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 chapter 11.[1] The statute takes effect on February 19, 2019, 180 days after its enactment.

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 small business cases continue to apply with two changes. First, SBRA revises the definition of "small business debtor" in § 101(51D).[2] Second, SBRA amends § 1102(a)(3) to provide that no committee of unsecured creditors is appointed in any small business case unless the court orders otherwise.

Subchapter V resembles chapter 12 in some ways. Thus, 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.

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[1] Section 3(a) of SBRA also amends § 547(b) to require that a trustee's avoidance of a preferential transfer be based on a trustee to exercise reasonable due diligence and take into account a party's "known or reasonably knowable" affirmative defenses under § 547(c).

[2] Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code.

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), 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.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") on October 3, 2019, gave notice of proposed amendments to the Federal Rules of Bankruptcy Procedure and the Official Forms. The proposed amendments have been published for public comment until November 13, 2019.[3] The Rules Committee has authority to make changes in the Official Forms prior to the effective date of the SBRA, but changes to the Bankruptcy Rules take three years or more under procedures applicable under the Rules Enabling Act, 28 U.S.C. §§ 2071-77. Accordingly, the Rules Committee will propose interim SBRA rules for adoption as local rules or by general order in each judicial district.

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."

[3] Information on how to submit comments can be found on the "Proposed Amendments for Public Comment" page of the Courts' public website at https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

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 small business case for a debtor who elects it; and a non-subchapter V 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 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 from 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 chapter12 or 13 cases. (Section VII(B)).

B. Sub 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. (Section V(A)).

The United States Trustee appoints a 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 filing date, 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. 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, the debtor receives a discharge under § 1141(d) upon confirmation. In the case of an individual, the § 1141(d) 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 VIII(B)).

If the court confirms a cramdown plan, the debtor does not receive a discharge 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. 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 VIII(B)).

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.

Under § 362(c)(2), the automatic stay remains in effect 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 115 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 IX).

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*).[4] New section 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.

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.

The proposed amendment to Bankruptcy Rule 1020(a) requires that the debtor also state whether the debtor elects application of subchapter V and provides that it proceed in accordance with the election unless the court finds that it is incorrect.

Proposed revisions to the voluntary petition forms require the debtor to state whether it is a small business debtor and whether it does or does not make the election.[5] The proposed new

[4] SBRA inserted new subsection (*i*) of § 103 and renumbered existing subsections (*i*) through (k) as (j) through (*l*). SBRA § 4(a)(2).

[5] Official Form 101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); Official Form 102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).

forms also include additional forms for the notice of a chapter 11 bankruptcy case when the debtor elects application of subchapter V.[6]

Bankruptcy Rule 1020(b) currently 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. The proposed amendment makes the same requirement applicable to the statement regarding the election.

B. Revised Definition of Small Business Debtor

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[7] 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[8] (4) in a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or the court has determined that the committee is not sufficiently active and representative to provide effective oversight of the debtor.

[6] Proposed 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 notice for individuals or joint debtors states that the debtor will generally remain in possession of property and may continue to operate the business (¶ 10) and advises that, in some cases, debts will not be discharged until all or a substantial portion of payments under the plan are made (¶ 11).

[7] Debts owed to one or more affiliates or insiders are excluded from the debt limit.

[8] The amount is revised every three years. 11 U.S.C. § 104. The current amount became effective to cases filed on or after April 1, 2019.

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) requires that 50 percent or more of the debt must arise from the commercial or business activities of the debtor.

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.[9]

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 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 section 13 or 15(d) of the Securities Exchange Act of 1934. New § 101(51D)(B)(ii). The other is for a corporate debtor subject to the reporting requirements of those sections and is an affiliate of a debtor. New § 101(51D)(B)(iii).

[9] 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."

