Final Report of the American Bankruptcy Institute Subchapter V Task Force

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Final Report and Recommendations

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Founded on Capitol Hill in 1982, the American Bankruptcy Institute (ABI) is the only multi-disciplinary, nonpartisan organization devoted to the advancement of jurisprudence related to problems of insolvency. The ABI membership includes nearly 10,000 attorneys, bankers, judges, accountants, professors, turnaround specialists and other bankruptcy professionals, providing a forum for the exchange of ideas and information. ABI was founded to provide Congress with unbiased testimony and research on insolvency issues. For further information, contact ABI.

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Final Report of the American Bankruptcy Institute Subchapter V Task Force

The ABI Task Force undertook a year-long, in-depth study of Subchapter V of Chapter 11 of the Bankruptcy Code. The Task Force studied the statute and related case law, analyzed empirical data, and heard directly from the major constituents affected by Subchapter V. This Report details the Task Force's key findings and recommendations. Overall, the information reviewed by the Task Force overwhelmingly shows that Subchapter V is working as Congress intended, allowing smaller companies to reorganize their businesses and to make payments to their creditors. The Task Force's study also revealed, however, certain practices and procedures that may benefit from further refinement or statutory amendment. Accordingly, this Report not only highlights key takeaways from the Task Force's study but also offers best practices and potential statutory amendments for policymakers, judges, and practitioners to consider.

I. Introduction

Smaller businesses are the core of the U.S. economy. In 2023, the United States was home to approximately 33.2 million small businesses, which employed over 61 million people representing 46% of private sector employees.[1] Approximately 50 percent of those businesses fail within the first five years of operation, and approximately 70 percent fail before their tenth anniversary.[2] Common reasons cited for such failures include insufficient capital, a faulty business model or infrastructure, and inadequate or inexperienced management. These challenges are not unique to smaller businesses, and larger companies frequently use Chapter 11 of the U.S. Bankruptcy Code to address them.

Many in the bankruptcy field, however, found standard Chapter 11 ineffective for smaller businesses. The research documenting the reorganization challenges for smaller businesses began around thirty years ago. Reorganization through Chapter 11 proved costly and time-consuming, and many smaller businesses were unable to use it successfully or did not try, choosing to liquidate in state

1 Small Business Administration, Frequently Asked Questions About Small Businesses (March 2023), https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf.

2 *See* Bureau of Labor Statistics, *Business Development Dynamics, Entrepreneurship and the U.S. Economy*, http://www.bls.gov/bdm/entrepreneurship/bdm_chart3.htm (documenting, by percentage, the survival rates of establishments by year started and number of years since starting from 1994 through 2015); Chamber of Commerce, *Small Business Statistics*, https://www.chamberofcommerce.org/small-business-statistics/ (last accessed March 22, 2024) (50% of small business fail every year).

court proceedings and close the business.[3] Recognizing these challenges early, U.S. Bankruptcy Judge Thomas Small deployed an innovative "fast-track" Chapter 11 process for smaller businesses in North Carolina in the 1980s.[4]

With increasing study and research,[5] proposals for change gained momentum. The National Bankruptcy Review Commission (NBRC), established pursuant to the Bankruptcy Reform Act of 1994,[6] evaluated proposals concerning smaller business bankruptcy and recommended reforms specifically tailored to the concerns of small business cases.[7] In 2014, the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 (the Chapter 11 Commission) built on this earlier work. Like the earlier NBRC, the Chapter 11 Commission obtained the input of bankruptcy judges and bankruptcy professionals knowledgeable about the small- and middle-market cases, examined the issues identified as barriers to effective reorganizations for these entities, and recommended the creation of an alternative restructuring scheme which would eliminate or minimize these barriers.[8] The work of these commissions, along with the efforts of many others, led to necessary legislative reform in 2019.

Congress enacted the Small Business Reorganization Act of 2019 (SBRA) on August 23, 2019, to facilitate the reorganization of smaller business debtors in the United States.[9] The SBRA, codified as Subchapter V of Chapter 11 of the Bankruptcy Code, became effective on February 19, 2020.[10] Subchapter V's goal is to provide eligible business debtors with a quicker, less costly, and more feasible path to reorganization than a standard Chapter 11 case.[11]

Many debtors have availed themselves of Subchapter V. As of February 29, 2024, almost 7,500 Subchapter V cases have been filed,[12] representing more than a quarter of all Chapter 11 cases filed

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3 *See, e.g.,* Am. Bankr. Inst. Comm'n to Study the Reform of Chapter 11, 2012-2014, Final Rep. & Recommendations (2014) 282–283, http://commission.abi.org/full-report, [hereinafter "Chapter 11 Commission Report"] (reporting anecdotal evidence that distressed companies were increasingly turning to state law remedies (*e.g.*, receiverships and assignments for the benefit of creditors) and equity receivership law with greater frequency); Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, 38 J. Legal Stud. 255, 256, 300 (2009) (finding that around 80 percent of small businesses used state law procedures to liquidate or reorganize during the period of study).

4 Hon. A. Thomas Small, U.S. Bankruptcy Judge for the Eastern District of North Carolina (retired), *Small Business Bankruptcy Cases*, 1 Am. Bankr. Inst. L. Rev. 305 (1993) (describing the fast-track procedure); *see also* Hon. A. Thomas Small, *Small Business Reorganization Chapter*, 4 Am. Bankr. Inst. L. Rev. 550 (1996) (recommending a small business reorganization chapter modeled after Chapter 12).

5 *See, e.g.*, Anne Lawton, *Chapter 11 Triage: Diagnosing a Debtor's Prospects for Success*, 54 Ariz. L. Rev. 985, 995–1001 (2012); Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, *supra* note 3, at 256; Ford Elsaesser, *The Small Business Blues-Making Bankruptcy Work in Mid-size Cases*, Am. Bankr. Inst., WL 091803 ABI-CLE 547 (2003); Brian A. Blum, *The Goals and Process of Reorganizing Small Businesses in Bankruptcy*, 4 J. Small & Emerging Bus. L. 181 (2000); Robert M. Lawless, *et al.*, *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. Ill. L. Rev. 847 (1994).

6 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (Oct. 22, 1994).

7 *See* Nat'l Bankr. Review Comm'n Final Report: Bankruptcy: The Next Twenty Years (Oct. 20, 1997) 609–660, [hereinafter NBRC Report], http://govinfo.library.unt.edu/nbrc/reporttitlepg.html.

8 *See* Chapter 11 Commission Report, *supra* note 3, at 275–283.

9 Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (Aug. 23, 2019) (effective Feb. 19, 2020).

10 *See id.*

11 H.R. Rep. No. 116-171, at 4 (2019), *as reprinted in* 2019 U.S.C.C.A.N. 366, 369.

12 *See* U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, https://www.justice.gov/ust/page/file/1499276/dl?inline.

since February 2020.[13] Subchapter V filings reached record levels in 2023 and constituted 44% of all Chapter 11 filings for that year.[14] Meanwhile, courts have generated four years of case law addressing various statutory and procedural issues arising in Subchapter V cases. Enough time has passed to merit evaluating the collective Subchapter V experience thus far and to consider the overall effectiveness of the subchapter.

To that end, the American Bankruptcy Institute (ABI) created the Subchapter V Task Force (Task Force) in April 2023. The Task Force was charged with reviewing the implementation and administration of Subchapter V. The Task Force continued the ABI's tradition of bringing together experienced professionals to study and report on matters affecting the bankruptcy system.[15] Indeed, the SBRA is informed by the final report of the Chapter 11 Commission, and some of its proposals have been incorporated into the SBRA.[16]

The Task Force is co-chaired by Bankruptcy Judge Michelle Harner (District of Maryland) and Megan Murray (Underwood Murray) and includes Bankruptcy Judge Paul Bonapfel (Northern District of Georgia), former ABI President Robert Keach (Bernstein Shur), Elizabeth Lally (Spencer Fane), Jolene Wee (JW Infinity Consulting, LLC), and Donald Swanson (Koley Jessen, P.C.).[17] In addition, Lisa Tracy, Deputy General Counsel, Executive Office for U.S. Trustees, also participates as an *ex officio* member representing the U.S. Trustee Program.[18]

The Task Force spent the past twelve months holistically evaluating the subchapter, guided by its mission statement, which reads:

> The ABI Subchapter V Task Force is committed to reviewing the implementation and administration of Subchapter V of Chapter 11 of the Bankruptcy Code. The Task Force will study and evaluate case law and statistical data under Subchapter V from February 19, 2020, through and including the present. This study will consider, among other things, how the subchapter is working in practice and whether it is achieving certain underlying objectives, such as assisting debtors and creditors in resolving the reorganization cases of small- and medium-sized businesses more effectively and efficiently, and what may

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13 *See* Appendix B (ABI Statistical Summary of Subchapter V Cases), at 1. Subchapter V cases likely represent a higher percentage of all Chapter 11 filings than the ABI data indicate. The U.S. Trustee Program's data report a higher number of Subchapter V cases overall than the ABI's data. There is a variance in the two datasets because the U.S. Trustee Program's statistical summary includes cases that are pending while the ABI's data, which combine data from PACER and the Federal Judicial Center's Integrated DataBase (IDB), only become available after a case has been statistically closed.

14 Professor Robert M. Lawless, *About 44% of Chapter 11s are Subchapter V Cases*, Credit Slips: A Discussion on Credit, Finance, and Bankruptcy, (Mar. 26, 2024), https://www.creditslips.org/creditslips/2024/03/about-44-of-chapter-11s-are-subchapter-v-cases.html (reporting that Subchapter V cases constituted 44% of all Chapter 11 case filings in 2023).

15 The ABI previously has installed two commissions—the Commission to Study the Reform of Chapter 11 (the Chapter 11 Commission) and the Consumer Bankruptcy Commission—charged with studying and reporting on Chapter 11 and consumer bankruptcy reforms. For more about the Chapter 11 Commission, *see* https://commission.abi.org/purpose-commission.

16 *See generally* Chapter 11 Commission Report, *supra* note 3, at 275–283 (describing the Commission's recommendations and proposals for legislative reform for small and middle market businesses).

17 Appendix A (Biographies of Members of the American Bankruptcy Institute Subchapter V Task Force).

18 *Id*. As a nonvoting member, Deputy General Counsel Lisa Tracy took no position on legislative proposals or recommendations. Ms. Tracy provided institutional perspectives and technical assistance on issues considered by the Task Force.

be needed to improve its effectiveness. The Task Force intends to memorialize the results of its study in a written report.[19]

To carry out its mission, the Task Force sought input from a range of interested bankruptcy judges, academics, insolvency professionals, and other interested groups. The Task Force convened seven public hearings, held roundtable discussions with trade groups, and deployed surveys inviting comment on Subchapter V. The Task Force also consulted the case law and commentary relevant to Subchapter V.

The Task Force's evaluation of the implementation of Subchapter V was guided by the following core principles.

- First, Subchapter V, just over four years old, is still in its infancy. Because the subchapter remains relatively new, many issues are not sufficiently developed, or have yet to reveal themselves, so the Task Force's study was necessarily limited in scope. Thus, the Task Force was careful not to recommend statutory reform, in some instances, out of concern that certain reforms may be premature or incomplete at this time or would result in unintended consequences. The Task Force instead focused on recommending statutory reform or practical guidance for issues that clearly warrant it based on the collective experience with Subchapter V thus far.
- Second, Subchapter V is flexible by design. Its overarching objectives are to promote reorganization of smaller businesses and payment to those businesses' creditors through an expedited, lower-cost restructuring mechanism. This flexibility ensures that courts have authority to oversee the reorganization of salvageable businesses while dismissing or converting other cases not suited for the Subchapter. The structure of Subchapter V also allows courts to use the Bankruptcy Code's existing tools to supervise and resolve cases without unnecessary delays. The Task Force throughout its study was careful to balance the flexibility Congress intentionally created in Subchapter V against the need for reform.
- Third, the Task Force's evaluation and recommendations considered the rights and interests of creditors in Subchapter V cases. Subchapter V gives smaller businesses an opportunity to reorganize that they would not otherwise have in standard Chapter 11, which—as a starting point in this context—is overall better for creditors. In addition, many creditor protections that would apply in a standard Chapter 11 apply equally in Subchapter V. The best interest of creditors test, for instance, applies in Subchapter V and ensures creditors do not receive less in a Subchapter V reorganization than they would in liquidation. Likewise, Chapter 11's feasibility test applies in Subchapter V. Moreover, although Subchapter V modifies the Chapter 11 absolute priority rule, it includes a projected disposable income test that sets the minimum requirements for a confirmable nonconsensual plan. The Task Force's study did not uncover evidence indicating that creditors are doing worse in Subchapter V than they would in any other scenario under bankruptcy law or state law.

19 *See* ABI Subchapter V Task Force, Purpose, https://subvtaskforce.abi.org/purpose.

- Fourth, the Task Force's recommendations for legislative changes are *not* an indication that the Subchapter has failed. Rather, the Task Force's study reveals that Subchapter V has been very effective. Thus, the Task Force's recommendations herein target aspects of Subchapter V that are ambiguous or not operating as effectively as the rest of the statute, and in many of those instances, the Task Force concluded that reform or guidance would be helpful without negatively impacting the subchapter as a whole.
- Fifth, in studying the implementation and operation of Subchapter V only a few years after its creation, the Task Force endeavored to conduct a holistic investigation. The Task Force considered the various perspectives of bankruptcy judges, Subchapter V trustees, practitioners, commentators, academics, and other stakeholder groups, shared through witness testimony, roundtable discussions, survey responses, academic literature, commentary, and case law.

After extensive study, the Task Force has concluded that the overwhelming consensus of bankruptcy professionals, bankruptcy judges, and academics is that Subchapter V is functioning as Congress intended. Many have commented that Subchapter V is the most effective and useful bankruptcy legislation passed since enactment of the Bankruptcy Code in 1978.

The data show that confirmation in Subchapter V cases occurs more often, more quickly, and at lower cost than in non-Subchapter V small business cases and standard Chapter 11 cases, and that creditors are receiving more money in Subchapter V.[20] As with any piece of new legislation, however, the Task Force study also revealed aspects of Subchapter V cases that would benefit from more clarity in the statute or consistency in the case law. As such, this Report offers both potential statutory changes and practical guidance to strengthen Subchapter V for all constituencies.

This Report explains the components of the Task Force's study process, summarizes the results of the study, and where appropriate, provides recommendations for statutory reform or other guidance. The Report organizes its recommendations based on key components of a Subchapter V case: eligibility, the role of the Subchapter V trustee, case administration matters, plan and confirmation issues, and postconfirmation administrative matters.

All decisions and recommendations set forth in the Report were made by the Task Force members. Academic Reporter Professor Alexandra Sickler worked closely with the Task Force members to draft the language of the recommendations, supporting principles, and narrative for each of the recommendations. Although the Reporter acted as the principal draftsperson of the Report, the Task Force Members reviewed and commented on various iterations of this Report to achieve this final product. *The Task Force voted unanimously to approve each of the recommendations and principles set forth in this Report at various meetings over the course of the Task Force's study and voted to adopt this Report on April 5, 2024.*

20 *See* Section II *infra* (discussing the available data).

II. Executive Summary of Task Force Findings and Recommendations

The Task Force, after investigation and analysis, has concluded that Subchapter V is effective and functioning as Congress intended. Nearly all bankruptcy judges, practitioners, and Subchapter V trustees who provided testimony to the Task Force widely acclaim the subchapter as a success.[21] Almost fifty witnesses across seven hearings testified that Subchapter V has already proven to be successful in saving smaller businesses.

Many witnesses observed that Subchapter V cases are faster, more affordable, and provide a more feasible path to reorganization. Bankruptcy Judge Hannah Blumenstiel (Northern District of California) testified that the Subchapter V cases in her district are shorter, less costly, and confirm plans at higher rates than non-Subchapter V cases:

> Of the 110 Sub V cases filed in my district, 61 of them, or 55%, resulted in confirmed plans. Of the 295 non-Sub V Chapter 11 cases filed in the Northern District of California since February 19, 2020, just 99 of them, or 34%, resulted in a confirmed plan. The average duration of Sub V cases in my district was 407 days, more than 2 months shorter than a non-Sub V Chapter 11 case, which lasts an average of 470 days. But the most striking distinction was cost. The average amount of professional fees awarded in a non-Sub V Chapter 11 case filed in the Northern District of California was $679,387. The average amount of professional fees awarded in a Sub V case in my district was $145,790 – a staggering difference.[22]

Bankruptcy professionals and judges repeatedly emphasized that Subchapter V allows businesses to reorganize that cannot afford the costs of a standard Chapter 11 case. For example, Bankruptcy Judge Michael E. Romero (District of Colorado) explained:

> [Subchapter V] has opened up the ability for financial rehabilitation to entities previously priced out [of] the more standard Chapter 11 process. The value of extending a survival opportunity to financially challenged; but valuable members of our communities, can never be underestimated.[23]

Practitioners and judges also agree that Subchapter V is more efficient. Bankruptcy Judge Paul M. Black (Western District of Virginia) stated:

> Prior to the enactment of Subchapter V, my experience was that requiring a small[er] business to comply with the same Chapter 11 structure as a large commercial operation was not always

21 Different viewpoints exist about how to define "success" in reorganization cases. Some take a broad view of "success," arguing that even if no plan is confirmed, success has been achieved where the case results in an orderly sale of assets or a negotiated solution without a formal plan. *See* NBRC Report, *supra* note 7, at 610.

22 *Written Statement of Hon. Hannah Blumenstiel, U.S. Bankruptcy Court for the Northern District of California*, at 2 (General Experiences with Subchapter V) (Jun. 9, 2023), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing.

23 *Written Statement of Hon. Michael E. Romero, U.S. Bankruptcy Court for the District of Colorado*, at 6, ABI Subchapter V Task Force Hearing (Operation of the Case) (Jul. 28, 2023), https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing.

> a good fit. The absolute priority rule was a practical impediment, and it was expensive, time-consuming, and fraught with battles that were often not worth engaging in for anyone . . . Subchapter V has eliminated a lot of the unnecessary battles and wheel spinning, keeping the focus on timely confirmation of a plan of reorganization.[24]

The kinds of businesses that have been able to use Subchapter V to reorganize are varied and provide important services to the people in their local and regional economies.[25] Witnesses recounted successful reorganizations of businesses such as restaurants, construction companies, an engineering firm, medical practices, a nursing home operator, an underground utilities operator, a recycling center, a business providing cremation services, a litigation support business, a bowling alley, an event rental company, among many others.

The data also support the conclusion of the Task Force and almost all witnesses that Subchapter V is operating as intended. *Confirmation rates are higher, most debtors confirm plans more quickly, and dismissals occur earlier.* The data show that 50% of all Subchapter V cases confirm plans, and 69% of these confirmed plans were consented to by all creditor classes.[26] These confirmation rates are favorable compared with confirmation rates under standard Chapter 11 and other non-Subchapter V small business cases. Pre-SBRA, only about 25% of the debtors with assets or liabilities less than $10 million were able to confirm a plan in standard Chapter 11.[27] Subchapter V cases also move more quickly, with most smaller businesses reaching confirmed plans within 6.4 months of filing under Subchapter V.[28] Thus, Subchapter V is effective, both in facilitating reorganization of those salvageable businesses and in filtering out cases that cannot reorganize.[29]

The data also indicate that the businesses of many Subchapter V debtors continue to operate after bankruptcy. A recent study reports the survival rate for firms with confirmed Subchapter V plans as of December 2023 is 86.0%, higher than the 70.3% survival rate for non-Subchapter V cases.[30] The same study finds that Subchapter V more than doubles the probability of reorganization for firms near the $7.5 million threshold, without harming expected recovery rates for unsecured creditors.[31] Taken together, this data show that Subchapter V is working.

As with any piece of new legislation, however, the Task Force study also revealed aspects of Subchapter V cases that would benefit from more clarity in the statute or consistency in the case law. As such, this Report

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24 *Written Statement of Hon. Paul M. Black, U.S. Bankruptcy Court for the Western District of Virginia*, at 1–2, ABI Subchapter V Task Force Hearing (Eligibility) (Jun. 23, 2023), https://subvtaskforce.abi.org/hearings/june-23-2023-virtual-public-hearing.

25 *See* Ed Flynn, *Subchapter V's First 1,000 Cases,* 39 Am. Bankr. Inst. J. 30, 42–44 (Nov. 2020) (enumerating the leading categories of businesses for the first 1,000 subchapter V cases).

26 *See* United States Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, available at https://www.justice.gov/ust/page/file/1499276/dl?inline..

27 Ed Flynn, *Chapter 11 Is for Individuals and Small Business?*, XXXVII ABI Journal 12, 102-03 (Dec. 2018).

28 *See* U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, available at https://www.justice.gov/ust/page/file/1499276/dl?inline.

29 *See* NBRC Report, *supra* note 7, at 610 (explaining that success in reorganization has different meanings).

30 Edith Hotchkiss, Benjamin Iverson, Xiang Zheng, *Can Small Business Survive Chapter 11?*, (Mar. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4726391. Survival rates are based on operating status from state-level business registry records.

31 *Id.*

offers both potential statutory changes and best practices to strengthen subchapter V for all constituencies. The Task Force's key recommendations are as follows:

Key Recommendations:

Eligibility

- The Task Force recommends that eligibility for Subchapter V should remain at $7,500,000 in aggregate noncontingent, liquidated debt, subject to existing adjustment for inflation and the existing exclusion of insider and affiliate debt, to ensure consistency and access to Subchapter V as a debt restructuring tool for smaller businesses that cannot reorganize in a standard Chapter 11 case.
- A statutory change to section 1182(1)(A) is necessary to clarify how to treat outstanding liabilities under an unexpired lease for purposes of determining whether a debtor satisfies the debt limit requirement for Subchapter V eligibility.

The Role of the Subchapter V Trustee

- There is general agreement that the U.S. Trustee Program, Bankruptcy Administrators, bankruptcy professionals, and professional organizations like the American Bankruptcy Institute, the National Association of Bankruptcy Trustees, among others, should continue to provide training and other educational programming to support Subchapter V trustees, develop their skills, and to promote uniformity and consistency in skill sets among Subchapter V trustees.
- The Task Force recommends that courts use an interim compensation procedure or practice according to a set of key principles that include, as appropriate, establishing an escrowed fund or other mechanism to ensure payment of Subchapter V trustees' fees and expenses, subject to final approval by the court.
- The Task Force finds a statutory amendment is not necessary to clarify the scope of the Subchapter V trustee's duties and powers but offers some guidance for courts and parties involved in cases warranting an expansion of the Subchapter V trustee's duties and powers.
- If the parties and the court are considering appointment of the Subchapter V trustee to mediate a dispute, the Task Force urges those involved to use caution, acknowledge the potential issues involved, and insist on entry of a mediation order that details the scope of any agreement to appoint the Subchapter V trustee as mediator.

Case Administration

- The Task Force concludes that amendment of section 1188(a) to require an earlier status conference or to state additional requirements for the status reports is not necessary.

- The Task Force finds that the provisions for removal of the debtor in possession in section 1189 should not be changed to permit anyone but the debtor to file a plan upon removal.
- The Task Force proposes a statutory amendment to section 1185 that would permit the court to approve the debtor's retention of professionals after removal of the debtor from possession, after notice and hearing, in certain limited circumstances, and provide for their compensation.

Plan and Confirmation Issues

- The Task Force declines to recommend a statutory amendment that sets a deadline for plan confirmation.
- The Task Force recommends an amendment to section 1191(a) to address the existing challenge of achieving a consensual confirmation where a class of creditors neither objects to the plan nor votes to reject the plan. In this situation, the class is silent, and under the current Bankruptcy Code, the plan cannot be confirmed as a consensual plan even though technically, the plan is not nonconsensual.
- The Task Force concludes that a corporation's (or other entity's) discharge after nonconsensual confirmation should not be subject to the section 523(a) exceptions for the same reasons that Congress chose to provide for an exceptionless discharge of a corporation when it enacted Chapter 11 in 1978. Because the Task Force agrees with the majority rulings of the courts that this is the result under the current statutory language of sections 1192(2) and 523(a) and properly reflects Congressional intent, an amendment is arguably not necessary. Nevertheless, the Task Force recommends that Congress amend section 1192 to confirm existing policy and clarify that the exceptions to discharge do not apply to non-individual Subchapter V debtors.

Postconfirmation Administrative Matters

- The Task Force recommends statutory amendments that would impose a uniform postconfirmation reporting requirement for Subchapter V debtors, to be filed by the debtor with the motion for final decree or application for discharge, and implemented through changes to the Bankruptcy Rules, the creation of a new official bankruptcy form, and a directive for collection and publication of pertinent data.
- The Task Force declines to recommend a statutory change to section 1194(b) which would make the debtor rather than the Subchapter V trustee the disbursing agent.
- The Task Force does not recommend any statutory changes to Subchapter V's existing standards for postconfirmation modification of plans.

III. Eligibility

A. The Amount of the Debt Cap Should Remain at $7,500,000

Recommendation and Supporting Principles:

Recommendation

The ABI Subchapter V Task Force concludes that eligibility for Subchapter V should remain at $7,500,000 in aggregate noncontingent, liquidated debt (subject to the existing adjustment for inflation and the existing exclusion of debts owed to affiliates and insiders, as discussed in the next section).

Supporting Principles

- Maintaining the debt cap at $7,500,000 provides consistency and access to Subchapter V as a debt restructuring tool for smaller businesses that cannot reorganize in a standard Chapter 11 case.
- Because Congress raised the debt cap so soon after Subchapter V went into effect, most Subchapter V debtors have filed while the $7,500,000 debt cap has been in place.
- Reverting to the lower debt cap, which is untested, would make reorganization inaccessible to many smaller businesses. More than a quarter of Subchapter V debtors would not have been eligible for Subchapter V under the lower cap.
- Bankruptcy professionals overwhelmingly support making the current $7,500,000 debt cap permanent.
- No clear reason, supported by data, exists for reversion to the lower, untested debt cap.

In December 2023, the Task Force released a preliminary report recommending that Congress pass legislation that would make the current $7,500,000 debt cap permanent (subject to existing adjustment for inflation).[32]

After investigation and analysis, the Task Force concluded that maintaining the debt cap at $7,500,000 provides consistency and access to Subchapter V. Because the current cap has been in effect far longer than it has not, most Subchapter V debtors have filed while it has been in place. The

32 American Bankruptcy Institute Subchapter V Task Force, Preliminary Report, Maintaining the $7,500,000 Debt Cap for Subchapter V Eligibility, December 2, 2023, https://abi-org.s3.amazonaws.com/SubV/media/SubV_Report_Final1.pdf. The text of that report is replicated here in the Final Report and is also available online as a standalone report on the Task Force website: https://subvtaskforce.abi.org/. *See also* National Bankruptcy Conference, *Letter Re: Maintaining $7.5 Million Debt Cap in Subchapter V of Chapter 11 of the Bankruptcy Code* (Dec. 8, 2023), http://nbconf.org/wp-content/uploads/2023/12/Maintaining-Sub-V-Cap-12.5.2023.pdf (letter to Congress in support of maintaining the debt cap for Subchapter V at $7,500,000).

$7,500,000 debt cap has existed for all but the first six weeks after the effective date of Subchapter V (February 19 to March 26, 2020) and two months in 2022 (March 27 to June 21, 2022) due to temporary legislation that increased the debt cap.

