language of § 326(b) is that the limitation applies to a “trustee appointed under section 1202(a) or 1302(a) of this title.” [Footnote continues on next page.]

close to the legislative process expect a prompt technical amendment to resolve this issue by making the five percent limitation also applicable to sub V trustees.<sup>34</sup>

### **3. Deferral of non-standing subchapter V trustee's compensation**

A standing sub V trustee receives compensation as a percentage of payments the trustee makes from funds paid by the debtor under a plan. The percentage fees of a standing trustee, therefore, are necessarily deferred until payments are made.

A non-standing trustee's compensation is allowable as an administrative expense, which has priority under § 507(a)(2) subject only to claims for domestic support obligations. Under § 1129(a)(9)(A), a plan must provide for payment of administrative expenses in full on or before the effective date of the plan. This requirement applies in subchapter cases to confirmation of a consensual plan under new § 1191(a).

New § 1191(e), however, permits payment of administrative expense claims through the plan if the court confirms it under the cramdown provisions of new § 1191(b). Accordingly, a non-standing sub V trustee faces deferral of payment of compensation for services in the case.

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Generally, then, § 326(a) deals with chapter 7 and 11 cases and § 326(b) deals with chapter 12 and 13 trustees. Without an amendment, a sub V trustee would be a chapter 11 trustee, and § 326(a) would apply. Similarly, unamended §326(b) would not apply because it is for chapter 12 and 13 cases.

SBRA § 4(a)(4)(A) amended § 326(a) by excluding sub V trustees from its application. SBRA § 4(a)(4)(B) amended § 326(b) to prohibit a standing sub V trustee from receiving compensation under § 330. SBRA's amendments to 28 U.S.C. § 586(e) provide for compensation of a standing sub V trustee under its provisions, so the same provisions that govern compensation of chapter 12 and 13 standing trustees apply. SBRA § 4(b)(1).

What the SBRA amendments did not do was add "§ 1183" (the new subchapter V section that calls for the appointment of a sub V trustee) before "§ 1202(a) and 1302(a)" (the sections under which chapter 12 and 13 trustees are appointed) in the language quoted above. Without this insertion, amended § 526(b) does not limit the compensation of a non-standing sub V trustee. As the next footnote discusses, one reading of amended § 526(b) is that nothing authorizes compensation of a non-standing sub-V trustee.

<sup>34</sup> Such an amendment would also clarify that a non-standing trustee is entitled to compensation. As amended, § 326(b) applies to cases under subchapter V, chapter 12, and chapter 13. Before and after the amendment, § 326(b) states that the court "may allow reasonable compensation under section 330 of this title to a trustee appointed under section 1202(a) or 1302(a) of this title," but it does not state that the court may allow compensation under § 330 of a trustee appointed under new § 1383. Because § 330(a) is subject to § 326, and § 326(b) does not provide for compensation of a non-standing sub V trustee, some observers have argued that a sub V trustee is not entitled to compensation.

As section IV(E)(2) discusses, some observers expect a technical amendment to § 326(b) that will impose a limitation on a non-standing trustee's compensation to five percent of payments under the plan. If this occurs, a non-standing trustee's compensation may arguably be limited to five percent of payments as they are made.

#### **F. Trustee's Employment of Attorneys and Other Professionals**

Section 327(a) permits a bankruptcy trustee to employ attorneys and other professionals "to represent or assist the trustee in carrying out the trustee's duties."

SBRA does not modify this provision for subchapter V cases. If a standing sub V trustee is appointed, the standing trustee presumably would follow the practice of standing trustees in chapter 12 and 13 cases and not retain counsel or other professionals except in exceptional circumstances.

A non-standing sub V trustee's employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of SBRA to streamline and simplify chapter 11 cases for small business debtors and to reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances. In this regard, a person serving as a sub V trustee might be presumed to have a sufficient understanding of applicable legal principles to perform the trustee's monitoring and supervisory duties, and to appear and be heard on specified issues, without the necessity of separate legal advice.

A question exists, however, as to whether a trustee who is not an attorney may appear and be heard in a bankruptcy case. Section 1654 of title 28 provides as follows:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

The statute applies only to natural persons; it does not permit a corporation or other entity to appear in federal court except through licensed counsel. *E.g.*, *Rowland v. California Men's Colony*, 506 U.S. 194, 202, 113 S. Ct. 716, 721 (1993) (“[T]he lower courts have uniformly held that 28 U.S.C. § 1654, providing that ‘parties may plead and conduct their own cases personally or by counsel,’ does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.”).

Courts have applied the rule to prohibit an individual who serves as the trustee for a trust or as the personal representative of an estate from representing the trust or estate unless the trust or estate has no creditors and the individual is the sole beneficiary.<sup>35</sup> Because a bankruptcy trustee acts as the representative of the estate, § 323(a), and creditors have an interest in the estate, the same rule would appear to require a trustee who is not an attorney to retain a lawyer to appear and be heard in a bankruptcy court.

The nature of reorganization proceedings in a bankruptcy court and, specifically, the facilitative, advisory, and monitoring role that subchapter V contemplates for the trustee, however, suggest that the rule applicable in a federal lawsuit between discrete parties should not be extended to apply to a nonlawyer subchapter V trustee unless the trustee is a party to a discrete controversy in an adversary proceeding or contested matter.

In this regard, 28 U.S.C. § 1654 and the case law establishing the rule have their roots in 18<sup>th</sup> and 19<sup>th</sup> century practice in federal courts when the availability of bankruptcy relief was

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<sup>35</sup> *E.g.*, *Guest v. Hansen*, 603 F.3d 15 (2d Cir. 2009) (estate); *Knoefler v. United Bank of Bismarck*, 20 F.3d 347 (8<sup>th</sup> Cir. 1994) (trust); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696 (9<sup>th</sup> Cir. 1987) (trust).

either nonexistent or short-lived. The statute could not have contemplated a reorganization case involving many parties and many inter-related moving parts that involve business issues and often require negotiations and compromise to achieve a successful outcome for all the parties. In other words, a bankruptcy reorganization is quite different from a lawsuit that involves discrete parties asserting claims and defenses to establish their rights and obligations.

This distinction is particularly important in a subchapter V case. Specific duties of the sub V trustee are to facilitate the development of a consensual plan of reorganization, new § 1183(b)(7), and to appear and be heard on confirmation and other significant issues that relate to confirmation, new § 1183(b)(3). The statute makes it clear that the trustee's primary role is to work with the parties and then to *report* to the court, not to engage in litigation with them.

A nonlawyer trustee does not need an attorney to work with the parties on business issues, to investigate and obtain information about the debtor and its business, to facilitate confirmation, and to report to the court. When the time comes to report to the court, the trustee should be permitted to perform the reporting function without a lawyer.

Assuming that the nonlawyer trustee is knowledgeable about reorganization law and practice (and a sub V trustee who is not knowledgeable should not be a sub V trustee), neither the debtor, creditors, nor the court need a lawyer to present the trustee's reports and views to the court.

In short, unless a sub V trustee needs to *litigate* something,<sup>36</sup> the trustee does not need counsel. The statute and case law governing federal *litigation* should not be extended to the trustee's appearance in court to *report*.

The subchapter V trustee's primary role is analogous to the role of an examiner in a standard chapter 11 case, § 1106(b),<sup>37</sup> or an expert witness that a court appoints, Fed. R. Evid. 706. Such parties provide information to the court and the parties and may do so without counsel. A sub V trustee with similar advisory duties should similarly be permitted to provide information to the court without the necessity of having to do so through a lawyer.<sup>38</sup>

Finally, the trustee is an officer of the court. The court need not insist that its officer hire a lawyer to hear what the officer has to say.

If a nonlawyer is the sub V trustee, the trustee's ability to appear in court without a lawyer is critical to accomplishment of the objective of subchapter V of providing debtors – and creditors – with the opportunity to accomplish an expeditious and economic reorganization, hopefully on a consensual basis. A requirement for employment of counsel adds an additional layer of expense that should not ordinarily be necessary and that threatens accomplishment of subchapter V's primary objective.<sup>39</sup> Moreover, if a nonlawyer trustee must have a lawyer, the additional expense may as a practical matter preclude the appointment of a nonlawyer trustee.

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<sup>36</sup> For example, a nonlawyer trustee might be required to employ counsel to perform the duties to object to proofs of claim, if a purpose would be served, and to oppose the discharge of the debtor, if advisable. New § 1183(b)(1) (making these duties of a chapter 7 trustee under § 704(a)(5) and (6) applicable to a sub V trustee).

<sup>37</sup> Although bankruptcy courts often authorize an examiner to employ counsel or other professionals, § 327(a) does not provide authority for an examiner to employ a professional person. *See generally* 5 *Norton Bankruptcy Law and Practice* § 99:29 (3d ed.). *See also In re W.R. Grace & Co.*, 285 B.R. 148, 156 (Bankr. D. Del. 2002) (“[T]he basic job of an examiner is to examine, not to act as a protagonist in the proceedings. The Bankruptcy Code does not authorize the retention by an examiner of attorneys or other professionals.” (citation omitted)).

<sup>38</sup> In some jurisdictions, some chapter 7 panel trustees are not lawyers. Informal discussions with some judges indicate that in some courts nonlawyer trustees appear without counsel when the matter does not require actual litigation.

<sup>39</sup> This consideration suggests that a court may invoke § 105(a) to permit a nonlawyer to appear without counsel as being “necessary or appropriate” to carry out the provisions of the Bankruptcy Code.

If a court determines that the rule prohibiting a nonlawyer trustee from appearing in federal court requires the trustee to retain counsel in order to be heard, considerations of economic administration may lead the court to limit the services that will be compensated to those for which a lawyer is legally required. Non-compensable services might include, for example, work in connection with the investigation of the debtor and its business or negotiations or development of business information to facilitate a consensual plan. And because it is the trustee, not the lawyer, who is to be heard, any written report concerning confirmation and other matters would seem to be the responsibility of the trustee, not the lawyer.

## **V. Debtor as Debtor in Possession and Duties of Debtor**

### **A. Debtor as Debtor in Possession**

The debtor, as debtor in possession, remains in possession of assets of the estate. New § 1186(b). A sub V debtor in possession has the rights, powers, and duties of a trustee that a standard chapter 11 debtor in possession has, including the operation of the debtor's business. New § 1184.<sup>40</sup>

The court may remove the debtor as debtor in possession under new § 1185(a), as section V(C) discusses. The court may reinstate the debtor in possession. New § 1185(b).

If the court terminates the debtor as debtor in possession, the trustee's duties are expanded to include, among other things, operation of the debtor's business, as section IV(B)(3) discusses. The trustee cannot, however, file a plan because only the debtor may do so. New § 1189(a).

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<sup>40</sup> Section 1107(a), which provides for the debtor to remain in possession with the rights, powers, and duties of a trustee, is inapplicable in a sub V case. New § 1181(a). New § 1184 replaces § 1107(a) in sub V cases.

## **B. Duties of Debtor in Possession**

Upon the filing of a voluntary case, a small business debtor must file documents required of a small business debtor under §§ 1116(1)(A) and (B). Although § 1116 does not apply in a subchapter V case under new § 1181(a),<sup>41</sup> new § 1187(a) requires the sub V debtor to comply with §§ 1116(a)(A) and (B) upon electing to be a sub V debtor.

The timing of the election does not change the time for the debtor to file the required documents from the date of the filing of the petition. If the debtor makes the election in the petition (as Interim Rule 1020(a) requires), the debtor must file the documents at that time. If the debtor does not make the election in the petition (an election arguably might occur later by amendment), § 1116(1) is applicable and requires the debtor to append the documents to the petition.

In an involuntary case, the debtor must file the documents within seven days after the order for relief.<sup>42</sup>

The documents that § 1116(1) requires are: the debtor's most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or a statement under penalty of perjury that no balance sheet, statement of operations or cash-flow statement has been prepared and no federal tax return has been filed.

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<sup>41</sup> Section 1116 does not apply in a sub V case, § 1181(a), but § 1187 incorporates all its requirements. In view of this, it is unclear why § 1116 does not apply in subchapter V cases. Perhaps it is because § 1116 also applies to a trustee.

<sup>42</sup> Section 1116(1) requires a small business debtor in an involuntary case to file the required documents within seven days after the order for relief. Interim Rule 1020(a) permits a debtor to make the subchapter V election within 14 days after entry of the order for relief in an involuntary case. As the text discusses, new § 1187(a) requires compliance with the requirements of § 1116(1) upon the debtor's election to be a subchapter V debtor.

Unless and until the debtor makes the election, however, § 1116 applies. Accordingly, the debtor must comply with § 1116(1) and file the required documents within seven days after the order for relief, regardless of when the debtor makes the election.

SBRA does not change a small business debtor's duty under § 308 to file periodic reports. New § 1187(b). Under § 308(b), the periodic reports must contain information including: (1) the debtor's profitability; (2) reasonable approximations of the debtor's projected case receipts and cash disbursements; (3) comparisons of actual case receipts and disbursements with projections in earlier reports; (4) whether the debtor is in compliance with postpetition requirements of the Bankruptcy Code and the Bankruptcy Rules and whether the debtor is timely filing tax returns and paying taxes and administrative expenses when due; and (5) if the debtor has not complied with the foregoing duties, how, when, and at what cost the debtor intends to remedy any failures.