IV. THE SUBCHAPTER V TRUSTEE

A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases. New § 1183(a).[10] The trustee is a standing trustee (under the same provisions that govern standing chapter 12 and chapter 13 trustees[11]), if the U.S. Trustee has appointed one, or a disinterested person that the U.S. Trustee appoints. The court has no role in the appointment of the trustee.[12]

The United States Trustee Program is in the process of selecting a pool of persons who may be appointed on a case-by-case basis in sub V cases rather than appointing standing trustees.[13]

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 1104, which specifies the duties of the trustee in a standard chapter 11 case, does not apply in sub V cases, although new § 1183 makes many of its provisions applicable in some circumstances.

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[10] 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 trustee.

[11] Section 4(b) of SBRA amends 28 U.S.C. § 586 to make its provisions with regard to standing chapter 12 and 13 trustees applicable to standing sub V trustees.

[12] 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).

[13] 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. (No. 10) 12 (October 2019).

In October, the U.S. Trustee in a public notice requested resumes with regard to appointment in the Northern District of Georgia with a deadline for submission of November 15, 2019.

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.

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).

Second, the trustee must appear and be heard at the status conference that new § 1188(a) requires. New § 1183(b)(3). Although § 105(d) provides for a status conference on the court's own motion or on the request of a party in interest, 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, the 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 this 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 or non-sub V case has a broad duty of investigation under § 1106(a)(3), unless the court orders otherwise.

For cause shown and on request of a party in interest, the sub V trustee, or the U.S. Trustee, however, the court may impose the investigative duties that § 1106(a)(3) specifies on the sub V trustee, together with the duty under § 1104(a)(4) to file a statement of the investigation. New § 1184(b)(2). 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), 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)); and (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)).

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)).

Unlike chapter 12 and 13 trustees, a sub-V trustee does not have the duty under § 704(a)(9) to make a final report and to file a final report.[14] The U.S. Trustee, however, has the duty to monitor and supervise subchapter V cases and trustees, 28 U.S.C. § 586(a)(3),[15] and the U.S. Trustee Program expects to develop uniform procedures for reporting to enable U.S. Trustees to evaluate and monitor sub V trustees.[16] In addition, the court may order (for cause and on request of a party in interest, the sub V trustee, or the U.S. Trustee) that the sub V trustee file postconfirmation reports pursuant to § 1106(a)(7). New § 1183(b)(2).

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 do 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).[17] A chapter 12 trustee has the same duties under § 1202(b)(5).[18] 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: to be accountable for all property received (§ 704(a)(2)); to examine and object to proofs of claim if a purpose would be served (§ 704(a)(5)); to furnish information concerning the estate and its

[14] 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 perform his 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.
[15] 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.
[16] 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. (No. 10) 12 (October 2019).
[17] Section 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.
[18] 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.

administration as requested by a party in interest, unless the court orders otherwise (§ 704(a)(7)); to file reports (§ 704(a)(8)); 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)); to provide required notices with regard to domestic support obligations (§ 704(a)(10)); to perform any obligations as the administrator of an employee benefit plan (§ 704(a)(11)); and to use 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 and Termination of Trustee's Service

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 directions 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).[19]

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.

Provisions with regard to 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, 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.[20] 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.

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[19] 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, therefore, 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.

[20] Chapter 12 also does not contain provisions for preconfirmation payments to the trustee.

The court may, of course, require the debtor to make adequate protection payments. 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.

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 preconfirmation 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 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). 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.

Trustee makes payments under a plan confirmed under the cramdown provisions of new § 1191(b).

If the court confirms a plan under the "cramdown" provisions of new § 1191(b) (which means that one or more classes of impaired classes did not accept the plan), new § 1194(b) requires the sub V trustee to make payments to creditors under the plan, unless the plan or the order confirming the plan provides otherwise. Chapters 12 and 13 contain identical provisions. §§ 1226(c), 1326(c).

The statute contains no standards 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?

Because new § 1194(b) is identical to the chapter 13 provision, courts may look to the case law and practice in chapter 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.[21] Courts vary, however, with regard to whether the debtor may make direct payments to other types of creditors.

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. 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.[22]

Debtor makes payments under a plan confirmed under new § 1191(a).