Because Congress raised the debt cap so soon after Subchapter V went into effect, no basis exists for evaluating how the lower debt cap version of the subchapter would work. The lower debt cap, therefore, has not been tested through experience. As one bankruptcy judge observed in a written statement to the Task Force, "[q]uery whether that is a test we want to run at the expense of America's small businesses, especially now as filings are increasing."[33]

Reverting to the lower debt cap would make reorganization inaccessible to many smaller businesses. As of February 29, 2024, almost 7,500 Subchapter V cases have been filed,[34] representing more than a quarter of all Chapter 11 cases filed since February 2020.[35] Subchapter V filings reached record levels in 2023 and were 44% of all Chapter 11 filings for that year.[36] *Significantly, more than a quarter of these Subchapter V debtors would have been ineligible for Subchapter V relief under the lower cap*.[37] In addition, the confirmation rate has been higher for cases with debts above the original limit.[38]

Moreover, the amount of debt for a small business varies based on the nature of the business, its location, and the reason bankruptcy relief is necessary. For instance, the debt cap may function as a measure of a case's complexity rather than its size because a very small business could have a very large debt if something unexpected happens. As explained to the Task Force, "large debts do not always mean large businesses."[39]

A case study from the Western District of Virginia illustrates this point. Here, a Hepatitis A outbreak at a restaurant caused substantial injuries and several deaths, leading to an estimated $40,000,000 in claims, which were contingent and unliquidated. Once insurance coverage was settled, a consensual Subchapter V plan was reached with the tort claimants participating in a $14,000,000 recovery. Administrative costs were low, and insurance coverage proceeds were distributed exclusively to the tort claimants. In a standard Chapter 11 case, administrative costs would have impeded the debtor's

33 *Written Statement of Hon. Laurel M. Isicoff, U.S. Bankruptcy Court for the Southern District of Florida*, ABI Subchapter V Task Force Hearing (Final Hearing), at 2 (Oct. 12, 2023), https://subvtaskforce.abi.org/hearings/october-12-2023-hybrid-public-hearing.

34 *See* U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, https://www.justice.gov/ust/page/file/1499276/dl?inline.

35 *See* Appendix B (ABI Statistical Summary of Subchapter V Cases), at 1. Subchapter V cases likely represent a higher percentage of all Chapter 11 filings than the ABI data indicate. The U.S. Trustee Program's data report a higher number of Subchapter V cases overall than the ABI's data. There is a variance in the two datasets because the U.S. Trustee Program's statistical summary includes cases that are pending while the the ABI's data, which combine data from PACER and the Federal Judicial Center's Integrated DataBase (IDB), only become available after a case has been statistically closed.

36 Professor Robert M. Lawless, *About 44% of Chapter 11s are Subchapter V Cases*, Credit Slips: A Discussion on Credit, Finance, and Bankruptcy, (Mar. 26, 2024), https://www.creditslips.org/creditslips/2024/03/about-44-of-chapter-11s-are-subchapter-v-cases.html (reporting that Subchapter V cases constituted 44% of all Chapter 11 case filings in 2023).

37 *See* Appendix B (ABI Subchapter V Statistical Summary of Subchapter V cases), at 7 ("About 26.2% of Subchapter V cases have been between the old and new debt limits.").

38 *Id.* at 7.

39 *Written Statement of Hon. Paul M. Black, supra* note 24, at 4.

ability to reorganize and continue operating, and the injured claimants likely would not have recovered as much.

Witnesses at the Task Force hearings overwhelmingly supported making the $7,500,000 debt cap permanent to maintain consistent access to Subchapter V. At each of the Task Force's seven public hearings, witnesses on panels comprised of bankruptcy judges, Subchapter V trustees, and practitioners advocated for maintaining the Subchapter V debt eligibility threshold at $7,500,000 to preserve Subchapter V as a meaningful restructuring tool.[40]

The Task Force also surveyed American Bankruptcy Institute members about their experiences with Subchapter V and circulated the survey to invite responses from members of other major insolvency organizations.[41] Overall, the survey responses indicate that Subchapter V is achieving its goal of streamlining the reorganization process for smaller businesses.[42] Relevant to eligibility, many respondents, when asked to identify one change to Subchapter V they would like made, advocated for making the $7,500,000 debt cap permanent or increasing it, while only one advocated for a lower cap.[43] In short, most bankruptcy professionals involved in Subchapter V cases report that the $7,500,000 debt cap is effective and appropriate and must be maintained.

Indeed, the Task Force heard some witnesses advocate for increasing the Subchapter V debt cap to $10,000,000, which would align more closely with Chapter 12's debt cap for family farmers.[44] In 2019, Congress enacted a permanent increase to the Chapter 12 debt cap, which is currently $11,097,350.[45] Chapter 12-eligible family farmers are a specialized kind of smaller business, and the higher debt cap for these entities reflects the scale and scope of their operations. Prospective Subchapter V debtors are likewise smaller businesses, so some rationale exists for mirroring the debt limits of Subchapter V and Chapter 12.

In comparison, reverting to the lower cap would align Subchapter V eligibility more closely with Chapter 13 eligibility, which provides bankruptcy relief for consumers with regular income. In 2022,

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40 *See, e.g., Written Statement of Hon. Laurel M. Isicoff, supra* note 33, at 2 ("I believe the debt limit should be maintained at least at the $7.5 million level."); *Written Statement of David Cox,* ABI Subchapter V Task Force Hearing (Final Hearing), at 2 (Oct. 12, 2023), https://subvtaskforce.abi.org/hearings/october-12-2023-hybrid-public-hearing ("To date there seems to be a consensus that the temporary $7.5 million debt limits should be made permanent (a position with which I concur), if not increased to $10 million."); *Written Statement of Adam Prescott,* ABI Subchapter V Task Force Hearing (Eligibility), at 7 (Jun. 23 2023), https://subvtaskforce.abi.org/hearings/june-23-2023-virtual-public-hearing (advocating for permanently extending the existing $7.5 million debt cap); *Written Statement of Robert Gonzales*, ABI Subchapter V Task Force Hearing (Eligibility), at 4 (Jun. 23, 2023), https://subvtaskforce.abi.org/hearings/june-23-2023-virtual-public-hearing ("[I]t is crucial that Congress make the current debt limit permanent, or ideally increase it."); *Written Statement of Hon. Hannah Blumenstiel, supra* note 22, at 3 (explaining that but for the increased debt limit, 38% of the cases filed under Subchapter V as of June 2023 would not have benefited from the Subchapter V.).

41 *See* Appendix C (ABI Subchapter V Task Force Survey: Summary of Key Insights and Feedback) (reporting an average overall positive sentiment about Subchapter V by respondents).

42 *Id.*

43 *Id.*

44 *See, e.g., Written Statement of David Mawhinney*, ABI Subchapter V Task Force Hearing (General Observations), at 4 (Jun. 9, 2023), https://subvtaskforce.abi.org/hearings/june-23-2023-virtual-public-hearing ("Congress should increase the debt cap for subchapter V eligibility to $10 million and make it permanent."); *Written Statement of Eyal Berger*, ABI Subchapter V Task Force (Postconfirmation Issues), at 6 (Sept. 22, 2023), https://subvtaskforce.abi.org/hearings/september-22-2023-virtual-public-hearing, (advocating for a debt cap higher than $10 million); *Written Statement of Adam Prescott, supra* note 40, at 7 (same).

45 Family Farmer Relief Act of 2019, Pub. L. No. 116-51, 133 Stat. 1077 (Aug. 23, 2019).

Congress temporarily increased the debt cap for Chapter 13 eligibility to $2,750,000.[46] While Subchapter V debtors may be more like Chapter 12 farm debtors subject to an $11,097,350 debt cap than Chapter 13 consumer debtors subject to a $2,750,000 debt cap, many small businesses may not have the same extensive debt structure as farms that would justify an increase of the debt cap to $10,000,000 or more at this time. The Task Force concludes that further research, data, and study are needed prior to increasing the debt limit over $ 7,500,000.

Some expressed concerns to the Task Force that the higher debt cap inadequately protects unsecured creditors.[47] The Task Force understands why creditors might voice these concerns, as Subchapter V does change the timetable for, and the scope of the absolute priority rule in, a small business case. There does not appear to be any quantifiable data to evaluate these concerns. The Task Force did, however, study these concerns under the statutory language and in light of the testimony and other evidence offered at the public hearings. The projected disposable income test, which requires payment of earnings to creditors over a three-to-five-year period and is a prerequisite to an owner retaining the business,[48] appears to be an effective substitute for the protections of the absolute priority rule in a non-Subchapter V case and as a practical matter is more beneficial to unsecured creditors.[49]

In addition, creditors in a Subchapter V case have many of the protections that they would have in a standard Chapter 11 case,[50] including the ability to (i) seek conversion or dismissal of the case,[51] (ii) request removal of the debtor in possession or expansion of the powers of the trustee,[52] (iii) move for relief from the automatic stay or to compel assumption or rejection of an executory contract or lease,[53] and (iv) object to confirmation of the debtor's plan. Thus, although unsecured creditors' rights are different in a Subchapter V case, such concerns do not justify reducing the debt cap back to $3,024,725.

A few also expressed concern about debtor abuse of Subchapter V if the $7,500,000 debt cap remains in place. To be sure, not every kind of entity that meets the existing cap can or should be in a Subchapter V case. The Task Force heard testimony on this point throughout its hearings. Most of that commentary emphasized that the Bankruptcy Code has built-in mechanisms to deal with those entities and prevent such abuse.[54] The statute has other eligibility criteria that gate debtors from Subchapter V. Congress excluded categories of debtors—"single asset real estate" debtors and publicly traded companies and their affiliates—to ensure only small business debtors targeted by Subchapter V could elect Subchapter

46 Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298 (Jun. 21, 2022).

47 *Letter from American Bankers Association, and Independent Community Bankers Association to the ABI Subchapter V Task Force* (Oct. 23, 2023), https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/joint-trades-statement-on-subchapter-v.pdf.

48 *See* 11 U.S.C. § 1191(c).

49 *Written Statement of Richardo Kilpatrick*, ABI Subchapter V Task Force Hearing (General Observations) at 5 (Jun. 9, 2023) (explaining that "there are still substantial and meaningful rights that exist for creditors"), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing.

50 *Id.* at 5 (noting that the "other protections incorporated in the general provisions of the Code still exist.").

51 11 U.S.C. § 1112.

52 *Id*. § 1185, 1183(b)(2).

53 *Id*. §§ 362(d), 365.

54 *See, e.g., Written Statement of Richardo Kilpatrick*, *supra* note 49, at 5 ("There are some businesses that are ill-suited for Subchapter V but there are tools within the Subchapter V provisions to address those cases.")

V.[55] In addition, courts have proven themselves well-equipped to address eligibility issues that are appropriately raised by the United States Trustee and other parties in cases. Further, courts can remove Subchapter V debtors from possession and convert or dismiss cases in appropriate circumstances.[56] In short, courts have existing tools to filter out debtors that should not be in Subchapter V.

Moreover, the Task Force heard testimony that Subchapter V has improved the reorganization process and outcomes not only for debtors but also creditors. One experienced Subchapter V trustee described the higher debt cap as "an improvement in the [C]hapter 11 process, particularly because of the shift away from fights over class-gerrymandering and creditor vetoes, with a refocused emphasis on economic recovery by comparing liquidation to future plan projections."[57] The trustee explained that:

> In Subchapter V the parties tend to focus more quickly on economic recovery rather than creditor-veto holdout power. And prior to Subchapter V, in those cases where debtors could overcome an unsecured creditor veto with an impaired secured creditor class vote, debtors would often be incentivized to pay general unsecured creditors little or nothing and employ the new value corollary to circumvent the absolute priority rule on cramdown plans, and few of these types of cases for small business debtors seem to attract competing plans that render a better result for unsecured creditors.[58]

Another practitioner testified that "Subchapter V has also proven effective for creditors," because allocating payments over a three-to-five-year plan achieves a better result for creditors "as compared to the other viable alternatives for many of these debtors, such as shutting its doors and liquidating."[59]

Based on the foregoing, the Task Force strongly recommends Congress pass legislation that would make the current $7,500,000 debt cap permanent (subject to existing adjustment for inflation and the existing exclusion of insider and affiliate debt, as discussed in next section).

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55 11 U.S.C. § 1182(1)(A).

56 *Id*. § 1112.

57 Written Statement of John Patrick Fritz, ABI Subchapter V Task Force Hearing (General Experiences), at 8 (Jun. 9, 2023), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing.

58 *Id*.

59 *Written Statement of Brian Shaw*, ABI Subchapter V Task Force Hearing (General Observations), at 4 (Jun. 9, 2023), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing.

B. Debts Owed to Affiliates and Insiders Should Remain Excluded from the Debt Eligibility Calculation

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends no change to the Subchapter V eligibility standards with regard to debts owed to affiliates and insiders.

Supporting Principles

- Congress originally excluded debts owed to affiliates and insiders from the eligibility calculation in order to make Subchapter V widely available to small businesses.
- Smaller businesses often rely on loans or credit from shareholders or related entities. Requiring smaller businesses to include debts owed to affiliates and insiders in the Subchapter V eligibility calculation would discourage some individuals and entities from extending credit to and investing in smaller businesses.
- The Task Force did not receive or uncover any evidence that excluding debts owed to affiliates or insiders from the eligibility calculation was allowing larger or more complex businesses to file for Subchapter V.
- The Task Force's investigation shows that Subchapter V is working as Congress intended, helping smaller businesses that would benefit from the subchapter reorganize while dismissing or converting cases that should not be in Subchapter V.

Section 1182(1) currently excludes debts owed to affiliates and insiders from the debt eligibility calculation for Subchapter V.[60] The Task Force considered and rejected a revision to section 1182(1) which would include debts owed to affiliates and insiders in the Subchapter eligibility calculation.[61]

First, requiring smaller businesses to include debts owed to affiliates or insiders in the Subchapter V eligibility standard would discourage smaller business owners, shareholders, or related entities from extending loans or credit to the debtor business, which is a form of funding frequently relied upon by

60 11 U.S.C. §1182(1)(A).

61 This determination is consistent with that of the National Bankruptcy Conference. *See* National Bankruptcy Conference, *Letter: Re: Exclusion of Insider or Affiliate Debt in Determining Eligibility for Subchapter V of Chapter 11 of the Bankruptcy Code* (Mar. 26, 2024); http://nbconf.org/wp-content/uploads/2024/03/NBC-SubV-and-Insider-Debt-Letter-final-March-26-2024.pdf.

smaller businesses.[62] The Task Force believes that such change would skew incentives to invest, and be vested, in the success of the debtor's business operations and could negatively impact the ability of smaller businesses to obtain the necessary funding to sustain their businesses operations either outside of bankruptcy or through a Subchapter V reorganization.

In addition, the Task Force did not receive or uncover any evidence that including debts owed to affiliates or insiders in the eligibility calculation allows larger or more complex businesses to file for Subchapter V bankruptcy or otherwise abuse the system. Rather, the Task Force's investigation shows that Subchapter V does an effective job of reorganizing smaller businesses intended to benefit from the subchapter and dismissing or converting those cases not well-suited for the subchapter.[63]

Finally, the Task Force's study demonstrates that Subchapter V is working as intended by Congress, helping smaller businesses reorganize their businesses and make payments to their creditors.[64] Indeed, at its inception and based on information provided to the Task Force, the exclusion of debts owed to affiliates and insiders from the eligibility calculation was originally included by Congress to make Subchapter V available to as many smaller businesses as possible.[65] The effectiveness of the subchapter over the past four years supports Congress' original approach to the Subchapter V eligibility standards, and the Task Force has no evidence suggesting that a change is necessary.

Based on the foregoing, the Task Force strongly recommends no change to the Subchapter V eligibility standards concerning debts owed to affiliates and insiders.

62 *See, e.g., Oral Testimony of John Patrick Fritz*, ABI Subchapter V Task Force Hearing (General Observations) (Jun. 9, 2023) (explaining that many small businesses have substantial insider debt stemming from a capital infusion from owners or management), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing.

63 According to data from the U.S. Trustee Program, 50% of Subchapter V cases filed between fiscal year 2020 and fiscal year 2023 had confirmed plans, 29% were dismissed, and 11% were converted to another chapter. *See* U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, available at https://www.justice.gov/ust/page/file/1499276/dl?inline.

64 *See id.; see Hotchkiss, Iverson, & Zhang, supra* note 30.

65 The definition of "small business debtor" under section 101(51D) also excludes affiliate and insider debt for eligibility for non-Subchapter V small business cases and informed the eligibility provisions for Subchapter V.

C. Future Rent Payments on Unexpired Leases & Subchapter V Eligibility

Recommendation and Supporting Principles:

Recommendation

A statutory change to section 1182(1)(A) is necessary to clarify how to treat outstanding liabilities under an unexpired lease for purposes of determining whether a debtor satisfies the debt limit requirement for Subchapter V eligibility.

Supporting Principles

- Section 1182(1) excludes contingent and unliquidated debts from the Subchapter V debt eligibility calculation.
- A Subchapter V debtor may have one or more unexpired leases where the amount of future rent, if considered a noncontingent and liquidated debt, would be so large that the debtor would be excluded from Subchapter V.
- Disagreement exists in the case law about whether future rent payments on an unexpired lease are noncontingent and/or liquidated debt for purposes of this calculation.
- The Task Force recommends a statutory amendment to exclude future rent payments and lease obligations from the Subchapter V debt eligibility calculation because including these amounts in the Subchapter V debt eligibility calculation does not serve the underlying purpose of a debt cap, which generally indicates the complexity of issues in the underlying case, and the amounts are contingent and unliquidated on the petition date.

Section 1182(1) excludes contingent and unliquidated debts from the Subchapter V debt eligibility calculation.[66] A Subchapter V debtor may have one or more unexpired leases where the amount of future rent is so large that the debtor would be excluded from Subchapter V debt if all the future rent amounts are noncontingent or liquidated debts included in the eligibility calculation.

Disagreement has emerged among courts about whether future postpetition rents owed under an unexpired lease are included in the Subchapter V eligibility calculation. The disagreement turns on whether a debtor's future rents under an unexpired lease constitutes noncontingent, liquidated debt that must be included in the calculation. A related issue is whether the appropriate amount for purposes of

66 *See* 11 U.S.C. § 1182(1)(A) (the debtor must have "aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition. . . in an amount not more than $7,500,000 . . . not less than 50 percent of which arose from the commercial or business activities of the debtor.").

calculating eligibility is the full amount remaining due under the lease or whether section 502(b)(6), which caps the allowed amount of a lessor's claim in the bankruptcy case, controls this question.[67]

Several cases illustrate the disagreement. In *In re Parking Management*, the debtor moved to reject leases on the petition date.[68] The lease-rejection damages, if required by the Bankruptcy Code to be included in the eligibility calculation, would have rendered the debtor ineligible for Subchapter V.[69] The court, however, held that claims for damages arising from the rejection of unexpired leases were contingent for Subchapter V eligibility purposes because rejection required postpetition court approval in order to fix the amount of the lessor's rejection claim.[70] As a result, the amounts were excluded from the eligibility calculation.[71]

In contrast, in *In re Macedon Consulting*, the court held that a debtor's future rent payments owed under an unexpired lease constitutes noncontingent, liquidated debt that must be included in the Subchapter V debt eligibility calculation.[72] The *Macedon* debtor, a tenant under prepetition leases with nearly $14.4 million in future lease payments, listed in its schedules and statements only the lease-rejection damages in amounts capped by section 502(b)(6), as the amount owed, which resulted in its total debts being below the $7.5 million debt cap.[73] The court held that the debtor's future rent payments under the leases was noncontingent and liquidated debt for purposes of assessing Subchapter V eligibility.[74] In doing so, the court distinguished between lease-rejection claims and future rent payments, explaining that the debtor's liability on the future rent payments arose prepetition on the dates the leases were executed.[75] As a result, the lease liabilities were included in the debt eligibility calculation, and the debtor was ineligible for Subchapter V because it had more than $7.5 million in aggregate noncontingent debt.

More recently, a court expressly declined to follow the *Macedon* ruling in *In re Zhang Medical P.C.* and concluded that a debtor's future rent payments under an unexpired lease "should rarely, if ever," be included in the debt eligibility calculation.[76] The court observed that to hold otherwise "would greatly restrict Subchapter V eligibility, since many debtors otherwise eligible . . . are parties to long-term leases or contracts with future payment obligations well in excess of $7.5 million."[77]

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67 *See* 11 U.S.C. § 502(b)(6).

68 *In re Parking Management, Inc.,* 620 B.R. 544 (Bankr. D. Md. 2020).

69 *Id*.

70 *Id*. at 554 ("[o]pening up eligibility determinations to postpetition events, even if deemed to apply retroactively, is contrary to the purpose and spirit of Subchapter V and could nullify the very benefits it is intended to convey.").

71 *Id*.

72 *In re Macedon Consulting, Inc*., 652 B.R. 480 (Bankr. E.D. Va. 2023).

73 *Id.* at 484.

74 *Id.*

75 *Id.* at 485–86.

76 *In re Zhang Medical P.C*., 655 B.R. 403, 407, 411 (Bankr. S.D.N.Y. 2023) (finding that the debtor did not qualify for Subchapter V on other grounds).

77 *Id.* at 411 (noting also that the debtor's future base rent payments under the lease at issue were more than $60 million).

According to *Zhang Medical*, because the Bankruptcy Code gives the debtor a right to assume or reject executory contracts and unexpired leases, the amount and nature of its obligations under that contract or lease are contingent and unliquidated until debtor elects either to assume or to reject the contract or lease.[78] If the debtor assumes, it will be responsible for the full amount of its contractual obligations.[79] If, however, a debtor rejects an unexpired lease, its obligation on the lease is the capped amount set by section 502(b)(6).[80] Because the amount and nature of the debtor's obligations depend on an uncertain future event (*i.e*., the debtor's election to either assume or reject the unexpired lease), the future payments are both contingent and unliquidated prior to that election.[81]

The developing case law in this area creates substantial uncertainty about Subchapter V eligibility for many small businesses.[82]

The Task Force agrees that the future rent liabilities and lease obligations are contingent and unliquidated on the petition date and should not be included in the debt eligibility calculation for the following reasons, among others:

1. *Including a Subchapter V debtor's future rent payments under an unexpired lease in the debt eligibility calculation does not advance the underlying purpose of the debt cap,* which is used to distinguish between smaller cases with potentially less complex issues from larger cases which are more likely require the standard Chapter 11 guidelines.

2. The petition date is an important demarcation in bankruptcy, separating a debtor's pre- and postpetition obligations. The debt cap focuses on the prepetition side of a debtor's financial affairs. As of the petition date, the amount of the debtor's liability on future rent payments under an unexpired lease is not yet due and owed. This approach aligns with the general approach of the Bankruptcy Code; for example, the Code in several places invalidates *ipso facto* clauses and precludes acceleration of certain kinds of prepetition obligations.[83] Thus, the amounts are contingent and unliquidated until the debtor decides to assume or to reject the lease under section 365. If the debtor rejects the lease, its obligation is the capped amount set by section 502(b)(6). In addition, the debtor's liability may be subject to adjustment under applicable nonbankruptcy law.

The Task Force also thinks that executory contracts and other kinds of unexpired leases may warrant similar treatment.

The Task Force concludes that a statutory change would provide much-needed clarity and allow both debtors and counterparties to assess and protect their respective rights in a Subchapter V case more readily.

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78 *Id*. at 412.

79 *Id*.

80 *Id*.

81 *Id*.

82 *Id*. at 411 (rejecting the *Macedon* ruling "because of the enormous—and in the Court's view detrimental—impact that ruling, if followed, would have in limiting eligibility for Subchapter V relief.")

83 S*ee* 11 U.S.C. §§ 365(e)(1) and 541(c)(1).

Based on the foregoing, the Task Force proposes amending section 1182(1)(A) to clarify that, for purposes of calculating the debt eligibility cap, lease liabilities are limited to the amount due and payable as of the petition date without regard to any acceleration of the due date for any such payment.

Proposed Amended Text to 11 U.S.C. § 1182(1)(A)

1) DEBTOR. —The term "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 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 $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and

(B) does not include—

(i) any member of a group of affiliated debtors under this title that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders);

(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or

(iii) any debtor that is an affiliate of a corporation described in clause (ii).

(C) For the purposes of this section, any amounts payable under the terms of a lease after the date the petition is filed shall be considered contingent and unliquidated, without regard to any acceleration of the due date for any such payment, even if such liabilities are reflected on one or more of the debtor's balance sheet as of the date of the filing of the petition.

IV. Role of the Subchapter V Trustee

A. In General

Recommendation and Supporting Principles:

Recommendation

There is general agreement that the U.S. Trustee Program, Bankruptcy Administrators,[84] bankruptcy professionals, and professional organizations like the American Bankruptcy Institute and the National Association of Bankruptcy Trustees, among others, should continue to provide training and other educational programming to support Subchapter V trustees, develop their skills, and to promote uniformity and consistency in skill sets among Subchapter V trustees.

Supporting Principles

- The U.S. Trustee Program's appointment of case-by-case trustees in Subchapter V has been largely effective. Throughout the Task Force's public hearings, bankruptcy judges emphasized that the success of any Subchapter V case depends in large part on the participation of a skilled and engaged Subchapter V trustee.
- According to the Task Force study, Subchapter V trustees have proven effective in fulfilling their statutory duties, including facilitating development of a plan and functioning as "utility players" in cases, responding to the needs of the cases in which they are appointed.
- There is general agreement about the set of skills and abilities Subchapter V trustees need to be effective. Not all Subchapter V trustees have the same background and experience, but they are typically lawyers, accountants, restructuring professionals, or financial advisors. The Task Force agreed that the implementation and administration of Subchapter V benefits from continued education and professional development for Subchapter V trustees.

84 The scope of the Task Force's study encompassed testimony, and, where possible, data from bankruptcy professionals in the six Bankruptcy Administrator districts in North Carolina and Alabama. Because the study did not uncover any material differences in experiences in these districts, unless otherwise noted, any references in this Report to the U.S. Trustee Program also includes Bankruptcy Administrators in North Carolina and Alabama.

Section 1183 provides that a Subchapter V trustee shall be appointed in each Subchapter V case.[85] Although section 1183 also allows for appointment of a standing trustee, the U.S. Trustee Program, which appoints and supervises Subchapter V trustees, has instead selected a pool of persons who may be appointed on a case-by-case basis.[86] Those selected must have "a strong business acumen and include lawyers, CPAs, MBAs, restructuring consultants and financial advisors with diverse backgrounds in such areas as business, law, accounting, turnaround management and mediation."[87]

Section 1183(b) of the Bankruptcy Code enumerates the duties of a Subchapter V trustee. These duties include, among other things, accounting for property received, examining proofs of claim, furnishing information when requested by creditors, investigating the debtor's business to determine its viability, and facilitating a consensual plan.[88] The Subchapter V trustee is also required to attend status conferences and other important hearings such as financing hearings, plan confirmation hearings and sale hearings.[89] The Subchapter V trustee may, in certain circumstances, be responsible for disbursing plan payments postconfirmation.[90] The Subchapter V trustee is also authorized to operate the business after the debtor has been removed from possession.[91]

Unlike other bankruptcy trustees, the Subchapter V trustee has the duty to "facilitate the development of a consensual plan of reorganization."[92] This duty is unique to Subchapter V trustees and distinguishes them from trustees in other chapters, where "trustees are adversarial to the debtor by virtue of their duties to protect the bankruptcy estate and its creditors."[93]

The Task Force solicited data and commentary about the role of the Subchapter V trustee.[94] Most think the use of case-by-case trustees has been largely effective. Throughout hearings, bankruptcy judges emphasized that the success of any Subchapter V case is due in large part to a skilled and

85 11 U.S.C. § 1183(a). *See* Handbook for Small Business Chapter 11 Subchapter V Trustees ("Sub V Handbook"), 1-1 ("In each case in which a small business debtor elects to proceed under SBRA, a subchapter V trustee is appointed immediately to perform certain duties in connection with the administration of the case.").