The debtor must also comply with the duties of a debtor in possession in small business cases specified in § 1116(2) – (7). New § 1187(b). Thus, the debtor's senior management personnel and counsel must: (1) attend meetings scheduled by the court or the U.S. Trustee (including initial debtor interviews, scheduling conferences, and § 341 meetings, unless waived for extraordinary and compelling circumstances); (2) timely file all schedules and statements of financial affairs (unless the court after notice and a hearing grants an extension not to exceed 30 days after the order for relief, absent extraordinary and compelling circumstances); (3) file all postpetition financial and other reports required by the Bankruptcy Rules or local rule of the district court;<sup>43</sup> (4) maintain customary and appropriate insurance; (5) timely file required tax returns and other government filings and pay all taxes entitled to administrative expense priority; and (6) allow the U.S. trustee to inspect the debtor's business premises, books, and records.

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<sup>43</sup> That is not a typo. The statute specifies local rule of the district court.

A debtor in possession under new § 1184 has the duties of a trustee under § 1106(a), except those specified in paragraphs (a)(2) (file required lists, schedules, and statements), (a)(3) (conduct investigations), and (a)(4) (report on investigations).

The duties under § 1106(a)(1) include the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a). These provisions include duties: to be accountable for all property received; to examine and object to proofs of claim if a purpose would be served; to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise; to file reports; to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee; to provide required notices with regard to domestic support obligations; to perform any obligations as the administrator of an employee benefit plan; and to use reasonable and best efforts to transfer patients from a health care business that is being closed.

Other § 1106(a) duties applicable to the debtor under new § 1184 are the duties: to file a plan, § 1106(a)(5);<sup>44</sup> to file tax returns for any year for which the debtor has not filed a tax return, (a)(6); to file postconfirmation reports as are necessary or as the court orders, (a)(7); and to provide required notices with regard to any domestic support obligations, (a)(8).

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<sup>44</sup> The duty under § 1106(a)(5), applicable to the sub V debtor under new § 1184, is to “as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case.”

The § 1106(a)(5) language is somewhat problematical in a sub V case. First, § 1121 (dealing with who may file a plan) does not apply in a sub V case because only the debtor may file a plan. Second, the statutory deadline of 90 days for the debtor to file a plan, new § 1189(b), is inconsistent with the “as soon as practicable” direction in § 1106(a)(5).

Nevertheless, the clear import of the statutory scheme is that the sub V debtor has a duty to file a plan.

### C. Removal of Debtor in Possession

New § 1185(a) provides for removal of a debtor in possession, for cause, on request of a party in interest and after notice and hearing.<sup>45</sup> “Cause” includes “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case.” This language is identical to § 1104(a),<sup>46</sup> which provides for appointment of a trustee in a standard or non-sub V chapter 11 case, and to § 1204(a), which provides for removal of the debtor in possession in a chapter 12 case.

New § 1185(a) also provides for removal of the debtor in possession “for failure to perform the obligations of the debtor” under a confirmed plan, as sections V(C) and XII(C) discuss. Sections 1104(a) and 1204(a) do not contain this ground for removal of a debtor in possession.

If the court removes the debtor in possession, the trustee has the duty to operate the business of the debtor, new § 1183(b)(5), and other duties that Section IV(B)(3) discusses. The trustee cannot, however, file a plan because only the debtor may do so. New § 1189(a).

New § 1185(b) permits the court to reinstate the debtor in possession on request of a party in interest and after notice and a hearing. Section 1202(b) contains identical language in chapter 12 cases, and § 1105 similarly permits the court to terminate the appointment of a

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<sup>45</sup> Sections 1104 and 1105, which deal with appointment of a trustee and termination of the trustee’s appointment, are inapplicable in a sub V case. New § 1181(a).

Section 1104 also permits appointment of a trustee if it is “in the interests of creditors, any equity security holders, and other interests of the estate.” New § 1185(a) does not include this reason as “cause” for removing a debtor in possession.

Section 1104 also permits the appointment of an examiner. Subchapter V has no provision for appointment of an examiner. As section IV(B)(1) notes, the court may authorize a trustee to investigate for cause shown under new § 1183(b)(2).

<sup>46</sup> Section 1104 does not apply in a sub V case. New § 1181(a).

chapter 11 trustee and restore the debtor to possession and management of the estate and operation of the debtor's business.<sup>47</sup>

Like §§ 1104(a) and 1204(a), new § 1185(a) states that the court *shall* remove the debtor in possession if a specified ground exists. A potential issue is whether removal of the debtor for failure to perform under a confirmed plan is mandatory if the failure is not material or if the debtor has cured or can cure defaults. If a debtor establishes that reinstatement is appropriate at the same time that removal is sought, a court might find sufficient reason not to remove the debtor.

Section XII(C) further discusses postconfirmation removal of the debtor in possession.

## **VI. Administrative and Procedural Features of Subchapter V**

Subchapter V includes several features designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan. These features include elimination of the committee of unsecured creditors and the requirement of a separate disclosure statement unless the court orders otherwise; the requirement of a status conference; an expedited timetable for the filing of a plan; elimination of U.S. Trustee fees; and a modification of the disinterestedness requirement applicable to the retention of professionals by the debtor under § 327(a).

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<sup>47</sup> If the debtor is removed from possession, a question arises whether the attorney (and other professionals employed by the debtor) is entitled to compensation for services rendered to the debtor after the removal.

The Supreme Court in *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023 (2010), ruled that an attorney for a former chapter 11 debtor in possession who provides services after conversion to chapter 7 is not entitled to compensation under § 330(a) for postconversion services because § 330(a) does not authorize compensation for a debtor's attorney. The same principle applies when a trustee is appointed in a chapter 11 case, thus removing the debtor as debtor in possession.

Subchapter V does not address this issue. If the *Lamie* ruling precludes compensation of a sub V debtor's attorney after removal and the debtor cannot find an attorney to provide counsel without compensation, the debtor will not have a realistic chance of obtaining reinstatement or filing a plan.

## **A. Elimination of Committee of Unsecured Creditors**

SBRA amends § 1102(a)(3) to provide that a committee of unsecured creditors will not be appointed in the case of a small business debtor unless the court for cause orders otherwise. SBRA § 4(a)(11). Prior to the amendment, § 1102(a)(3) permitted the U.S. Trustee to appoint a committee unless the court, for cause, ordered that a committee not be appointed.

The other provisions of § 1102<sup>48</sup> (dealing with appointment of committees) and § 1103 (dealing with powers and duties of committees) do not apply in a sub V case unless the court orders otherwise. New § 1181(b).

## **B. Elimination of Requirement of Disclosure Statement**

Section 1125 regulates postpetition solicitation of acceptances or rejections of a plan. It requires that creditors receive “adequate information”<sup>49</sup> about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves.

§ 1125(b). The court must hold a hearing on approval of the disclosure statement after at least 28 days’ notice before solicitation of votes on the plan may occur. Bankruptcy Rule 3017(a).

In a small business case, § 1125(f)(3) permits the court to conditionally approve a disclosure statement, subject to objection after notice and hearing, § 1125(f)(3)(A), so that solicitation may occur without prior notice and hearing on the disclosure statement, § 1125(f)(3)(B). The hearing on approval of the disclosure statement may be combined with the hearing on confirmation. § 1125(f)(3)(C).

In addition, the court in a small business case may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary, § 1125(f)(1), and

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<sup>48</sup> The other provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(b).

<sup>49</sup> Section 1125(a)(1) defines “adequate information” as information that would enable “a hypothetical investor of the relevant class to make an informed judgment about the plan.”

may approve a disclosure statement submitted on a standard form approved by the court or on Official Form B425B, § 1125(f)(2).

In a sub V case, § 1125 is inapplicable unless the court orders otherwise. New § 1181(b). Thus, the debtor need not file a disclosure statement in connection with its plan unless the court requires it. If the court orders that § 1125 apply, the provisions of § 1125(f) just discussed apply.

A sub V debtor's plan must, however, contain certain information that a disclosure statement typically contains. New § 1190(a)(1) requires that a plan include: (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.

Subchapter V does not require that the plan contain "adequate information", and it does not provide for any judicial review of the required information. Material or intentional errors or omissions might provide a basis for denial of confirmation for the debtor's lack of good faith in proposing the plan. § 1129(a)(3).<sup>50</sup>

### **C. Required Status Conference and Debtor Report**

Section 105(d) permits, but does not require, the court to convene a status conference in a case under any chapter, on its own motion or on request of a party in interest. Section 105(d) does not apply in a sub V case. New § 1181(a).

Instead, new § 1188(a) makes a status conference mandatory and requires the court to hold it not later than 60 days after the entry of the order for relief in the case. The court may extend the time for holding the status conference if the need for an extension is "attributable to circumstances for which the debtor should not justly be held accountable." New § 1188(b).

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<sup>50</sup> See Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 No. 10 BANKRUPTCY LAW LETTER (October 2019) at 10.

The statutory purpose of the status conference is “to further the expeditious and economical resolution” of the case.

Not later than 14 days prior to the status conference, the debtor must file, and serve on the trustee and all parties in interest, a report that “details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.” New § 1188(c).

The trustee has the duty to appear and be heard at the status conference. § 1183(3). As section IV(B)(1) notes, one of the trustee’s duties is to “facilitate the development of a consensual plan of reorganization.” New § 1183(b)(7).

#### **D. Time for Filing of Plan**

Only the debtor may file a plan. New § 1189(a). The debtor has a duty to do so.<sup>51</sup>

The deadline for the sub V debtor to file the plan is 90 days after the order for relief. New § 1189(b). The court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable. *Id.* New § 1193(a) permits preconfirmation modification of a plan.

The timing requirements in a small business case under existing law are that a plan must be filed within 300 days of the filing date, § 1121(e), and that confirmation occur within 45 days of the filing of the plan, § 1129(e). These requirements do not apply in a subchapter V case. New § 1181(a). They continue to apply in the case of a small business debtor who does not elect subchapter V.

The schedule for the filing of the plan in a sub V case thus differs from the schedule in a non-sub V case in two ways. First, a sub V debtor must file a plan much more promptly than a

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<sup>51</sup> See *supra* note 44.

non-sub V debtor – 90 days instead of 300.<sup>52</sup> Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

As section VI(B) explains, the debtor does not have to file a disclosure statement because § 1125 does not apply unless the court orders otherwise. New § 1181(b).

As in all chapter 11 cases, a debtor’s failure to file a plan within the time the Bankruptcy Code requires (or the court orders) is cause for conversion or dismissal of the case. § 1112(c)(4)(J). Section 1112(b)(1) states that the court *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interest of creditors and the estate, unless the court determines that the appointment of a trustee or an examiner *under § 1104* is in the best interests of the estate. Because § 1104 does not apply in a sub V case, new § 1181(a), the court apparently has no alternative to conversion or dismissal.

## **E. No U.S. Trustee Fees**

28 U.S.C. § 1930(a)(6)(A) requires the quarterly payment of U.S. Trustee fees in chapter 11 cases based on disbursements in the case. The new law amends this subparagraph to except cases under subchapter V from this requirement. SBRA § 4(b)(3).

## **F. Modification of Disinterestedness Requirement for Debtor’s Professionals**

Section 327(a) permits employment of professionals by a debtor in possession in a chapter 11 case only if, among other things, the professional is a “disinterested person.” A person who holds a claim against the debtor is not a disinterested person under the term’s definition in § 101(14)(A). A disinterested person cannot not have an interest “materially adverse to the interest of the estate.” § 101(14)(C).

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<sup>52</sup> Because of the short time to file a claim, counsel for a sub V debtor should promptly request the court to issue a bar order establishing a deadline for the filing of proofs of claim if the court by local rule or general order has not fixed a deadline for filing proofs of claim in sub V cases.

The effect of these provisions is to disqualify an attorney or other professional to whom the debtor owes money at the time of filing because the professional is a creditor. Moreover, because payment of amounts owed to the professional prior to filing would in most instances be a voidable preference under § 547 and result in the professional having a material adverse interest to the estate in a preference action, the debtor's professionals must either waive any unpaid fees or forego representation of the debtor.

Section 1195 addresses this issue in part. It provides that a person is not disqualified from employment under § 327(a) solely because the professional holds a prepetition claim of less than \$ 10,000.

#### **G. Time For Secured Creditor to Make § 1111(b) Election**

Section 1111(b) permits a secured creditor to make an election under certain circumstances for allowance or disallowance of its claim the same as if it had recourse against the debtor on account of such claim, whether or not it has recourse. If the election is made, the claim is allowed as secured to the extent it is allowed. Bankruptcy Rule 3014 provides for the election to be made at any time prior to the conclusion of the hearing on the disclosure statement. Alternatively, if the disclosure statement is conditionally approved under Bankruptcy Rule 3017.1 and a final hearing on the disclosure statement is not held, the election must be made within the date fixed for objections to the disclosure statement under Bankruptcy Rule 3017.1(a)(2) or another date fixed by the court.

Interim Rule 3017 takes account of the fact that subchapter V does not contain a requirement for a disclosure statement unless the court orders otherwise. It provides that, in a subchapter V case, the election may be made not later than a date the court may fix.