If the court confirms a consensual plan under new § 1191(a), the provisions of new § 1194(b) just discussed do not apply. Instead, the trustee's services terminate when the plan has

[21] W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, *Chapter 13 Practice and Procedure* § 4:10 (2019 ed.).
[22] *Id.*

been "substantially consummated." New § 1183(c)(1). Under § 1101(2), substantial consummation generally occurs upon "commencement of distribution under the plan."[23]

Unless the plan implicates other requirements for substantial confirmation,[24] the sub V trustee's services are terminated 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, after the first payment, the sub V trustee no longer exists and, therefore, cannot make payments.

D. Termination of Service of the Trustee and Reappointment

When termination of the trustee's services 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). Termination of the services of the sub V trustee also occurs, of course, upon its dismissal or conversion to another chapter.[25]

1. Termination of services of trustee upon confirmation of consensual plan under § 1191(a) and reappointment if the debtor seeks postconfirmation plan modification

As section IV(C) discusses, if the court confirms a consensual plan under new § 1191(a), new § 1183(c) provides that the services of the trustee terminate when the plan has been

[23] 11 U.S.C. § 1101(2)(C).

[24] "Substantial consummation" under § 1101(2) also requires transfer of all or substantially all of the property proposed to be transferred and assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan. § 1101(2)(A), (B).

[25] 11 U.S.C. § 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.

substantially consummated. This will ordinarily occur when the first distribution under a consensual plan occurs.

If the debtor seeks to modify a confirmed consensual plan under new § 1193(b), new § 1183(c) permits the U.S. Trustee to reappoint the trustee in order to perform the trustee's duty under new § 1183(b)(3)(C) to appear and be heard at the hearing on the proposed modification.[26]

2. Termination of services of trustee when cramdown confirmation occurs

When the court confirms a plan under the cramdown provisions of new § 1191(b) (because one or more impaired classes of creditors do not accept it), the trustee must make payments to creditors, except as the plan or the order confirming it provides otherwise. 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 services are terminated when cramdown confirmation occurs. If the trustee makes all payments that the trustee is to make under the plan, the trustee or the debtor will presumably request that the court enter an order terminating the trustee's services and discharging the trustee from any further obligations in the case.

3. Reappointment of trustee upon debtor's failure to perform obligations under confirmed plan

If the debtor fails to perform the debtor's obligations under any confirmed plan, new § 1185(a) permits the court to remove the debtor as debtor in possession. If postconfirmation removal occurs, the U.S. Trustee may reappoint the trustee. New § 1183(c).

[26] The reason for the provision is unclear. If the plan is a consensual one that was confirmed under new § 1191(a), modification is permissible only before substantial consummation occurs. New § 1193(b). If substantial consummation has not occurred such that plan modification is permissible, the trustee is still serving and need not be reappointed.

E. Compensation of 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.

1. Compensation of standing subchapter V trustee

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

Under SBRA's amendments to 28 U.S.C. § 586(e), 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 services of a standing trustee are terminated by dismissal or conversion of the case or upon substantial consummation of a consensual plan under new § 1181(a) (as section IV(C)(2) 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

The new statute does not specifically address compensation of a subchapter V trustee who is not a standing trustee. Accordingly, the general rule of § 330(a) applies. Section 330(a) permits the court to award to a trustee "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses."

Section 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. SBRA amends § 326(a) to make the limit inapplicable to a sub V trustee. SBRA § 4(a)(4). The exclusion of the sub V trustee from the limits based on disbursements responds to the fact that, in a sub V case that is dismissed or converted, or in which a consensual plan is confirmed under new § 1191(a), the sub V trustee will not have received any money to disburse such that application of the § 326(a) limit would result in no fee.[27]

3. Deferral of 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.

A non-standing trustee's compensation is allowable as an administrative expense, which has a priority under § 507(a)(2) subject only to claims for domestic support obligations. In a

[27] In chapter 12 and chapter 13 cases in which a non-standing trustee serves, § 326(b) limits the trustee's compensation to five percent of payments under the plan. The SBRA does not extend this limitation to a sub V trustee.

standard chapter 11 case or a non-sub V case, a plan must provide for payment of such administrative expenses in full on or before the effective date of the plan under § 1129(a)(9)(A), unless the holder of the claim has agreed to different treatment.