86 Section 1183(a) also contemplates that the United States trustee shall appoint one disinterested person to serve as trustee in the case if the United States trustee has not otherwise appointed a standing trustee. *See also* Clifford J. White, III, *Small Business Reorganization Act: Implementation and Trends*, 40 Am. Bankr. Inst. J. 54 (Jan. 2021) ("In implementing the SBRA, the USTP recruited, vetted and trained approximately 250 selectees from more than 3,000 applicants."); Sub V Handbook, *supra* note 85, at 2-1–2-2. The U.S. Trustee Program engaged in public advertising and outreach to identify individuals interested in serving as a Subchapter V Trustee. *Id*. at 2-1. Qualified individuals must be competent to perform the statutory duties set out in section 1183, successfully complete a background security investigation and post or maintain an appropriate bond. *Id*. at 2-1–2-2. They must also be disinterested as defined in section 101(14A). Additional considerations for selection may be based on the unique circumstances of the specific case. *Id*. at 2-2.

87 White, *Small Business Reorganization Act: Implementation and Trends*, *supra* note 86, at 54.

88 11 U.S.C. § 1183(b). *See also* Sub V Handbook, *supra* note 85, 1-1 ("In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. The subchapter V trustee also may be required to act as a disbursing agent for the debtor's payments to creditors under the confirmed plan of plan reorganization. In certain instances, the subchapter V trustee may be required to administer property of the debtor's bankruptcy estate for the benefit of creditors.").

89 *Id*. § 1183(b).

90 *Id*.

91 *Id*. § 1183(b)(5).

92 *Id*. § 1183(b)(7).

93 In *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022).

94 *See* Appendix C (ABI Subchapter V Task Force Survey: Summary of Key Insights and Feedback); Appendix D (ABI Subchapter V Task Force Survey of Subchapter V Trustees: Results).

engaged Subchapter V trustee. The consensus view is that the successes enjoyed by debtors and creditors alike under the subchapter is due in no small part to the work performed by the Subchapter V trustees.[95] One court described the Subchapter V trustees as an "honest brokers" who have provided "credibility in evaluating the debtor's business's prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor's stakeholders, thereby enabling small business to reorganize."[96]

The testimony of bankruptcy professionals and judges shows that, in practice, the extent to which the Subchapter V trustee's role emphasizes any one of the duties set forth in 11 U.S.C. § 1183(b) shifts both from case to case and over time within a single case. The Subchapter V trustee has been described as a "utility player" in cases, deploying different skills and abilities as needed to resolve whatever problems a case presents.[97] One Subchapter V trustee, who had been appointed in about 40 cases, explained that she fills in anywhere there are "gaps or she is needed to facilitate the administration of the bankruptcy case."[98] In addition to working with debtors and creditors to reach agreement on a consensual plan, Subchapter V trustees in some circumstances assist the debtor's counsel by informing them about deadlines, revising plans, and drafting pleadings, cash collateral orders and stipulations, as appropriate.[99]

Subchapter V trustees are typically lawyers, accountants, or financial advisors, but they do not all have the same skills and experiences. All agree that Subchapter V trustees need a variety of legal knowledge and skills and business acumen to be effective, such as practical dispute resolution skills, experience in liquidating assets (including causes of action), forensic accounting, and if no Subchapter V experience, then experience representing debtors in Chapter 13 and/or Chapter 11 (particularly negotiating and confirming plans of reorganization).[100] Likewise, there is general agreement that the U.S. Trustee Program, Bankruptcy Administrators, bankruptcy professionals, and professional organizations like the American Bankruptcy Institute and the National Association of Bankruptcy Trustees, among

95 *See, e.g., Written Statement of Hon. Judge Goldblatt, U.S. Bankruptcy Court for the District of Delaware*, at 2, ABI Subchapter V Task Force Hearing (Role of the Subchapter Trustee) (Jul. 14, 2023) https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing ("I do want to emphasize the very high regard I have for the work of the subchapter V trustees that have appeared in cases before me."); *Written Statement of Hon. Craig Gargotta, U.S. Bankruptcy Court for the Western District of Texas*, at 2, ABI Subchapter V Task Force Hearing (Plan and Confirmation Issues) (Sept. 8, 2023) https://subvtaskforce.abi.org/hearings/september-8-2023-virtual-public-hearing ("My perception of the subchapter V cases that I have seen in my court is that the most significant benefit in subchapter V cases has been the subchapter V trustees."); *Written Statement of Hon. Deborah Thorne, U.S. Bankruptcy Court for the Northern District of Illinois*, at 2, ABI Subchapter V Task Force Hearing (Role of the Subchapter Trustee) (Jul. 14, 2023)), https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing (describing concrete ways the bankruptcy court and the debtor benefit from the expertise of the Subchapter V trustee); *Written Statement of Hon. Hannah Blumenstiel, supra* note 22, at 4 ("Good trustees are invaluable . . . .").

96 *In re Corinthian Communications, Inc.*, 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022).

97 *Written Statement of Hon. Meredith Grabill, U.S. Bankruptcy Court for the Eastern District of Louisiana*, at 3, ABI Subchapter V Task Force Hearing (Role of Subchapter V Trustee) (July 14, 2023), https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing.

98 *Written Statement of Susan Seflin*, at 4, ABI Subchapter V Task Force Hearing (Role of the Subchapter V Trustee) (Jul. 14, 2023) https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing (stating that "the most important part of my job as trustee is to fill in anywhere there are 'gaps' and/or where I am needed to facilitate the administration of the bankruptcy case."); *see also Written Statement of Hon. Meredith Grabill, supra* note 97, at 4 ("The Subchapter V Trustee has researched complex regulatory schemes or vetted proposed plans, as examples, to provide advice and an extra set of hands to the debtor's counsel, who is herself, more often than not, a sole practitioner.").

99 *E.g., Written Statement of Susan Seflin*, *supra* note 98.

100 *See, e.g, Written Statement of Hon. Meredith Grabill, supra* note 97.

others, should continue to provide training and other educational programming to support Subchapter V trustees, develop their skills, and to promote uniformity and consistency in skill sets among Subchapter V Trustees across the country.[101]

Based on the foregoing, the Task Force agreed that the implementation and administration of Subchapter V benefits from continued education and professional development for Subchapter V trustees.

B. Subchapter V Trustee Compensation

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends that courts use an interim compensation procedure or practice according to a set of key principles described below that include, as appropriate, establishing an escrowed fund or other mechanism to ensure payment of Subchapter V trustees' fees and expenses, subject to final approval by the court.

Supporting Principles

- Subchapter V trustees report that they often are not paid when cases are dismissed or resolved other than through a confirmed plan. Even when a plan is confirmed, 86% of Subchapter V trustees responding to a Task Force survey reported that they have been paid less than the amount of fees awarded in some cases.
- Testimony emphasized the need for interim compensation procedures to eliminate collection risk for the Subchapter V trustee, to ensure the appointment and retention of high-quality Subchapter V trustees, and to filter out the cases that are likely to result in dismissal or conversion because the debtor's business or plan is simply not feasible.
- Courts should use an interim compensation procedure or practice to ensure Subchapter V trustee compensation while preserving flexibility for courts to address the circumstances of individual cases.

The Subchapter V trustee is compensated through section 330(a)(1)(A), which allows for "reasonable compensation for actual, necessary services rendered by the trustee ... and by any paraprofessional

101 *See, e.g., id.; Written Statement of Marc Albert,* at 2, ABI Subchapter V Task Force Hearing (Role of the Subchapter V Trustee) (Jul. 14, 2023), https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing.

person employed by any such person."[102] The trustee may also be reimbursed for "actual, necessary expenses" pursuant to section 330(a)(1)(B).[103] In order for compensation to be awarded, a fee application must be filed with the court.[104]

Confirmation requires that the Subchapter V plan provide for payment of the Subchapter V trustee's fee. If the plan is confirmed consensually, the compensation must be paid on the plan's effective date.[105] If nonconsensual or "cramdown" confirmation occurs, the plan may provide for payment of the Subchapter V trustee over the life of the plan.[106]

Subchapter V trustees explained to the Task Force during hearings [107] and in survey data[108] that they face challenges being compensated for their work. When cases fail or are resolved in ways other than through a confirmed plan, Subchapter V trustees report they often do not get paid. Even in cases with confirmed plans, Subchapter V trustees informed the Task Force that payment of approved fees has been an issue. Responses to the Task Force's survey show that Subchapter V trustees are not always paid the full amount of professional fees awarded by the court. Eighty-six percent of the respondents reported that they are paid less than the amount of fees awarded in some cases.[109]

The bankruptcy system is addressing this issue both informally and, increasingly, formally through the promulgation of local rules and standing or scheduling orders designed to ensure compensation of Subchapter V trustees.[110] For instance, some Subchapter V trustees report that their districts use an informal escrow procedure upon motion of the Subchapter V trustee. Essentially, at the outset of the case, the Subchapter V trustee asks that the debtor be required to pay a predetermined amount into an escrow account, the balance of which is used to pay all or a substantial part of the Subchapter V

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102 11 U.S.C. § 330(a).

103 *Id*. § 330(b). These section 330 compensation provisions apply regardless of whether the Subchapter V trustee makes disbursements of estate funds.

104 *See* Fed. R. Bankr. P. 2016(a) ("An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.").

105 *See* 11 U.S.C. § 1129(a)(9)(A) (requiring that a consensual plan provide for payment of claims under section 507(a)(2), which includes Subchapter V trustee claims for compensation under section 330 that are section 503(b) administrative expense claims entitled to section 507(a)(2) priority).

106 *See id.* § 1191(e). ("Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.").

107 *See, e.g., Written Statement of Katharine B. Clark,* ABI Subchapter V Task Force Hearing (Jun. 9, 2023), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing. *See also* Editors, *Has Subchapter V Solved the Problems of Small Business Bankruptcies: Views and Reflections of Subchapter V Trustees on the First Two Years of the New Law*, 31 No. 3 J. Bankr. L. & Prac. NL Art. 1 (Jun. 2022) (compiling views of Subchapter V trustees who note, among other observations, that payment of fees is challenging in cases that do not confirm and uniformity in compensation procedure is desirable).

108 *See* Appendix C (American Bankruptcy Institute Subchapter V Survey: Summary of Key Insights Feedback) (respondents frequently cited ensuring compensation of Subchapter V trustees as an area needing improvement); Appendix D (ABI Subchapter V Task Force Survey of Subchapter V Trustees: Results).

109 *See* Appendix D (ABI Subchapter V Task Force Survey of Subchapter V Trustees: Results).

110 *See* Hon. Paul W. Bonapfel, *Guide to the Small Business Reorganization Act of 2019* § IV.E.2. [hereinafter *SBRA Guide*] (Jun. 2022) (describing ways to address the problem, including (1) predicating dismissal orders on the payment of compensation to the Subchapter V trustee; (2) including compensation for the Subchapter V trustee in the debtor's cash collateral budget; or (3) requiring periodic payments to be deposited and held in an escrow account for payment of the Subchapter V trustee's fees).

trustee's fees and costs.[111] Then, upon confirmation of a Subchapter V plan, the Subchapter V trustee can file one fee application and get paid.

In addition, in cases where first day motions seek the use of cash collateral, particularly if the proposed use includes the creation of a reserve fund for professionals, some Subchapter V trustees have successfully obtained a line-item in the budget to provide a reserve for fees and costs to be held in trust by debtor's counsel. Some Subchapter V trustees file interim fee applications. In the context of dismissal, some Subchapter V trustees have succeeded in obtaining court orders that condition dismissal on the payment of their fees.[112]

Some districts formally require one of these methods in their local rules or standing orders.[113] For example, the Eastern District of Missouri has promulgated a local rule that provides for an escrow procedure. Under local bankruptcy rules, the debtor must tender $1,000 to the Subchapter V trustee within seven days after notification of the appointment of the Subchapter V trustee.[114] The Subchapter V trustee holds the funds in escrow for the purpose of compensation for services rendered and reimbursement for out-of-pocket expenses.[115] The court may adjust the dollar amount upon the request of any interested party.[116] Payment of compensation and reimbursement to the Subchapter V trustee from the escrowed funds is subject to allowance and approval by court order.[117]

The Northern District of West Virginia has a General Order that requires an initial deposit of $1,000 to be segregated and held by the debtor's attorney for purposes of compensating the Subchapter V trustee within seven days after notification of the appointment of the Subchapter V trustee.[118] A *pro se* debtor must tender $1,000 to the Subchapter V trustee to be held in escrow for purposes of compensating the Subchapter V trustee for services rendered and reimbursing out-of-pocket expenses. Here, too, the amount set aside is subject to adjustment by the court, and any payment of the segregated funds requires court approval.[119]

Meaningful testimony emphasized the need for implementation of interim compensation procedures to reduce collection risk for the Subchapter V trustee, to ensure the appointment and retention of high-

111 *See Written Statement of Hon. Michael E. Romero, supra* note 23, at 4; *Written Statement of Hon. Craig Gargotta*, *supra* note 95, at 3.

112 *See, e.g., In re New York Hand & Physical Therapy PLLC*, No. 21-35911, 2023 WL 2962204, at *4 (Bankr. S.D.N.Y. Apr. 14, 2023) (conditioning dismissal of Subchapter V debtor's case on payment in full of Subchapter V trustee's fees); *Written Statement of Geoff Groshong*, at 3, ABI Subchapter V Task Force Hearing (Operation of the Case) (Jul. 28, 2023), https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing. *But see In re East Coast Diesel, LLC*, 2022 WL 19078763 (Bankr. M.D.N.C. 2022) (declining to condition dismissal on payment of the trustee's fees and postpetition taxes because the evidence did not establish that all postpetition wages had been paid and that disputes over the amount of the prepetition taxes existed).

113 *See* Appendix F (Chart of Subchapter V Local Bankruptcy Rules by State and District /Division).

114 Local Bankruptcy Rule 2015-3(C) (Bankr. E.D. Mo.), https://www.moeb.uscourts.gov/sites/moeb/files/USBC%20EDMO%20Local%20Rules%20Rev%20120123.pdf.

115 *Id*.

116 *Id*.

117 *Id*.

118 General Order 21-5 Establishing an Initial Deposit for Cases Filed Under Subchapter V of Chapter 11 (Bankr. N.D. W.Va.), https://www.wvnb.uscourts.gov/sites/wvnb/files/general-ordes/General%20Order%2021-5.pdf.

119 *Id*.

quality Subchapter V trustees, and to filter out the cases that are likely to result in dismissal or conversion because the debtor's business or plan is simply not viable.[120] If the debtor cannot allocate some amount for the trustee's fees at the outset of the case or at periodic intervals during the pendency of the case, it is unlikely that the debtor will be able to propose, confirm, and perform under a plan.[121] A set-aside also assists the debtor in budgeting and gives the debtor a trial run at performing on obligations prior to confirmation.

The Task Force evaluated whether a statutory amendment to address the problem is necessary. Specifically, the Task Force debated whether an amendment should expressly authorize or require courts to implement an escrow or deposit procedure, or whether the debtor should be required to fund an escrow account for eventual payment of the trustee's compensation in a prescribed amount, such as $1,000 per month or $5,000 on the first day. The Task Force concluded that Subchapter V contains sufficient tools that permit courts to deal with the problem of payment of fees of Subchapter V trustees without a statutory amendment that mandates a particular procedure or prescribed amount.

The Task Force believes that the need for flexibility trumps uniformity here. Mandating a uniform procedure or fixed escrow amount diminishes the court's flexibility and discretion and would adversely impact the ability of some smaller business debtors to reorganize. Bankruptcy judges need flexibility so they can exercise discretion to set an amount at an appropriate level on a case-by-case basis. If the escrow amount is set too high for a particular debtor, the burden of excessive administrative costs may make it difficult or even impossible to confirm a plan or make ongoing payments during the case.[122] One of Subchapter V's stated goals is a more feasible, cost-effective reorganization for small business.[123] Requiring a debtor to escrow amounts that impair or prohibit a debtor's ability to reorganize is contrary to this purpose.

Although the Task Force does not recommend a statutory amendment, the Task Force encourages courts to use an interim compensation procedure or practice that ensures payment of the Subchapter V trustee's fees and expenses, or other administrative expenses that the court deems appropriate.[124] Ensuring payment of professional fees and expenses, such as through a set-aside or carve-out in a cash collateral order, is not novel. Carve-outs are common in standard Chapter 11 cases for the payment of debtor's counsel and for the unsecured creditors' committee professionals.[125] As such, courts have the

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120 *Written Statement of Amy Denton Mayer,* 8–10, ABI Subchapter V Task Force Hearing (Role of the Subchapter V Trustee) (Jul. 14, 2023), https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing.

121 *Written Statement of Katharine B. Clark, supra* note 107, at 2.

122 The size of cases and businesses also appear to vary by geographic location and district, making a local approach to any early-case escrow or set aside more appropriate.

123 H.R. Rep. No. 116-171, at 4 (2019), *as reprinted in* 2019 U.S.C.C.A.N. 366.

124 A local or case-specific approach also allows courts to consider the overall circumstances of a case and whether other administrative expenses should be included in any set-aside or carve-out. *But see In re Roe*, No. 23-32077, 2024 WL 206678, at *3 (Bankr. D. Or. Jan. 18, 2024) (grappling with the appropriateness of requiring an escrow of only the Subchapter V trustee's compensation rather than for all administrative expenses).

125 *Basics of Professional Retention and Compensation*, 24-Feb. Am. Bankr. Inst. J. 18, 60 (Feb. 2005) (explaining the use of negotiated "carve-outs" in cash collateral motion to ensure payment of professional fees); Bruce H. White & William L. Medford, *Obtaining Attorney Fee Carve-Outs in Cash Collateral Orders*,19-Oct. Am. Bankr. Inst. J. 28, 28 (2001) ("It is also quite common for cash-collateral orders to provide "carve-outs" for professionals. Specifically, debtors often . . . include provisions in proposed cash-collateral orders that segregate, *i.e.*, carve-out. . .an amount sufficient . . . for the payment of professional fees and expenses. A carve-

requisite experience and sufficient discretion to determine what is necessary and appropriate based on the circumstances of individual cases.

In addition, not all Subchapter V debtors are able to confirm plans and their cases are dismissed or converted. The risk of nonpayment for Subchapter V trustees is higher in this context. An interim compensation procedure that provides for a set-aside amount to compensate the trustee would minimize such risk.

After reviewing various methods that courts have adopted, the Task Force offers the following guidance and best practices for ensuring Subchapter V trustee compensation. This guidance aligns with parameters set forth by the U.S. Trustee Program relating to Subchapter V trustee compensation.[126]

- First, any escrowed or deposited amounts to provide a fund for payment of the Subchapter V trustee's fees should be approved by the court or by local rule. Some courts have entered scheduling or standing orders or amended their local rules to require the debtor's counsel to pay initial or monthly amounts to the Subchapter V trustee to hold in a trust account or to segregate these amounts.[127] Some have also required that debtors include anticipated trustee fees in their cash-collateral budgets or pay the fees as a condition of dismissing a case.

- Second, any escrowed or deposited amounts should not be in an amount that adversely affects the debtor's cash flow or its ability to reorganize.[128] One of Subchapter V's stated goals is a more feasible, cost-effective reorganization for small business.[129] Paying deposit amounts or advance fees that impair or prohibit a debtor's ability to reorganize is contrary to this purpose.

- Third, Subchapter V trustees must obtain court approval before drawing on any funds set aside for Subchapter V trustee compensation.[130] Funds should be deposited in an escrow or trust account, and like any other estate professionals, Subchapter V trustees may submit interim fee applications but should not be paid until the court approves a fee request pursuant to section 330.

- Fourth, any procedure should not prevent the debtor from paying administrative expenses over time in the case of a nonconsensual plan pursuant to section 1191(e).[131]

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out assures that unencumbered assets will exist for the payment of debtor's counsel's fees and expenses in the event of an insolvent estate. Additionally, a carve-out may provide for statutory fees and, sometimes, fees and expenses of other professionals.").

126 Daniel J. Casamatta & Michael J. Bujold, *The USTP's Positions on Select SBRA Legal Issues*, 41-Nov Am. Bankr. Inst. J. 14, 63-64 (Nov. 2022).

127 Some courts require the debtor's counsel to segregate the funds unless the debtor is pro se, in which case the Subchapter V trustee establishes a trust account. A second approach directs the Subchapter V trustee to set up the account for the funds. The Task Force does not endorse any particular approach but notes that requiring the Subchapter V trustee to establish the account imposes an administrative burden on the Subchapter V trustee.

128 *See* Casamatta & Bujold, *supra* note 126, at 64.

129 H.R. Rep. No. 116-171, at 4 (2019), *as reprinted in* 2019 U.S.C.C.A.N. 366.

130 *See* Casamatta & Bujold, *supra* note 126, at 64.

131 *See id.* (observing that "requiring the debtor to pay significant monthly retainers or trustee fees may obviate or infringe upon the debtor's rights" to pay the trustee's fees over the life of the plan when the plan confirmed is nonconsensual).

C. Expanding the Duties and Powers of the Subchapter V Trustee

Recommendation and Supporting Principles:

Recommendation

The Task Force finds a statutory amendment is not necessary to clarify the scope of the Subchapter V trustee's duties and powers but offers some guidance for courts and parties involved in cases warranting an expansion of the Subchapter V trustee's duties and powers.

Supporting Principles

- The Bankruptcy Code dictates the scope of Subchapter V trustee's duties, which vary depending on whether the debtor remains in possession. The Subchapter V trustee has inherent power to act to carry out those statutory duties.
- The Bankruptcy Code contemplates expansion of those duties and powers, either by removing the debtor from possession or by court order conferring expanded duties to investigate and report on the debtor's business and financial affairs.
- A Subchapter V trustee has automatically expanded duties and powers under section 1183(b)(5) when the court orders removal of debtor from possession pursuant to section 1185. Upon dispossession, the trustee is automatically authorized to operate the business of the debtor and has additional duties specified in section 704(a)(8) and section 1106(a)(1), (2), and (6) of the Bankruptcy Code.
- Under section 1183(b)(2), the court may for cause enter an order expanding the trustee's duties to investigate and report, even if the debtor is not removed.
- The Task Force offers some considerations for courts and parties when expanded duties and powers are necessary.

Section 1183 enumerates the Subchapter V trustee's duties. In general, the role of the Subchapter V trustee is to supervise and monitor the case and to participate in the development and confirmation of the plan.[132] In addition, the Subchapter V trustee must appear and be heard at the status conference[133] and at any hearing concerning the value of property subject to a lien, confirmation of a plan, modification

132 11 U.S.C. § 1183(b).

133 *Id*. § 1188.

of a plan after confirmation, and the sale of property of the estate.[134] As in Chapter 11, Chapter 12, and Chapter 13 cases, the Subchapter V debtor remains in possession of assets and operates the business.[135] The Subchapter V trustee has a right to obtain information about the debtor's business and financial condition in order to carry out the duties to participate in the plan process and to be heard on the plan and other matters.[136]

The Subchapter V trustee does not have investigative duties at the outset of the case. Section 1106, which specifies the duties of the trustee in a standard Chapter 11 case, does not apply in Subchapter V. Section 1183, however, makes some of its provisions applicable if the court so orders for cause.[137] Among those is the duty to investigate the debtor's financial affairs.[138]

When the court orders removal of the debtor from possession pursuant to section 1185,[139] a Subchapter V trustee has automatically expanded duties and powers under section 1183(b)(5).[140] Upon dispossession of the debtor, the trustee is automatically authorized to operate the business of the debtor.[141] Section 1183(b)(5) also assigns to the Subchapter V trustee the duties specified in section 704(a)(8) and section 1106(a)(1), (2), and (b).[142]

The Task Force surveyed Subchapter V trustees about the expansion of their duties under section 1183(b)(2) and the expansion of their powers under section 1185.[143]

Survey respondents described their expanded duties as including: investigating the debtor's finances; investigating avoidance actions; investigating insider loans; reviewing and reporting on whether the debtor follows the sale procedures; operating the business; exercising control over sales proceeds pending plan approval; controlling the debtor's bank accounts while business operations continued postconfirmation; reporting on the debtor's operations; preparing monthly financial reports; determining whether creditors' claims were noncontingent for eligibility purposes; liquidating assets

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134 *Id*. §1183(b)(3).

135 *Id*. § 1184.

136 *In re Ozcelebi*, 639 B.R. 365, 382 (Bankr. S.D. Tex. 2022) ("The responsibility of the subchapter V trustee to participate in the plan process and to be heard on the plan and other matters cloaks the subchapter V trustee with the statutory right to obtain information about the debtor's property, business, and financial condition.").

137 *Id*. § 1183(b)(2) ("The trustee shall perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders."); *In re Corinthian Communications, Inc.*, 642 B.R. 224, 233 (Bankr. S.D. N.Y. 2022) ("A court may *sua sponte* issue an order expanding the Subchapter V Trustee's duties under section 1183(b), even though the subsection contains the phrase 'on request of a party in interest.'"); *In re AJEM Hospitality, LLC*, Case No. 20-80003 (Jointly Administered), 2020 WL 3125276, *2 (Bankr. M.D. N.C. 2020) (court allowed for limited expansion of trustee's duties based on § 1106(a)(3) language "to the extent that the court orders ….").

138 11 U.S.C. § 1183(b)(2).

139 *Id*. § 1185 (" On request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.").

140 *Id*. § 1183(b)(5) ("The trustee shall if the debtor ceases to be a debtor in possession—(A) perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title; and (B) be authorized to operate the business of the debtor.").

141 *Id*. § 1183(b)(5)(B).

142 In addition, Federal Rule of Bankruptcy Procedure 2012(a) provides for the automatic substitution of the Subchapter V trustee in any pending action, proceeding or contested matter.

143 *See* ABI Subchapter V Task Force Survey of Subchapter V Trustees: Results.

postconfirmation; facilitating settlement conferences on contested matters and adversary proceedings; objecting to claims; and analyzing and prosecuting causes of action.[144]

Many respondents indicated that their powers had not been expanded in any cases.[145] Most commonly, respondents indicated that their expanded powers included operating the business following removal of the debtor in possession.[146] They also were authorized to conduct and/or finalize section 363 sales, carry out liquidating plans, assist in the transition of the business from the debtor to a related entity, review potential avoidance actions for Chapter 7 liquidation analysis purposes, and negotiate mass tort scenarios to reduce claims against the estate.[147]

The Task Force study revealed that some Subchapter V trustees are uncertain about the scope of their authority when the debtor has been removed from possession. Although section 1183(b)(5) imposes certain duties on the Subchapter V trustee when the debtor is dispossessed, the testimony and survey data suggest that some subchapter V trustees are concerned that the scope of the trustee's powers is unclear in some instances. This kind of ambiguity can create unwanted delay, cost, and litigation in the case.

Clarity in this area is paramount. Subchapter V trustees need to be able to perform duties and exercise powers necessary and beneficial to the estate with confidence in their authority to do so.

The Task Force does not find a statutory amendment necessary for such clarity. The Bankruptcy Code dictates the scope of Subchapter V trustee's duties, which vary depending on whether or not the debtor remains in possession. The Subchapter V trustee has inherent power to act to carry out those statutory duties. In addition, the Bankruptcy Code contemplates expansion of those duties and powers, either by removing the debtor from possession or by order conferring expanded duties and authorizing expanded powers to investigate and report.

When the debtor is removed, the Subchapter V trustee has substantially the same rights, powers, and duties that a Chapter 11 trustee has in a standard Chapter 11 case, except the ability to file the plan, which is exclusive to the debtor under section 1189. This means that, upon removal of the debtor from possession, the Subchapter V trustee has automatically expanded powers that authorize the trustee to operate the debtor's business pursuant to section 1183(b)(5)(B), to sell estate assets under section 363, to obtain credit for the estate under section 364 (if the trustee decides to operate debtor's business), to recover possession of estate assets under sections 542 and 543, to avoid transfers under sections 544, 545, 547, 548 and 549, and to abandon property of the estate under section 554.