## **H. Times For Voting on Plan, Determination of Record Date for Holders of Equity Securities, Hearing on Confirmation, Transmission of Plan, and Related Notices**

Bankruptcy Rule 3017: (1) requires the court to fix the time for holders of claims or interests to vote to accept or reject a plan on or before approval of the disclosure statement; (2) provides that the record date for creditors and holders of equity securities is the date that the order approving the disclosure statement is entered or another date fixed by the court; (3) permits the court to set the date for the hearing on confirmation in connection with approval of the disclosure statement; and (4) requires that, upon approval of the disclosure statement, the court must fix the date for transmission of the plan, notice of the time for filing acceptances or rejections, and notice of the hearing on confirmation.

New Interim Rule 3017.2 provides for the court to establish all these times in a subchapter V case in which the disclosure statement requirements of § 1125 do not apply.

## **VII. Contents of Subchapter V Plan**

The requirements for the contents of a sub V plan are contained in existing §§ 1122 and 1123 (with two exceptions) and in new § 1190. An important provision is that new § 1190(3) permits modification of a claim secured only by a security interest in real property that is the

principal residence of the debtor if the loan arises from new value provided to the debtor's business.

Section 1122 states rules for classification of claims in a chapter 11 plan, and § 1123 states what provisions a plan must and may have. Two provisions in § 1123 – (a)(8) and (c)(3) – are not applicable in sub V cases under new § 1181(a).

### **A. Inapplicability of §§ 1123(a)(8) and 1123(c)(3)**

Section 1123(a)(8) requires the plan for an individual debtor to provide for payment to creditors of all or such portion of earnings from postpetition services or other future income as is necessary for the execution of the plan. Section 1123(c) prohibits a plan filed by an entity other than the debtor from providing for the use, sale, or lease of exempt property, unless the debtor consents.

SBRA replaces § 1123(a)(8) with a new provision in new § 1190, discussed below, which contains additional provisions for the content of a plan. Section 1123(c) is superfluous in a subchapter V case because only the debtor can propose a plan. New § 1189(a).

### **B. Requirements of New § 1190 for Contents of Subchapter V Plan; Modification of Residential Mortgage**

New § 1190 states three provisions governing the content of the plan.

First, new § 1190(1)<sup>53</sup> requires the inclusion of some of the information that would otherwise be included in a disclosure statement. The plan must include: (1) a brief history of the operations of the debtor; (2) a liquidation analysis; and (3) projections regarding the ability of the debtor to make payments under the proposed plan.

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<sup>53</sup> No apparent reason exists for using numbers for the subsections of this section instead of the customary lower-case letters.

Second, new § 1190(2) requires that the plan 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.” In an individual case, this provision replaces the similar rule in the inapplicable § 1123(a)(8). In non-individual cases, it imposes a new requirement.

Because a plan ordinarily must provide for payment of creditors from the debtor’s income, the requirement for the submission to the trustee of income as necessary for the execution of the plan states nothing more than a feasibility requirement.

New § 1190(2) raises interpretive issues, however, regarding the requirement that future income be submitted to the “supervision and control” of the trustee.

If a plan is consensual such that confirmation occurs under new § 1191(a), new § 1194 does not contemplate that the trustee make the payments. Moreover, new § 1183(c)(1) provides for termination of the trustee’s service upon substantial consummation of a consensual plan under new § 1191(a). Under § 1101(2), “substantial consummation” occurs upon (among other things<sup>54</sup>) “commencement of distribution under the plan.” § 1101(2)(C). An issue is whether a consensual plan must provide for submission of future income to the trustee’s supervision and control when the trustee’s service will terminate once the first plan payment is made.<sup>55</sup>

The third content provision in new § 1190(3) modifies the rule of § 1123(b)(5) that a plan may not modify the rights of a claim secured only by a security interest in real property that is the debtor’s principal residence. (The same prohibition exists in chapter 13 cases, § 1322(b)(2), and in standard and non-sub V cases, § 1123(b)(5).)

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<sup>54</sup> Substantial consummation also requires transfer of all or substantially all of the property proposed by the plan to be transferred, § 1101(2)(A), and assumption by the debtor or by the successor to the debtor of the business or of the management of all or substantially all of the property dealt with by the plan, § 1101(2)(B).

<sup>55</sup> See section IX(A).

New § 1190(3) permits modification of such a claim if the new value received in connection with the granting of the security interest was not used primarily to acquire the real property and was used primarily in connection with the small business of the debtor.<sup>56</sup> A potential issue is whether this new exception to the anti-modification rule applies when the debtor grants a security interest in the principal residence as additional collateral (perhaps in connection with a workout) but does not receive any new value.

### **C. Payment of Administrative Expenses Under the Plan**

If the court confirms a plan under the cramdown provisions of new § 1191(b), new § 1191(e) permits the plan to provide for the payment through the plan of claims specified in §§ 507(a)(2) and (3), notwithstanding the confirmation requirement in § 1129(a)(9) that such claims be paid in full on the plan's effective date. Section 507(a)(2) includes administrative expense claims allowable under § 503(b), and § 507(a)(3) gives priority to involuntary gap claims allowable under § 503(f).

Administrative expenses include claims under § 503(b)(2) for fees and expenses of professionals employed by the debtor and the trustee under § 330(a) and claims under § 503(b)(9) for goods received by the debtor in the ordinary course of business within 20 days before the filing of the petition.<sup>57</sup>

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<sup>56</sup> New § 1190(3) states that its provisions apply “notwithstanding section 1123(b)(5).”

<sup>57</sup> The permission to pay these priority claims “through the plan” without requiring payment in full raises questions of whether a plan may provide for less than full payment and whether interest is required. Presumably, Congressional intent is to change the timing requirement for payment of the claims and not to permit partial payment. See Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 No. 10 BANKRUPTCY LAW LETTER (October 2019) at 15-16.

## **VIII. Confirmation of the Plan**

### **A. Consensual and Cramdown Confirmation in General**

Under current law, the court must confirm a chapter 11 plan if all the requirements of § 1129(a) are met.

When all of the requirements of § 1129(a) are met except the requirement in paragraph (a)(8) that all impaired classes accept the plan, § 1129(b)(1) permits so-called “cramdown” confirmation “if the plan does not discriminate unfairly, and is fair and equitable” with regard to each impaired class that has not accepted it. Section 1129(b)(2) states the rules for the “fair and equitable” requirement for classes of secured claims (§ 1129(b)(2)(A)), unsecured claims (§ 1129(b)(2)(B)), and interests (§ 1129(b)(2)(C)). The effects of confirmation are the same regardless of whether cramdown confirmation occurs under § 1129(b).

New § 1191 states the rules for confirmation in a sub V case. Section 1129(a) remains applicable in a sub V case, except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual if an unsecured creditor invokes it. New § 1181(a). Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.

If all the applicable requirements in § 1129(a) are met except for the projected disposable income rule of paragraph (a)(15), new § 1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it. Thus, these materials refer to it as a “consensual plan.” (It is not a defined term.)

New § 1191(b) states the rules for cramdown confirmation. It replaces the cramdown provisions of § 1129(b), which do not apply in a sub V case. New § 1181(a). (The requirements in § 1129(b)(2)(A) for cramdown confirmation with regard to a class of secured claims, however, remain applicable in a sub V case under new § 1191(c)(1).)

The next section explains the cramdown confirmation provisions of new § 1191(b). In general, new § 1191(b) permits confirmation even if the requirements of paragraphs (8), (10), and (15) of § 1129(a) are not met. Thus, cramdown confirmation does not require (1) that all impaired classes accept the plan (§ 1129(a)(8)) or (2) that at least one impaired class of creditors accept it (§ 1129(a)(10)).

Cramdown confirmation under new § 1191(b) also does not require that the plan meet the projected disposable income requirement of § 1129(a)(15), applicable only in the case of an individual if any unsecured creditor invokes it. Cramdown confirmation does, however, impose a modified projected disposable income rule, expanded to include all debtors, not just individuals, as the next section discusses. For an individual, it is significant that the projected disposable income rule comes into play only if one or more *classes* does not accept the plan. Unless a class consists of only one creditor, therefore, a single creditor cannot invoke the projected disposable income requirement, which a single creditor can do in a standard or non-sub V case under § 1129(a)(15) even if all impaired classes accept the plan.

Importantly, the effects of confirmation differ depending on whether confirmation occurs under new § 1191(a) (where all classes have accepted it) or under new § 1191(b) (where one or more – or even all – classes have not accepted it). Other text explains the consequences of the type of confirmation relating to: payments under the plan by the trustee and termination of the service of the trustee (part IX); compensation of the trustee (section IV(E)); postconfirmation

modification of the plan (section VIII(C)); discharge (part X); contents of property of the estate (part XI); and postconfirmation default and remedies (part XII).

## **B. Cramdown Confirmation Under New § 1191(b)**

### **1. Changes in the cramdown rules and the “fair and equitable” test**

Discussion of the revised cramdown rules in a sub V case begins with a brief summary of the key provisions that govern cramdown confirmation under pre-SBRA law.

Section 1129(a) contains two important requirements for confirmation with regard to acceptances of a plan. First, paragraph (a)(8) requires that all impaired classes accept the plan. Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.

Section 1129(b) permits cramdown confirmation if all the requirements for confirmation in § 1129(a) are met except the requirement of paragraph (a)(8) that all impaired classes accept it. Section 1129(b), however, does not affect the confirmation requirement of § 1129(a)(1) that at least one impaired class of creditors accept the plan. Cramdown confirmation under § 1129(b) is not available, therefore, if no impaired class of creditors has accepted the plan.

In addition, if the nonaccepting class is the class of unsecured creditors, the absolute priority rule of § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception). In an individual case, many courts conclude that the absolute priority rule prohibits the debtor from retaining property without payment in full to unsecured creditors.

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply. New § 1181(a). Instead, new § 1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan and (2) eliminate the absolute priority rule.

New § 1191(c) states a new “rule of construction” for the requirement that a plan be “fair and equitable,” as later text discusses. It thus replaces the “fair and equitable” requirements of §1129(b), which do not apply in a subchapter V case.

The debtor may invoke new § 1191(b) when all confirmation requirements of § 1129(a) are met except those in paragraphs (8), (10), and (15). Thus, in addition to eliminating the (a)(8) requirement that all impaired classes accept the plan, new § 1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan. The projected disposable income test of § 1129(a)(15), applicable only in the case of an individual, is replaced by a revised projected disposable income text applicable to all debtors, as later text explains. New § 1191(d).

Under the cramdown rules in new § 1191(b), if all other confirmation standards are met, the court must confirm a plan, on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan (1) does not discriminate unfairly and (2) is fair and equitable. These two general standards are the same as the ones that govern in a cramdown under § 1129(b).

It does not appear that the new statute effects any change in the unfair discrimination requirement. New § 1191(c) does, however, provide a new “rule of construction” in subchapter V cases for the condition that a plan be “fair and equitable,” to replace the detailed definition of that term that § 1129(b) contains.

The following sections explain the requirements of the “fair and equitable” test in sub V cases.

## **2. Cramdown requirements for secured claims**

With regard to a class of secured claims, a subchapter V plan is “fair and equitable” if it meets the existing rules for secured claims stated in § 1129(b)(2)(A). Subchapter V thus does not change existing law about permissible cramdown treatment of secured claims.

Subchapter V does, however, limit the issues a secured creditor with an unsecured deficiency claim can raise to block cramdown confirmation.

First, a secured creditor with a large deficiency claim often controls the vote of the unsecured class. If no other impaired class of creditors accepts the plan, cramdown confirmation is not possible in a standard or non-sub V case because of the absence of an accepting impaired class of claims, which § 1129(a)(10) requires. This requirement is inapplicable for cramdown confirmation in a sub V case under new § 1191(b).

Second, the creditor cannot invoke the absolute priority rule with regard to the unsecured portion of its claim.

## **3. Components of the “fair and equitable” requirement in subchapter V cases; no absolute priority rule**

New § 1191(c) does not state a “fair and equitable” rule specifically with regard to unsecured claims. Instead, it imposes a projected disposable income requirement (sometimes called the “best efforts” test), requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. Notably absent is the absolute priority rule.

## **4. The projected disposable income (or “best efforts”) test**

The projected disposable income (or “best efforts”) requirement is in new § 1191(c)(2).<sup>58</sup>

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<sup>58</sup> Compliance with the projected disposable income requirement is a mandatory condition for cramdown confirmation under new § 1191(b). In chapter 11, 12, and 13 cases, it applies only if a holder of an allowed unsecured claim or, in a chapter 12 or 13 case, the trustee, invokes it. §§ 1129(a)(15), 1225(b), 1325(b).

The plan must provide that all of the projected disposable income of the debtor to be received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan. New § 1191(c)(2)(A).<sup>59</sup> Alternatively, the plan may provide that the value of property to be distributed under the plan within the three-year or longer period that the court fixes is not less than the projected disposable income of the debtor.<sup>60</sup>

The language is substantially the same as the language of the projected disposable income test applicable in chapter 12 cases under § 1225(b).<sup>61</sup> Like the chapter 12 requirement (and unlike chapter 11's), it applies to entities as well as individuals.

Key issues are: (1) How is projected disposable income determined? (2) How does the court determine whether the required period should be longer than three years; and (3) If so, how does the court determine how much longer the period must be?