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.

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 of substantially increasing the administrative expenses of the case. In view of the intent of SBRA to streamline and simplify small business cases under chapter 11 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.

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. [28]

The court must terminate the debtor's status as debtor in possession for cause. New § 1185(a).[29] Cause includes: (1) fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after commencement of the case; or (2) failure of the debtor to perform the obligations of the debtor under a confirmed plan.

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).

The court may reinstate the debtor in possession. New § 1185(b).[30]

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[28] 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.

[29] 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.

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 for appointing a trustee.

Section 1104 also permits the appointment of an examiner. Subchapter V has no provision for appointment of an examiner.

[30] 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.

B. Duties of Debtor in Possession

Upon the filing of the case, the debtor must file documents required of a small business under § 1116(1)(A) and (B). New § 1187(a).[31] Thus, the debtor must file with the petition 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.

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

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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.

[31] Section 1116 does not apply in a sub V case, § 1181(a), but § 1187 incorporates all of 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.

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;[32] (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.

Pursuant to new § 1184, a debtor in possession also has the duties of a trustee under § 1106(a), except those specified in paragraphs (2) (file required lists, schedules, and statements), (3) (conduct investigations) and (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 duties under § 1106(a) applicable to the debtor under § 1184 are the duties: to file a plan, § 1106(a)(5); [33] to file tax returns for any year for which the debtor has not filed a tax

[32] That is not a typo. The statute specifies local rule of the district court.

[33] The duty under § 1106(a)(50, 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

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).

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 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).

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 a small business case 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[34] (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).

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.

[34] The other provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(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" about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves. § 1125(b). In a standard chapter 11 case, the court must hold a hearing after at least 28 days' notice on the disclosure statement before the debtor can solicit acceptances of its plan. 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 may approve a disclosure statement submitted on standard forms approved by the court 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) projection with respect to the ability of the debtor to make payments under the proposed plan of reorganization.

C. Required Status Conference and Requirement of 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." 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).

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 hear 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.[35]

[35] See *supra* note 33.

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) (making §§ 1121 and 1129(e) inapplicable). They continue to apply in the case of a small business debtor who does not elect subchapter V.

The schedule for the filing of a 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 non-sub V debtor – 90 days instead of 300.[36] Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

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

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).

[36] 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 stablishing a deadline for the filing of proofs of claim.

F. Modification of disinterestedness requirement for debtor 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 must also not have an interest "materially adverse to the interest of the estate." § 101(14)(C).

The effect of these provision 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.

VII. CONTENTS OF SUBCHAPTER V PLAN

The requirements for the contents of a sub V plan are contained in existing sections 1122 and 1123 (with two exceptions) and in new § 1190. An important provision is that new § 1190(3) permits modification of 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.

The 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

Section 1190 states three provisions governing the content of the plan.

First, new § 1190(1)[37] requires the inclusion of information that would otherwise be included in a disclosure statement. Thus, 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.

[37] 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, with regard to 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 services upon substantial consummation of a consensual plan under new § 1191(a). Under § 1101(2), "substantial consummation" occurs upon (among other things[38]) "commencement of distribution under the plan." § 1101(2)(C). The issue is whether a consensual plan must provide for submission of future income to the trustee's supervision and control when the trustee's services will be terminated.

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).)

[38] 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).

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.[39] 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.

VIII. CONFIRMATION OF THE PLAN, EFFECT OF CONFIRMATION, AND DISCHARGE

Section 1129(a), which states the rules for confirmation of a chapter 11 plan, applies in a sub V case, other than paragraph (a)(15), which states the projected disposable income rule for individual chapter 11 cases. A different projected disposable income rule, expanded to apply to all debtors, applies in the cramdown context, discussed below.