The Task Force heard a concern that some courts and bankruptcy professionals hold the view that the Subchapter V trustee lacks some of these powers, such as the authority to conduct a 363 sale, when

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144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

the debtor has been dispossessed, without a court order granting such powers.[148] The Task Force does not share that view, but the court can address the matter in the removal order if requested by the parties.

Likewise, the court may enter an order expanding the Subchapter V trustee's duties even if the debtor is not removed, though only to investigate and report on the debtor.[149]

The Task Force debated offering a framework for considering how to delineate expanded duties and powers of the Subchapter V trustee in court orders. The Task Force considered whether such orders should be drafted with specificity or in more general terms. The Task Force ultimately concluded that the language of such an order, including its degree of specificity, depends on the circumstances of the individual case.

For instance, a Subchapter V trustee may need the order to be drafted in general language, so the trustee has broad authorization to do what is necessary and beneficial for the estate and creditors. One approach, as a matter of best practice, is to draft an order expanding the Subchapter V trustee's powers by identifying and specifying any limitations on those powers and explaining the purpose of such limitations. In effect, the Subchapter V trustee would have clarity concerning what actions are not permissible. A different approach would specifically enumerate the Subchapter V trustee's expanded powers and duties, with the implication that anything not included is not authorized by the court.[150]

The Task Force also observes that the Subchapter V trustee is included in the *Barton* doctrine.[151] This doctrine, which stems from *Barton v. Barbour*, 104 U.S. 126 (1881), is a common law principle that bars suits against court-appointed trustees and other fiduciaries absent permission of the appointing forum.[152] Although the *Barton* case did not deal with bankruptcy trustees, all the courts of appeals that have considered the issue have extended its applicability to such trustees and their counsel.[153] The doctrine applies to Subchapter V trustees to the same extent it has been held to apply, or not, to other

148 This view is that the statutory rights, powers, and functions that revert to the trustee upon removal of a debtor from possession in standard Chapter 11 cases and Subchapter V cases are not the same because section 1181 makes section 1106 inapplicable in Subchapter V cases except as otherwise stated in section 1183. Close scrutiny of section 1183's references to section 1106 indicates that when the debtor has been removed from possession, there are no material differences in duties, and the powers necessary to exercise those duties, between the trustee in a standard Chapter 11 case and the trustee in Subchapter V except for the ability to file a plan.

149 11 U.S.C. § 1183(b)(2).

150 *See, e.g., In re Frasier Contracts, Inc., No.* 22-03776, ECF No. 206, Order on Agreed Motion to Expand the Scope of Subchapter V Trustee's Powers (Bankr. M.D. Fla. Jul. 5, 2023) (specifically enumerating trustee's expanded powers).

151 *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (holding that leave of court must be obtained before a receiver can be sued in another forum).

152 *Id.* at 126 ("[i]t is a general rule that before suit is brought against a receiver[,] leave of the court by which he was appointed must be obtained.").

153 *See Alexander v. Hedback*, 718 F.3d 762, 767 (8th Cir. 2013); *In re VistaCare Group, LLC*, 678 F.3d 218, 224 (3d Cir. 2012); *Satterfield v. Malloy*, 700 F.3d 1231, 1234–35 (10th Cir. 2012); *McDaniel v. Blust*, 668 F.3d 153, 156–57 (4th Cir. 2012); *Beck v. Fort James Corp. (In re Crown Vantage, Inc.*), 421 F.3d 963, 970 (9th Cir. 2005); *Muratore v. Darr*, 375 F.3d 140, 147 (1st Cir. 2004); *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000); *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998); *Lebovits v. Scheffel (In re Lehal Realty Assocs.),* 101 F.3d 272, 276 (2d Cir. 1996); *Allard v. Weitzman (In re DeLorean Motor Co.*), 991 F.2d 1236, 1240 (6th Cir. 1993); *Anderson v. United States*, 520 F.2d 1027, 1029 (5th Cir. 1975); *Vass v. Conron Bros. Co.*, 59 F.2d 969, 970 (2d Cir. 1932); 1 Collier on Bankruptcy ¶ 10.01 (16th ed. 2023) ("All circuits except the District of Columbia Circuit have ruled upon the vitality of the *Barton* doctrine, and all have concluded that it applies to suits against bankruptcy trustees.").

trustees.[154] However, conflicting authority exists about whether the *Barton* doctrine applies when the case has been closed.[155]

Based on the foregoing, the Task Force finds a statutory amendment is not necessary to clarify the scope of the Subchapter V trustee's duties and powers but offers some guidance for courts and parties involved in cases warranting an expansion of the Subchapter V trustee's duties and powers.

D. Subchapter V Trustee as Mediator

Recommendation and Supporting Principles:

Recommendation

If the parties and court are considering appointment of the Subchapter V trustee to mediate a dispute, the Task Force urges those involved to use caution, acknowledge the potential issues involved, and insist on entry of a mediation order that details the scope of any agreement to appoint the Subchapter V trustee as mediator.

Supporting Principles

- Even though Subchapter V trustees perform mediator-like functions in carrying out the duty to facilitate development of the plan, they are not mediators because classic mediation involves requirements of neutrality and confidentiality, both of which are potentially inconsistent with the role and duties of the Subchapter V trustee.
- The Subchapter V trustee has statutory duties the trustee must fulfill that can conflict with the requirements of neutrality and confidentiality in mediation.
- The Subchapter V trustee is not neutral. The Subchapter V trustee is an independent third party with fiduciary duties who must be fair and impartial to all parties in the case. Thus, the trustee is also involved in the underlying case as a party in interest and must take positions on issues that arise in the case, such as confirmation of the plan.

154 The *Barton* doctrine does not apply when the trustee's actions exceed the bounds of his or her official authority, known as the "*ultra vires*" exception. *See In re Ondova Ltd. Co.,* 914 F.3d 990, 993 (5th Cir. 2019); *In re Christensen*, 598 B.R. 658, 665 (Bankr. D. Utah 2019); *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC)*, 545 B.R. 91, 105 (Bankr. W.D. Pa. 2015); *see* Hon. Harlin D. Hale & Amber Carson, You Can't Sue Me: Claims Against Professionals, 36-AUG Am. Bankr. Inst. J. 28 (Aug. 2017).

155 *See, e.g., Chua v. Ekonomou*, 1 F.4th 948 (11th Cir. 2021) (ruling that the *Barton* doctrine no longer applies once the case is closed); *Tufts v. Hay*, 977 F.3d 1204, 1209–10 (11th Cir. 2020) (stating that "the *Barton* doctrine has no application when jurisdiction over a matter no longer exists in the bankruptcy court" and that, although there is "no categorical rule that the *Barton* doctrine can never apply once a bankruptcy case ends," in cases where any decision by a district court would have "no conceivable effect" on a bankruptcy estate, the *Barton* doctrine does not deprive the district court of subject matter jurisdiction).

- The Subchapter V trustee in carrying out their duties may not be able to maintain confidentiality of information learned during mediation.
- To the extent that the court and parties determine to have the Subchapter V trustee serve as mediator in the particular case, the Task Force urges those involved to use caution. The court and the parties should evaluate the nature of the mediation and the necessity of a confidentiality waiver to the extent necessary for the trustee to fulfill those duties. The Task Force also recommends entry of a mediation order that details the scope of any agreement to appoint the Subchapter V trustee as mediator.
- This guidance is not meant to disrupt how courts and parties are navigating these challenges. The guidance merely offers alternatives for using mediation as a tool in Subchapter V cases while acknowledging that the Subchapter V trustee must fulfill statutory duties that require careful consideration of the requirements of neutrality and confidentiality in mediation.

Unlike trustees in other kinds of bankruptcy cases, the Subchapter V trustee has the duty to "facilitate the development of a consensual plan of reorganization."[156] This duty is unique to Subchapter V trustees. The role distinguishes them from trustees in other chapters, who occupy a more adversarial posture to the debtor due to their duties to protect the estate and creditors.[157] Unlike their counterparts in other chapters, Subchapter V trustees do not take possession of estate property unless the debtor is removed[158] and are not required to investigate the debtor's financial affairs unless the court orders it for cause.[159]

The duty to facilitate the development of a consensual plan has led some to conclude that the Subchapter V trustee functions like a mediator.[160] At first blush, the analogy seems apt. The Subchapter V trustee must work with the parties—the creditors and the debtor—to help them reach agreement on a plan.[161] One Subchapter V trustee has explained that the trustee's role in a Subchapter V case is like a mediator's role in settlement negotiations because the trustee is "actively analyzing issues, questioning

156 11 U.S.C. § 1183(b)(7).

157 *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022); *In re 218 Jackson LLC*, 631 B.R. 937, 947 (2021); Patricia Redmond & Ashley D. Champion*, Come Together: The Unique Role of Subchapter V Trustees and the Cautionary Tale of 218 Jackson*, 40 Am. Bankr. Inst. J. 12 (Nov. 2021) ("[T]he subchapter V trustee's role is intended to be one of mediator rather than adversary.").

158 *See* 11 U.S.C. § 1183(b)(5).

159 *Id*. § 1183(b)(2).

160 *See, e.g., In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022); *In re 218 Jackson LLC*, 631 B.R. 937, 947 (2021); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020) ("A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a de facto mediator between the debtor and its creditors."); Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 Am. Bankr. Inst. L. Rev. 25 (2020); Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers,* 38 Amer. Bankr. Inst. J. 8 (Nov. 2019) (the statutory goal of a consensual plan suggests that the trustee also fill a mediation role).

161 *In re 218 Jackson, LLC*, 631 BR. at 937.

perceptions, conducting private caucuses, stimulating negotiations between opposing sides, suggesting alternatives, and keeping order amongst the parties and counsel."[162]

Another Subchapter V trustee has described the trustee's role as that of a "mediator with an eye towards compromise."[163] In this sense, the Subchapter V functions like a mediator in fulfilling the duty to facilitate the development of consensual plan, including the facilitation of resolution of other, related conflicts along the way.

It is true that the Subchapter V trustee performs mediator-like functions in carrying out the duty to facilitate development of the plan. But they are not mediators because, among other things, classic mediation involves requirements of neutrality and confidentiality, both of which are inconsistent with the role and duties of the Subchapter V trustee.[164]

Mediator and facilitator have different meanings. A mediator is a "[a] neutral person who tries to help disputing parties reach an agreement."[165] Facilitator means "[s]omeone who helps a group of people engage in discussions or work together . . .one who interacts with parties in negotiations, exchanging information and trying to further the process."[166] Thus, both mediators and the Subchapter V trustee working as "plan facilitator" are third parties helping disputing parties reach an agreed resolution. But the Subchapter V trustee's role is distinct from that of a pure mediator in several respects.[167]

A mediator is neutral. A mediator is not involved in the underlying case, and the mediator cannot take a position before the court on issues being mediated. A Subchapter V trustee, while disinterested,[168] is not necessarily neutral.[169]

The trustee is an independent third party with fiduciary duties who must be fair and impartial to all parties in the case,[170] making the trustee uniquely positioned to facilitate a consensual confirmation.

162 *Written Statement of Amy Denton Mayer, supra* note 120, at 5 (Jul. 14, 2023), https://subvtaskforce.abi.org/hearings/july-14-2023-virtual-public-hearing.

163 *Written Statement of Marc Albert, supra* note 101, at 2–3.

164 *See, e.g., Written Statement of Hon. Craig Gargotta, supra* note 95, at 2 (observing that "the subchapter V trustees in our district strike a good balance between remaining neutral yet serving almost as mediators between creditors and the debtor").

165 Black's Law Dictionary (11th ed. 2019).

166 *Id.*

167 Even though the Subchapter V trustee is not, in a technical sense, a mediator in the bankruptcy case, unless appointed to fulfill that role in a dispute, mediation skills are helpful in carrying out the Subchapter trustee's duty to facilitate the development of a consensual plan. *See, e.g., Written Statement of Susan Seflin, supra* note 98, at 4–5 ("In January of 2021, the subchapter v trustees in the Central District of California participated in a weeklong mediation training program to improve our mediation skills and it was incredibly helpful. With that training and my experience as chapter 11 debtor counsel, I have helped facilitate many consensual subchapter v plans and I have been appointed as the mediator in two of my subchapter v trustee cases.").

168 To be appointed, a Subchapter V trustee must be a "disinterested person" within the meaning of section 101(14). Therefore, the Subchapter V trustee cannot be a creditor, equity holder, officer, employee or other stakeholder in the debtor and cannot have an interest "material adverse" to the estate, any class of creditors or equity security holders. *Id*. Simply put, the Subchapter V trustee must have no pecuniary interest in the outcome of the case. *See also Written Statement of Hon. Judge Goldblatt*, *supra* note 95, at 2 ("From what I have seen, a large part of the success in some of these cases is attributable to the presence of a party-in-interest who does not have his or her own financial stake in the case.").

169 Black's Law Dictionary defines "neutral" as "not supporting any of the people or groups involved in an argument or disagreement; indifferent to the outcome of a dispute; refraining from taking sides in a dispute; impartial; unbiased." Neutral, Black's Law Dictionary (11th ed. 2019).

170 Sub V Handbook, *supra* note 85, at 2-2.

But the trustee is also involved in the underlying case as a party in interest and must take positions on issues that arise in the case, such as plan confirmation.[171] In these instances, the trustee is not neutral. Thus, the Subchapter V trustee is not a mediator, in the formal sense, even though the duty to facilitate development of a consensual plan necessarily involves some of the functions of a mediator in order to facilitate conflict resolution on the path to a confirmable plan.

In addition, a mediator has the duty to maintain confidentiality of information learned during the mediation.[172] In contrast, the Subchapter V trustee has no such duty. The Subchapter V trustee is an estate fiduciary and party in interest in the bankruptcy case.

Not every disclosure to the Subchapter V trustee is protected. Unless the court orders otherwise, the Subchapter V trustee must furnish information concerning the estate and the estate's administration if requested by a party in interest under section 1183(b)(1) and section 704(a)(7).[173] The trustee may be called upon by the court to express positions on other matters, such as asset sales and plan confirmation, and in that process, may be required to disclose confidential info learned during a mediation.[174] When the Subchapter V trustee is appointed to mediate a dispute, a conflict arises because the trustee may be required to make disclosure to the court with respect to matters learned during the mediation even if the parties requested or directed the trustee to maintain confidentiality.

The Task Force heard concerns from Subchapter V trustees about being formally appointed by the court to mediate disputes between the debtor and creditors.[175] When the Subchapter V trustee is appointed to formally mediate a dispute between the debtor and a creditor, how the trustee navigates the conflict between the mediator's duty of confidentiality and the trustee's duties as the Subchapter V trustee in the case presents a challenge.

Anecdotal evidence underscores both the challenge and divergent viewpoints here. One Subchapter V trustee, in compiling materials for a presentation at the National Conference of Bankruptcy Judges in 2022, asked Subchapter V trustees to answer the following question:

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171 *See* 11 U.S.C. §1183(b)(3) (requiring the trustee to appear and be heard at the section 1188 status conference and any hearing that relates to valuing property subject to a lien, plan confirmation, modification of the plan after confirmation, sale of estate property); Bonapfel, *SBRA Guide*, *supra* note 110, § IV.B ("Because the subchapter V trustee is a fair and impartial fiduciary with monitoring and supervisory duties and the duty to facilitate a consensual plan, courts are likely to request that the subchapter V [trustee] advise the court of the trustee's positions and recommendations concerning issues affecting administration of the case." (citing *In re Major Model Management, Inc*., 641 B.R. 302, 321-22 (Bankr. S.D.N.Y. 2022) (Requesting Subchapter V trustee's views concerning whether class proof of claim should be permitted and agreeing that claims allowance process was the better approach)).

172 *See, e.g.,Written Statement of Amy Denton Mayer, supra* note 120, at 5 ("Mediators typically sign, and require the parties to sign, confidentiality agreements. Mediators are also subject to strict limitations on disclosures pursuant to professional and ethical standards. Thus, they are required to maintain the parties' confidences."); Mediation, Black's Law Dictionary (11th ed. 2019) (Mediation means "a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. . . Mediation is a confidential process that includes a supervised settlement conference presided over by an impartial, neutral mediator to promote conciliation, compromise and the ultimate settlement of a civil action.").

173 11 U.S.C. § 1183(b)(1) (requiring the Subchapter V trustee to perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a)).

174 *See id.*; Amy Denton Mayer, *How to Effectively Utilize the Subchapter V Trustee to Make You Subchapter V Case Magical: The Statutory Role of the Subchapter V Trustee, the Subchapter V Trustee as Facilitator/Mediator, and Other Ways to Effectively Utilize the Subchapter V Trustee*, 96th Annual National Conference of Bankruptcy Judges (Oct. 19-22, 2022) https://ncbjmeeting.org/2022/materials/NCBJ%20Five%20Secrets%20to%20Magical%20Sub-V.pdf.

175 *See Written Statement of Amy Denton Mayer, supra* note 120.

> Have you ever entered into a formal agreement with the parties to mediate a dispute in a subchapter V case? Do you discuss confidentiality (or lack thereof) with the debtor and other parties in interest?[176]

Some Subchapter V trustees responded with an unequivocal "no" to the first question.[177] Others responded "yes" and explained they have experienced some success in this context.[178] But one story is a cautionary tale:

> I conducted a formal mediation in one of my subchapter V cases, with the normal sort of confidentiality provisions (which I consider critical to a successful mediation process)... [T]he mediation resulted in an impasse . . . confirmation was denied and the case got dismissed. I've had a couple dozen subchapter V cases as trustee, and only one case — this one case where I conducted a formal (failed) mediation with strict confidentiality — did not result in a confirmed plan. Also, the confidentiality provision in the mediation agreement limited my ability to "appear and be heard" in the hearings in the case, which jeopardized my ability to adequately honor my duties under section 1183. When I did pipe up at the hearings, one or more lawyers got annoyed and suggested that I might be breaching mediation confidentiality. I'm never doing it again... [A]s I have learned the hard way, although facilitating the development of a consensual plan is like mediation, it is not mediation. I think confidentiality is key to a successful mediation, but a subchapter V trustee cannot agree to mediation level confidentiality and still adequately fulfill her or his responsibilities. Or, at least I am unable to do that.[179]

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176 Compiled by David Mawhinney, *Subchapter V Trustees In Their Own Words*, 96th Annual National Conference of Bankruptcy Judges, Five Secrets for a Magical SubV (Oct. 19-22, 2022) https://ncbjmeeting.org/2022/materials/NCBJ%20Five%20Secrets%20to%20Magical%20Sub-V.pdf.

177 *See id.*:

> Never. I could not serve as a mediator in a case where I have duties as a subchapter V trustee. I always tell parties that nothing they say to me is protected by any confidentiality or privilege. On the other hand, I can still have private conversations with each side and, for strategic reasons, I can coordinate communications with the debtor or a creditor, agreeing not to speak to another side (for now) unless spoken to. I will initially defer to the debtor on how and when it wants to approach a key creditor.
>
> ***
>
> I have never done so, because I don't think that I can agree to confidentiality that mediation usually requires due to the multiple duties to the estate/creditors under the trustee duties. I have one case that is in mediation, and I was unable to participate for those reasons also.
>
> ***
>
> No- I've participated in numerous Sub V mediations - usually conducted by another Bankruptcy judge in the district- but not act as mediator- I'm usually confronted with conflict issues when considering role a formal mediator.

178 *See id.*:

> Yes, and yes. I believe that as long as all of the parties agree, in writing, then the content of settlement discussions with me as trustee/mediator could remain confidential. In both instances where we did a formal mediation, the parties agreed and that is how it was conducted. One led to a consensual plan and the other is still in the works, but hopefully headed to a consensual plan.

179 *Id.*

The Task Force study indicates that in some instances, the debtor and other parties in interest are amenable to the Subchapter V trustee being appointed to mediate a dispute and are willing waive any potential conflict. [180] They simply enter into an agreement to appoint the Subchapter V trustee to mediate the dispute.[181]

The Task Force offers the following guidance when the parties and the court are considering appointment of the Subchapter V trustee as a mediator. This guidance is not meant to disrupt how courts and parties are navigating these challenges. The guidance merely offers alternatives for using mediation as a tool in Subchapter V cases while acknowledging that the Subchapter V trustee must fulfill statutory duties that may impede the requirements of neutrality and confidentiality in mediation.

If formal mediation is appropriate for a dispute, the Subchapter V trustee does not need to fill the role of mediator. The court can enter an order appointing a mediator other than the Subchapter V trustee to mediate a dispute. If, however, the parties and court are considering appointment of the Subchapter V trustee to formally mediate a dispute in the case, the Task Force urges those involved to use caution, acknowledge the potential issues involved, and consider entry of a mediation order.

The Task Force recommends entry of a mediation order that details the scope of any agreement to appoint the Subchapter V trustee as mediator. Such an order would provide and structure for the mediation and clarity about obligations of the Subchapter V trustee serving as mediator. In addition, the parties should waive confidentiality in the context of the mediation to the extent necessary for the trustee to fulfill those duties.

180 *See Oral Testimony of Heidi Sorvino*, ABI Subchapter V Task Force Hearing (Oct. 12, 2023) https://subvtaskforce.abi.org/hearings/october-12-2023-hybrid-public-hearing.

181 *Id.*

V. Case Administration

A. Status Conference and Status Report

Recommendation and Supporting Principles:

Recommendation

The Task Force concludes that amendment of section 1188(a) to require an earlier status conference or to state additional requirements for the status reports is not necessary.

Supporting Principles

- Section 1188(a) requires the court to hold a status conference within 60 days of the petition date.
- Nothing in section 1188 precludes the court from setting an earlier status conference as a matter of practice. An earlier status conference could provide the court and parties in interest an earlier assessment of the case and promote efficient prosecution of the case, including the development of a plan by the 90-day statutory deadline.
- These potential advantages, however, do not warrant a statutory change in view of the discretionary authority to adopt these practices.
- Under section 1188, the debtor must file and serve a report detailing the efforts the debtor has undertaken and plans to take to develop a consensual plan of reorganization no later than 14 days before the status conference.
- Neither Subchapter V nor the Federal Rules of Bankruptcy set forth the requisite contents of the debtor's status report. It is inappropriate to impose additional mandatory requirements for the status report because such matters are best left to the discretion of the bankruptcy judge.
- The orders, rules, and forms that some courts have promulgated with regard to the contents of the status report vary in the information they require, but nonetheless provide some guideposts for consideration.
- The Task Force offers as guidance certain categories of information that are minimally sufficient for the court and other parties in interest to understand the nature of the debtor's case.

Subchapter V emphasizes speed and flexibility. Section 1188(a) requires the court to hold a status conference within 60 days of the petition date.[182] No later than 14 days before the status conference, the debtor must file and serve a report detailing the efforts the debtor has undertaken and plans to take to develop a consensual plan of reorganization.[183] The purpose of the status conference is to "further the expeditious and economical resolution" of the case,[184] including discussion of how the debtor intends to achieve plan confirmation.

The Task Force heard testimony on the utility of an early mandatory status conference. Some agree that an early status conference is invaluable to "canvass the issues, set expectations, and move the case forward expeditiously."[185] But others have found the status conference unhelpful[186] or observe that "some lawyers have had some difficulty in providing useful information" in the status report.[187]

One witness suggested the Task Force consider recommending an earlier status conference based on the practice of some courts. Some courts have a practice of setting an earlier status conference, around one to two weeks into the case, to outline the issues and develop a strategy for reorganization. [188] These courts often convene a second status conference on or before the sixtieth day after the petition date.[189]

Another witness recommended requiring the section 1188(a) status conference no later than 30 days after the petition date and eliminating the requirement of section 1188(c) to file a status report.[190] The earlier status conference would give the court, the trustee, and creditors a preview of the debtor's case at the inception of the case, and the later one would provide an opportunity to gauge the debtor's success in addressing the challenges outlined and discussed during the initial status conference.

182 11 U.S.C. § 1188(a). The court may extend the 60-day deadline if the debtor demonstrates that "the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." *Id.* § 1188(b).

183 *Id.* § 1188(c).

184 *Id.* § 1188(a).

185 *Written Statement of Hon. Elizabeth S. Stong, U.S. Bankruptcy Court for the Eastern District of New York*, at 6, ABI Subchapter V Task Force Hearing (Operation of the Case) (Jul. 28, 2023), https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing; *Written Statement of Richardo Kilpatrick*, note 49, at 4; *Written Statement of Rebecca Redwine*, ABI Subchapter V Task Force Hearing (Plan and Confirmation Issues), at 3 (Sept. 8, 2023) https://subvtaskforce.abi.org/hearings/september-8-2023-virtual-public-hearing ("The two components of Sub-V that have assisted in obtaining consensual plans in my cases are the § 1188(c) status report requirement and the confirmation standards of § 1191(a) versus (b). The status report immediately sets the tone for confirmation and forces debtor's counsel to reach out to creditors to begin negotiating almost immediately upon filing. The status report also requires counsel to analyze and address potential confirmation issues at the very start of the case.").

186 *Written Statement of Craig Geno*, at 2, ABI Subchapter V Task Force Hearing (Jul. 28, 2023) (Operation of the Case), https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing ("Unfortunately, for the most part, the status conference is somewhat of a non-event, and a perfunctory function that does not accomplish much. My experience has been this is true whether or not there are significant first day motions or whether the case has proceeded without a lot of judicial involvement.").

187 *See, e.g., Written Statement of Hon. Craig Gargotta, supra* note 95, at 2.

188 *Written Statement of Hon. Laurel M. Isicoff,* supra note 33, at 3, (explaining that she sets an early status conference within two weeks of the petition date, unless there are first day hearings); *Written Statement of Richardo Kilpatrick*, *supra* note 49, at 4.

189 *Id.*

190 *Written Statement of Hon. Scott M. Grossman, U.S. Bankruptcy Court for the Southern District of Florida*, at 5, ABI Subchapter V Task Force Hearing (Operation of the Case) (Jul. 28, 2023) https://subvtaskforce.abi.org/hearings/july-28-2023-virtual-public-hearing.

Nothing in section 1188 precludes the court from setting an earlier status conference as a matter of practice.[191] It merely mandates a status conference no later than 60 days after the order for relief.[192] The Task Force concurs that an earlier status conference could provide the court and parties in interest an earlier assessment of the case to discover what the case is about, issues that may be encountered, and how the debtor intends to achieve confirmation of a plan.

Moreover, an earlier assessment could further the efficient prosecution of the case, including the development of a plan by the 90-day deadline. And an earlier status conference allows for an additional, later one, the purpose of which would be to assess the progress toward achieving a reorganization plan.[193]

Nevertheless, the Task Force concluded that these potential advantages do not warrant a statutory change in view of the discretionary authority to adopt these practices. The Task Force encourages courts to schedule earlier or additional status conferences as appropriate, but in doing so, to be mindful of the mandated status report which must be filed within 14 days before the section 1188 status conference. Debtors need sufficient time to prepare a status report that contains minimally sufficient information to be useful to the court and the interested parties in the case. Thus, if a court prefers to convene a status conference earlier than the sixtieth day, such as one to two weeks into the case, the court should, as a matter of best practices, consider scheduling a second, later conference that functions as the section 1188 conference for which the status report is required.

The Task Force also heard some testimony on the utility of the status report which must be filed no later than 14 days before the initial status conference. The status report must describe "the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization."[194]

One witness viewed some merit in the status report because it forces the debtor to focus on the case, and the report may highlight or reflect some of the challenges in the case early.[195] The status report also can function as mechanism for opening negotiations with creditors. But some testimony expressed the view that the preparation of the status report is an exercise that consumes the debtor's time that might be better spent focused on a reorganization plan.[196]

Neither Subchapter V nor the Federal Rules of Bankruptcy Procedure set forth the requisite contents of the debtor's status report. Some courts use local rules, standing orders, and scheduling

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191 *See* 11 U.S.C. § 1188(a).

