

SMALL BUSINESS
REORGANIZATION ACT
OF 2019 (“SBRA” or
“Subchapter V”)
HIGHLIGHTS

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▶ Enactment

- ▶ Enacted August 23, 2019
- ▶ Effective with respect to cases filed on or after February 19, 2020
- ▶ Codified as new 11 U.S.C. §§ 1181-1195
- ▶ Amended as part of the Coronavirus Aid Relief and Economic Security Act (the “CARES Act”)

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HIGHLIGHTS

▶ Making the Election

- ▶ Debtors must elect to proceed under Subchapter V; if they do not make the election, they are governed by the existing BAPCPA provisions applicable to small business debtors
- ▶ 3 types of Chapter 11s: standard, Subchapter V case; non-Subchapter V small business case
- ▶ Pursuant to Rule 1020, the election is made on the petition
- ▶ Case proceeds under Subchapter V unless the court finds the election was improper following an objection by the United States Trustee or a party in interest
- ▶ Courts have held that a debtor(s) in an existing Chapter 11 case (even a case that is a year old and not confirmable under § 1129) may elect to proceed under Subchapter V; this results in restarting the clock on several things under the Bankruptcy Code

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▶ Eligibility

- ▶ Person engaged in commercial or business activities; may engage in owning or operating real property so long as the primary activity isn't owning or operating single asset real estate
- ▶ 50% or more of the debt must arise from debtor's commercial or business activities; no business income requirement like in Chapter 12 cases
- ▶ Prior to the enactment of the CARES Act, aggregate noncontingent liquidated secured and unsecured debts of \$2,725,625 or less (excluding debts to affiliates or insiders)
- ▶ CARES Act temporarily increased the aggregate debt limit to \$7,500,000 (excluding debts to affiliates or insiders) for cases filed AFTER March 27, 2020; increased debt limit expires March 27, 2021

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- ▶ Less Expensive
 - ▶ There is no unsecured creditors committee unless the court orders it for cause
 - ▶ There are no quarterly fees payable to the Office of the United States Trustee

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- ▶ Appointment of Subchapter V Trustee
 - ▶ Subchapter V Trustee is appointed in all cases; however, debtor remains in possession
 - ▶ United States Trustee appoints Trustee from local pool on a case-by-case basis
 - ▶ Trustee has oversight and monitoring duties (i.e. appear and be heard at IDI, 341, certain hearings), but primary goal is to facilitate confirmation of a consensual plan
 - ▶ Trustee operates business if debtor is removed from possession for cause or failure to perform the obligations of the debtor under a confirmed plan; removal of DIP requires the Trustee to assume additional duties (i.e., file unfiled schedules and SOFA, file tax returns, file reports including MORs, perform obligations as administrator of employee benefit plan, transfer patients from a health care business being closed); court can reinstate DIP
 - ▶ Trustee is compensated under § 330 following fee application procedure; most local Subchapter V Trustees are billing at \$300 per hour

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- ▶ Property of the Estate
 - ▶ § 1115(a) does NOT apply in Subchapter V cases, therefore, property that the debtor acquires after the petition date and from earnings from postpetition services are NOT property of the estate unless the plan is crammed down; then property of the estate includes postpetition assets and earnings from services

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▶ Status Conference

- ▶ § 1188(a) requires an initial status conference; no such requirement in any other case
- ▶ Must be held within 60 days of entry of order for relief; court can hold the status conference beyond the 60 day period if it is “attributable to circumstances for which the debtor should not justly be held accountable”
- ▶ Trustee must appear and be heard at the status conference
- ▶ 14 days prior to the status conference, debtor must file and serve a report that “details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization”

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- ▶ Reporting Duties of DIP
 - ▶ Debtor must file most recent balance sheet, statement of operations, cash-flow statement, federal income tax return, or a statement under penalty of perjury that no such documents exist
 - ▶ Debtor must file small business MORs
- ▶ Employment and Compensation of Professionals
 - ▶ Debtor may employ a professional under § 327(a) so long as the professional’s claim is less than \$10,000
 - ▶ Consensual plan requires payment of administrative claims on the effective date
 - ▶ Cramdown plan may provide for payment of administrative claims, including debtor’s counsel and the Subchapter V Trustee through the plan

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▶ Plan

- ▶ Only the debtor can file a plan
- ▶ Plan must be filed within 90 days of the petition date; court may extend the deadline if the need for the extension is “attributable to circumstances for which the debtor should not justly be held accountable”
- ▶ No deadline for obtaining confirmation after filing the initial draft of the plan
- ▶ No disclosure statement requirement unless the court orders otherwise; if the court orders a disclosure statement, then the provisions of § 1125(f) apply
- ▶ Contents governed by most of §§ 1123 and 1190
- ▶ Liquidation analysis and projections must accompany the plan
- ▶ Plan may provide for modification of a claim secured only by a security interest in real property that is the debtor’s principal residence if new value in connection with granting of security interest was not used to acquire it and was primarily in connection with the small business of the debtor

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- ▶ Confirmation
 - ▶ Consensual
 - ▶ All impaired classes accept
 - ▶ Plan complies with § 1129(a)
 - ▶ Discharge entered upon confirmation
 - ▶ Debtor makes plan payments
 - ▶ Trustee terminated upon substantial consummation

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▶ Cramdown

- ▶ § 1129(a)(15) does NOT apply; plan must provide that all of the projected disposable income of the debtor to be received in the 3 year period after first payment under the plan is due, or in such longer period not to exceed 5 years as the court may fix, will be applied to make payments under the plan; no standard to govern how to determine whether to extend the 3 year period; means test standards that govern expenses in Chapter 13 for a above-median debtor do NOT apply in a Subchapter V case
- ▶ § 1129(a)(10) does NOT apply, therefore, cramdown is permitted even if all impaired classes reject the plan
- ▶ § 1129(b) does NOT apply; cramdown rules are in § 1191(b)
- ▶ Absolute priority rule does NOT apply
- ▶ Discharge is delayed until debtor completes the payments under the plan
- ▶ Trustee makes plan payments unless plan or confirmation order provides otherwise
- ▶ Trustee is NOT terminated automatically

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- ▶ Postconfirmation Modification of Plan
 - ▶ A consensual plan cannot be modified after substantial consummation
 - ▶ A cramdown plan can be modified within 3 years or such longer time not to exceed 5 years as the court fixes