A PRIMER ON

THE SMALL BUSINESS REORGANIZATION ACT OF 2019

by:

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NOTE: THIS MATERIAL DOES NOT CONSTITUTE THE OFFICIAL POSITION OF THE AUTHOR OR OF ANY COURT AND SHOULD NOT BE CONSTRUED AS AN INDICATION OF FUTURE RULINGS INVOLVING THE SMALL BUSINESS REORGANIZATION ACT OF 2019

I. Introduction

Effective February 19, 2020, the Small Business Reorganization Act of 2019 ("SBRA") amends the definitions of "small business case" and "small business debtor" in subsections 101(51C) and (51D) of the Bankruptcy Code, respectively, and adds subchapter V (containing 15 sections) to Chapter 11. While the definition of a small business debtor under § 101(51D) has some conforming changes, the aggregate debt limit of $2,725,625 does not change. Under the CARES Act, the aggregate debt limit is now $7,500,000.00 effective March 25, 2020 and sunsets on March 25, 2021. More importantly, subchapter V only applies if the small business debtor ***elects*** to be governed by the provisions of subchapter V, which includes the appointment of a trustee. Thus, under the SBRA, a § 101(51D) "small business debtor" that files Chapter 11 has two options: (1) proceed as a subchapter V case by electing subchapter V, or (2) proceed as a BAPCPA "small business case" by not electing subchapter V.

But why would a debtor elect to proceed under subchapter V if the appointment of a trustee imposes a degree of oversight on the debtor? This paper attempts to answer that question. Additionally, this paper—although not exhaustive—will attempt to summarize and detail the specific provisions of subchapter V of the Bankruptcy Code in such a way as to introduce the reader to its practical application. As this paper will demonstrate, the new subchapter V is a hybrid of chapters 11, 12 and 13 of the United States Bankruptcy Code. Additionally, attached is a copy of the proposed amendments to the Federal Rules of Bankruptcy Procedure and proposed new forms.

The principal features of subchapter V are set forth below; before we get to that however, I want to lay out what I see as the big 6:

- elimination of creditor sponsored plans

- elimination for the most part—of a creditors' committee;

- elimination of the Absolute Priority Rule;

- ability of a Debtor to modify a non-purchase money security interest or mortgage in a residence used in connection with a Debtor's business;

- confirmation of a Plan can be obtained without the support of any class of claims, so long as the plan meets certain requirements; and

- the serial filer no-automatic-stay provision of § 362(n) does not apply

II. General Provisions

1. **The small business case.** Eligibility for a Subchapter V small business reorganization case is restricted to a "small business debtor" (statutorily defined in § 101(51D)) that "elects subchapter V of chapter 11 shall apply." The SBRA also amends the pre-existing "small business case" definition in § 101(51C) as follows:

   (51C) The term "small business case" means a case filed under chapter 11 of this title in which the debtor is a small business debtor [defined in § 101(51D)] *and has not elected that subchapter V of chapter 11 of this title shall apply.*

2. **The small business debtor.** The prior definition of "small business debtor" measured the "business" status of a debtor by simply asking whether that debtor is "engaged in commercial or business activities," which could mean anything, even something as simple as operating a lemonade stand. The definition now requires that at least 50% of the debt arose from commercial or business activities. Additionally, the SBRA excludes publicly traded corporations and amends the definition of "small business debtor" (now eligible for a subchapter V case) in § 101(51D) as follows (additions are in italics; deletions are lined through):

   (51D) The term "small business debtor"—

   > **(A)** subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning ~~or operating real property or activities incidental thereto~~ *single asset real estate*) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,725,625.00[1] (excluding debts owed to 1 or more affiliates or insiders) ~~for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors~~

[1] $7,500,000.00 (CARES Act. Effective from March 28, 2020 – March 27, 2021)

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