192 *See id.*

193 Courts can continue and reconvene the section 1188 status conference during the case. *See Dietz v. Bouldin*, 579 U.S. 40, 47 (2016) ("This Court has also held that district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.").

194 *Id.* § 1188(c).

195 *Written Statement of Craig Geno, Subchapter V trustee*, *supra* note 186, at 1–2.

196 *Written Statement of Hon. Scott M. Grossman, supra* note 190, at 4. *See* Section VI.A *infra*, (debtors and their counsel might file a reorganization plan before or on the ninetieth day that complies with section 1190, sets forth adequate information, and contains substantive terms for parties to evaluate even though the debtor has not yet reached agreement with the creditors or completed discussions with the Subchapter V trustee).

orders[197] to outline what information to include in the status report.[198] Some districts have mandatory[199] or recommended forms.[200]

The Task Force concludes that it is inappropriate to impose additional mandatory requirements for the status report because such matters are best left to the discretion of the bankruptcy judges. At the same time, it is useful for the Task Force to offer guidance about the contents of the report to maximize its usefulness in promoting the goals of the subchapter.

The orders, rules, and forms that some courts have promulgated with regard to the contents of the status report vary in the information they require, but nonetheless provide some guideposts for consideration.

The Task Force suggests that the following categories of information are minimally sufficient for the court and other parties in interest to understand the nature of the debtor's case:

1. A description of the nature of the debtor's business;
2. A description of the efforts the debtor has undertaken or will undertake to obtain a consensual plan of reorganization, including a description of communications with parties in interest in the case;[201]
3. The estimated time by which the debtor plans to file the reorganization plan and any complications the debtor anticipates in complying with the 90-day deadline for filing a plan;
4. Any anticipated issues the debtor might encounter during this case, including but not limited to valuation, leases and contracts, and the sale or surrender of real or personal property;[202] and
5. "[A]ny other issues the debtor expects the court will need to address before confirmation or that could have an effect on the efficient administration of the case."[203]

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197 *See, e.g., Written Statement of Hon. Craig Gargotta, supra* note 95, at 3.

198 *See* Hon. Paul W. Bonapfel, *SBRA Guide, supra* note 110, § VI.C (outlining the specific items that courts might require in the report).

199 The bankruptcy court in the District of New Jersey requires use of its status report form, available at: http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms.

200 Some courts with suggested forms include the District of Maryland, https://www.mdb.uscourts.gov/content/local-bankruptcy-forms, Central District of California, https://www.cacb.uscourts.gov/forms/local_bankruptcy_rules_forms; and the Southern District of Indiana, https://www.insb.uscourts.gov/sites/insb/files/SubVStatusReport.pdf.

201 *See, e.g.,* Subchapter V Status Report Pursuant to 11 U.S.C. §1188(c) (Bankr. S.D. Ind.), https://www.insb.uscourts.gov/sites/insb/files/SubVStatusReport.pdf ("Provide a description of the Debtor's communications with applicable parties in interest (including, *e.g.*, secured creditors, priority creditors, unsecured creditors, equity interest holders, the case trustee, or others) concerning the Debtor's proposed plan or explain the Debtor's rationale for not discussing the plan with parties in interest.]").

202 *Id.*

203 Hon. Paul W. Bonapfel, *SBRA Guide, supra* note 110, § VI.C.

B. Removal of the Debtor in Possession and Consequences for the Case

Recommendation and Supporting Principles:

Recommendation

The Task Force finds that the provisions for removal of the debtor in possession in section 1189 should not be changed to permit anyone but the debtor to file a plan upon removal.

Supporting Principles

- Under section 1189, only the debtor may file a plan in a Subchapter V case.
- When the debtor is removed from possession for cause under section 1185(a), questions arise about how to resolve the case if the Subchapter V trustee or some other party in interest cannot file a plan.
- Nothing prohibits the Subchapter V trustee from drafting a plan for the debtor to file and communicating with debtor's counsel about that plan and its feasibility.
- If the removed debtor does not cooperate with the Subchapter V trustee to develop and file a plan of reorganization, then the court may (and likely should) consider other alternatives to resolve the pending case, such as conversion or dismissal under section 1112 or a sale of the business as a going concern.
- Whatever post-removal path is necessary is ultimately a fact-dependent determination subject to the court's discretion.

As under any chapter of the Bankruptcy Code, some Subchapter V cases will involve debtors who do not comply with their obligations under the Bankruptcy Code. One way Subchapter V addresses this issue is removal of the debtor from possession for cause.[204] A court also, for example, has the power to convert or dismiss the case under section 1112 of the Bankruptcy Code.

Removal of the debtor in possession may be necessary either to help the debtor take steps to "right the ship"[205] (so to speak) or to determine the best alternative to resolve the case for the estate and

204 11 U.S.C. § 1185(a) ("[T]he court shall order that the debtor shall not be a debtor in possession for cause.").

205 *In re Corinthian Communications, Inc.*, 642 B.R. 224, 226 (Bankr. S.D.N.Y. 2022)

creditors. In the latter scenario, Subchapter V grants the Subchapter V trustee enhanced duties upon removal of the debtor in possession.[206]

The Subchapter V trustee does not, however, have the ability to file a plan of reorganization, at least not without the cooperation of the debtor.[207] This inability to file a plan has led to some confusion and frustration concerning the role of the Subchapter V trustee and the resolution of the case after dispossession of the debtor.

The Task Force reviewed the meaningful testimony on the challenges faced by a Subchapter V trustee when the trustee has an enhanced role but no ability to independently file a plan. Many bankruptcy judges, Subchapter V trustees, and other bankruptcy professionals suggested giving the trustee the ability to file a plan when the debtor has been removed from possession.[208] The Task Force understands these concerns, particularly in light of the potential value of some Subchapter V debtors as a going concern despite the removal of the debtor in possession.

Indeed, this kind of assessment is so case-specific and fact-driven that it is difficult to articulate a blanket rule that would be fair and warranted in every Subchapter V case. The Task Force is also mindful of the Subchapter V trustee's duty to help facilitate a consensual plan of reorganization.[209] The current statutory framework requiring a Subchapter V trustee to continue to work with a debtor after removal from possession arguably aligns with that duty and the general objective of Subchapter V to rehabilitate smaller businesses to preserve the business as a going concern.[210] Here, the Task Force observes that nothing prohibits the Subchapter V trustee from drafting a plan for the debtor to file and communicating with debtor's counsel about that plan and its feasibility.

That said, if a debtor has been removed from possession and does not cooperate with the Subchapter V trustee to develop and file a plan of reorganization, then the court should consider other alternatives to resolve the pending case.

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206 11 U.S.C. §1183(b)(5) ("The trustee shall if the debtor ceases to be a debtor in possession—(A) perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title; and (B) be authorized to operate the business of the debtor.").

207 *Id*. § 1189(a) ("Only the debtor may file a plan under this subchapter."). When compared to a regular Chapter 11 case, the Subchapter V trustee's inability to file a plan may seem incorrect or at odds with the objectives of the Code. When that limitation on the trustee's powers is, however, viewed through the objectives of Subchapter V (particularly, encouraging and helping smaller businesses to reorganize while preserving their prepetition ownership structure), it's potential value in the Subchapter V context becomes more apparent. These competing considerations are discussed below.

208 *See, e.g., Written Statement of Hon. Hannah Blumenstiel*, *supra* note 22, at 4; *Written Statement of Hon. Michael E. Romero*, *supra* note 23, at 6 ("Perhaps it is time to consider adding a provision which allows creditors, or at the very least, the Sub V Trustee an opportunity to file a plan in those instances where the debtor is simply treading water."); *Written Statement of Sumner Bourne*, at 7, ABI Subchapter V Task Force Hearing (Eligibility) (Jun. 23, 2023), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing ("The Subchapter V trustee should be authorized to file a plan, if the debtor is not an individual and the debtor has been removed as a debtor in possession under Section 1185."). *But see Oral Testimony of Brian Shaw*, ABI Subchapter V Task Force Hearing (General Observations) (Jun. 9, 2023) (arguing that giving the trustee power to file a plan will increase administrative costs, and require them, in some instances, to hire counsel, making the subchapter less affordable), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing; *Oral Testimony of David Mawhinney*, ABI Subchapter V Task Force Hearing (General Observations) (Jun. 9, 2023) (expressing concerns about valuing assets, determining projected disposable income, among others, if given the ability to file a plan as Subchapter V trustee), https://subvtaskforce.abi.org/hearings/june-9-2023-virtual-public-hearing.

209 *Id*. § 1183(b)(7).

210 *See* H.R. Rep. No. 116-171, at 4 (2019), *as reprinted in* 2019 U.S.C.C.A.N. 366, 369.

When reorganization is not likely and sale of the business as a going concern is not a viable option, conversion or dismissal under section 1112 of the Bankruptcy Code is the proper result. For example, if the case involves a recalcitrant debtor and if liquidation is the best resolution, conversion to a Chapter 7 case (despite the possible appointment of a different individual to serve as trustee) is likely best for all parties in interest and preserves the integrity of the system. If the case is converted to Chapter 7, it is possible the Subchapter V trustee could be appointed as the Chapter 7 trustee.[211]

If, however, a debtor might be sold as a going concern and pursuing such a sale in a Subchapter V case could produce value for the estate, resolution of the case under Subchapter V may better serve the goals of the Bankruptcy Code and be in the best interests of the estate and creditors.

Liquidation of the debtor through a going concern sale is possible in a Chapter 7 case. Section 721 permits the court to authorize a chapter 7 trustee to operate the business of the debtor "for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate." But liquidation of a going concern business under Chapter 7 poses significant problems. Conversion to Chapter 7 may adversely affect the business's relationships with its customers, suppliers, and employees, who may perceive Chapter 7 as the end of the debtor's business. If the Subchapter V trustee is not appointed as the Chapter 7 trustee, it may be difficult to effect an optimal continuation of the business pending sale. And the Chapter 7 trustee is charged with the expeditious liquidation of assets, which may result in the realization of less value than would occur in a Subchapter V case.[212]

The "real world," practical considerations in many cases require continuation of the case in Subchapter V to realize the highest possible value from the sale of the debtor's business. Given the Subchapter V trustee's familiarity with the case, the debtor's business, and the creditors, the Subchapter V trustee may be in the best position to maximize the estate's value. Although, without the debtor's participation, the disbursement of sales proceeds cannot occur through a plan of reorganization, the proceeds can be administered through conversion to Chapter 7 after the sale or a structured dismissal.[213]

The Subchapter V trustee—precisely because of its pre-removal dealings with the debtor and stakeholders—might be exactly the right individual to lead the case to resolution. These are fact-specific determinations that should be left to the discretion of the court. Again, however, the Task Force would encourage courts to be specific in the role, duties, and powers of the Subchapter V trustee after

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211 *See* 11 U.S.C. §701(a)(1) (trustee may appoint disinterested person "that is serving as trustee in the case immediate before the order for relief" under chapter 7).

212 *See In re Boteilho Hawaii Enterprises Inc.*, Case No. 22-00827, 2023 WL 7117223 (Bankr. D. Haw. Oct. 24, 2023). In its discussion of the hypothetical chapter 7 liquidation of the debtor, the court noted that a trustee must liquidate assets "as expeditiously as is compatible with the best interests of parties in interest" under section 704(a)(1) and that, therefore, the trustee must "always dispose of the property quickly (although not necessarily at 'fire sale' prices."). *Id*. at * 2.

213 A "structured dismissal" is not expressly defined or mentioned in the Bankruptcy Code, but it is a term used to refer to a "hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." Chapter 11 Commission Report, *supra* note 3, at 270). Structured dismissals can "facilitate efficient case resolutions" when the "actual or perceived costs and delays associated with the plan-confirmation process or a conversion to chapter 7 of the Bankruptcy Code." *Id.* at 271. Nevertheless, bankruptcy courts may not approve structured dismissals or other final distributions of property that violate the Bankruptcy Code's priority rules without the affected creditors' consent. *Czyzewski v. Jevic Holding Corp*., 580 U.S. 451 (2017).

removal of the debtor in possession to ensure that all parties have clarity concerning the timing, cost, and anticipated actions to resolve the Subchapter V case.[214]

If the court, after removal of the debtor from possession, does not dismiss or convert the case, the Task Force concludes that courts should clearly define the role of the Subchapter V trustee, including the powers that the court finds applicable to a resolution of the case. For a Subchapter V trustee to serve that role effectively, all parties, including the debtor, must have confidence in the objectives and motivations of the trustee. A court may want to hear and consider the Subchapter V trustee's perspective regarding the discussions, negotiations, and dealings among all the parties in the case before deciding to keep a case in Subchapter V after removal of the debtor in possession. In some cases, the Subchapter V trustee may not be the best individual to sell or liquidate the debtor; a Chapter 7 trustee might be a better alternative.

Otherwise, questions may arise concerning the trustee's authority to sell the debtor's assets under section 363 or to pursue avoidance claims arising from the trustee's initial role in the case with the responsibility to facilitate a consensual plan.

The Task Force considered the recommendations of many bankruptcy professionals and judges that, upon removal of the debtor in possession, the trustee should be permitted to file a plan of reorganization. The Task Force concluded that such a change is not warranted for the following reasons.

- First, given the nature of most businesses in Subchapter V cases, if the debtor after removal declines to work with the trustee to file a plan that is feasible and capable of confirmation, the prospects for a stand-alone reorganization are not good.
- Second, the possibility that someone other than the debtor could file a plan of reorganization is contrary to a fundamental policy of Subchapter V that leaves the debtor in charge of the outcome of the case. Congress's decision to not terminate plan exclusivity for the Subchapter V debtor serves core objectives of the subchapter. Subchapter V is designed, among other things, to help smaller companies retain ownership through a lower-cost path to reorganization. Many of these businesses are of little value without the owner's or entrepreneur's involvement.
- Although reserving plan exclusivity to the debtor is a difficult policy decision, on balance, it better serves the objectives of Subchapter V, encouraging smaller business to use the subchapter but discouraging its abuse with a stark consequence, namely conversion or dismissal. Permitting the trustee to file a plan could deter the willingness of smaller businesses to file Subchapter V if faced with the loss of control that plan exclusivity provides. Moreover, if the prepetition owners or management are not cooperating in the case, a reorganization through a sale is the most viable path where the business retains any value without them.
- Finally, although it is possible in rare cases that the filing of a plan by the trustee after removal of the debtor could be appropriate (such as to resolve disputes among holders of equity interests

214 *See* Section IV.C *supra*.

in a debtor with good prospects for reorganization and equity value), that rare situation does not warrant a general rule permitting the trustee to file a plan after removal which could have adverse consequences in many other cases.

In light of the foregoing, the Task Force does not recommend any changes to section 1189 at this time.

C. Compensation of the Debtor's Professionals for Services After the Debtor Has Been Removed from Possession

Recommendation and Principles:

Recommendation

The Task Force proposes a statutory amendment to section 1185 that would permit the court to approve the debtor's retention of professionals after removal of the debtor from possession, after notice and hearing, in certain limited circumstances, and provide for their compensation.

Supporting Principles

- When the court orders removal of the debtor in possession, the Subchapter V trustee is authorized, under section 1183(b)(5), to step in and run the business of the debtor. Upon dispossession, however, the debtor ceases to be the debtor in possession and therefore loses its status as the "trustee." Yet the debtor retains permanent exclusivity to file a plan pursuant to section 1189(a).
- Absent dispossession, debtor's counsel would be paid for work on a plan of reorganization by filing an application for compensation under section 330(a), which allows all professionals properly retained under section 327 to be compensated for services rendered to the estate. Section 327, in turn, authorizes the "trustee," in the traditional sense, to retain professionals, and, in a Subchapter V case, section 1184 gives the debtor in possession all the rights and obligations of a trustee. When the debtor no longer has the rights of a "trustee," section 327 arguably no longer authorizes the attorney's retention and, therefore, there is statutory uncertainty about whether the attorney may receive compensation for post-removal services.
- When removal of the debtor from possession occurs but the filing of a plan by the debtor is a feasible alternative, the problem is that the debtor's counsel cannot be properly compensated for the work it does on behalf of the debtor.

- The Task Force heard repeated requests for a recommendation for a statutory amendment to close the gap in the Bankruptcy Code relating to compensation of the debtor's counsel when the debtor has been dispossessed.
- The Task Force proposes a statutory amendment to section 1185 that would permit the court to approve the debtor's retention of professionals after the debtor has been removed from possession, after notice and hearing, in certain limited circumstances, and provide for their compensation.

When the court orders removal of the debtor in possession, the Subchapter V trustee is authorized, under section 1183(b)(5), to step in and run the business of the debtor. Upon dispossession, however, the debtor ceases to be the debtor in possession and therefore loses its status as the "trustee." Yet the debtor retains permanent exclusivity to file a plan pursuant to section 1189(a).

Absent dispossession, debtor's counsel would be paid for work on a plan of reorganization by filing an application for compensation under section 330(a), which allows all professionals properly retained under section 327 to be compensated for services rendered to the estate. Section 327, in turn, authorizes the "trustee," in the traditional sense, to retain professionals, and, in a Subchapter V case, section 1184 gives the debtor in possession all the rights and obligations of a trustee. When the debtor no longer has the rights of a "trustee," section 327 arguably no longer authorizes the attorney's retention and, therefore, there is statutory uncertainty about whether the attorney may receive compensation for post-removal services.

This potential statutory uncertainty creates challenges for a debtor that has been removed but may nonetheless be able to propose and confirm a Subchapter V plan. To accomplish this task and properly work with the Subchapter V trustee, a debtor needs, and the case likely benefits from, the continued assistance of the debtor's counsel. An additional concern is that section 1185(b) permits reinstatement of the debtor in possession, after notice and a hearing. A debtor without counsel who can be paid is unlikely to be able even to attempt reinstatement.

The Supreme Court addressed a similar issue in a different context in *Lamie v. United States Trustee*.[215] In that case, counsel to a former Chapter 11 debtor in possession continued to provide services to the estate after the case was converted to one under chapter 7.[216] When counsel moved for compensation under section 330, his motion was denied.[217] This issue ultimately reached the Supreme Court, which held that section 330 authorized only counsel to the trustee to seek compensation out of

215 540 U.S. 526 (2004).

216 *Id.* at 529.

217 *Id.*

the estate.[218] Conversion, the Court reasoned, ended the debtor's tenure as trustee and therefore ended counsel's position as a professional retained by the trustee.[219] As a result, if debtor's counsel wished to be compensated out of the estate for postconversion services, counsel needed to be retained by the Chapter 7 trustee going forward.[220]

When a Subchapter V debtor is removed as debtor in possession, however, the potential gap in the statute creates a more serious obstacle to the successful resolution of the bankruptcy case. On the one hand, only the Subchapter V debtor may propose a plan. Drafting and filing a plan requires the assistance of counsel. But because of *Lamie,* there are potential challenges to compensating the Subchapter V debtor's counsel out of the estate for doing this necessary work. The Subchapter V trustee's role is limited is in the case of a debtor who is dispossessed under 11 U.S.C. § 1185(a).

The current legal landscape provides no clear path to allowing debtor's counsel to continue to be compensated following dispossession.[221] Despite the expanded powers provided under 11 U.S.C. § 1183(b)(5), if the debtor ceases to be a debtor in possession, the Subchapter V trustee's role is not such that the trustee can step into the shoes of advisor to the debtor.

Some courts are identifying potential statutory solutions to this problem, but each is subject to potential counterarguments.[222] In *In re ComedyMX, LLC*, the court articulated three possibilities for compensating the dispossessed debtor's counsel.[223] First, the court stated that the fees may be awardable on the basis that they are actual, necessary costs and expenses of preserving the state under section 503(b)(1)(A).[224] Second, the court argued that an award of fees could be appropriate under section 330 because, as prior counsel to the debtor, the firm is a professional person employed under section 327.[225] As a third alternative, the court said that the effect of section 1189 is to leave a debtor that has been removed from possession under section 1185(a) with certain limited obligation of a trustee, such that the disposed debtor remains entitled to retain counsel under section 327(a) to carry out this role.[226] As no party objected to compensating the removed debtor's counsel for actual necessary work performed for the benefit of the estate after the dispossession date, the court did not address the counterarguments to these potential solutions.[227]

Throughout the Task Force study, bankruptcy judges and practitioners emphasized to the Task Force the need for a statutory amendment to the Bankruptcy Code that would ensure the debtor's counsel is

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218 *Id.* at 537.

219 *Id.* at 532, 537.

220 *Id.* at 538.

221 *See, e.g., In re NIT West Coast, Inc.*, 638 B.R. 441 (Bankr. E.D. Cal.) (citing *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (denying compensation for services provided by counsel after debtor was removed as debtor in possession).

222 *Written Statement of Hon. Judge Goldblatt*, *supra* note 95, at 5–6 (explaining the problems with the possible statutory workarounds).

223 *In re ComedyMX, LLC*, No. 22-11181, ECF No. 153, Order Regarding the Motion to retain Leech Tishman Fuscaldo & Lampl as Attorneys for the Debtors Effective as of the Petition Date, ¶5 (Bankr. D. Del. April 25, 2023).

224 *Id*.

225 *Id*.

226 *Id*.

227 *Id*.

properly compensated for the work it does on behalf of the debtor in filing a plan in this context. The Task Force agrees that statutory clarity is necessary here and proposes an amendment to the Bankruptcy Code. The Task Force's proposed amendment, however, is not intended to disrupt current practices to ensure that the debtor's counsel can be compensated for providing actual and necessary services that are beneficial to the estate.

The Task Force proposes amending section 1185 by adding subsection (c) which allows the dispossessed debtor to apply for the court's approval to retain counsel who would be treated and compensated as an estate professional.

Retention would not be authorized in all circumstances. The proposal enumerates limited circumstances in which the debtor would be permitted to retain professionals, subject to court approval after notice and hearing. Under proposed section 1185(c)(1), the court could approve the debtor's request to retain professionals if:

1. there is a reasonable likelihood that the debtor can file a confirmable plan of reorganization within a reasonable period of time and the debtor requires the services of a professional to do so;
2. the debtor requires the services of a professional to perform any duties of the debtor; or
3. the debtor's employment of a professional is in the best interests of creditors and the estate.

The first situation recognizes that in Subchapter V only the debtor may file a plan and the Bankruptcy Code should provide for retention of the debtor's counsel following removal of the debtor so that the debtor can try to file a confirmable plan and reorganize under the subchapter. The latter two situations are meant to provide flexibility for situations where the debtor needs the assistance of counsel for some purpose other than filing a plan. These situations give courts discretion to determine that the debtor may need to retain a professional in other circumstances in order to reorganize under the subchapter.

Proposed section 1185(c)(2) provides for the compensation of professionals the court permits the debtor to retain under proposed section 1185(c)(1). The court may approve reasonable compensation for actual, necessary services rendered by the professional and by any paraprofessional person employed by such person and reimbursement for actual, necessary expenses based on a consideration of the necessity and benefit of such services and the other factors set forth in section 330. Proposed section 1185 (c)(3) makes it clear that the court may limit the scope of the services approved under section 1185 (c)(1) and compensated under section 1185 (c)(2).

Proposed Section 1185(c)

1185(c) Retention and compensation of professionals.*—After removal of the debtor in possession, the court may authorize the employment and compensation of professionals by the debtor in accordance with this subsection.*

(1) The court after notice and a hearing may approve the debtor's employment of one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, if the court finds—

> (A) That there is a reasonable likelihood that the debtor can file a confirmable plan of reorganization within a reasonable period of time and the debtor requires the services of a professional to do so;
>
> (B) The debtor requires the services of a professional to perform any duties of the debtor; or
>
> (C) The debtor's employment of a professional is in the best interests of creditors and the estate.

(2) The court after notice and a hearing may award to a professional employed under this subsection reasonable compensation for actual, necessary services rendered by the professional and by any paraprofessional person employed by such person and reimbursement for actual, necessary expenses based on a consideration of the necessity and benefit of such services and the other factors set forth in section 330.

(3) The court may limit the scope of the services of any such professional.

VI. Plan and Confirmation Issues

A. Plan and Confirmation Deadlines

Recommendation and Supporting Principles:

Recommendation

The Task Force declines to recommend a statutory amendment that sets a deadline for plan confirmation.

Supporting Principles

- The Task Force is concerned that imposing a fixed deadline could prematurely end cases for viable smaller companies that need more time to negotiate and finalize the terms of the plan.
- The Task Force encourages the use of the Bankruptcy Code's existing tools to dispose of cases that would not benefit from such additional time. Tools such as motions to modify the automatic stay or to convert/dismiss the case remain available to creditors, and courts can use status hearings, scheduling orders, and show cause orders, among other things, to keep cases moving.
- Plans that are filed solely to satisfy the 90-day deadline in section 1189(b) and do not comply with the minimum requirements set forth in section 1190 are incomplete and improper placeholder plans. A plan that is a good faith proposal containing adequate and reasonably complete information in compliance with section 1190 is not an improper placeholder plan, even if the plan is not final, may be nonconsensual, or the debtor and its counsel may contemplate modifications to the plan before confirmation.

Subchapter V is designed to be a streamlined and accelerated process.[228] The Subchapter V plan process, as codified, reflects this objective. The Bankruptcy Code offers general guidance, including a relatively short deadline for filing the plan of reorganization, and provides the court appropriate flexibility to set other deadlines and requirements for solicitation and confirmation of the plan.[229]

228 *In re Ikalowych*, 629 B.R. 261, 266 (Bankr. D. Colo. 2021) (observing that Subchapter V is "designed to streamline the reorganization and rehabilitation process"); *In re Trepetin*, 617 B.R. 841, 846 (Bankr. D. Md. 2020) ("Congress contemplated an accelerated process for Subchapter V cases."); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 340 (Bankr. S.D. Fla. 2020) ("Subchapter V by its very nature is intended to be an expedited process."); *In re Online King LLC*, 629 B.R. 340, 350 (Bankr. E.D.N.Y 2021). (Subchapter V "is a fast-tracked process aimed at giving the qualifying debtor a less expensive and accelerated path to reorganize...").

229 The Task Force heard testimony about prepackaged Subchapter V bankruptcies as a mechanism for further accelerating reorganization for smaller businesses, but because the topic is so new, the Task Force did not have sufficient information to study the issue. *See*

More specifically, section 1189(b) requires the debtor to file a plan no later than 90 days after the petition.[230] The court may allow for more time to file the plan if the debtor can show that the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.[231]

No deadline for confirmation exists. Once a debtor has filed a plan, it can be modified at any time before confirmation.[232] This statutory scheme raises two problems. First, without a deadline for confirmation, a Subchapter V case may languish instead of moving quickly as contemplated. Second, some practitioners file incomplete or bare-bones plans solely to meet the 90-day statutory deadline with the expectation that they can remedy the deficiencies prior to the confirmation hearing. Some practitioners refer to such plans generally as "placeholder plans." The case law expresses concerns about the inappropriate use of placeholder plans by practitioners where those plans are incomplete or facially deficient.[233]

The Task Force heard testimony suggesting that the imposition of an outside deadline for plan confirmation would ensure cases move quickly, consistent with congressional intent.[234] That approach would mirror, in many ways, the 45-day deadline imposed on regular small business cases under Chapter 11.[235]

The Chapter 11 Commission, however, recommended elimination of the deadline for plan confirmation in non-Subchapter V small business cases.[236] The Chapter 11 Commission debated the utility of firm deadlines in the context of small business cases, balancing the need to "assess the viability

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Written Statement of Eyal Berger, *supra* note 44, at 4–5; Christopher Hampson & Jeffrey Katz, *The Small Business Prepack: How Subchapter V Paves the Way for Bankruptcy's Fastest Cases*, 92 Geo. Wash. L. Rev.— (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4595995. The concept of a "prepackaged" or "pre-arranged" Subchapter V plan may warrant further study as the law develops.