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<sup>59</sup> The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1). This was the chapter 13 rule until the enactment of BAPCPA in 2005, which amended § 1325(b)(1) to require the use of projected disposable income to make payments to unsecured creditors.

Presumably, the amended chapter 13 provision takes account of the fact that the “means test” standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE (2019) §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

The difference in how the debtor must use projected disposable income may affect the timing of payments to unsecured creditors but appears to have no material effect on the amount of money that must be paid under the plan or how much of it goes to unsecured creditors. *See id.* § 8:68.

<sup>60</sup> The projected disposable income tests in chapter 11 and 12 also contain this alternative, but the chapter 13 one does not.

<sup>61</sup> Section 1225(b)(1)(A) provides that the debtor need not commit projected disposable income if the plan provides for full payment. New § 1191(c)(2) does not contain this provision, raising the possibility that a creditor could insist on commitment of disposable income to pay more than the allowed amount of the claim. *See* Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 No. 10 BANKRUPTCY LAW LETTER (October 2019) at 13. It seems unlikely that Congress could have intended such a result that is inconsistent with the common-sense principle, even if unstated, that payment of the full amount of the claim (perhaps with interest) resolves it.

### **i. Determination of Projected Disposable Income**

The Bankruptcy Code does not define “projected disposable income,” but it defines “disposable income” in chapters 12 (§ 1225(b)(2)) and 13 (§ 1325(b)(2)). In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.

New § 1191(d) defines disposable income as income that is received by the debtor and that is not “reasonably necessary to be expended” for these specified purposes:

- The maintenance or support of the debtor or a dependent of the debtor (new § 1191(d)(1)(A)); or
- a domestic support obligation that first becomes payable after the date of the filing of the petition (new § 1191(d)(1)(B)); or
- payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor (§ 1191(d)(2)).

The definition of disposable income in new § 1191(d) is substantially the same as the definition of disposable income in § 1225(b)(2) that applies in chapter 12 cases. It is also substantially the same as the definition in § 1325(b)(2) that applies in chapter 13 cases, except that the chapter 13 definition permits a deduction for charitable contributions. The chapter 11 provision, § 1129(a)(15), incorporates the chapter 13 definition.

The definition of disposable income in all cases is, therefore, substantially the same. But the manner of determining permissible deductions in calculating disposable income differs materially with regard to expenditures for the “maintenance or support” of the debtor and the debtor’s dependents.

In chapter 13 cases, the so-called “means test” standards govern the deductions that an “above-median”<sup>62</sup> debtor may take in calculating disposable income. § 1325(b)(3). It is not clear whether the means test applies in chapter 11 cases.<sup>63</sup>

The means test rules do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor.

New § 1191(d) does not incorporate the means test in the calculation of disposable income. The test for determining what maintenance and support expenditures are “reasonably necessary to be expended” for “maintenance or support” in new § 1191(d)(1) is the same in sub V cases as it is in chapter 12 and below-median chapter 13 cases, and as it was in chapter 13 cases prior to the introduction of the means test standards in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).<sup>64</sup> The case law on disposable income in such cases should provide guidance in making such determinations.

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<sup>62</sup> Generally, an “above-median” debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a “below-median” debtor is one whose income is below the median. *See* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE (2019) § 8:12. The rules for determining the debtor’s status are set forth in § 1322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the “means test” rules for determination of disposable income; and § 1325(b)(4), which defines “applicable commitment period” for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an “above-median” debtor must use the means test rules and pay projected disposable income for five years. A “below-median” debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor’s plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed three years. *See id.* §§ 4:9, 8:12.

<sup>63</sup> In chapter 11 cases, § 1129(a)(15) states that projected disposable income is “as defined in [§ 1325(b)(2)].” Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of “amounts reasonably necessary to be expended” under § 1325(b)(2) for an above-median debtor. The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in § 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

<sup>64</sup> Prior to the amendment of the projected disposable income test by BAPCPA in 2005, the standard in all chapter 13 cases was whether expenditures were reasonably necessary for the support of the debtor and the debtor’s dependents. No distinction between above-median and below-median debtors existed under pre-BAPCPA law. Accordingly, the pre-BAPCPA case law deals with the same standard that new § 1191(d)(1) states. For a discussion of application of the “reasonably necessary” standard for expenditures for maintenance and support in chapter 13 cases, *see* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE (2019) § 8:28.

With regard to expenditures for the business, income is not “disposable income” under new § 1191(d)(2) if it is “reasonably necessary to be expended” for expenditures “necessary for the continuation, preservation, or operation” of the business. The rule obviously contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

Questions may arise when the debtor wants to establish a reserve for various purposes, such as capital expenditures that are anticipated (*e.g.*, the need to repair or replace existing equipment), or when the debtor needs to use income to grow the business (*e.g.*, increasing inventory levels, marketing expenses, or payroll) to improve its profitability. Creditors may reasonably argue that the disposable income they must receive should not be depleted when the debtor will gain the benefit of the investment of income in the business.

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.<sup>65</sup> As later text discusses, an extension of the period that the debtor must make payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or to grow the business.

Another question arises if a debtor is a “pass-through” entity for income tax purposes (*e.g.*, a subchapter S corporation or an entity taxed as a partnership, including a limited liability company). Such a business does not pay tax on its income. Rather, its income is “passed through” to its owners, who must pay tax on it whether or not the income is distributed to them.

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<sup>65</sup> See, *e.g.*, *Hamrich v. Lovald (In re Hamrich)*, 98 F.3d 388 (8<sup>th</sup> Cir. 1996) (affirming confirmation of a plan including a reserve); *In re Schmidt*, 145 B.R. 893 (Bankr. D.S.D. 1991) (capital reserve permissible only if debtor demonstrates that obtaining financing is not feasible); *In re Kuhlman*, 118 B.R. 731 (Bankr. D.S.D. 1990) (debtor has burden of proving expenditures reasonably necessary for farming operation and living expenses); *In re Janssen Charolais Ranch, Inc.*, 73 B.R. Bankr. D. Mont. 1987) (*dicta*) (reserve is allowable). *But see Broken Bow Ranch, Inc. v. Farmers Home Admin. (In re Broken Bow Ranch, Inc.)*, 33 F.3d 1005 (8<sup>th</sup> Cir. 1994).

Payment of profits to owners of a business does not easily fit within the concept of an expenditure reasonably necessary for its continuation, preservation, or operation.

If the debtor's disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income<sup>66</sup> but will receive no money to pay it. Because the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business itself.

Courts will have to decide whether distributions to owners to pay taxes the owners incur are an appropriate expenditure that is "reasonably necessary for the continuation, preservation, or operation of the business" when the debtor itself is not obligated to pay the tax.

**ii. Determination of period for commitment of projected disposable income for more than three years**

A projected disposable income test applies in cases under chapter 12 (§ 1225(b)) and 13 (§ 1325(b)) and in standard chapter 11 and non-sub V cases of individuals (§ 1129(a)(15)). Each one prescribes the period of time for which the debtor must commit projected disposable income to make payments under the plan.<sup>67</sup> The required time is colloquially referred to as the "commitment period," but only chapter 13 specifically uses the term by defining the "applicable commitment period" – the period for which the debtor must use projected disposable income to

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<sup>66</sup> Note that payments to creditors under the plan are not necessarily allowable as a deduction in determining taxable income. No deduction is permissible to the extent that the debtor is repaying principal on a loan. With regard to trade debt, no deduction will be allowed if the debtor calculates taxable income on an accrual basis (as the IRS requires for many businesses) and has already deducted the amount due as an expense.

<sup>67</sup> In chapter 13 cases, projected disposable income must be used specifically to pay unsecured creditors. See *supra* note 59.

pay unsecured creditors – as three years for “below-median” debtors and five years for “above-median” debtors. § 1125(b)(4).

For sub V cases, new § 1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes. The five-year *maximum* commitment period in a sub V case is the same as the longest *minimum* commitment period under the other tests.<sup>68</sup>

New § 1191(c)(2) contains no standards for fixing the commitment period. And because the involvement of the court in *choosing* the commitment period is unique to subchapter V, practice and precedent under the tests in other chapters may not provide appropriate guidance.

In chapters 12 and 13 and in non-sub V chapter 11 cases of individuals, the court has no role in determining the commitment period for the projected disposable income. The court in a chapter 12 case and in the case of a below-median chapter 13 debtor must *approve* the term of a plan in excess of three years if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is a different question than whether to require the debtor to pay more than the debtor wants.<sup>69</sup> Case law dealing with the length of a plan under the other tests, therefore, does not deal with the issue that new § 1191(c)(2) presents.<sup>70</sup>

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<sup>68</sup> The maximum commitment period in a chapter 12 case is five years. § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors, § 1325(b)(4)(A) and five years for above-median debtors. § 1325(b)(4)(B). The commitment period in a chapter 11 case is the longer of five years or the period for which the plan provides for payments. § 1129(a)(15).

<sup>69</sup> In a chapter 12 case, a plan may not provide for payments in excess of three years unless the court, for cause, *approves* a longer period, not to exceed five years. § 1222(c). Approval of a longer period in a chapter 12 case extends the commitment period for the period that the court approves, § 1225(b)(1)(B), but only the debtor may file a plan, § 1221, so it is the debtor who chooses the commitment period.

In chapter 13 cases, the court has no choice to make. The statute fixes the “applicable commitment period” as three years for a below-median debtor and five years for an above-median debtor. The only dispute for the court is whether the debtor is below-median or above-median.

In chapter 11 cases, § 1129(a)(5) specifies the commitment period as the longer of five years or the period for payments under the plan. The court neither approves nor fixes the commitment period.

<sup>70</sup> As the text notes, the court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years, § 1222(c), 1322(d). [Footnote continues on next page.]

Courts will, therefore, have to determine what facts and circumstances justify a longer commitment period and, if so, how much longer the period should be.

One reason to extend the period could be a debtor's deduction from projected disposable income of amounts required for anticipated capital needs or expenses to grow the business, as earlier text discusses. If the court permits such deductions, existing creditors are effectively funding the business for the future benefit of the debtor. An extension of the commitment period could be an appropriate way for creditors to share in the debtor's success that depends in part on their involuntary contributions in the form of reduced projected disposable income.<sup>71</sup>

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In chapter 13 cases, the fact that the plan of a below-median debtor extends beyond three years does not affect the applicable commitment period or how much projected disposable income the debtor must pay.

In a non-sub V chapter 11 case, § 1129(a)(15) sets the commitment period as the longer of five years or the period for which the plan provides payments. Thus, the terms of the plan, not a separate determination by the court, govern the length of time that the debtor must use projected disposable income to make payments.

Until enactment of BAPCPA in 2005, which increased the minimum commitment period in chapter 13 cases for above-median debtors to five years, a chapter 13 plan of any debtor could not provide for payments for more than three years unless the court, for cause, approved a longer period, up to five years. Pre-BAPCPA § 1322(c) (BAPCPA renumbered subsection (c) as subsection (d)). See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE (2019) § 4:9. And the pre-BAPCPA projected disposable income test required use of projected disposable income for only three years, regardless of the length of the plan. Pre-BAPCPA § 1325(b)(1)(B).

(The pre-BAPCPA rules for chapter 12 cases were different, and BAPCPA did not change them. As in pre-BAPCPA chapter 13 cases (and as in cases of below-median chapter 13 debtors under current law), the maximum duration of a plan under § 1222(c) is three years unless the court approves a longer period for cause. But unlike pre-BAPCPA chapter 13, the chapter 12 projected disposable income test in § 1225(b)(1) requires use of projected disposable income during any longer period that the court approves.)

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. See CHAPTER 13 PRACTICE AND PROCEDURE § 4:9 and cases cited. This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan (§ 1321) (although an unsecured creditor or trustee may request modification of a confirmed plan (§ 1329(a)); and (2) the court must *approve* a period longer than three years for cause (§ 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

Although the case law deals with the question of how long a plan should be, it does so in the context of a debtor's proposal of a longer period. The case law does not consider the different question of whether the court should require the debtor to make payments for a longer period than the plan proposes.

<sup>71</sup> See 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (In a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

Courts will also have to decide how to proceed when a creditor or trustee<sup>72</sup> asks it to fix the commitment period for a longer time than the debtor’s plan specified. The authority of the court to fix the commitment period implies authority to order more payments than the debtor’s plan proposes. The contrary position is that the court may only deny confirmation unless the debtor modifies the plan to conform with the court’s determination. As a practical matter, it may make no difference to a debtor who wants a confirmed plan.

The court’s authority to fix the commitment period also implies that the court may raise the issue *sua sponte*.

## **5. Requirements for feasibility and remedies for default**

New § 1191(c)(3) adds two other factors to the “fair and equitable” analysis.

First, new § 1191(c)(3)(A) requires that the debtor will be able to make all payments under the plan, new § 1191(c)(3)(A)(i), or that there is a reasonable likelihood that the debtor will be able to make all payments under the plan, new § 1191(c)(3)(A)(ii). The requirement strengthens the more relaxed feasibility test that the confirmation standard in § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposes it.

Second, new § 1191(c)(3)(B) requires that the plan provide appropriate remedies to protect the holders of claims or interests if the debtor does not make the required plan payments. Section XII(B) discusses remedies for default in the plan.