If a plan meets all the applicable requirements of § 1129(a), the court must confirm it under new § 1191(a).

Section 1129(b), which states the cramdown rules for confirmation of a plan that one or more impaired classes does not accept, does not apply in sub V cases. New § 1181(a). New § 1191(b) states the cramdown rules in a sub V case.

Whether a plan is confirmed under new § 1191(a) or § 1191(b) has important consequences relating to payments under the plan by the trustee, the debtor's discharge, the contents of property of the estate, and the applicability of the automatic stay after confirmation.

[39] New § 1190(3) states that its provisions apply "notwithstanding section 1123(b)(5)."

A. Confirmation of Consensual Plans Under New § 1191(a)

If the plan meets all the applicable requirements of § 1129(a), the court must confirm it under new § 1191(a). If all those requirements are met, all classes of impaired creditors have accepted it. Thus, these materials refer to it as a consensual plan. (It is not a defined term.)

Confirmation of a consensual plan under new § 1191(a) has important consequences.

First, as section IV(d)(1) notes, the services of the trustee are terminated under new § 1183(c) upon substantial consummation. Under § 1101(2), substantial consummation generally occurs when payments commence, as that sections explains. Thus, the trustee does not make payments under a plan confirmed under new § 1191(a).

Second, the discharge provisions of § 1141(d) apply upon confirmation of a consensual plan, except for paragraph (5). New § 1181(a). Section 1141(d)(5) provides for the delay of discharge in an individual case until the debtor has completed all payments under the plan. Because § 1141(d)(5) is inapplicable, any subchapter V debtor who obtains confirmation of a consensual plan under new § 1191(a) receives a discharge upon confirmation.

Third, under § 1141(b), confirmation vests property of the estate in the debtor, unless the plan or confirmation order provides otherwise. The additional property of the estate provisions in § 1186 (discussed in Part IX) do not apply.

Fourth, discharge triggers termination of the automatic stay under § 362(c)(2)(C).

B. Cramdown Confirmation Under New § 1191(b)

1. Requirements for cramdown confirmation

Subchapter V revises the cramdown rules in chapter 11 cases for sub V cases.

Under existing law, cramdown confirmation is possible under § 1129(b) notwithstanding the failure of all impaired classes to accept the plan. Section 1129(b) cramdown is not available, however, if no impaired class has accepted the plan (the § 1129(a)(10) requirement).

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 reject it and (2) eliminate the absolute priority rule.

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 (which § 1129(b) does), new § 1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan.

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.

It does not appear that the new statute effects any change in the unfair discrimination requirement.

New § 1191(c), however, applies a new "rule of construction" in subchapter V cases for the condition that a plan be "fair and equitable," thus replacing the definition in § 1129(b).

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 secured claims, except that a secured creditor with an unsecured deficiency claim loses in many cases the ability to control the unsecured class and cannot invoke the absolute priority rule.

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

The disposable income requirement is in new § 1191(c)(2). The plan must provide that all of the projected disposable income of the debtor to be received in the 3-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). Alternatively, the plan may provide that the value of property to be distributed under the plan within the 3-year or longer period that the court fixes is not less than the projected disposable income of the debtor. The statute contains no standards to govern how the court determines whether to extend the 3-year period.

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)).

New § 1191(c)(3) states a feasibility test as part of the "fair and equitable" analysis. The requirement is 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).

New § 1191(c)(3) further 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. New § 1191(c)(3)(B).

The two § 1191(c)(3) provisions thus augment 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.

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. As section IV(E)(3) discusses, this means that a plan may propose for payment of compensation of the trustee through postconfirmation payments. The same rule permits deferral of fees of the debtor's attorney and other professionals.

2. Consequences of cramdown confirmation

Payments to creditors by trustee

If the court confirms a plan under the cramdown provisions of new § 1191(b), new § 1194(b) requires the trustee to make payments under the plan, unless the plan or the order confirming the plan provides otherwise. The trustee's services do not terminate under new

§ 1183(c) upon substantial consummation of a plan confirmed under new § 1191(b) because it applies only to a plan confirmed under new § 1191(a).