230 11 U.S.C. § 1189(b). Courts agree the debtor has the burden of proof to demonstrate grounds that justify an extension of time under section 1189(b). *In re: Signia, Ltd*, No. 23-14384, 2024 WL 331967, at *3 (Bankr. D. Colo. Jan. 29, 2024); *Online King*, 629 B.R. at 349 ("the burden of proof rests with the debtor to establish the limited circumstances under which a court may grant an extension of the statutory deadline."); *In re Excellence 2000, Inc.*, 636 B.R. 475, 480 (Bankr. S.D. Tex. 2022) (same); *In re HBL SNF, LLC*, 635 B.R. 725, 729 (Bankr. S.D.N.Y. 2022) (same); *In re Trinity Legacy Consortium, LLC*, No. 22-10973-j11, 2023 WL 6217784, at *3 (Bankr. D.N.M. Sept. 25, 2023) (same); *Seven Stars*, 618 B.R. at 340 (same).

231 11 U.S.C. § 1189(b).

232 *Id*. §1193(a) (allowing the debtor to modify the plan at any time before confirmation).

233 *See In re United Safety and Alarms, Inc.*, Case No. 23-14861-SMG, 2024 WL 973674, at *1 (Bankr. S.D. Fla. Mar. 6, 2024) (converting Subchapter V case to Chapter 7 in part because the debtor's plan did not contain any liquidation analysis or projections, as required by section 1190(1), and was therefore incomplete and deficient); *In re Signia, Ltd*, Case No. 23-14384-TBM, 2024 WL 331967, at *1 (Bankr. D. Jan. 29, 2024) ("[S]ome debtors and their counsel manipulate the deadline by filing bogus placeholder plans of reorganization on the ninetieth day. Such plans are obviously deficient (many containing blanks, inadequate information, and missing financials) and have no chance of confirmation. However, they seem to be filed in an attempt to pay lip service to the 90-day Section 1189(b) requirement while obviously skirting the import of the statute.").

234 *Written Statement of Hon. Michael E. Romero*, *supra* note 23, at 4–5 ("It has been my experience that in many. . . cases, a bare-bones or 'placeholder' plan is filed merely to satisfy the statutory requirement. . . . If there are no adverse creditors nor an engaged Sub V Trustee, the matter tends to languish unless the Court actively monitors the case. This is the very antithesis of the speed and cost savings goals of the Subchapter. If my experience is similarly shared by other courts, perhaps the Task Force might consider adding an outside date by which confirmation of a plan must occur."); *see also* Jonah R. Hall, *A Creditor's Kerfuffle: How the SBRA Harms Creditors in Small Business Cases*, 25 N.C. Banking Inst. 595, 612 (2020) (observing that the lack of a plan confirmation deadline allows the debtor to hold up the case through modifications to the plan so long as it remains unconfirmed).

235 *Id*. § 1129(e) ("In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).").

236 Chapter 11 Commission Report, *supra* note 3, at 295 (describing testimony that the 45-day deadline for plan confirmation is "nearly impossible for small business debtors to achieve").

of the debtor earlier rather than later in the case" against "handcuffing debtors to artificial deadlines that might not facilitate the debtor's reorganization or serve the interests of the estate in the particular case."[237] The Chapter 11 Commission determined that the deadline was, on balance, detrimental to small business debtors and their creditors.[238]

After weighing the burdens against the benefit of imposing another statutory deadline, the Task Force agrees with the Chapter 11 Commission. A deadline for confirmation would reduce Subchapter V's flexibility and impose an artificial deadline without regard for the needs of a particular case. Such a deadline could prematurely end cases for viable smaller companies that need more time to negotiate and finalize the terms of the plan.

The Task Force also believes that the Bankruptcy Code currently provides more than adequate tools to the court and creditors in cases that would not benefit from such additional time. Tools such as motions to modify the automatic stay or to convert/dismiss the case remain available to creditors, and courts can use status hearings, scheduling orders, and show cause orders, among other things, to keep cases moving.[239] Overall, the Task Force is concerned that imposing a fixed deadline for confirmation or a fixed standard for determining such a deadline could adversely affect reorganization prospects for Subchapter V debtors.

The Task Force study also revealed different views about the practice of filing "placeholder plans." But the differences seem to be based on the nature and content of these plans and not necessarily what has been coined a "placeholder plan."

Some debtors file a plan solely to satisfy the 90-day statutory deadline in section 1189(b), but the plan filed is incomplete or deficient rather than a substantive reflection of the debtor's proposed reorganization. Other debtors may file a plan by the deadline that sets forth adequate information and contains substantive terms for parties to evaluate, but the debtor has not yet reached agreement with the creditors or completed discussions with the Subchapter V trustee.[240] Both of these kinds of plans are often generically referred to as placeholder plans but in the latter instance, that may be a misnomer. The fact that a plan is nonconsensual or not final, or that the debtor and their counsel anticipate further negotiations and modifications to the plan should not be determinative. The Task Force offers the

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237 *Id.*

238 *Id.*

239 Federal Rule of Bankruptcy Procedure 3017.2 authorizes courts to fix various deadlines in Subchapter V cases in which there is no disclosure statement including for notice and transmission of the plan, voting, and confirmation. Fed. R. Bankr. P. 3017.2. This rule was added to authorize the bankruptcy court to set times and dates appropriate to the circumstances of each case. Some districts have developed a template or form proposed order for setting such deadlines under Rule 3017.2. *See, e.g.,* Order on Debtor's Motion to Set Deadlines Pursuant to Interim Rule 3017.2 (setting deadlines for voting on the plan and confirmation); *Written Statement of Hon. Craig Gargotta, supra* note 95, at 3 (describing proposed local scheduling order developed to provide guidance to both the debtor and creditors as to when to vote and solicit ballots, and when confirmation of the plan will occur).

240 Among the functions of the status report is to initiate negotiations about the plan. *See* Section V.A *supra*. A nonfinal plan that complies with the requirements of Subchapter V may also serve the purpose of opening negotiations. Practitioners should be aware that some courts may prefer the debtor file a status report before any plan is filed, and where no such preference, whether they use the status report or a substantive, nonfinal plan to open negotiations is a strategic decision that might turn on the complexity of the case and how many parties are involved.

following guidance to distinguish between the kinds of plans that a debtor may file within the time provided by section 1189.

- The debtor must comply with the Bankruptcy Code's 90-day deadline. Filing a plan before the ninetieth day ensures that the debtor has met that requirement.
- The plan filed must also comply with the requirements stated in section 1190, for instance, by including a brief history of the business operations, a liquidation analysis, and projections indicating the ability of the debtor to make payments under the proposed plan, among others.[241] The debtor may modify the plan any time before confirmation.[242]
- Filing a plan that is incomplete or deficient or otherwise noncompliant with section 1190 is inappropriate. But the plan does not need to be the debtor's final plan, reflecting full negotiations with creditors, or even a plan that has creditor support.

The Task Force acknowledges the concerns articulated about placeholder plans that are filed solely to satisfy the 90-day deadline without reflecting the substantive terms of the debtor's proposed reorganization. Such plans are improper placeholder plans because they do not comply with section 1190. In addition, practitioners should not use the practice of filing a placeholder plan as a substitute for requesting an extension of time under section 1189(b).

However, a debtor and their counsel should not be discouraged from filing a plan early in the case or with the petition, or one just prior to the 90-day deadline that is nonconsensual, even if the debtor and their counsel contemplate ongoing negotiations and preconfirmation modifications. The critical inquiry is whether the plan filed is a good faith proposal that contains adequate and reasonably complete information in compliance with section 1190. Such a plan is not appropriately called a placeholder plan; rather, such a plan sets forth the debtor's preferred reorganization strategy.

Based on the foregoing, the Task Force declines to recommend a statutory amendment that sets a deadline for plan confirmation.

241 11 U.S.C. § 1190.

242 *Id*. § 1119(3)(a).

B. Accounting for the Silent Class

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends an amendment to section 1191(a) to address the existing challenge of achieving a consensual confirmation where a class of creditors neither objects to the plan nor votes to reject the plan. In this situation, the class is silent, and under the current Bankruptcy Code, the plan cannot be confirmed as a consensual plan even though technically, the plan is not nonconsensual.

Supporting Principles:

- Subchapter V has two types of confirmation: consensual (section 1191(a)) and nonconsensual (section 1191(b)), also referred to as “cramdown” confirmation. In a Subchapter V case, the consequences of confirmation are different depending on whether the confirmation is consensual or cramdown.
- One of the statutory requirements for consensual confirmation is acceptance by all impaired classes. An obstacle to consensual confirmation occurs when all actively involved parties have agreed on a plan but one (or more) class of creditors have neither voted nor objected to confirmation. The class is silent.
- Unless the court deems the failure to object an acceptance of the plan or declines to count the nonvoting class—two approaches courts have developed to address the silent class—the plan is nonconsensual under the Bankruptcy Code.
- The Task Force believes that a silent class should not prevent confirmation of a consensual plan because, in this situation, the plan is effectively and practically consensual even if not statutorily consensual.
- Yet the Task Force also thinks that the absence of an affirmative vote on the plan should not allow the debtor to avoid payment of the minimum that Subchapter V requires for confirmation when an impaired class has not affirmatively accepted the plan. Therefore, with regard to the silent class, the plan must comply with the cramdown requirements of section 1191(b).
- Thus, the Task Force recommends amending section 1191(a) to permit confirmation notwithstanding failure to comply with section 1129(a)(8) because of a silent class if the plan meets the requirements of section 1191(b) with regard to the silent class.

Subchapter V has two types of confirmation: consensual and nonconsensual, also referred to as "cramdown" confirmation. Section 1191(a) provides for consensual confirmation and states that "[t]he court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met."[243] Confirmation under section 1191(a) is considered "consensual" if all impaired classes of creditors have accepted the plan pursuant to section 1129(a)(8).[244]

Section 1191(b) provides for nonconsensual confirmation. Under section 1191(b), a Subchapter V debtor must demonstrate that the plan the plan does not discriminate unfairly and is "fair and equitable" with respect to each impaired class that has not accepted the plan.[245] If creditors do not consent to the plan, Subchapter V requires that debtors commit their projected disposable income to creditors for a period of three to five years.[246]

In a standard chapter 11 case, the consequences of confirmation are the same, whether the plan is consensual or cramdown. The timing and scope of the discharge and other consequences of confirmation are the same.

In a Subchapter V case, however, the consequences of confirmation are different depending on whether the confirmation is consensual or cramdown. The discharge that a debtor receives in a Subchapter V case and its timing depend on whether the plan confirmed is consensual or not. If the plan is consensual, then the debtor's discharge is governed by section 1141(d) which would also apply in a standard chapter 11 case.[247] A Subchapter V debtor with a confirmed consensual plan receives the discharge immediately upon confirmation.[248] When the court confirms a cramdown plan, the Subchapter V debtor instead receives a discharge under section 1192 "as soon as practicable" after the debtor completes plan payments.[249]

Other provisions of Subchapter V are affected by cramdown confirmation. If the plan is not consensual, then the trustee remains in place to administer the plan payments unless the plan or the order confirming the plan provides otherwise.[250] In addition, the postpetition property of a debtor that confirms a nonconsensual plan remains property of the estate, whereas with a consensual plan, the debtor retains such property outside of the estate.[251] The rules for postconfirmation modification differ depending on whether the court has confirmed a consensual plan or a cramdown plan.[252] The debtor may modify a consensual plan for only a short period of time before the plan is substantially consummated,

243 *Id.* § 1191(a).

244 *See id.*

245 *Id.* § 1191(b).

246 *Id.* § 1191(c)(2), (d).

247 *See id.* § 1191(a), 1141(d).

248 *See id.* 1141(d).

249 *Id.* §§ 1181(c), 1192.

250 *Id.* § 1194(b).

251 *Id.* § 1186.

252 *See id.* § 1193.

which typically occurs upon commencement of payments under the plan.[253] In contrast, a cramdown plan may be modified at any time postconfirmation during the plan commitment period.[254]

Subchapter V encourages consensual confirmation. The Bankruptcy Code charges the Subchapter V trustee with the unique duty to facilitate development of a consensual plan, a duty that does not exist under any other chapter of the Bankruptcy Code.[255] Subchapter V debtors are incentivized to pursue a consensual plan because the consequences of a cramdown plan are less favorable.[256]

But an obstacle to consensual confirmation occurs when all actively involved parties have agreed on a plan but one or more class of creditors have neither voted nor objected to confirmation. In this circumstance, the plan is arguably consensual because no one opposes it. Nevertheless, one of the statutory requirements for consensual confirmation is affirmative acceptance by all impaired classes.[257] Thus, the silent class prevents the plan from being consensual as a statutory matter.

Courts have developed three approaches to dealing with the silent class.[258] The prevailing view is that affirmative acceptance of the plan is required. These courts infer rejection from the silence, and confirmation of the plan when a class is silent must be decided under the cramdown provisions in section 1191(b).[259]

A second approach deems the failure to object an acceptance of the plan. Such plans may still be confirmed as consensual under section 1191(a).[260] Deemed acceptance is based on a pre-SBRA case decided in the Tenth Circuit, *Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.)*.[261] The Tenth Circuit concluded that when no vote is cast in an impaired class that the class should be deemed to have implicitly accepted the plan.[262] Many of the courts adopting *Ruti-Sweetwater*'s "deemed acceptance" rule in Subchapter V cases are in the Tenth Circuit.[263]

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253 *Id.* § 1193(b). *See id.* § 1101(2) (defining "substantial consummation").

254 *Id.* § 1193(c).

255 *Id.* § 1183(b)(7); *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022) (noting that this duty is "unique" to a Subchapter V trustee).

256 *In re Franco's Paving LLC*, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023) ("Subchapter V is intended to encourage consensual plans confirmed under § 1191(a).").

257 *Id.* §§ 1191(a), 1128(a)(8).

258 *In re Hot's Power Wash, Inc.*, 655 B.R. 107, 115 (Bankr. S.D. Tex. 2023) ("Courts have generally followed one of three approaches when presented with a plan in which there is a non-voting impaired creditor class: (a) a nonvoting class is deemed to have accepted the plan for purposes of § 1129(a)(8); (b) a nonvoting class is deemed to have rejected the plan for purposes § 1129(a)(8); and (c) a nonvoting class is not counted for purposes of § 1129(a)(8).").

259 *See, e.g., In re Creason*, 2023 WL 2190623, at *2 (Bankr. W.D. Mich. Feb. 23, 2023) (rejecting "deemed acceptance" as irreconcilable with the formal requirements of Federal Rule of Bankruptcy Procedure Rule 3018(c) governing the "form of acceptance or rejection"). Even though no party had balked at "deemed acceptance" as a practice, the bankruptcy court rejected *Ruti-Sweetwater*'s holding *sua sponte*, calling it a "minority position," and quoted a leading bankruptcy treatise's description of the decision as unfortunate. *See id.* at *2 (citing 7 Collier on Bankruptcy ¶ 1129.02 (16th ed. 2022)).

260 *See, e.g., In re Jaramillo*, Case No. 21-10306-t11, 2022 WL 4389292, at *2 (Bankr. D.N.M. Sept. 22, 2022).

261 836 F.2d 1263 (10th Cir. 1988).

262 *Id.*

263 *See, e.g., In re Jaramillo*, 2022 WL 4389292, at *2; *In re Robinson*, 632 B.R. 208, 220 (Bankr. D. Kan. 2021) (cited and applied "*Sweetwater*'s binding precedent that a nonobjecting and nonvoting creditor is deemed to have accepted a chapter 11 plan under § 1129(a)(8)"); *In re Lost Cajun Enterprises, LLC*, 634 B.R. 1063, 1072–73 (Bankr. D. Colo. 2021) (nonvoting creditor deemed to have accepted the plan in a subchapter V case); *In re Olson*, 2020 WL 10111637, at *2 (Bankr. Utah Sept. 16, 2020) (same); and *In*

Some of those courts also articulate independent reasons, separate from precedent, for applying the "deemed acceptance" rule in Subchapter V cases. These reasons are based on policy and practicality. One explained that the "deemed acceptance" rule promotes Subchapter V's legislative goal to streamline the reorganization process for smaller businesses.[264] Another pragmatically observed that certain unsecured creditors, such as the IRS, credit card companies, or others often do not vote in Subchapter V cases and such nonvoting creditors should not be permitted to derail the confirmation process.[265]

A third approach has developed.[266] This approach disregards the silent class for purposes of 1129(a)(8) because it is mathematically impossible to determine acceptance or rejection when no vote is cast in the class.[267] These courts observe that section 1126, which governs acceptance of a plan, generally requires at least two-thirds in amount of the claims in a class and one-half in number of claimants in a class vote to accept a plan.[268] Noting that the legislative history of section 1126 specifies that mathematical calculation requires the number of accepting votes be divided the total votes cast in class,[269] these courts explain that when no vote is cast, the equation cannot be solved because the denominator is zero.[270] These courts conclude that the result of the calculation for a nonvoting class is "absurd" and not contemplated by Congress, which based on the legislative history, "presumed the existence of at least one vote in each class."[271]

The Task Force heard ample testimony about the challenges of achieving consensual confirmation when a class of creditors remains silent and neither objects nor votes to accept or reject a plan.[272]

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re Desert Lake Group, LLC, No. 20-22496, ECF 114 (Bankr. D. Utah Sept. 30, 2020) (unpublished) (concluding that all impaired classes of claims and interests had accepted the debtor's plan — either by affirmatively voting to accept the plan or were deemed to have accepted the plan, by not objecting to confirmation and not returning a ballot).

264 *See, e.g.*, *In re Robinson*, 632 B.R. at 220 (following deemed acceptance rule for nonobjecting creditors to satisfy section 1191(a)'s consensual confirmation requirement).

265 *In re Jaramillo*, 2022 WL 4389292, at *3 ("Applying *Ruti-Sweetwater's* deemed acceptance rule to subchapter V cases is consistent with the realities of modern bankruptcy practice for individuals and small businesses, where many general unsecured creditors (*e.g.,* credit card companies) do not vote. There is nothing wrong with not voting, but the confirmation process should not be derailed as a result.").

266 *In re Franco's Paving LLC*, 654 B.R. at 110 (explaining that the court was not limited to a "binary choice between a 'deemed acceptance' and a 'deemed rejection' when an impaired class is silent").

267 *Id*. ("In a situation where no votes are cast, the . . . the class should not be counted for purposes of § 1129(a)(8)."); *In re Hot'z Power Wash, Inc.,* 655 B.R. 107, 118 (Bankr. S.D. Tex. 2023) ("[S]ince the application of the mathematical calculation in § 1126(c) is absurd as applied to a nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditors fails to cast a ballot, that class will not be counted . . . .").

268 11 U.S.C. § 1126 (c) ("A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . .").

269 *In re Franco's Paving LLC*, 654 B.R. at 109 n.1 (quoting. Rep. No. 95-989 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5909 ("[t]he amount and number are computed on the basis of claims actually voted for or against the plan"); *In re Hot'z Power Wash, Inc.,* 655 B.R. at 117 (same).

270 *In re Hot'z Power Wash, Inc.,* 655 B.R at 117 ("dividing zero by zero was absurd and could not have been intended by Congress"); *In re Franco's Paving LLC*, 654 B.R. at 109 ("In practical terms, the equation cannot be solved.").

271 *In re Hot'z Power Wash, Inc.,* 655 B.R at 118; *In re Franco's Paving LLC*, 654 B.R. at 110.

272 *See Written Statement of Craig Geno, supra* note 186, at 1 ("As another Subchapter V Trustee has written to the Task Force, the vast majority of my cases are "technically" non-consensual—due to lack of creditor involvement in voting—but they are more "non-technically" consensual because the actual participants either vote for the plan or resolve their claims/objections."); *Written Statement of Rebecca Redwine*, *supra* note 185, at 4 ("One concern I have with current Sub-V law is the risk of subjecting a debtor to cramdown due to the inability to obtain a ballot. After conferring with counsel both in my district and throughout the state, this is a common problem. This issue has arisen in multiple cases where the SBA or another government entity is a party in the case."); *Written Statement of Hon. Craig Gargotta, supra* note 95, at 2 ("[T]he biggest challenge that debtor's counsel has in obtaining confirmation of a plan is an affirmative vote in support of the plan."); *Written Statement of Geoff Groshong*, *supra* note 110, at 2

The Task Force believes that a silent class should not prevent confirmation of a consensual plan. In such a situation, the plan is effectively and practically consensual even if not statutorily consensual. Where active parties have negotiated terms and do not require continued trustee monitoring, deferral of discharge, or provisions to address property of the estate, the silent class should not require a different result. [273]

Yet the Task Force also thinks that the absence of an affirmative vote should not result in the ability of a debtor to avoid payment of the minimum that Subchapter V requires for confirmation when a class has not affirmatively accepted the plan. Therefore, with regard to the silent class, the plan must comply with cramdown requirements of 1191(b).

The Task Force recommends amending section 1191(a) to permit confirmation notwithstanding failure to comply with 1129(a)(8) with regard to a silent class if the plan meets the requirements of 1191(b) with regard to that silent class. The proposed change does not diminish protections for the silent class or change its substantive rights. The change simply clarifies the postconfirmation consequences for the Subchapter V debtor who would have had a purely consensual plan but for the silent, nonvoting, nonobjecting class. In particular, the effects of the proposed change to permit consensual confirmation in the silent class situation are (1) elimination of trustee monitoring (and related expense) after confirmation;[274] (2) immediate discharge of the debtor; and (3) elimination of the debtor's postconfirmation modification rights.

This proposed change is in line with the objectives of Subchapter V, namely to streamline reorganization for smaller businesses without altering the balance of protections and rights afforded creditors. The proposed change does not preclude creditors from objecting to, or voting on, the plan and may in fact encourage creditor participation. Indeed, the statutory recognition of a creditor's existing ability to object to the plan (even if the creditor does not vote) may promote more creditor engagement. Regardless, the proposed change would not alter the standards for confirmation and creditors would continue to receive certain protections under section 1191.

In conclusion, the Task Force recommends amending section 1191(a) to permit confirmation notwithstanding failure to comply with section 1129(a)(8) with regard to a silent class if the plan meets the requirements of section 1191(b) with regard to that silent class. The proposed statutory change is below.

Section 1191(a) currently states: **"**The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met."[275]

(explaining that a key reason for nonconsensual plans in cases in which he serves as Subchapter V trustee is the failure of a creditor, such as the Small Business Administration, to vote).

273 *See In re Franco's Paving LLC*, 654 B.R. at 110 ("From a practical perspective, a creditor that agrees to a debtor's plan may express its consent by affirmatively voting for a plan or by simply choosing not to file an objection. The outcome should be no different, as the overarching policy of Subchapter V is satisfied.").

274 *See In re Creason,* Case No. 22-00988-swd, 2023 WL 2190623 (Bankr. W.D. Mich. Feb. 23, 2023) (allowing the debtor, rather than requiring the trustee, to disburse plan payments even though the plan confirmed was nonconsensual because the plan was not consensual due to the nonparticipation of a single creditor in their own class).

275 11 U.S.C. § 1191(a).

The Task Force recommends the following proposed amendment to subsection (a).

§ 1191. Confirmation of plan

(a) Terms. – The court shall confirm a plan under this subchapter only if *either* –

(1) all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met; *or*

(2) (A) all of the requirements of section 1129(a), other than paragraphs (8), (10), and (15) of that section, of this title are met;

(B) all of the requirements of section 1191(b) are met; and

(C) no class of claims or interests that is impaired under the plan votes to reject the plan and no creditor within such class objects to confirmation of the plan.

C. Scope of the Discharge in Nonconsensual Entity Plans

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends a statutory amendment to section 1192 to clarify the scope of a discharge for a corporate (or other entity) debtor with a nonconsensual confirmed plan.

Supporting Principles

- Disagreement has emerged in the case law and among commentators about whether the exceptions to discharge in section 523(a) apply to the discharge a corporation (or other entity) receives under section 1192 in a Subchapter V case when the plan is confirmed as nonconsensual under section 1191(b). The disagreement turns on how sections 1192(2) and 523(a) interact.
- After examining the case law's competing interpretations and weighing the testimony on this issue, the Task Force finds that a corporation's (or other entity's) discharge under a nonconsensual Subchapter V plan should not be subject to the section 523(a) exceptions.
- In particular, the Task Force proposes adding a new subsection (2) to section 1192 which makes it clear that the section 523 exclusions from the discharge apply only in Subchapter V cases with individual debtors who have nonconsensual confirmed plans.

- The proposed change aligns the Subchapter V discharge with Congressional policy and Subchapter V's legislative history. In addition, the proposed change does not alter the balance of creditor protections that currently exist for nonconsensual plans; it merely clarifies existing Congressional intent.
- The Task Force also recommends an additional amendment to section 1192 to make section 1141(d)(6) apply to a Subchapter V debtor with a plan confirmed nonconsensually under section 1191(b). Section 1141(d)(6) excepts certain fraudulent False Claim Act and tax claims from the discharge of a corporation under § 1141(d)(1) and, therefore, applies to a Subchapter V discharge after confirmation of a consensual plan. The proposed amendment makes section 1141(d)(6) applicable to the discharge of a Subchapter V debtor after nonconsensual confirmation.

Two provisions govern the discharge of the Subchapter V debtor: sections 1141(d) and 1192. Which provision applies depends on the whether the debtor's confirmed plan is consensual or nonconsensual. If the plan is consensual and confirmed under section 1191(a), then section 1141(d) governs the debtor's discharge.[276] If the plan is nonconsensual and confirmed under section 1191(b), then section 1192 controls the scope of the Subchapter V debtor's discharge entered after completion of payments.[277]

Disagreement has emerged in the case law and among commentators about whether the exceptions to discharge in section 523(a) apply to the discharge a corporation (or other entity) receives under section 1192 in a Subchapter V case when the plan is confirmed as nonconsensual under section 1191(b).[278] The disagreement turns on how sections 1192(2) and 523(a) interact.[279]

Section 1192 provides that "any debt—of the kind specified in section 523(a)" is excepted from discharge when a plan is confirmed nonconsensually under section 1191(b).[280] In turn, section 523(a) provides that "[a] discharge under section 727, 1141, *1192*, 1228(a), 1228(b), or 1328(b) of this title

276 11 U.S.C. § 1141(d).

277 *See id*. § 1192.

278 For a thorough explanation and examination of the competing interpretations and the reasons supporting them, *see* Hon. Paul W. Bonapfel & Robert Schaaf, *Do 523(a) Exceptions to Discharge Apply to the Discharge of a Corporation in a Subchapter V case after "Cramdown" Confirmation under section 1191(b)?*, 32 No. 4. Norton J. Bankr. L. & Prac. NL Art. 1 (Dec. 2023). *See also Subchapter V discharge*, 4 Norton Bankr. L. & Prac. 3d § 107:20; *compare* James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, Norton Bankr. L Adviser (exceptions are applicable to discharge of Subchapter V entity debtor) with Richard P. Cook, *Discharges in Subchapter V: What Has Changed? What Remains the Same? Are Elephants Hiding in Mouseholes?*, 41-Jun Am. Bankr. Inst. J. 24 (Jun. 2022) (exceptions should not be applicable to discharge of Subchapter V entity debtor).