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<sup>72</sup> Subchapter V does not expressly give the trustee standing to object to confirmation, but the trustee’s duty to appear and be heard at the confirmation hearing, new § 1183(b)(3)(B), at a minimum contemplates that the trustee may express the trustee’s views on any confirmation issue to the court.

If the trustee is not a lawyer, a trustee’s “objection” may initiate a dispute that requires legal representation, whereas a trustee’s report bringing potential issues to the attention of the court may not. See section IV(F). Unless the court concludes as a legal matter that it has no independent duty to determine compliance with confirmation requirements, it makes no practical difference, unless the trustee plans to appeal an adverse determination. Failure to object might be a waiver of it for appellate purposes.

## **6. Payment of administrative expenses under the plan**

New § 1191(e) permits confirmation of a plan under new § 1191(b) that provides for payment through the plan of administrative expense claims and involuntary gap claims. Section VI(C) discusses this provision.

### **C. Postconfirmation Modification of Plan**

The rules for postconfirmation modification in new § 1193 differ depending on whether the court has confirmed a consensual plan under new § 1191(a) or a cramdown plan under new § 1191(b). The provisions in § 1127 for modification of a plan do not apply in a sub V case. New § 1181(a).

#### **1. Postconfirmation modification of consensual plan confirmed under new § 1191(a)**

If the court has confirmed a consensual plan under new § 1191(a), new § 1193(b) does not permit modification after substantial consummation. The modification must comply with applicable plan content requirements.

The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under new § 1191(a). The holder of any claim or interest who voted to accept or reject the confirmed plan is deemed to have voted the same way unless, within the time fixed by the court, the holder changes the vote. New § 1193(d).

These are the same rules that govern postconfirmation modifications in standard and non-sub V cases under § 1127(b).

#### **2. Postconfirmation modification of cramdown plan confirmed under new § 1191(b)**

If the plan has been confirmed under new § 1191(b), new § 1193(c) permits the debtor to modify the plan at any time within three years, or such longer time not to exceed five years as the

court fixes. The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of new § 1191(b).<sup>73</sup>

The postconfirmation modification rules for a cramdown plan are similar to the postconfirmation modification provisions in chapters 12 and 13. They permit postconfirmation modification at any time prior to the completion of payments under the plan and require that the modified plan meet the usual confirmation requirements. §§ 1229, 1329. The chapter 12 and 13 provisions, however, contain specific standards for what a modification may do. Unlike the provisions in the other chapters, however, new § 1193(c) does not permit modification at the request of creditors or the trustee.

## **IX. Payments Under Confirmed Plan; Role of Trustee After Confirmation**

Subchapter V has different provisions for the disbursement of payments to creditors and the role of the trustee depending on whether the court confirms a consensual plan under new § 1191(a) or a cramdown plan under new § 1191(b).

### **A. Debtor Makes Plan Payments and Trustee’s Service Is Terminated Upon Substantial Consummation When Confirmation of Consensual Plan Occurs Under New § 1191(a)**

If all impaired classes accept the plan and it meets the confirmation requirements of § 1129(a) other § 1129(a)(15),<sup>74</sup> the court must confirm it under new § 1191(a). New § 1183(c)(1) provides that confirmation of a consensual plan under new § 1191(a) leads to the termination of the trustee’s service when the plan has been “substantially consummated.” The

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<sup>73</sup> The provisions of new § 1192(d) with regard to acceptances or rejections of the original plan do not apply to postconfirmation modification of a cramdown plan, presumably because such a plan is confirmed without regard to acceptances.

<sup>74</sup> Section 1129(a)(15) states chapter 11’s projected disposable income requirement that applies only in the case of an individual. See section VIII(B)(4).

debtor must file a notice of substantial consummation within 14 days after it occurs and serve it on the sub V trustee, the U.S. trustee, and all parties in interest. New § 1183(c)(2).

Under § 1101(2), “substantial consummation” generally occurs upon “commencement of distribution under the plan.”<sup>75</sup> Unless the plan implicates other requirements for substantial consummation,<sup>76</sup> therefore, the sub V trustee’s service terminates when the first payment under the plan occurs.

Arguably, a sub V trustee could make the first payment under the plan, although the statute does not appear to require this. But it is clear that, at least after the first payment, the sub V trustee no longer exists and, therefore, cannot make payments.

### **B. Trustee Makes Plan Payments and Continues to Serve After Confirmation of Plan Confirmed Under Cramdown Provisions of New § 1191(b)**

When the court confirms a cramdown plan under new § 1191(b), new § 1194(b)<sup>77</sup> provides for the sub V trustee to make payments to creditors under the plan unless the plan or the order confirming it provides otherwise. Chapters 12 and 13 contain identical provisions for the trustee to make plan payments. 11 U.S.C. § 1226(c), 1326(c).

Because the trustee must make payments under a cramdown plan, the trustee’s service does not terminate upon its substantial consummation. New § 1183(c) provides for termination of the trustee’s service upon substantial consummation of a plan only if it is a consensual one confirmed under new § 1191(a).

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<sup>75</sup> § 1101(2)(C).

<sup>76</sup> “Substantial consummation under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, 11 U.S.C. § 1101(2)(A) and (2) assumption by the debtor or 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, § 1101(2)(B).

<sup>77</sup> Curiously, paragraph (b) of new § 1194 is titled “Other Plans,” even though it applies exclusively to plans confirmed under the cramdown provisions of new § 1191(b) and no other provisions of new § 1194 deal specifically with payments under a consensual plan confirmed under new § 1191(a).

The trustee's service continues, therefore, at least until the trustee has made the required disbursements. Subchapter V does not specify when the trustee's service is terminated when cramdown confirmation occurs. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge, as section X(B) discusses. That time seems to be the appropriate time for the trustee or the debtor to request that the court enter an order terminating the trustee's service and discharging the trustee from any further obligations in the case.

As noted above, new § 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise. The statute contains no standards, however, for the court to determine under what circumstances a plan or confirmation order may provide that the trustee will not make payments. For example, may a nonconsensual plan provide for the debtor to make postpetition installment payments on a mortgage or other long-term debt that is being cured and reinstated, or regular payments on an unexpired lease of real or personal property that is being assumed?

Because new § 1194(b) is identical to the chapter 12 and 13 provisions for disbursements to creditors, courts may look to the case law and practice in chapter 12 and 13 cases for guidance in determining the extent to which a plan may provide for the debtor to make payments instead of the trustee.

In chapter 13 cases, courts universally require a plan to provide for the trustee to make disbursements to priority and unsecured creditors and to holders of secured claims that the plan modifies.<sup>78</sup> Courts vary, however, with regard to whether the debtor may make direct payments to other types of creditors.

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<sup>78</sup> W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:10 (2019 ed.).

Typical exceptions to payments by the trustee in chapter 13 cases are for postpetition installment payments on real estate or other long-term debts that are being cured and reinstated and postpetition payments due on leases or executory contracts that are being assumed. In such instances, the trustee usually disburses amounts required to cure prepetition defaults. Courts have also permitted a debtor to make direct payments on a secured claim that the debtor does not seek to modify.<sup>79</sup>

Some courts, however, require that all postpetition payments, including postpetition payments on a mortgage or other long-term debt or an assumed lease or other executory contract, be made by the trustee during the term of the plan.<sup>80</sup> In a sub V case, the trustee under this approach would make those payments during the three- to five-year period during which the debtor must commit projected disposable income to the plan, as section VIII(B)(4) discusses.

## **X. Discharge**

The discharge that a debtor receives in a sub V case and its timing depend on whether consensual confirmation occurs under new § 1191(a) or cramdown confirmation occurs under new § 1191(b).

### **A. Discharge Upon Confirmation of Consensual Plan Under New § 1191(a)**

Section 1141(d) governs discharge in a chapter 11 case. Except for paragraph (d)(5), all of it remains applicable in a sub V case when the court confirms a consensual plan under new § 1191(a). As the next section discusses, it does not apply when the court confirms a cramdown plan under new § 1191(b). § 1181(c).

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

Section 1141(d)(5) does not apply in a sub V case. New § 1181(a). The omission is material only in an individual case because (d)(5) applies only in a chapter 11 case in which the debtor is an individual.

Section 1141(d)(5) has two primary effects in an individual case.<sup>81</sup> First, it prohibits entry of a discharge order until the debtor has completed payments under the plan unless the court orders otherwise for cause. § 1141(d)(5)(A). Second, it permits discharge without completion of payments if creditors have received what they would have gotten in a chapter 7 case and modification of the plan is not practicable. § 1141(d)(5)(B).

Because § 1141(d)(5) does not apply in a sub V case, an individual debtor receives a discharge immediately upon confirmation of a consensual plan under new § 1191(a).<sup>82</sup> Because the debtor receives an immediate discharge, there is no need for a provision permitting discharge if the debtor does not complete payments.

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<sup>81</sup> Subparagraph (A) of § 1141(d)(5) defers entry of the discharge in an individual case until the debtor has completed all payments under the plan unless the court orders otherwise for cause. Alternatively, subparagraph (B) of § 1141(d)(5) permits a discharge if the debtor has not completed payments if (1) creditors have received payments under the plan with a value of the amount they would have received if the debtor's estate had been liquidated on the effective date; and (2) modification of the plan under § 1127 is not practicable. (The subparagraph (B) provision is similar to the so-called "hardship" discharge that exists in chapter 12 and 13 cases, §§ 1228(b), 1328(b), except that a chapter 12 or 13 debtor must also establish that the failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.)

Subparagraph C of § 1141(d)(5) provides the court may not grant a discharge under either subparagraph (A) or (B) if the court finds that § 522(q)(1) is applicable, certain criminal proceedings are pending, or the debtor is liable for a debt described in § 522(q)(1). The same grounds for discharge are in § 727(a)(12).

Section 522(q)(1) denies a debtor an exemption of assets in excess of an aggregate amount of \$ 170,350 (as of April 1, 2019; it is subject to adjustment every three years) under circumstances described in subparagraphs (A) or (B) of § 522(q)(1) unless the court finds under § 522(q)(2) that certain exempt property is reasonably necessary for the support of the debtor or any dependent.

Subparagraph (A) denies the exemption if the debtor has been convicted of a felony that under the circumstances demonstrates that the filing of the case was an abuse of the Bankruptcy Code. Subparagraph (B) denies the exemption if the debtor owes a debt arising from (1) violation of state or federal securities laws; (2) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under the federal securities laws; (3) any civil remedy under 18 U.S.C. § 1964; or (4) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

<sup>82</sup> The individual debtor also does not have to deal with the § 522(q) issues discussed in the previous footnote, although they rarely arise.

Under § 1141(d)(1)(A), confirmation of a plan results in the discharge, with some exceptions, of any debt that arose before the date of confirmation and any debt specified in § 502(g) (claims from the rejection of an executory contract or unexpired lease lease), § 502(h) (claims arising from the exercise of avoidance powers), and § 502(i) (claims for taxes arising after the commencement of the case entitled to priority under § 507(a)(8)). The discharge applies whether or not a proof of claim was filed or deemed filed, the claim is allowed, or its holder has accepted the plan. § 1141(d)(1)(A).

A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case. § 1141(d)(3). Only an individual is entitled to a discharge in a chapter 7 case. § 727(a)(1). An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.

The § 1141(d)(1)(A) discharge is effective except as otherwise provided in § 1141(d), the plan, or the confirmation order.

Section 1141(d) has two exceptions applicable in a sub V case.

First, in the case of an individual debtor, a § 1141(d)(1)(A) discharge does not discharge the individual from any debt that is excepted under § 523(a). No such exceptions to the § 1141(d)(1)(A) discharge exist for a debtor that is not an individual.

Second, a § 1141(d)(1)(A) discharge does not discharge any debtor from any debt (1) specified in § 523(a)(2)(A) or (B) that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 of the United States Code;

and (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid. § 1141(d)(6).

## **B. Discharge Upon Confirmation of a Cramdown Plan Under § 1191(b)**

When the court confirms a cramdown plan under new § 1191(b), § 1141(d) does not apply, except as provided in new § 1192. New § 1181(c). The debtor, therefore, does not get a discharge under § 1141(d)(1)(A). Instead, new § 1192 governs discharge in the cramdown situation.

New § 1192 provides for discharge to occur “as soon as practicable” after the debtor completes all payments due within the first three years of the plan, “or such longer period not to exceed five years as the court may fix.”<sup>83</sup> Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with cramdown confirmation under new § 1191(b), but the statute does not expressly so state. Section VIII(B)(4)(ii) discusses determination of the commitment period.

The new § 1192 cramdown discharge discharges the debtor from all debts discharged under § 1141(d)(1)(A), with certain exceptions discussed below. As noted in the previous section X(A), the § 1141(d)(1)(A) discharge applies unless § 1141(d), the plan, or the confirmation order provides otherwise.

The new § 1192 discharge also applies to “all other debts allowed under [§ 503] and provided for in the plan.” Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses, § 503(b)(1); compensation of the trustee and professionals employed by the trustee and the debtor, § 503(b)(2); and § 503(b)(9) claims for

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<sup>83</sup> Section 1141(d)(5)(A), which defers the discharge of an individual in a chapter 11 plan until the debtor completes payments, permits the court to order otherwise, for cause, after notice and a hearing. New § 1192 contains no provision for an earlier discharge.

goods the debtor received within 20 days of the filing. The discharge provision thus recognizes that a plan confirmed under new § 1191(b) may provide for the payment of administrative expenses through the plan. § 1191(e).<sup>84</sup>

New § 1192 excepts certain debts from discharge.