The statute provides no guidance as to the circumstances under which the court may confirm a plan or enter a confirmation plan that does not provide for the trustee to make payment, as section IV(C) discusses.

Timing of discharge

Another consequence of cramdown confirmation under new § 1191(b) is that, under new § 1181(c), the discharge provisions of § 1141(d) do not apply, except as provided in new § 1192. New § 1192 delays discharge until the debtor completes payments due within the first three years of the plan, or such longer period not to exceed five years as the court may fix. A potential issue is whether the fixing of a longer period under this section occurs at the time of discharge or at the time of confirmation.

The discharge under new § 1192 discharges the debtor from all debts provided in § 1141(d)(1)(A) and allowed administrative expenses provided for in the plan, with two exceptions. First, it 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 5 years fixed by the court. Second, it does not discharge any debt excepted under § 523(a).

Property of the estate and automatic stay

When the court confirms a plan under new § 1191(b), new § 1186(a) provides that property of the estate includes postpetition assets and earnings from services, as Part IX discusses. New § 1186(a) deals only with postpetition assets and earnings. It does not address what happens to property of the estate that existed on the petition date.

Section 1141(b) (which remains applicable in a sub V case) does address the issue. It provides that confirmation vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise.

Whether petition-date assets, and not just postpetition assets, remain property of the estate upon cramdown confirmation is important because several provisions of the automatic stay apply only to actions against property of the estate.

Part IX further discusses property of the estate issues.

C. Postconfirmation Modification of Plan

The postconfirmation modification rules 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).

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).

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

If the plan has been confirmed under § 1191(b), § 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 § 1191(b).[40]

IX. PROPERTY OF THE ESTATE

Property of the estate in a standard chapter 11 case (including a small business case) consists of the same property that is property of the estate under § 541. For a debtor that is a corporation or other entity, the debtor in possession (or trustee) acts on behalf of the estate and any property the estate acquires after the commencement of the case is property of the estate under § 541(a)(7).

Prior to the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA"), property that an individual chapter 11 debtor acquired after commencement of the case was not property of the estate unless the postpetition property was a proceed of prepetition property under § 541(a)(6) or property acquired within 180 days of the filing by bequest, devise, inheritance; as the result of a property settlement agreement or divorce decree; or as a beneficiary of a life insurance policy or death benefit plan under § 541(a)(5). Postpetition earnings from services performed by an individual were not property of the estate. § 541(a)(6).

BAPCPA added § 1115 to chapter 11. It provides that, in a 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. Section 1115 tracks the language of §§ 1207 and 1306, which contain the same rule for cases in chapter 12 and 13, respectively.

[40] 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.

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 combination of (1) inapplicability of § 1115 at the outset of the case and (2) the later applicability of provisions with the same language in the case of cramdown confirmation means that postpetition assets and earnings that were not property of the estate on the petition date become property of the estate upon confirmation.

The retroactive nature of the provision raises questions in cases of individuals. (The questions do not arise when the debtor is a corporation or other entity because any postpetition assets the estate acquires are property of the estate anyway under § 541(a)(7)). For example, if an individual acquires assets postpetition or has earnings from postpetition services, is the debtor authorized to use or dispose of them without supervision by the trustee or approval by the court? What happens if cramdown confirmation occurs and the debtor no longer has the postpetition assets or earnings?

The inapplicability of § 1115 at the beginning of the case of an individual raises other issues. 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?[41] Similarly, may the holder of a domestic support obligation seek to enforce the claim against postpetition property and earnings?[42]

X. 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?

[41] Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (2) precludes enforcement of a prepetition judgment; paragraphs (3) and (4) prevents acts against property of the estate; paragraph (5) precludes enforcement of a prepetition lien; paragraphs (6) and (7) do not apply to postpetition claims; and paragraph (8) deals with tax claims for taxable periods ending before the date of the petition.

[42] Section 362(b)(2)(B) excepts collection of a domestic support obligation from property that is not property of the estate.