279 *Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols., LLC)*, 651 B.R. 862, 866 (B.A.P. 9th Cir. 2023) ("Facially, these sections appear to be in conflict because § 523(a) refers to individual debtors, while §1192 provides for discharge of both individual and corporate debtors and does not distinguish between them when excepting debts "of the kind specified in section 523(a)"); *Nutrien Ag Sols., Inc. v. Hall (In re Hall)*, 651 B.R. 62, 67 (Bankr. M.D. Fla. 2023) ("[t]he two sections ostensibly conflict"); *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337, 341 (Bankr. W.D. Tex. 2022).

280 11 U.S.C. § 1192(2).

does not discharge an *individual debtor* from any debt" enumerated in section 523(a).[281] Section 1192(2) does not expressly limit the applicability of the section 523(a) exceptions to individuals. Section 523(a), however, does. The implication of this language is that section 1192(2)'s reference to debts "of a kind specified" in section 523(a) includes only debts excepted by 523(a), which are only debts of individuals.[282]

Most courts and the one Bankruptcy Appellate Panel that have considered the issue have reached the same conclusion: Section 1192 does not make Section 523(a) exceptions to discharge for individual debtors applicable to entity Subchapter V debtors with nonconsensual confirmed plans.[283] Two courts and the Fourth Circuit, however, have ruled that section 523(a) applies both to individuals and corporations receiving a discharge under section 1192.[284] These courts examine the text of sections 1192(2) and 523(a) along with their context, chapter 11 policy, and legislative history to reach their contrasting conclusions.[285]

The Bankruptcy Appellate Panel and many of the courts that have addressed this issue agree that the text of section 523(a) unambiguously applies only to debts in individual cases.[286] Section 1192's reference to debts "of the kind specified in section 523(a)" means the list of 21 kinds of nondischargeable debts under section 523(a), but nothing in the text of section 1192 eliminates the "express limitation in the preamble of § 523(a) or otherwise expands its scope to corporate debtors."[287]

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281 *Id*. § 523(a) (emphasis added).

282 Even though the Bankruptcy Code does not define "individual," bankruptcy professionals understand the word to mean natural person. Moreover, the Bankruptcy Code clearly distinguishes between an "individual" and a "corporation."

283 *See Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols., LLC)*, 651 B.R. 862 (B.A.P. 9th Cir. 2023) (nondischargeability provisions were not applicable to corporate debtor with nonconsensual plan in Subchapter V of Chapter 11); *In re Ra Custom Design, Inc. v. Ra Custom Design, Inc*., No. 23-58494, 2024 WL 607716, at *1 (Bankr. N.D. Ga. Feb. 13, 2024) (holding that the exceptions to discharge under section 523(a) of the Bankruptcy Code do not apply to corporate debtors with a nonconsensually confirmed plan under Subchapter V); *In re R&W Clark Construction, Inc.,* 656 B.R. 628 (Bankr. E.D. Ill. 2024) (same); *BenShot, LLC v. 2 Monkey Trading, LLC (In re Monkey Trading, LLC)*, 650 B.R. 521 (Bankr. M.D. Fla. 2023) (same), notice of appeal filed, No. 23-12342 (11th Cir. July 19, 2023); *Nutrien Ag Sols., Inc. v. Hall (In re Hall),* 651 B.R. 62 (Bankr. M.D. Fla. 2023) (same); *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337 (Bankr. W.D. Tex. 2022) (same), notice of appeal filed, No. 23-60034 (5th Cir., Apr. 7, 2023); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, No. 21-31500, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022) (same); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021) (same); *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd*, 36 F.4th 509 (4th Cir. 2022) (same); *Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.)*, 626 B.R. 871 (Bankr. D. Md. 2021) (same).

284 *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 517-18 (4th Cir. 2022); *In re Duntov Motor Co., LLC*, No. 21-40348, ECF No. 27 (Bankr. N.D. Tex. Aug. 26, 2021) (ruling that section 1192(2) applies to except from discharge debts of the kind specified in section 523(a) for a Subchapter V debtor that is a limited liability corporation); *In re Tonka International Corporation*, Case No. 20-40731, 2020 WL 13881422, at *5 (Bank E.D. Tex. Sept. 16, 2020) ("Section 1192, by its terms, expands the exclusion from discharge of debts of a kind specified in § 523(a) 'beyond debtors who are individuals to include all subchapter V debtors.'" (quoting Collier on Bankruptcy § 1192.03)). One bankruptcy court ruled that a judgment for patent infringement against a corporation in a Subchapter V case was excepted from discharge under § 523(a)(6) as a willful and malicious injury without addressing whether section 523(a) exceptions apply to the discharge of a corporation or citing the applicable subchapter V discharge provision, 11 U.S.C. § 1192(2). *Concrete Log Systems, Inc. v. Better Than Logs, Inc. (In re Better Than Logs, Inc.*), 631 B.R. 670, 688–89 (Bankr. D. Mont. 2021).

285 *See* Bonapfel and Schaaf, *supra* note 284, Part IV.

286 *In re Off-Spec Solutions, LLC*, 651 B.R. at 867; *In re GFS Indus., Inc.*, 647 B.R. at 341-43 ("§ 1192(2)'s reference to § 523(a) only incorporates the list of nondischargeable debts, without expanding it. In other words, the language of § 1192(2) does not intend to except from discharge any debts that § 523(a) does not already except.").

287 *In re Off-Spec Solutions, LLC*, 651 B.R. at 867.

In *In re GFS Industries, LLC*, the court observed that the discharge provisions in section 1141(d) demonstrate that Congress knows how to distinguish dischargeability based on the type of debtor.[288] Section 1141(d)(6) states: "the confirmation of a plan does not discharge *a debtor that is a corporation* from any debt (A) of the kind specified in paragraph 2(A) or 2(B) of section 523(a) that is owed to a governmental unit..."[289] In contrast, section 1141(d)(2) states that the section 523(a) exceptions apply to the discharge of an individual.[290] Section 1192(2), the court reasoned, does not make this distinction.[291] "Thus, in order to determine to which debtors § 1192(2) refers, one must look to the language of § 523(a), which unequivocally applies only to individuals."[292]

In *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC* (*In re Cleary Packaging LLC*),[293] the Fourth Circuit examined the text of the two statutes and concluded that the text of section 1192 refers to the types of debts, not the types of debtors, and consequently, makes those types of debts nondischargeable to all debtors under § 1192.[294] The Fourth Circuit explained:

> [W]hile § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that the *debtors* covered by the discharge language of § 1192(2) – i.e., both individual and corporate debtors – remain subject to the 21 *kinds of debt* listed in § 523(a).[295]

The Fourth Circuit held that any tension between the language of section 523(a) addressing individual debtors and the language of section 1192(2) addressing both individual and corporate debtors could be resolved by explaining that the more specific language of section 1192(2)—dealing only with Subchapter V discharges—should govern over the more general provisions of section 523(a) that reference other discharges under the Bankruptcy Code.[296]

The Task Force concludes that a corporation's (or other entity's) discharge after nonconsensual confirmation should not be subject to the section 523(a) exceptions for the same reasons that Congress chose to provide for an exceptionless discharge of a corporation when it enacted Chapter 11 in 1978. Because the Task Force agrees with the majority rulings of the courts that this is the result under the

288 *In re GFS Industries, LLC*, 647 B.R. at 343.

289 11 U.S.C. §1141(d)(6) (emphasis added).

290 *Id*. §1141(d)(2).

291 *In re GFS Industries, LLC*, 647 B.R. at 343.

292 *Id*. at 343.

293 36 F.4th 509 (4th Cir. 2022).

294 *Id.* at 515.

295 *Id*. (original emphasis).

296 *Id*.

current statutory language of sections 1192(2) and 523(a) and properly reflects Congressional intent, an amendment is arguably not necessary.

Nevertheless, the Task Force recommends that Congress amend section 1192 to confirm existing policy and make it clear that the exceptions do not apply.

The proposed amendment reflects Congressional policy with regard to discharge of entities in Chapter 11 and Subchapter V's legislative history.

Congress enacted comprehensive bankruptcy reform in 1978, replacing the previous reorganization chapters of the Bankruptcy Act of 1898[297] (chapters X, XI, and XII), as amended by the Chandler Act of 1938,[298] with a unitary Chapter 11.[299] The discharge provisions in the repealed chapters varied.[300] Chapter X governed corporate reorganizations and allowed for discharge with a limited exception for priority tax debts, defined as those owed to the United States or a state within one year before the filing of the case that had not been assessed before confirmation or that arose postpetition.[301] Chapter XI, however, made the discharge subject to exceptions. Chapter 11 in the new Bankruptcy Code provided for a corporation to receive a discharge under § 1141(d)(1) upon confirmation of a plan without any exceptions if the corporation remained in business.

The legislative history makes it clear that Congress, in enacting Chapter 11 as part of the Bankruptcy Code in 1978, made an intentional policy choice when it chose to limit the section 523(a) exceptions to discharge in Chapter 11 cases to individuals. Congress made it explicit that a discharge eliminates all of a corporate debtor's debt.[302] Currently, the only exception to discharge of corporate debt is set forth in section 1141(d)(6), which Congress added to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[303] No other exceptions to discharge under section 523(a) have been incorporated into Chapter 11.

Nothing in the legislative history of the SBRA, consisting of the Report of the House Judiciary Committee, indicates that Congress intended for section 523(a) to apply to corporate (or other entity) debtors in Subchapter V cases.[304] It merely mentions that section 1192 excepts "any debt that is otherwise nondischargeable."[305] This language logically refers to section 523(a), which applies only to debts of individuals. Had Congress intended to expand the application of the section 523(a) exceptions

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297 *See* Bankruptcy Act of 1898, Pub. L. No. 55-541, 30 Stat. 544 (repealed 1978).

298 *See* Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 840.

299 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

300 See Bonapfel and Schaaf, *supra* note 284, Part III.B (describing the exceptions to discharge under chapters X, XI, XII, and XIII under the Chandler Act Amendments).

301 *See* Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Amer. Bankr. Inst. L. Rev. 757, 762-63 and n. 38 (2005) (quoting the Bankruptcy Act of 1898, Sec. 271).

302 *See id.* (tracing the history of the dischargeability of corporate debts).

303 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Pub. L. No. 109–8, Title VII, § 708, 119 Stat. 23, 126-27 (emphasis added) (codified at 11 U.S.C. § 1141(d)(6)).

304 H.R. Rep. No. 116-171 (2019), as reprinted in 2019 U.S.C.C.A.N. 366.

305 H.R. Rep. No. 116-171, at 8 (2019), as reprinted in 2019 U.S.C.C.A.N. 366, 374.

to discharge to individuals, a significant departure from the longstanding scope of the discharge in Chapter 11 cases, surely it would have more clearly stated such a change.[306]

This recommended amendment does not alter the balance of creditor protections that currently exist for nonconsensual plans; it merely clarifies existing Congressional intent. Nonconsensual plans must commit projected disposable income to the plan,[307] demonstrate a reasonable likelihood the debtor will complete plan payments, and provide for appropriate remedies if the debtor does not make payments under the plan.[308]

Accordingly, the Task Force recommends a statutory change to section 1192 to clarify the scope of a discharge for an entity debtor with a nonconsensual confirmed plan.[309] Adding a new subsection (2) to section 1192 which makes it clear that the section 523 exclusions from the discharge apply only in Subchapter V cases with individual debtors who have nonconsensual confirmed plans.

The Task Force also recommends an additional amendment to section 1192 to make section 1141(d)(6) apply to a Subchapter V debtor with a plan confirmed nonconsensually under section 1191(b), as it does in the case of a debtor who receives a discharge under section 1141(d)(1) after consensual confirmation.

Section 1141(d)(6) provides an exception to the § 1141(d)(1) discharge for debts of a kind specified in section 523(a)(2) that are owed by a corporation to a domestic governmental unit under the False Claims Act or similar state law and for debts for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat.[310] Because a debtor after confirmation of a nonconsensual plan receives a discharge under section 1192 rather than section 1141(d)(1), the section 1141(d)(6) exception does not appear to apply.

The proposed amendment makes it clear that the exception in section 1141(d)(6) applies to all Subchapter V debtors, regardless of the type of confirmation that occurs.

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306 *See Cleary Packaging, LLC*, 630 B.R. at 476, rev'd, 36 F.4th 509 (4th Cir. 2022) (quoting *Whitman v. American Trucking Associations*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1, (2001)):

> "[T]he suggestion that Congress incorporated [21] new exceptions to discharge for small corporations in a bill [the SBRA] that was introduced in April 2019, and signed into law by the President in August 2019, seems not only improbable but also contradicts years of bankruptcy law and policy. 'Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"

Hon. Paul W. Bonapfel, *SBRA Guide*, *supra* note 110, §X.D ("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.").

307 11 U.S.C. § 1191(c)(2).

308 *Id*. § 1191(c)(3).

309 Task Force member, Judge Harner, abstained from the vote on this issue given her involvement in the *Cleary* matter, which is part of the case law split under section 1192.

310 *Id*. § 1141(d)(6) ("Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or (B)for a tax or customs duty with respect to which the debtor—(i) made a fraudulent return; or (ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.").

Although the § 1141(d)(6) exception applies by its terms only to the discharge of a corporation, debts within its scope are excepted from the discharge of an individual under § 523(a). Subparagraph (A) defines a subset of debts that are not dischargeable under § 523(a). Subparagraph (B) defines debts that are excepted from discharge under § 523(a)(1)(C).

The proposed amended language for both changes follows.

Proposed Amended Section 1192

If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt-

(1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or

(2) of an individual debtor of the kind specified in section 523(a) of this title; or

(3) of the kind specified in section 1141(d)(6) of this title.

VII. Postconfirmation Administrative Matters

A. Postconfirmation Reporting Requirement

Recommendation and Supporting Principles:

Recommendation

The Task Force recommends statutory amendments that would impose a uniform postconfirmation reporting requirement for Subchapter V debtors, to be filed by the debtor with the motion for final decree or application for discharge, and implemented through changes to the Bankruptcy Rules, the creation of a new official bankruptcy form, and a directive for collection and publication of pertinent data.

Supporting Principles

- Although Subchapter V contemplates that either debtors in possession or trustees will file postconfirmation reports, no specific postconfirmation reporting requirements exist for Subchapter V debtors unless required by local rule or court order.
- Although this keeps administrative costs low, in keeping with the legislative goals of the SBRA, it means courts and creditors have little information about the progress of plan implementation.
- A uniform postconfirmation report would provide better information to the court and creditors about the progress of plan implementation; it also would better inform bankruptcy policy, permitting Congress, courts, scholars, other parties in interest, and the public to better evaluate the efficacy of Subchapter V.
- The recommended change would not affect the ability of courts to order pre- or postconfirmation reporting under section 1106(a)(7) of the Code.

No postconfirmation reporting requirements exist for Subchapter V debtors unless required by local rule or court order. A streamlined postconfirmation process holds a reorganized debtor accountable and may encourage more attention to, and thoughtfulness about, plan implementation by the debtor following confirmation. The lack of postconfirmation reporting also keeps administrative costs low, in

keeping with the legislative goals of the SBRA, but courts and creditors have little information about the progress of plan implementation as a result.

A Subchapter V debtor that confirms the plan consensually under section 1191(a) must file a notice of substantial consummation of the plan pursuant to section 1183(c)(2) no later than 14 days after the plan is substantially consummated.[311] After substantial consummation, defined in section 1101(2),[312] and termination of the trustee's services pursuant to section 1183(c)(1), the debtor may seek entry of a final decree closing the case pursuant to section 350(a) and Federal Rule of Bankruptcy Procedure 3022, upon a showing that the estate has been fully administered and that there are no remaining matters for which the court must continue to exercise jurisdiction.

The situation is different for a Subchapter V debtor that confirms a nonconsensual plan under section 1191(b). If the confirmed plan is nonconsensual, the case ordinarily will remain open after substantial consummation until plan payments are completed, the trustee has filed the final report and accounting of the administration of the estate,[313] and there are no remaining matters for which the court must continue to exercise jurisdiction.[314]

Uniform postconfirmation reporting is required in non-Subchapter V, non-small business debtor Chapter 11 cases.[315] Specifically, debtors in possession or trustees in non-small business or non-Subchapter V cases must file with the court postconfirmation reports (PCR-11s) about the progress of plan implementation. These reports also assist with calculating any postconfirmation fees that must be paid by the debtor.[316]

In Subchapter V, and as discussed further below, any postconfirmation reporting requirement arguably would serve a different purpose. It would provide a mechanism to assess the efficacy of the subchapter and also allow courts and creditors to gauge the debtors' progress in plan implementation and performance.

Subchapter V contemplates some kind of postconfirmation reporting by debtors in possession. Under section 1106(a)(7), made applicable to Subchapter V debtors by section 1184, debtors have the duty "to file such reports as are necessary or as the court orders." At present, there is no uniform or standardized requirement for postconfirmation reporting.

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311 11 U.S.C. § 1183(c)(2). *See* Section VI.C, *infra* (explaining substantial consummation).

312 *Id*. § 1101(2).

313 *Id*. § 1183(b)(1) (incorporating section 704(a)(9)).

314 *See id*. § 350(a).

315 *See* 28 U.S.C. 589b(a) (requiring the Attorney General to issue rules requiring uniform forms for final reports by trustees in Chapter 7, Chapter 12, Chapter 13, and Subchapter V cases and periodic reports by debtors in possession or trustees in cases under chapter 11 of title 11).

316 The Task Force notes that Subchapter V cases are not subject to the general reporting or fee guidelines applicable to standard Chapter 11 debtors, and this aspect of Subchapter V has, from the Task Force's review of the cases, been critical to the success of the subchapter. The Task Force's recommendation regarding a uniform postconfirmation report should not be read as similar to those reports used for, among other things, calculating postconfirmation fees in Chapter 11. Subchapter V's objective of reducing fees and costs associated with bankruptcy for smaller debtors is paramount and should be preserved.

For example, some courts have implemented postconfirmation reporting requirements for Subchapter V debtors through local bankruptcy rules. The District of Maryland, for instance, has implemented a streamlined postconfirmation reporting requirement in Subchapter V by local rule.[317] The notice of substantial consummation, which under section 1183(c)(2) must be filed within 14 days after the plan is substantially consummated, must include a certification by the debtor that includes a summary report of the disbursements, distributions, and transfers that have been made pursuant to the plan, together with a description of other acts taken to consummate the plan. The certification must also describe any matters involving consummation of the confirmed plan that have not been fully resolved. Likewise, the Eastern District of Texas requires a postconfirmation report within 60 days after the order confirming the plan in Subchapter V cases with consensual confirmed plans.[318] The report must inform the court of the postconfirmation actions taken by the confirmed debtor or the Subchapter V trustee and the progress made toward substantial consummation of the plan.[319]

Other courts require periodic reporting for Subchapter V debtors until a final decree is entered in the case.[320] Subchapter V debtors with confirmed plans, whether consensual under section 1191(a) or nonconsensual under section 1191(b), must file quarterly reports after confirmation pursuant to Local Bankruptcy Rule 3020-2 in the Central District of California.[321] These reports must include:

1. Progress that has been made toward substantial consummation of the confirmed plan;
2. A schedule listing for each debt and each class of claims; the total amount required to be paid under the plan; the amount required to be paid as of the date of the report; the amount actually paid as of the date of the report; and the deficiency, if any, in required payments;
3. A schedule of any and all postconfirmation tax liabilities that have accrued or come due and a detailed explanation of payments thereon;
4. Projections as to the reorganized debtor's, postconfirmation trustee's, or other responsible party's continuing ability to comply with the terms of the plan;
5. An estimate of the date for plan consummation and application for final decree; and

317 L.B.R. 3022-1(e) (Bankr. D. Md.), https://www.mdb.uscourts.gov/files/localrules.pdf.

318 L.B.R. 2015-1(d) (Duty to Keep Records, Make Reports, and Give Notice of Case) (Bankr. E.D. Tex.), https://www.txeb.uscourts.gov/sites/txeb/files/2022%20LOCAL%20RULES_rev%20as%20of%208-22-22.pdf.

319 *Id*.

320 *See, e.g.,* L.B.R. 3021-1 Post-Confirmation Reporting Requirements in Chapter 11 Small Business and Subchapter V Cases (Bankr. E.D. Wash) (requiring quarterly postconfirmation reports in Subchapter V cases using the appropriate mandatory form until a final decree is entered or the case is dismissed or converted to another chapter); L.B.R. 2015-1(d) (Duty to Keep Records, Make Reports, and Give Notice of Case) (Bankr. E.D. Tex.) (requiring annual reports in Subchapter V cases with nonconsensual confirmed plans), https://www.txeb.uscourts.gov/sites/txeb/files/2022%20LOCAL%20RULES_rev%20as%20of%208-22-22.pdf.

321 Local Bankruptcy Rule 3020-2 (Bankr. C.D. Cal.) (requiring Subchapter V debtors to file postconfirmation quarterly reports) and Local Bankruptcy Rule 3020-01 (Bankr. C.D. Cal.) (enumerating required contents of reports), https://www.cacb.uscourts.gov/sites/cacb/files/documents/local_rules/LBRs%203003-1%20through%203022-1.pdf.

6. Any other pertinent information needed to explain the progress toward completion of the confirmed plan.[322]

Pursuant to this particular local rule, unless otherwise ordered, the first postconfirmation status report must be filed within 120 days of entry of the order confirming the plan unless the court orders otherwise.[323] Subsequent reports are due on the 15th day of the month following each successive 120-day reporting period until a final decree is entered.[324]

The Task Force heard testimony that the addition of uniform postconfirmation reporting requirements for Subchapter V debtors would be helpful to understanding how Subchapter V debtors fare after their plans are confirmed.[325] It also might assist courts and creditors in monitoring the debtor's progress and implementation under the plan.

In evaluating the merits of this suggestion, the Task Force balanced the benefits of have a reporting mechanism to evaluate both plan implementation within an individual case and the effectiveness of the subchapter overall against the costs of imposing an additional requirement and its costs on smaller business debtors.

After weighing the broader perspectives shared with the Task Force about the utility of a postconfirmation reporting requirement, the Task Force has concluded that the implementation of some required postconfirmation report would be useful. To that end, the Task Force proposes statutory language and amendments which require the Subchapter V debtor to file a postconfirmation report using a uniform form designed by the Judicial Conference.

A postconfirmation report would provide information to the court about how the implementation of the plan is progressing. The Task Force recognizes that some jurisdictions currently require some kind of postconfirmation reporting requirements. The national reporting requirement proposed herein is not meant to displace the role of the court to impose reporting requirements either before or after confirmation. Rather, the proposal introduces a uniform report that would be filed in every Subchapter V with a confirmed plan, in addition to other reporting obligations of the Subchapter V debtor in the particular case or jurisdiction. Such a requirement also would hold Subchapter V debtors more accountable for postconfirmation performance and encourage some continued level of disclosure from debtors to the courts and creditors.

In addition, the reporting requirement would provide a mechanism for aggregating and analyzing data about Subchapter V plans in order to better inform bankruptcy policy, permitting policymakers, courts, scholars, and the public to more accurately assess whether the subchapter is effective as a

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322 L.B.R. 3020-1(b) (Bankr. C.D. Cal.)

323 L.B.R. 3020-1(c) (Bankr. C.D. Cal.).

324 *Id.*

325 *See Written Statement of Dan Etlinger*, ABI Subchapter V Task Force Hearing (Plan and Confirmation Issues) (Sept. 8, 2023), https://subvtaskforce.abi.org/ (supporting periodic reports that describe a Subchapter V efforts towards substantial consummation and general case updates); *Written Statement of Keri Riley*, ABI Subchapter V Task Force Hearing (Postconfirmation Issues) (Sept. 22, 2023), https://subvtaskforce.abi.org/ (supporting post confirmation reporting requirements).

reorganization tool. As such, ensuring consistency and uniformity in the contents, form, and timing of the report is critically important. Consistency and uniformity will facilitate the aggregation of the data, which will assist Congress in its efforts to analyze bankruptcy trends and make policy decisions, without imposing significant additional burdens upon trustees and debtors in possession.

The Task Force proposes statutory changes to implement this recommendation. In evaluating different alternatives for such a statutory change, the Task Force considered the various ways that national reporting requirements could be designed and implemented. The Task Force notes that others, such as the United States Trustee program, could conceivably perform this role. The Task Force finds, however, that the Judicial Conference and the Administrative Office of the United States Courts are the best resources here based on their vast experience and methodical procedures (as well as the similar role they served under BAPCPA). The Task Force does not make this suggestion lightly and appreciates the significant responsibilities already placed on the Judicial Conference and the Administrative Office. Nevertheless, the proposal outlined below represents the most effective and expedient path to a solution.

Accordingly, the Task Force makes the following recommendations. First, the Task Force proposes that Congress direct the Judicial Conference to propose (in accordance with section 2073 of title 28) amended Federal Rules of Bankruptcy Procedure, and to prescribe (in accordance with Rule 9009 of the Federal Rules of Bankruptcy Procedure) official forms for postconfirmation reporting by Subchapter V debtors.[326] Official Bankruptcy Forms are approved by the Judicial Conference and must be used under Bankruptcy Rule 9009.

The Task Force recommends identifying the following data points to be disclosed by Subchapter V debtors in their postconfirmation reports:

1. U.S. Bankruptcy Court;
2. Name of Debtor;
3. Case Number;
4. Whether the case is jointly administered, and if jointly administered, identify the lead case number;
5. Information about the industry classification, published by the Department of Commerce, for the businesses conducted by the debtor;
6. Petition date;
7. Confirmation date;

326 In the alternative, the Task Force proposes that Congress direct the Attorney General (who presumably would delegate authority to the Executive Office for U.S. Trustees as a component of the U.S. Department of Justice) to issue rules creating a uniform form for postconfirmation reporting by Subchapter V debtors. Section 589b(a) of title 28 already directs the Attorney General to issue rules requiring uniform forms for final reports by trustees in Subchapter V cases and periodic reports by debtors in possession or trustees in cases under Chapter 11 of title 11. The statute would require an amendment to section 589b(a) to authorize the Attorney General to issue rules requiring a uniform form for a final report by Subchapter V debtors.

8. Effective date of the plan;
9. Whether the plan was confirmed under section 1191(a) or section 1191(b) of the Bankruptcy Code;
10. The amount of administrative expense claims incurred in the case and the amount of those claims actually paid in accordance with the plan as of the date of the filing of the report;
11. A list of each class of claims or interests under the plan; the amount required to be paid on account of each such class of claims or interests under the plan; and the amount actually paid on account of each such class of claims or interests under the plan as of the date of the filing of the report; and
12. Any other pertinent information needed to explain the completion, or the progress toward completion, of the confirmed plan.

Second, the Task Force proposes that Congress direct the Director of the Administrative Office to collect and publish the aggregated data captured in the new postconfirmation Subchapter V official form annually pursuant to an amendment to 28 U.S.C. § 159.

Proposed Amended Section 1187

The Task Force recommends an amendment to the Bankruptcy Code to implement the postconfirmation reporting requirement for Subchapter V debtors. The Task Force recommends providing for the postconfirmation reporting duty for Subchapter V debtors by adding a new subsection (d) to section 1187.

(a) Filing Requirements.

Upon electing to be a debtor under this subchapter, the debtor shall file the documents required by subparagraphs (A) and (B) of section 1116(1) of this title.

(b) Other Applicable Provisions.

A debtor, in addition to the duties provided in this title and as otherwise required by law, shall comply with the requirements of section 308 and paragraphs (2), (3), (4), (5), (6), and (7) of section 1116 of this title.

(c) Separate Disclosure Statement Exemption.

If the court orders under section 1181(b) of this title that section 1125 of this title applies, section 1125(f) of this title shall apply.