First, new § 1192 does not discharge any debt on which the last payment is due after the first three years of the plan, or such other time not to exceed five years fixed by the court. § 1192(1). Again, any longer period fixed by the court will presumably be the same period that the court fixes for the commitment of projected disposable income in connection with cramdown confirmation.

Second, new § 1192(2) excepts any debt “of the kind specified in [§ 523(a)].” The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual under § 1141(d)(2).

It is not clear whether the § 523(a) exceptions apply when a debtor that is not an individual receives a discharge under § 1192.

In the case of a non-individual, the § 1141(d) discharge is not subject to the exceptions in § 523(a). Section 1141(d)(2) makes the § 523(a) exceptions applicable, but expressly limits application of § 523(a) to a debtor who is an individual.

New § 1192(2), in contrast, states, without qualification, that debts “of the kind specified” in § 523(a) are excepted from discharge. Because § 523(a) specifies various debts, the conclusion is that a debt listed in § 523(a) is excepted from the § 1192 discharge.<sup>85</sup>

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<sup>84</sup> Administrative expenses allowed under § 503(b) are entitled to priority under § 507(a)(2). New § 1191(e) permits the payment of a claim specified under § 507(a)(2) through a plan confirmed under new § 1191(b). See section VI(C).

New § 1191(e) also permits payment of claims specified in § 507(a)(3) through the plan. Section 507(a)(3) provides a priority for “involuntary gap claims” allowed under § 502(f).

<sup>85</sup> Without discussing this issue, some commentators have stated this conclusion. 5 *Norton Bankr. L. & Prac.* 3d § 107:17 (January 2020 update); James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, 2019 No. 10 *Norton Bankr. L. Adviser* (October 2019), Part IX.

The language of § 523(a), however, permits a different conclusion. As amended, § 523(a) begins as follows (language inserted by amendment in italics):

A discharge under section 727, 1141, *1192*, 1128(a), 1228(b), 1328(a), 1328(b) of this title does not discharge an individual debtor from any debt – [defined in paragraphs (1) through (19) of § 523(a)].

(The other listed sections are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases.)

As amended, therefore, § 523(a) states that a § 1192 discharge does not discharge an *individual* debtor from the listed types of debts. This amendment would be superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), new § 1192 alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual.

In other words, although new § 1192 states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of a non-individual has no operative effect because § 523(a), as amended, applies only to individuals by its own terms.

Legislative history supports the conclusion that Congress did not intend to make the § 523(a) exceptions applicable to a new § 1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the new § 1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and “any debt that is otherwise nondischargeable.”<sup>86</sup> The use of the words “otherwise nondischargeable” must refer to § 523(a), which applies only to individuals.

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<sup>86</sup> Report of Judiciary Committee of House of Representatives, Rep. No. 116-171, 116<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 23, 2018) at 8, *available at* <https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf>.

Moreover, if the drafters had intended to expand § 523(a) to permit exceptions to the discharge of non-individuals – a significant change in existing chapter 11 law – one would expect the House Judiciary Committee Report to point that out. It does not.<sup>87</sup> To the contrary, the Report’s explanation that the exceptions are for “any debt that is otherwise nondischargeable” demonstrates an intent to apply existing exceptions to discharge in chapter 11 cases in subchapter V, not to expand them.

Case law under chapter 12, however, leads to the conclusion that the § 523(a) exceptions apply to a new § 1192 discharge of a non-individual debtor. The chapter 12 discharge provision, § 1228(a)(2),<sup>88</sup> has the same language as new § 1192, and the prefatory language of § 523(a) as amended refers to § 1228 and new § 1192 in the same way.

In two corporate chapter 12 cases, the corporate debtors contended that the § 523(a) exceptions to the chapter 12 discharge did not apply to them because § 523(a) states that it only excepts debts of an individual.<sup>89</sup> Both courts ruled that the § 523(a) exceptions applied to the chapter 12 discharge of a corporation.

In *In re JRB Consolidated, Inc.*, 188 B.R. 373 (Bankr. W.D. Tex. 1995), the court reasoned that the operative language in § 1228(a)(2) (“debts of the kind” specified in § 523(a)) “does not naturally lend itself to also incorporate the meaning ‘for debtors of the kind’ referenced in § 523(a).” *Id.* at 374. Instead, the court concluded, “debts of the kind” is limited to the types of debts that the subparagraphs of § 523(a) identify. *Id.* Moreover, the court

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<sup>87</sup> Retired Bankruptcy Judge A. Thomas Small, Jr. submitted testimony in support of the legislation. Judge Small’s explanation of the new § 1192 discharge similarly made no reference to the applicability of the § 523(a) exceptions to the discharges of non-individuals.

<sup>88</sup> The chapter 12 discharge provision, § 1228(a)(2), excepts from discharge any debt “of a kind specified” in § 523(a). The language also appears in § 1228(c)(2), which governs the so-called “hardship” discharge that a debtor who cannot complete plan payments may receive under § 1228(b).

<sup>89</sup> *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009); *In re JRB Consolidated, Inc.*, 188 B.R. 373 (Bankr. W.D. Tex. 1995).

explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals. *Id.*

The court in *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. 2009), adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)<sup>90</sup> apply to debts “of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)” that meet certain other requirements even though corporate debtors are excluded from § 523(a) by its terms. *Id.* at \*2.

The *Breezy Ridge Farms* court also explained that its interpretation harmonized the provisions of § 1228 and § 523(a), *id.* at \* 2:

Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.

Under § 523(c)(1), a debtor is discharged from a debt excepted from discharge subparagraphs (2), (4), or (6) of § 523(a) unless, upon request of the creditor, the court determines that the debt is excepted. Bankruptcy Rule 4007(c) requires the filing of a complaint to determine the dischargeability of such a debt no later than 60 days after the date first set for the § 341(a) meeting. If the debtor does not list the creditor, however, § 523(a)(3) provides for such a debt to be excepted if the creditor did not have enough notice to permit the timely filing of

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<sup>90</sup> Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. See section X(A).

a proof of claim and a timely request for the determination, unless the creditor had actual notice of the deadlines in time to do so.

The clerk's office must give at least 30 days' notice of the deadline. The new Official Forms for the notice of the filing of a sub V case (Form 309E2 for cases of individuals and Form 309F2 for cases of corporations or partnerships) provide a space for the clerk to state the deadline.

## **XI. Changes to Property of the Estate in Subchapter V Cases**

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services.

First, SBRA makes § 1115(a) inapplicable in a sub V case. New § 1181(a). Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate.

Second, new § 1186 provides that, if the court confirms a plan under the cramdown provisions of new § 1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter. New § 1186 applies to debtors that are entities as well as individuals.

Discussion of the effects of these changes begins with a summary of postpetition property and earnings under current law.

### **A. Property Acquired Postpetition and Earnings from Services Performed Postpetition as Property of the Estate in Chapter 11 Cases Under Current Law**

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that

the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).

Section 541(a)(7) provides that any interest in property that the *estate* acquires after the commencement of the case is property of the estate.

In the case of an entity, the debtor in possession (or trustee) controls the entity and all its property and acts on behalf of the estate. Bankruptcy does not recognize any distinction between the property interests of an entity debtor and those of the estate. Any interest in property that an entity acquires after the commencement of the case (including any postpetition earnings) must, therefore, be property that the estate acquires and is property of the estate under § 541(a)(7).

In the case of an individual, however, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,<sup>91</sup> unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment). § 541(a)(6). Moreover, an individual's estate does not include earnings from postpetition services. § 541(a)(6).

The rules just stated for an individual apply in chapter 7 cases. In cases under chapters 12 and 13, however, property of the estate includes postpetition property and earnings.

§§ 1207(a), 1306(a).

The rules in chapter 11 cases of individuals were the same as in chapter 7 cases before enactment of the Bankruptcy Abuse and Consumer Protection Act of 2005 (“BAPCPA”). Thus, property that an individual chapter 11 debtor acquired after the filing of the case and earnings

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<sup>91</sup> Under § 541(a)(5), property that a debtor acquires, or becomes entitled to acquire, within 180 days after the petition date is property of the estate if the debtor acquires or becomes entitled to acquire it either: (A) by bequest, devise, or inheritance; (B) as the result of a property settlement agreement or divorce decree; or (C) as a beneficiary of a life insurance policy or death benefit plan.

from postpetition services were not property of the estate (with limited exceptions as noted above).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case, § 1115(a)(1), and earnings from postpetition services, § 1115(a)(2), both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

## **B. Postpetition Property and Earnings in Subchapter V Cases**

Section 1115 does not apply in subchapter V cases. New § 1181(a). New § 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b). New § 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

### **1. Property of the estate in subchapter V cases of an entity**

Section 1115(a) does not apply to an entity, so its inapplicability in a sub V case has no effect on the property of the estate in a sub V case of an entity.

New § 1186 deals with property of the estate when cramdown confirmation occurs under new § 1191(b). It provides that property of the estate consists of property of the estate under

§ 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

Discussion of the effects of new § 1186 when it applies begins with an explanation of what happens when it does not, *i.e.*, when the court confirms a consensual plan under §1191(a).

Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13. §§ 1227(b), 1327(b).

The vesting of property of the estate in the debtor means that the automatic stay with regard to acts against property terminates. Section 362(c)(1) provides, “The stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate.”

Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), however, because the plan or the confirmation order may provide for vesting to occur at some later time.

In the cramdown situation, new § 1186 provides that property of the estate consists of property of the estate under § 541 (which covers all the debtor’s property at the time of confirmation, as earlier text explains) and any postpetition assets and earnings. This means that the automatic stay does not terminate at confirmation under § 362(c)(1) because all property of the debtor and all its earnings are property of the estate.

New § 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not affect. Recall that § 1141(b) provides for vesting of property of the estate in the debtor upon confirmation. New § 1186, however, keeps it in the estate when cramdown confirmation occurs.

The purpose of new § 1186 seems to be to maintain judicial supervision of a debtor's assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation<sup>92</sup> and makes payments under the plan,<sup>93</sup> and discharge does not occur until the debtor has completed payments for the specified period.<sup>94</sup>

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one. New § 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these concepts, the provisions of new § 1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

## **2. Property of the estate in subchapter V cases of an individual**

SBRA's new rules governing property of the estate just discussed apply in the case of an individual sub V debtor.

Because § 1115(a) does not apply, postpetition assets and earnings of an individual are not property of the estate. The pre-BAPCPA rule recognizing the distinction between property of the estate and property of the debtor comes back into play.

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7, property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and

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<sup>92</sup> See sections IV(D)(1).

<sup>93</sup> See section IX(B).

<sup>94</sup> See section X(B).

until it is converted.<sup>95</sup> The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

The exclusion of postpetition assets and income from property of the estate of an individual in a sub V case raises questions. In a chapter 7 case, an individual is free to use postpetition assets and earnings without restriction or judicial approval. That is the same rule that governed pre-BAPCPA chapter 11 cases of individuals, and it now applies in a sub V case. Does this mean, for example, that an individual who acquires assets postpetition, or has earnings from postpetition services, may use or dispose of them without supervision by the trustee or approval by the court?

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?<sup>96</sup> Similarly, may the holder of a domestic support obligation seek to enforce the claim against postpetition property and earnings?<sup>97</sup>

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<sup>95</sup> *E.g.*, *In re Copeland*, 2019 WL 5390484 (D. Ariz. 2019); *In re Meier*, 550 B.R. 384 (N.D. Ill. 2016); *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015); *In re Hoyle*, 2013 WL 3294273 (Bankr. D. Idaho 2013) *In re Tolkin*, 2011 WL 1302191 (Bankr. E.D.N.Y. 2011); *accord, e.g.*, *In re Lincoln*, 2017 WL 535259 (Bankr. E.D. La. 2017); *In re Gorniak*, 549 B.R. 721 (Bankr. W.D. Wisc. 2016); *In re Colon*, 2016 WL 5819783 (Bankr. D. P. R. 2016). *Contra, e.g.*, *In re Markosian*, 506 B.R. 273, 275-77 (B.A.P. 9<sup>th</sup> Cir. 2014); *In re Evans*, 464 B.R. 429, 438-41 (Bankr. D. Colo. 2011).

<sup>96</sup> Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevents acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 19:6 (2019 ed.) (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

<sup>97</sup> Section 362(b)(2)(B) excepts collection of a domestic support obligation from property that is not property of the estate.

The nature of postpetition assets and earnings changes if cramdown confirmation occurs under new § 1191(b). In that situation, new § 1186 provides that, if cramdown confirmation occurs under new § 1191(b), property of the estate at the time of confirmation contains property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.

One consequence of the addition of postpetition assets and earnings to the estate is that, if conversion to chapter 7 occurs after cramdown confirmation, postconfirmation property and earnings will be property of the chapter 7 estate. If the court confirms a consensual plan, such property may not be property of the estate because neither § 1115(a) nor new § 1186 applies. Sections XII(C) and (D) further discuss this issue.

Issues may arise because of the retroactive nature of the operation of new § 1186: property that was not property of the estate becomes property of the estate upon cramdown confirmation. For example, what happens if, at the time of the confirmation hearing, an individual debtor has disposed of postpetition assets or earnings, which the debtor had the right to do when the property was not property of the estate? A creditor opposing confirmation could argue that the court cannot confirm the plan because the estate will not have all the property that new § 1186 requires it to have.

## **XII. Default and Remedies After Confirmation**

If a debtor defaults after confirmation of a plan, creditors must decide what remedies they have and how to invoke them. If the court confirmed the plan under the cramdown provisions of new § 1191(b), the sub V trustee must also decide what to do if a default occurs.

## **A. Effects of Confirmation Related to Default and Remedies**

Confirmation has different consequences depending on whether the court confirms a consensual plan under new § 1191(a) or under the cramdown provisions of new § 1191(b).

Under § 1141, confirmation in a chapter 11 case makes the provisions of a plan binding on debtors and creditors (§ 1141(a)) and vests property of the estate in the debtor unless the plan or confirmation order provides otherwise (§ 1141(b)). Confirmation in a chapter 12 case has the same effects. § 1227(a), (b).

Sections 1141(a) and (b) remain applicable in a sub V case, so confirmation of a sub V plan also makes the plan binding on the debtor and creditors and vests property of the estate in the debtor, unless the plan or confirmation order provides otherwise.

Chapter 11 and chapter 12 have different rules, however, with regard to discharge. In a chapter 11 case, confirmation of the plan discharges the debtor under § 1141(d)(1)(A). In a chapter 12 case, however, the debtor does not receive a discharge until the completion of all payments under the plan, § 1228(a), or the debtor is eligible for a so-called “hardship” discharge under § 1228(b) if the failure to complete payments is “due to circumstances for which the debtor should not justly be held accountable” and other requirements are met.<sup>98</sup>

The discharge provisions in subchapter V include both the chapter 11 and chapter 12 approaches to the timing of the discharge, depending on the type of confirmation that occurs.<sup>99</sup>

When the court confirms a consensual plan under new § 1191(a), the chapter 11 discharge provisions in § 1141(d)(1)(A) apply, and confirmation discharges debts as it provides.

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<sup>98</sup> § 1228(b)(1). Creditors must receive at least what they would have gotten in a chapter 7 case, § 1228(b)(2), and modification of the plan must not be practicable, § 1228(b)(3).

<sup>99</sup> See Part X.

When the court confirms a plan under the cramdown provisions of new § 1191(b), however, § 1141(d) does not apply. New § 1181(c). Instead, new § 1192 governs the discharge. Under § 1192, discharge does not occur until the debtor completes payments under the plan – the chapter 12 timing rule.

Unlike chapter 12, § 1192 does not provide for a “hardship” discharge. A debtor who cannot make payments under a cramdown plan may, however, seek relief through a postconfirmation plan modification under new § 1193(c), as later text discusses. If the court has confirmed a consensual plan, postconfirmation modification is not permissible after its substantial consummation, new § 1193(b) – the same rule that governs under § 1127(b) in standard and non-sub V cases.<sup>100</sup>

## **B. Remedies for Default in the Confirmed Plan**

Because the provisions of a confirmed plan are binding on the debtor and creditors under § 1141(a), the plan’s provisions for default and remedies control in the first instance.

In a consensual plan, the provisions governing default and remedies ordinarily have their source in negotiations with the various creditors that lead to terms that result in acceptance of the plan. Secured creditors and lessors are unlikely to accept a plan unless it includes acceptable remedies in the plan that allow them to exercise their remedies if the debtor defaults. Unsecured creditors and tax claimants often do not participate actively in the case of a small business debtor, but if they do, they likewise have the opportunity to negotiate acceptable terms to deal with defaults.

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in new § 1191(c) provide the source of remedies for default.

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<sup>100</sup> See section VIII(C). Section 1127 does not apply in sub V cases. New § 1181(a).

Cramdown confirmation requires that the plan provide “appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.” New § 1191(c)(3)(B).

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

The only specific remedy that new § 1191(c)(3)(B) contains is “the liquidation of nonexempt assets.”

Whether the source of the terms governing default and remedies is negotiation between the debtor and creditors or the requirements of new § 1191(c)(3)(B), creditors will want remedies that will protect their rights to recover.

For secured creditors and lessors, who have property rights in specific assets, the primary objective is to recover possession of the encumbered or leased property and to exercise their rights promptly upon the debtor’s default. Secured creditors and lessors will, therefore, want provisions in the plan that recognize their rights to proceed against the debtor’s property and that confirm that neither the automatic stay nor the discharge injunction will apply to their efforts to do so.

An unsecured creditor can subject the debtor’s assets to its debt only through judicial process, a somewhat cumbersome and potentially lengthy process with uncertain results and expense that may not justify the effort. An effective remedy for unsecured creditors, therefore, might include conversion to chapter 7 to permit a trustee to liquidate the assets. Later text

discusses issues that arise upon postconfirmation conversion to chapter 7 that the plan might appropriately address to protect unsecured creditors.

### **C. Removal of Debtor in Possession for Default Under Confirmed Plan**

Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or “for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.”<sup>101</sup> If removal of the debtor in possession occurs after the trustee’s service has been terminated upon substantial consummation of a consensual plan confirmed under new § 1191(a), new § 1183(c)(1) provides for reappointment of the trustee.

New § 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. A specific duty is operation of the business of the debtor. The duties do not include liquidation of the debtor’s assets, and nothing in subchapter V appears to authorize the trustee to do so.

The trustee’s operation of the business will be difficult, if not impossible, if secured creditors or lessors take possession of assets on account of the debtor’s defaults. And even if the trustee can operate the business, it is unclear what happens to it.

Perhaps the plan will have provisions for the cure of defaults and the trustee can manage the business to cure defaults so that the plan can go forward. If not, the plan will remain in default, and the trustee will do nothing more than observe as creditors exercise their remedies under the plan unless the plan is modified or the case is converted to chapter 7.

Property of the estate issues arise when reappointment of the trustee based on the debtor’s default occurs after confirmation of a consensual plan under new § 1191(a). Under § 1141(b),

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<sup>101</sup> Section V(C) discusses removal for cause.

property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan or confirmation order provides otherwise.<sup>102</sup> If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no “debtor in possession” to be removed.

Under this view, new § 1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the estate remains property of the estate under new § 1186<sup>103</sup>) or because the plan or confirmation order so provides.

Perhaps Congress did not intend to limit the operation of new § 1185(a) based on how property vests at confirmation. One possible interpretation of new § 1185(a), therefore, is that it impliedly authorizes the trustee to take possession of property of the debtor. Another potential interpretation is that it impliedly reverts the debtor’s assets into the estate.

Postconfirmation modification may not be a realistic possibility in many cases. First, only the debtor may modify a plan. New § 1193(b). Moreover, if the plan was a consensual one confirmed under new § 1191(a), postconfirmation modification under new § 1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments under the plan). Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter

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<sup>102</sup> See section XI(B).

<sup>103</sup> See section XI(B).

7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so. § 721.

#### **D. Postconfirmation Dismissal or Conversion to Chapter 7**

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes "material default by the debtor with respect to a confirmed plan." § 1112(b)(4)(N). Section 1112 remains applicable in a subchapter V case.

If the case is converted to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting. § 702(d).

#### **1. Postconfirmation dismissal**

The effects of postconfirmation dismissal differ depending on whether the debtor has received a discharge. The timing of the discharge under subchapter V depends on the type of confirmation that occurs.

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under new § 1191(a).<sup>104</sup> Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.<sup>105</sup>

If cramdown confirmation occurred under new § 1191(b), the debtor does not receive a discharge until the completion of payments. New § 1192.<sup>106</sup> Courts dealing with similar

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<sup>104</sup> See section X(A).

<sup>105</sup> *E.g., In re T & A Holdings, LLC*, 2016 WL 7105903 (Bankr. N.D. Ill. 2016).

<sup>106</sup> See section X(B).

provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the case is dismissed prior to the entry of discharge.<sup>107</sup> Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

Section 349, which deals with the effect of dismissal of a case, remains applicable in a subchapter V case. Unless the court orders otherwise for cause, (1) § 349(b)(1) provides for the reinstatement of any receivership proceeding; any transfer avoided under §§ 522, 544, 545, 547, 548, 549, or 724(a); and any lien avoided under § 506(d); and (2) § 349(c) reverts property of the estate in the entity in which such property was before the filing of the case.

## **2. Postconfirmation conversion**

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor, unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under new § 1191(a), but not when cramdown confirmation occurs under new § 1191(b) because new § 1186 keeps property in the estate.<sup>108</sup>

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<sup>107</sup> Chapters 12 and 13 have always delayed discharge until the completion of plan payments or grant of a “hardship” discharge, §§ 1228, 1328, and chapter 11 has done so in the cases of individuals since the addition of § 1141(d)(5) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).

In chapter 12 and 13 cases, courts have concluded that a confirmed plan is not binding upon dismissal of the case without a discharge. The court applied the same rule to the dismissal of an individual's chapter 11 case after confirmation in *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663 (Bankr. M.D. Fla. 2018), *on remand from* 887 F.3d 1255 (11<sup>th</sup> Cir. 2018). The district court and Eleventh Circuit opinions discuss and cite authority for the rules in chapter 12 and 13 cases.

<sup>108</sup> See section XI(B).

Most courts conclude that conversion of a chapter 11 case to chapter 7 does not re-vest property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.<sup>109</sup> Other courts have ruled that property of the estate upon conversion consists of property owned by the debtor at the time of commencement of the case,<sup>110</sup> on the confirmation date,<sup>111</sup> or on the date of conversion.<sup>112</sup>

Under these principles, property of the estate in a sub V case converted to chapter 7 after cramdown confirmation includes all the debtor's property. The result is the same if a consensual plan or the order confirming it provides that property of the estate not vest in the debtor until the occurrence of some later event that has not occurred at the time of conversion.

If property of the estate vested in the debtor at the time of confirmation of a consensual plan, however, what constitutes property of the estate at conversion is uncertain. In the first instance, it depends on whether the court applies the vesting principles in existing case law noted above and, if so, which view it adopts.

An alternative argument is that the provision in new § 1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous section discusses, it is arguable that new § 1185(a) necessarily requires the re-vesting of property of the estate upon removal of the debtor

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<sup>109</sup> E.g., *In re Sundale, Ltd.*, 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re Carter*, 201 B.R. 838 (Bankr. S.D. Ala. 1996); *TSP Industries, Inc.*, 117 B.R. 375 (Bankr. N.D. Ill. 1990).

In cases of individuals, § 1115(a) provides that property of the estate includes postpetition assets and earnings. Vesting principles developed in chapter 13 cases may lead to the conclusion that property an individual acquires after confirmation or income earned after confirmation does not vest in the debtor but remains property of the estate upon postconfirmation conversion. *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015). The rationale is that vesting of property of the estate at confirmation applies only to property of the estate at that time and that postconfirmation property that became property of the estate under § 1115(a) did not exist at confirmation and therefore remains property of the estate.

Subchapter V cases of individuals do not present this issue because § 1115(a) does not apply.

<sup>110</sup> *Smith v. Lee (In re Smith)*, 201 B.R. 267 (D. Nev. 1996), *aff'd* 141 F.3d 1179 (9<sup>th</sup> Cir. 1998).

<sup>111</sup> *Carey v. Flintridge Lumber (In re RJW Lumber Co.)*, 262 B.R. 91 (Bankr. N.D. Ca. 2001).

<sup>112</sup> *In re Midway, Inc.*, 166 B.R. 585, 59 (Bankr. D.N.J. 1994).

in possession after default under a consensual plan because otherwise it has no effective operation in that circumstance. If so, the result is properly the same if conversion occurs.

To avoid these potential issues and to insure that the estate has property at the time of conversion, creditors negotiating a consensual plan may want to insist on a provision in the plan that will keep assets as property of the estate until the debtor completes payments or meets some other milestone.

### **XIII. Effective Date**

The effective date of the new legislation is February 19, 2020, which is 180 days after its enactment on August 23, 2019, when the President signed it.

SBRA of 2019 § 5 provides, in full:

This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.”

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 provided that most of its provisions did not apply “with respect to cases commenced [under the Bankruptcy Code] before the effective date of this Act.” Pub. L. 109-8, § 1501(b) (Apr. 20, 2005). No such provision exists in the SBRA. Query whether a debtor in a small business case filed before the effective date may elect subchapter V treatment in the case when the effective date arrives?

**Lists of Sections of Bankruptcy Code  
and Title 28 Affected or Amended By  
The Small Business Reorganization Act of 2019**

**Enacted August 23, 2019, Effective February 19, 2020**

February 2020

<b>Sections of The Small Business Reorganization Act of 2019</b>		
SBRA § 1	Short Title – “The Small Business Reorganization Act of 2019”	
SBRA § 2	Enacts Subchapter V of Chapter 11 of the Bankruptcy Code, new §§ 1181—1195.	
SBRA § 3(a)	Amends 11 U.S.C. § 547(b) to provide that trustee’s avoidance of preferential transfer must be “based on reasonable due diligence in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses” under § 547(c). Applicable in all bankruptcy cases.	
SBRA § 3(b)	Amends 28 U.S.C. § 1409(b) to provide for venue only in the district of the defendant, for a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than \$ 25,000. Applicable in all bankruptcy cases.	
SBRA § 4(a)	Conforming amendments to the Bankruptcy Code.	
SBRA § 4(b)	Conforming amendments to Title 28.	
SBRA § 5	Effective date.	
SBRA § 6	Determination of budgetary effects.	
11 U.S.C.	<b>Amendments Relating to Cases of All Small Business Debtors</b>	SBRA
§ 101(51C)	New definition of “small business case” as a case in which a small business debtor (defined in § 101(51D)) does not elect application of subchapter V	§ 4(a)(1)(A)
§ 101(51D)	Revised definition of “small business debtor”	§ 4(a)(1)(B)
§ 103(i)	New subsection (i) provides that subchapter V applies only to a case in which a small business debtor elects its application	§ 4(a)(2)
§1102(a)(3)	No committee of unsecured creditors will be appointed in the case of a small business debtor (regardless of election), unless the court orders otherwise	§ 4(a)(11)

11 U.S.C.	<b>Sections of Bankruptcy Code Inapplicable or Modified in Subchapter V Cases</b>	New Subchapter V Section
§ 105(d)	§ 105(d) provisions for status conference are inapplicable. New § 1188 requires status conference and filing of report by debtor 14 days before it.	New § 1181(a)
§ 327(a)	New § 1195(a) states that person is not disqualified for employment under § 327 solely because the person holds a prepetition claim of less than \$ 10,000.	New § 1195(a)
§ 1101(1)	§ 1101(1) definition of debtor in possession is inapplicable. Replaced by new § 1182(2).	New § 1181(a)
§ 1102(a) § 1102(b) § 1103	<p>Paragraphs (1), (2), and (4) of § 1102(a) and paragraphs (1) and (2) of § 1102(b) deal with the appointment of committees. § 1102(b)(3) governs provision of information to, and communications with, creditors. Section 1103 describes the powers and duties of committees.</p> <p>These provisions are not applicable unless the court orders otherwise. Under amended § 1102(a)(3), no committee is appointed in a case of a small business debtor unless the court orders otherwise.</p>	New § 1181(b)
§ 1104 § 1105	Provisions for appointment of trustee (§ 1104) and termination of trustee’s appointment (§ 1105) are inapplicable. Replaced by § 1183 (appointment of trustee in all subchapter V cases) and § 1185 (removal of debtor in possession and reinstatement of debtor in possession)	New § 1181(a)
§ 1106	<p>§ 1106 specification of duties of trustee and examiner is inapplicable.</p> <p>New § 1183(b) states the trustee’s duties. The court may order the trustee to perform certain § 1106 duties (new § 1183(b)(2)), and several are applicable if the debtor in possession is removed (new § 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c).</p>	New § 1181(a)
§ 1107	<p>§ 1107 is inapplicable. § 1107(a) gives the debtor most of the rights, powers, and duties of a trustee. It is replaced by new § 1184, which gives the subchapter V debtor the same rights, powers, and duties.</p> <p>§ 1107(b) states that a professional is not disqualified under § 327(a) from employment by the debtor in possession solely because of the professional’s representation of the debtor prior to the case. No comparable provision exists in subchapter V, but the provision in new § 1195 that a professional is not disqualified solely because the professional holds a claim of less than \$ 10,000 impliedly has the same effect.</p>	New § 1181(a)

§ 1108	§ 1108 authorizes trustee (or debtor in possession) to operate the debtor's business. It is inapplicable and replaced by new § 1184 (authorizing debtor to operate business) and new § 1183(b)(5) (trustee's duties upon removal of debtor in possession include operating debtor's business)	New § 1181(a)
§ 1115	§ 1115 provisions for property of the estate in the chapter 11 case of an individual do not apply. If a plan is confirmed under the cramdown provisions of new § 1191(b), language similar to § 1115 provides that such property is property of the estate of any subchapter V debtor.	New § 1181(a)
§ 1116	§ 1116, which states the duties of trustee or debtor in possession in a small business case, is inapplicable. New §§ 1187(a) and (b) require the debtor to perform the specified duties.	New § 1181(a)
§ 1121	Provisions governing who may file a plan are inapplicable. Only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1123(a)(8)	Requirement that plan provide for payment of earnings or other income of debtor who is an individual as is necessary for the execution of the plan is inapplicable.  New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1123(c)	Prohibition on use, sale, or lease of exempt property of individual in a plan without consent of the debtor is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1125	Provisions in § 1125 for disclosure statement and solicitation of acceptances or rejections of plan do not apply unless the court orders otherwise. A plan must include some of the information that a disclosure statement must have. New § 1190(1). If the court requires a disclosure statement, the provisions of § 1125(f) apply under new § 1187(c).	New § 1181(b)
§ 1127	Provisions dealing with modification of plan are inapplicable and are replaced by new § 1193.	New § 1181(a)
§ 1129(a)(9)(A)	Confirmation requirement of § 1129(a)(9)(A) is that plan must provide for cash payment of priority claims specified in § 507(a)(2) (administrative expenses (including professional fees and trustee fees) and court fees) and § 507(a)(3) (involuntary gap claims), unless the claimant agrees otherwise. The court may confirm a plan that provides for payment of these claims through the plan under the cramdown provisions of new § 1191(b).	New § 1191(e)
§ 1129(a)(15)	Projected disposable income requirement for confirmation in case of individual is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)

<p>§ 1129(b)</p>	<p>“Cramdown” provisions are not applicable.</p> <p>New § 1191(b) states cramdown requirements when the requirements of § 1129(a)(8) (that all impaired classes accept the plan) and § 1129(a)(10) (that at least one impaired class of creditors accept the plan) have not been met.</p> <p>New § 1191(b) permits cramdown confirmation if the plan does not discriminate unfairly and if it is “fair and equitable with respect to” each impaired, nonaccepting class. The “fair and equitable” requirement in subchapter V does not include the absolute priority rule.</p> <p>For a secured creditor, the “fair and equitable” requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1).</p> <p>To be fair and equitable, (1) the plan must provide for all disposable income for a three to five year period (or its value) be applied to make payments under the plan, new § 1191(c)(2); and (2) there must be a reasonable likelihood that the debtor will be able to make all payments under the plan, and the plan must provide appropriate remedies to protect creditors if payments are not made, new § 1191(c)(3).</p>	<p>New § 1181(a)</p>
<p>§ 1129(c)</p>	<p>Provisions for confirmation when more than one plan meets confirmation requirements is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).</p>	<p>New § 1181(a)</p>
<p>§ 1129(e)</p>	<p>Provision requiring confirmation of plan in small business case within 45 days of its filing is inapplicable in subchapter V case. New § 1189(b) requires filing of plan within 90 days after the order for relief (unless the court extends the time), but does not contain a deadline for confirmation.</p>	<p>New § 1181(a)</p>
<p>§ 1141(d)</p>	<p>Provisions for chapter 11 discharge do not apply when the court confirms a cramdown plan under § 1191(b). New § 1192 states discharge provisions when cramdown confirmation occurs.</p> <p>In the cramdown context, discharge does not occur under new § 1192 until the debtor has completed payments under the plan for three years, or such longer period not to exceed five years as the court determines. The new § 1192 discharge applies to (1) debts listed in § 1141(d)(1)(A) and (2) all other debts allowed under § 503 and provided for in the plan, except for debts (x) on which the last payment is due after the applicable three to five year period and (y) of the kind specified in § 523(a).</p>	<p>New § 1181(c)</p>

	<b>Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter V</b>	
11 U.S.C.	<b>Conforming Amendments to the Bankruptcy Code</b>	SBRA
§ 322(a)	Amended to make its provisions for qualification of trustee in a case applicable to a subchapter V trustee appointed under new § 1183.	§ 4(a)(3)
§ 326(a)	Excepts subchapter V trustee appointed under new § 1183 from percentage limitations on compensation applicable to trustees in chapter 11 (and chapter 7) cases.	§ 4(a)(4)(A)
§ 326(b)	Provides that standing subchapter V trustee (like standing chapter 12 and 13 trustees under current law) cannot receive compensation under § 330. (Standing trustees receive compensation under 28 U.S.C. § 586(e), as amended to include standing subchapter V trustees.)	§ 4(a)(4)(B)
§ 347	<p>Current § 347(a) provides for a chapter 7, 12, or 13 trustee to pay into the court, for disposition under chapter 129 of title 28, funds that remain unclaimed 90 days after final distribution under § 726, § 1226, or § 1326. It thus does not apply in chapter 11 cases. SBRA § 4(a)(5)(a) adds subchapter V to the list of trustees and adds new § 1194 to the list of sections providing for distributions. New § 1194 provides for the subchapter V trustee to make distributions under a plan confirmed under the cramdown provisions of new § 1191(b).</p> <p>Current § 347(b) provides that unclaimed property in a case under chapter 9, 11, or 12 at the expiration of the time for presentation of a security or performance of any other act as a condition to participate under any plan confirmed under § 1129, § 1173, or § 1225 becomes property of the debtor or any entity acquiring the debtor’s assets under the plan. SBRA § 4(a)(5)(B) adds new § 1194 to the list of plans confirmed. New § 1194, however, is not the section under which plans are confirmed; it deals with payments by the trustee under a plan confirmed under new § 1191(b).</p> <p>It is unclear under these amendments what happens to unclaimed funds. Section 347(a), as amended, directs the subchapter V trustee to pay them into court. Amended § 347(b) states that the debtor becomes their owner. And it does not appear that amended § 347 deals at all with unclaimed funds when the plan is a consensual one confirmed under new § 1191(a).</p>	§ 4(a)(5)
§ 363(c)(1)	Extends provisions authorizing trustee who is authorized to conduct business to enter into transactions in the ordinary course of business without notice and hearing to subchapter V debtor and subchapter V	§ 4(a)(6)

	trustee. (Other provisions in § 363 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	
§ 364(a)	Extends provisions authorizing trustee who is authorized to conduct business to obtain unsecured credit and incur unsecured debt without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 364 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(7)
§ 523(a)	Applies exceptions to discharge to discharge of individual subchapter V debtor under new § 1192 (which is the discharge that a debtor receives when a plan is confirmed under the cramdown provisions of new § 1191(b)). It is unclear whether under new § 1192 the exceptions apply to the discharge of a debtor that is not an individual. If the court confirms a consensual plan under new § 1191(a), the debtor receives a discharge under § 1141(d)(1)-(4), under which the § 523(a) discharge exceptions apply only in cases of individuals.	§ 4(a)(8)
§ 524(a)(1)	Makes discharge injunction applicable to discharge granted under new § 1192.	§ 4(a)(9)(A)(i)
§ 524(a)(3)	Makes discharge provisions relating to community claims applicable to discharge under new § 1192.	§ 4(a)(9)(A)(ii)
§ 524(c)(1) § 524(d)	Extends provisions governing reaffirmation of debt and for hearing on proposed reaffirmation (which apply to a discharge under § 1141(d)) to discharge granted under new § 1192.	§ 4(a)(9)
§ 557(d)(3)	Makes provisions for expedited consideration of appointment of trustee and for retention and compensation of professionals subject to § 1183 in cases of debtors that own or operate grain storage facilities	§ 4(a)(10)
§ 1146(a)	Prohibition on taxation of issuance, transfer, or exchange, or of the making or delivery of an instrument of transfer, under a plan confirmed under § 1129 is extended to a plan confirmed under § 1191.	§4(a)(12)
	<b>Conforming Amendments to Title 28</b>	SBRA
28 U.S.C. § 586(a)(3), (b), (d)(1), (e)	Provisions applicable to U.S. Trustees duties to supervise the administration of cases and trustees, (a)(3), appoint standing trustees (b), prescribe qualifications of trustees, (d)(1), and fix compensation of standing trustees, (e), extended to include cases and trustees under subchapter V.  Adds new 28 U.S.C. § 586(e)(5), which provides for compensation of standing trustee in subchapter V case when trustee’s services are terminated due to dismissal or conversion of the case or substantial consummation of a plan under new § 1183(c)(1). In these circumstances, the standing trustee does not make disbursements on which a percentage fee would be due. The court is to award compensation “consistent with services performed by the trustee	§ 4(b)(1)

	and the limits on compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)].”	
28 U.S.C. § 589b	Provisions relating to reports of trustees and debtors in possession made applicable in subchapter V cases.	§ 4(b)(2)
28 U.S.C. § 1930(a)(6)(A)	Subchapter V cases excluded from requirement of payment of quarterly U.S. Trustee fees	§ 4(b)(3)
	<b>Amendments Applicable in All Cases</b>	
11 U.S.C. § 547(b)	As amended, 11 U.S.C. § 547(b) provides that a trustee may avoid a preferential transfer “based on reasonable due diligence in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses” under § 547(c).	SBRA § 3(a)
28 U.S.C. § 1409(b)	As amended, 28 U.S.C. § 1409(b) provides for venue only in the district of the defendant of a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than \$ 25,000.	SBRA § 3(b)

## **Summary of SBRA Interim Amendments to The Federal Rules of Bankruptcy Procedure To Implement SBRA**

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) and does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter V (unless committee has been appointed) and instead requires service on 20 largest.

Rule 2009 – permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2012 – makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) renumbered as Rule 2015(c). New Rule 205(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in “small business case” also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a “small business case,” although a subchapter V debtor is a “small business debtor.”)

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – New rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.