(d) *Postconfirmation Report. In addition to any reporting ordered by the court under section*

1106(a)(7), the debtor shall file a report disclosing information relevant to the implementation of the debtor's confirmed plan, including the amount required to be paid on account of claims and interests under the plan and the amount actually paid on account of such claims and interest as of the date of the filing of the report, as follows:

(1) *If the plan of the debtor is confirmed under section 1191(a), the debtor shall file the report with the motion for final decree.*

(2) *If the plan of the debtor is confirmed under section 1191(b), the debtor shall file the report with the application for a discharge.*

<<NOTE: 11 USC 1187 note.>> Effective Date. The amendments made by subsection (d) shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 1187(d) of title 11, United States Code, as added by subsection ().

Proposed Statutory Language Directing Judicial Conference

Proposal of Rules and Forms.—The Judicial Conference of the United States shall propose in accordance with section 2073 of title 28 of the United States Code amended Federal Rules of Bankruptcy Procedure,[327] and shall prescribe in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure official bankruptcy forms, directing debtors filing cases under subchapter V of chapter 11 to file a final report containing information, including information relating to—

(1) *U.S. Bankruptcy Court;*

(2) *Name of Debtor;*

(3) *Case Number;*

(4) *Whether the case is jointly administered, and if jointly administered, identify the lead case number;*

(5) *Information about the industry classification, published by the Department of Commerce, for the businesses conducted by the debtor;*

(6) *Petition date;*

(7) *Confirmation date;*

(8) *Effective date of the plan;*

(9) *Whether the plan was confirmed under section 1191(a) or section 1191(b) of the Bankruptcy Code;*

(10) *The amount of administrative expense claims incurred in the case and the amount of those claims actually paid in accordance with the plan as of the date of the filing of the report;*

(11) *A list of each class of claims or interests under the plan; the amount required to be paid on account of each such class of claims or interests under the plan; and the amount actually paid on account of each such class of claims or interests under the plan as of the date of the filing of the report; and*

(12) *Any other pertinent information needed to explain the completion, or the progress toward completion, of the confirmed plan.*

(b) Purpose. The rules and forms proposed under subsection (a) shall be designed to achieve a practical balance among—(1) the reasonable needs of the bankruptcy court, the United States trustee, creditors, and other parties in interest for reasonably complete information; (2) a small business debtor's

327 This would require an amendment to Fed. R. Bankr. P. 2015(a)(6).

interest that required reports be easy and inexpensive to complete; and (3) the interest of all parties that the required reports help understand the debtor's financial condition and successful consummation of its plan.

Proposed Amended 28 U.S.C. § 159

The Task Force recommends several amendments to 28 U.S.C. § 159 to direct the Director of the Administrative Office to compile and publish the aggregated data collected in the new official form postconfirmation report.

(a) The clerk of the district court, or the clerk of the bankruptcy court if one is certified pursuant to section 156(b) of this title, shall collect statistics regarding (1) debtors who are individuals with primarily consumer debts seeking relief under chapters 7, 11, and 13 of title 11 *and (2) debtors who elect to seek relief under subchapter V of chapter 11 of title 11 who complete the postconfirmation report required under 11 U.S.C. § 1187(d)*. Those statistics shall be in a standardized format prescribed by the Director of the Administrative Office of the United States Courts (referred to in this section as the "Director").

(b)The Director shall—

(1) compile the statistics referred to in subsection (a);

(2) make the statistics available to the public; and

(3) not later than ~~July 1, 2008~~ [insert date], and annually thereafter, prepare, and submit to Congress

(A) a report concerning the information collected under subsection (a)(1) that contains an analysis of the information; and

(B) *a report concerning the information collected under subsection (a)(2) that contains an analysis of the information, which report shall also be made available to the public within 30 days of its submission to Congress.*

* * *

(d)The compilation required under subsection (b)(3)(B) shall—

(1) include in the aggregate and for each district all the data reported in the official postconfirmation report prescribed pursuant to sections 2073 and 2075 of this title and required to be filed by subchapter V debtors pursuant to 11 U.S.C. § 1187(d).

B. Subchapter V Trustee as the Default Disbursing Agent

Recommendation and Supporting Principles:

Recommendation

The Task Force declines to recommend a statutory change to section 1194(b) which would make the debtor rather than the Subchapter V trustee the disbursing agent.

Supporting Principles

- The existing statutory language is sufficiently flexible to permit the debtor to function as the disbursing agent instead of the Subchapter V trustee.
- As currently written, the Bankruptcy Code permits charging the debtor rather than the trustee with the duty to make plan payments so long as that responsibility is allocated either in the plan or the order confirming the plan.

The Bankruptcy Code currently provides for the Subchapter V trustee to serve as the default disbursing agent for nonconsensual confirmed plans. Under section 1194(b), if a plan is confirmed under section 1191(b) of this title, except *as otherwise provided in the plan or in the order confirming the plan*, the trustee shall make payments to creditors under the plan.[328]

Some trustees prefer not to act as disbursing agents because it imposes administrative burden and expense. That expense also adds to the overall cost of a Subchapter V reorganization. Anecdotal evidence suggests that the plan provides, or the court orders, otherwise, in many nonconsensual plans, allowing debtors to make plan payments. In addition, testimony to the Task Force and some case law indicate that courts have routinely permitted debtors to make plan payments for confirmed plans that are nonconsensual due to a nonvoting, nonparticipating creditor with control of an entire class.[329] Typically, in this situation, the trustee will ask the court to permit the debtor to serve as the disbursing party to mitigate some of the hardship that accompanies cramdown confirmation.[330]

The Task Force considered a possible amendment to section 1194(b) that would change this default rule and instead permit the debtor to make plan payments for nonconsensual plans unless cause is

328 11 U.S.C. § 1194(b) (emphasis added).

329 *Written Statement of Rebecca Redwine*, *supra* note 185, at 4; *Written Statement of Hon. Craig Gargotta, supra* note 95, at 2-3 (noting that the Subchapter V trustee usually asks the court to authorize the debtor to act as the disbursing party for plan payments when the plan is nonconsensual only because of a silent, nonparticipating class); *In re Creason*, Case No. 22-00988-swd, 2023 WL 2190623 at *1 (Bankr. W.D. Mich. Feb. 23, 2023) (Debtor placed the creditor in its own class and the creditor did not return its ballot, so the class did not formally accept the plan).

330 *See, e.g.*, *In re Creason,* 2023 WL 2190623, at *2 n.3.

shown which would require the trustee to do so. This proposed change would make the debtor the default disbursing agent.

The Task Force determined, however, that the existing statutory language is sufficiently flexible to permit the debtor to function as the disbursing agent instead of the Subchapter V trustee. As currently written, the Bankruptcy Code permits charging the debtor rather than the trustee with the duty to make plan payments so long as that responsibility is allocated either in the plan or the order confirming the plan.[331] This language allows for flexibility that the Task Force thinks should be exercised where appropriate.

C. Postconfirmation Modification Standards

Recommendation and Supporting Principles:

Recommendation

The Task Force does not recommend any statutory changes to Subchapter V's existing standards for postconfirmation modification of plans.

Supporting Principles

- Subchapter V has different standards for postconfirmation modification of consensual and nonconsensual plans.
- The key difference between sections 1193(b) and 1193(c) is one of timing. A consensual plan may only be modified before the plan is substantially consummated, whereas a non-consensual plan may be modified at any time during the three-to-five-year period for the payment of projected disposable income.
- In the consensual plan context, the Code treats the plan as one having creditor support, meaning that creditors have relied on the terms proposed in the plan itself. Limiting the time within which a debtor may seek a postconfirmation modification respects the creditors vote (and any agreements reached among parties to achieve that vote) and provides certainty and finality for debtors and creditors, encouraging consensual plans.
- In the nonconsensual plan context, however, the plan lacks consensus and may contemplate payments over a longer period of time. The court in the first instance must evaluate whether the plan meets the cramdown requirements of Subchapter V and is capable of re-assessing that determination at the time of proposed modification, as well as determining whether the

331 *Id.*

circumstances warrant the modification. The debtor also does not receive a discharge until all payments have been made

- The limitation of the right to modify a plan to only the debtor departs from the postconfirmation modification standards in other chapters of the Bankruptcy Code that permit the U.S. Trustee and parties in interest to seek to modify plans after confirmation. This difference is consistent with the policy goals of Subchapter V to provide a more feasible path to reorganization. By limiting the ability to seek postconfirmation modifications to the plan to the debtor, Subchapter V minimizes potential disruptions to the debtor's rehabilitation process.

Subchapter V has different standards for postconfirmation modification of consensual plans and nonconsensual, or cramdown, plans.

The debtor may modify a consensual plan confirmed under section 1191(a) before the plan is substantially consummated.[332] Substantial consummation typically occurs once plan distributions have commenced.[333] The modified plan becomes the plan only if the court finds that circumstances warrant the modification, and the plan is confirmable under section 1191(a).[334] Notice and hearing to confirm the modified plan under section 1191(a) are required.[335] Holders of claims or interests that have accepted or rejected a consensually confirmed plan are deemed to have similarly accepted or rejected the plan as modified unless, within the time fixed by the court, the holder changes its previous acceptance or rejection.[336]

This standard is similar to the postconfirmation modification standard applicable in a standard Chapter 11 business case under section 1127(b), which also permits postconfirmation plan modifications only before substantial consummation.[337] Case law about substantial consummation in the Subchapter V context is developing.[338] Considerable case law exists discussing substantial consummation in the Chapter 11 context, and, generally, the inquiry turns on the specific facts of the case. The case law in

332 *Id*. § 1193(b). *See id*. § 1101(2) (Substantial consummation means "transfer of all or substantially all of the property proposed by the plan to be transferred; assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and commencement of distribution under the plan. "); *In re National Tractor Parts, Inc*., 640 B.R. 916, 922 (Bankr. N.D. Ill. 2022) (finding that Subchapter V plan could not be modified after substantial consummation of the plan as defined in section 1101(2)).

333 *In re National Tractor Parts, Inc*., 640 B.R. at 922 (ruling that "under the applicable canons of statutory construction, the correct reading of 11 U.S.C. § 1101(2)(C) is that . . . a plan is substantially consummated once any payment to any creditor is made").

334 11 U.S.C. § 1193(b).

335 *Id*.

336 *Id*. § 1193(d).

337 *See id.* § 1127(b) (allowing postconfirmation modification before substantial consummation of the plan but only if the modified plan meets the requirements of sections 1122 and 1123, circumstances warrant the modification, and the court confirms the modified plan after notice and a hearing).

338 *See, e.g., In re National Tractor Parts, Inc*., 640 B.R. at 922 (finding that Subchapter V plan could not be modified after substantial consummation of the plan as defined in section 1101(2)).

the standard Chapter 11 context is clear that application of the "substantial consummation" standard reinforces the principle of finality of the plan.[339]

A plan is substantially consummated if three requirements are met: (1) transfer of all or substantially all of the property proposed by the plan to be transferred; (2) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (3) commencement of distribution under the plan.[340] The party seeking to modify the plan has the burden of proving that the plan has not been substantially consummated. The majority view of courts is that the first requirement refers not to distributions under the plan, which are addressed by the third requirement for substantial consummation, but rather to transfers necessary to achieve reorganization and to "shape the new financial structure of the debtor."[341] Most courts have ruled that the third requirement—referring to payments to creditors to satisfy the debtor's debts—is satisfied once distributions have begun.[342] Thus far, court decisions in the Subchapter V context agree.[343]

Under section 1193(c), nonconsensual plans may be modified at any time postconfirmation during the plan commitment period.[344] Notice and a hearing are required to confirm the modified plan.[345] The modified plan becomes the plan only if the court finds that circumstances warrant the modification, and the plan is confirmable under section 1191(b).[346] Case law is still developing about what kinds of circumstances warrant modification.[347]

The postconfirmation modification standard in section 1193(c) for nonconsensual Subchapter V plans combines features from section 1127(b), which governs postconfirmation plan modifications in standard Chapter 11 business cases, with features from the applicable standards in Chapters 12 and 13, which have plan commitment periods like a nonconsensual Subchapter V plan. For both a standard Chapter 11 business case and a cramdown Subchapter V plan, the modified plan becomes the plan only if the court determines "circumstances warrant" the modification and approves it.[348] And as in Chapters 12 and 13, postconfirmation modification is permitted at any time before completion of plan payments, on condition that the modified plan meet confirmation requirements.[349]

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339 *Id*. at 920 (quoting *Matter of UNR Industries, Inc*. 20 F.3d 766, 769 (7th Cir. 1994)) (holding that Subchapter V plan was substantially consummated, and therefore it could not be modified).

340 11 U.S.C. § 1101(2).

341 7 Collier on Bankruptcy ¶ 1101.02 (16th ed. 2023) (citation omitted).

342 *Id*.

343 *In re Nat'l Tractor Parts, Inc.*, 640 B.R. at 922 (stating that section 1101(2)(C) is satisfied once any payment to any creditor is made).

344 11 U.S.C. § 1193(c).

345 *Id*.

346 *Id*.

347 *See, e.g. In re Samurai Martial Sports, Inc.*, 644 B.R. 667, 681 (Bankr. S.D. Tex. 2022) (finding that to determine whether a postconfirmation modification under section 1193(c) is warranted, "the debtor must show that the circumstances which gave rise to the modification were the result of an unforeseen circumstance that rendered the confirmed plan to be unworkable").

348 11 U.S.C. § 1127(b), § 1193(c).

349 *Id.* §§ 1193 (c), 1229, 1329.

The Task Force considered some testimony suggesting that perhaps two postconfirmation modification standards were unnecessary. After deliberation, however, the Task Force finds that the policy justifications for different postconfirmation modification standards for consensual and nonconsensual plans are persuasive.

The key difference between sections 1193(b) and 1193(c) is one of timing.[350] A consensual plan may only be modified before the plan is substantially consummated, whereas a nonconsensual plan may be modified at any time during the three-to-five-year period for the payment of projected disposable income.[351]

This difference makes sense. A more flexible standard for consensual plans could significantly alter the preconfirmation deal reached with creditors. Limiting the ability to seek a postconfirmation modification to the short time period between confirmation, when the Subchapter V debtor receives its discharge,[352] and substantial consummation provides certainty and finality for debtors and creditors and in that sense, the restrictive standard encourages consensual plans.

Cramdown plans, in contrast, lack the unanimity of consensual plans and may contemplate payments over a longer period of time. A court must consider all the relevant statutory requirements for cramdown confirmation under section 1191 before the plan can be confirmed. The court is capable of re-assessing those requirements at the time of proposed modification along with determining whether the circumstances warrant the modification. The debtor also does not receive a discharge until all payments have been made.

The Task Force also considered whether to recommend statutory changes that would permit the Subchapter V trustee or a creditor to seek to modify a plan postconfirmation. In particular, the Task Force heard testimony suggesting statutory changes that would allow the Subchapter V trustee and nonpriority unsecured creditors to file a motion to modify the plan postconfirmation.[353] The proposal would allow the Subchapter V trustee to seek the modification if in the trustee's reasonable judgment, such motion is warranted.[354] The creditors could file such a motion to benefit from actual disposable income that materially exceeds the disposable income payable to unsecured creditors under the plan.[355] Related to this change was the proposed addition of a requirement for the debtor file and serve an annual cash flow report over the life of the plan.[356]

350 Hon. Paul W. Bonapfel, *SBRA Guide: Subchapter V Update*, § IV (2023), https://www.flmb.uscourts.gov/judges/tampa/mcewen/SubchapterV_Update_Judge_Bonapfel_072023.pdf.

351 *Compare* 11 U.S.C. §§ 1193(b) and 1193(c).

352 Under section 1191(a), the Subchapter V debtor with a consensual confirmed plan receives a discharge under section 1141(d) which provides that "the confirmation of a plan . . . discharges the debtor."

353 *Oral Testimony of Hon. Robert H. Jacobitz*, U.S. Bankruptcy Court for the District of New Mexico, ABI Subchapter V Task Force Hearing (Final Hearing) (Oct. 12, 2023), https://subvtaskforce.abi.org/hearings/october-12-2023-hybrid-public-hearing.

354 *Id.*

355 *Id.*

356 *Id.*

The Task Force declines to recommend such a change. The limitation of the right to modify a plan to only the debtor departs from the postconfirmation modification standards in other chapters of the Bankruptcy Code that permit the U.S. Trustee and parties in interest to seek to modify plans after confirmation.[357] This difference, however, is consistent with the policy goals of Subchapter V. The SBRA legislative history does not expressly state why only the debtor may seek to modify the plan after confirmation in a Subchapter V case. It does, however, emphasize the imperative for a streamlined reorganization process for smaller business debtors. By limiting the ability to seek postconfirmation modifications to the plan to the debtor, Subchapter V minimizes potential disruptions to the debtor's rehabilitation process.

Based on the foregoing, The Task Force does not recommend any statutory changes to Subchapter V's existing standards for postconfirmation modification of plans.

VIII. Conclusion

The Task Force's investigation and analysis underscores Subchapter V's nascent status. In undertaking to study the implementation and operation of the subchapter during its first few years, the Task Force observed, based on the various perspectives of judges, trustees, practitioners, commentators, and other stakeholders, that the aspects of Subchapter V clearly in need of reform or guidance are limited in scope. The Task Force examined those issues (shared through surveys, witness testimony, academic literature, and case law) that it believed warranted recommendations in the form of legislative reform or practical guidance and best practices. Overall, the Task Force concluded that its recommendations would improve the operation of Subchapter V.

The Task Force also noted that there are yet other aspects of the subchapter which require additional study, data collection, and potentially reform. Issues continue to emerge, some unanticipated, revealing themselves in local practice and case law. The Task Force concluded that such matters were not sufficiently developed to allow for an appropriate examination.

The Task Force hopes that the Report informs the discussion about the implementation and operation of the subchapter, provides some guidance about how some aspects of the subchapter should function, and facilitates serious consideration and adoption by policymakers some of the recommendations for legislative reform.

357 11 U.S.C. §§ 1229, 1329 (permitting the debtor, the trustee, or an unsecured creditor to seek postconfirmation modification of the plan); § 1127(e) (permitting the debtor, the U.S. Trustee, the trustee, or an unsecured creditor to seek postconfirmation modification of the plan in an individual Chapter 11 case).

Appendix A: American Bankruptcy Institute Subchapter V Task Force Members

Hon. Michelle M. Harner
U.S. Bankruptcy Court, District of Maryland
Baltimore, MD

Hon. Michelle M. Harner is a U.S. Bankruptcy Judge for the District of Maryland in Baltimore, appointed in 2017. Prior to her appointment to the bench, she was the Francis King Carey Professor of Law and the Director of the Business Law Program at the University of Maryland Francis King Carey School of Law, where she taught courses in bankruptcy and creditors' rights, business associations, business planning, corporate finance and the legal profession. Judge Harner lectured frequently during her academic career on various topics involving corporate governance, financially distressed entities, risk management and related legal issues. Her academic scholarship is widely published, with her publications appearing in, among others, the *Vanderbilt Law Review*, *Notre Dame Law Review*, *Washington University Law Review*, Minnesota Law Review, *Indiana Law Journal*, *Fordham Law Review* (reprinted in *Corporate Practice Commentator*), *Washington & Lee Law Review*, *William & Mary Law Review*, *University of Illinois Law Review*, *Arizona Law Review* (reprinted in *Corporate Practice Commentator*) and *Florida Law Review*. Judge Harner has served as the Associate Reporter to the Advisory Committee on the Federal Rules of Bankruptcy Procedure, the Reporter to the ABI Commission to Study the Reform of Chapter 11, and most recently chaired the Dodd-Frank Study Working Group for the Administrative Office of the U.S. Courts. She also served as the Robert M. Zinman ABI Resident Scholar for the fall of 2015. She most recently served as the chair of the Dodd-Frank Study Working Group for the Administrative Office of the U.S. Courts. Judge Harner is an elected conferee of the National Bankruptcy Conference, an elected Fellow of the American College of Bankruptcy, and an elected member of the American Law Institute. She previously was in private practice in the business restructuring, insolvency, bankruptcy and related transactional fields, most recently as a partner at the Chicago office of the international law firm Jones Day. Judge Harner received her B.A. *cum laude* from Boston College in 1992 and her J.D. *summa cum laude* from The Ohio State University College of Law in 1995.

Megan W. Murray
Shareholder, Underwood Murray, PA
Tampa, FL

Ms. Murray, a founding shareholder of Underwood Murray, has nearly twenty years of reorganization and workout experience advising business owners, debtors, trustees, creditors' committees, secured and unsecured creditors, and asset purchasers and sellers. She has experience both on the legal side and on the business side in a global financial institution. She counsels businesses and owners in a wide variety of industries including but not limited to real estate, healthcare, hospitality, pharmaceutical, medical

services, construction, insurance, transportation, logistics, aviation, and financial services. Ms. Murray also has extensive experience representing a variety of fiduciaries, from chapter 7 and 11 trustees, assignees in assignments for the benefit of creditors and receivers in proceedings across the state. She brings this knowledge to her fiduciary clients, which also adds value to her non-fiduciary clients and representations. In addition to her broad range of representations in core bankruptcy matters, Ms. Murray counsels her clients in making critical business decisions, while prosecuting and defending complex business disputes. She has extensive experience in director and officer liability litigation, bondholder disputes, shareholder and partnership disputes, court-appointed receiverships, healthcare receiverships, assignment proceedings, recovery of large and small business assets, and lien priority disputes related to a variety of collateral including real property, equipment, medical equipment, aircraft and logistics-related assets. Ms. Murray has been recognized by her peers and clients as a leading bankruptcy lawyer in Florida. Those honors include recognition by *Chambers USA*, selection for inclusion by Florida *Super Lawyers* and *Best Lawyers* and named to *Florida Trend Magazine* Legal Elite. She has also garnered an AV® Preeminent distinction, the highest available mark for professional excellence from Martindale-Hubbell's Peer Review Ratings. In 2018 the American Bankruptcy Institute recognized Ms. Murray as a top "40 under 40," one of the highest honors in the industry for young professionals. Ms. Murray is a contributing author to Creditors' and Debtors' Practice in Florida, is a frequent speaker and author on bankruptcy and insolvency topics and is active in local and national bankruptcy bar associations. In 2023 Ms. Murray was selected to co-chair the American Bankruptcy Institute's task force on Subchapter V with the Hon. Michelle Harner, United States Bankruptcy Court for the District of Maryland. Ms. Murray is also president of the Tampa Bay Bankruptcy Bar Association (2023).

Hon. Paul W. Bonapfel
U.S. Bankruptcy Court, Northern District of Georgia
Atlanta, GA

Hon. Paul W. Bonapfel is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta and Rome, Ga., appointed in 2002. Prior to his appointment, he practiced law in Atlanta with Lam- berth, Bonapfel, Cifelli & Stokes, P.A., now known as Lamberth, Cifelli, Ellis & Nason, P.A. As an attorney, Judge Bonapfel represented all types of parties in bankruptcy cases, including consumer and business debtors in liquidation cases, business debtors in reorganization cases, chapter 7 and 11 bankruptcy trustees, creditors' committees, and creditors in both consumer and business cases. Judge Bonapfel is a co-author of Chapter 13 Practice and Procedure (Thomson Reuters). A Fellow in the American College of Bankruptcy, he has served as chairperson of the Bankruptcy Sections of the State Bar of Georgia and the Atlanta Bar Association and was a director and president of the Southeastern Bankruptcy Law Institute, which presents an annual seminar on bankruptcy law and procedure. In addition, he teaches a course at Mercer Law School in Macon, Ga., on consumer bankruptcy practice. Judge Bonapfel received his B.A. *cum laude* from Florida State University in 1972 and his J.D. *magna cum laude* from the University of Georgia School of Law in 1975, where he was a notes editor of the *Georgia Law Review*. Following law school, he clerked for U.S. District Judge Wilbur D. Owens, Jr., in Macon.

Soneet Kapila
ABI President
Partner, KapilaMukamal, LLP
Fort Lauderdale, FL

Soneet R. Kapila, CPA, CFF, CFE, CIRA is a founding partner of KapilaMukamal, LLP in Fort Lauderdale, Fla., and ABI's President. For more than 25 years, he has concentrated his efforts in the areas of consulting in insolvency, fiduciary and creditors' rights matters. Mr. Kapila is a federal bankruptcy trustee and serves as an examiner, CRO, chapter 7 and 11 trustee, subchapter V trustee, liquidating trustee, corporate monitor (SEC appointments), and as a state and federal court-appointed receiver. He has been appointed in numerous matters in the Southern and Middle Districts of Florida. As a trustee plaintiff, Mr. Kapila has managed complex litigation in significant cases. He advises and represents debtors, secured creditors and creditors' committees in formulating, analyzing and negotiating plans of reorganization. As a recognized expert in fraudulent conveyance, Ponzi schemes and insolvency issues, Mr. Kapila has provided expert testimony and litigation-support services to law firms involving complex insolvency issues and commercial damages. He has worked in conjunction with the SEC, FBI and U.S. Attorney's Office, and he has served both as a consultant and expert witness for litigation matters in state and federal courts. Mr. Kapila has spoken to various groups, including ABI, New York Law School, St. Thomas University Law School, and the National Conference of Bankruptcy Judges, Southeastern Bankruptcy Law Institute, National Association of Bankruptcy Trustees (NABT), Receiver's Forum, Association of Insolvency and Restructuring Advisors, Florida Institute of Certified Public Accountants, Turnaround Management Association, University of Miami School of Law, Florida International University School of Law, American Bar Association and the National Business Institute on topics related to insolvency, underperforming businesses and insolvency taxation. He is a Fellow of the American College of Bankruptcy and a past-president and past-chairman of the Association of Insolvency & Restructuring Advisors, for which he serves on its board of directors. Mr. Kapila has served on the advisory boards of ABI's Southeast Bankruptcy Workshop and Caribbean Insolvency Symposium. He also co-authored ABI's *Fraud and Forensics: Piercing Through the Deception in a Commercial Fraud Case* (2015). Mr. Kapila received his M.B.A. in 1978 from Cranfield School of Management.

Robert J. Keach
Shareholder, Bernstein Shur
Portland, ME

Robert J. Keach is co-chair of Bernstein Shur's Business Restructuring and Insolvency Practice Group. He is a Member of the Board of Directors and Fellow of the American College of Bankruptcy and served as Past President, President, and Chairman of the American Bankruptcy Institute (ABI). A national leader in Chapter 11 Reform and Subchapter V, Bob is a member of ABI's Subchapter V Task Force and former co-chair of their Commission to Study the Reform of Chapter 11. Mr. Keach focuses on the representation of various parties in workouts and bankruptcy cases, including debtors, creditors,

creditors' committees, lessors and third parties acquiring troubled companies and/or their assets. He has appeared as a panelist on national bankruptcy, lender liability and creditors rights programs, and is the author of several articles on bankruptcy and creditors' rights appearing in the *ABI Law Revi*ew, *Commercial Law Journal*, and *ABI Journal*, among other publications. Mr. Keach is a contributing author to *Collier Guide to Chapter 11: Key Topics and Selected Industries* (2011 Ed.). Bob is recognized as a "Star Individual" in Corporate Mergers & Acquisitions/Bankruptcy in *Chambers USA*, *Best Lawyers in Americ*a (Twenty-Year Certificate), *Lawdragon 2023 500 Leading U.S. Bankruptcy and Restructuring Lawyers*, *New England Super Lawyers* (Bankruptcy and Top 100 Lawyers in New England regardless of specialty) and is rated AV® Preeminent by Martindale-Hubbell. For his dedication to the field, in 2021 Bob received the prestigious American Bankruptcy Institute's Lifetime Achievement Award. Mr. Keach is also certified in business bankruptcy by the American Board of Certification. Currently, Bob serves as the chapter 11 trustee in the railroad reorganization case of Montreal Maine & Atlantic Railway, Ltd., a cross-border restructuring case. Mr. Keach is also the fee examiner in the Exide Technologies case in Delaware; he was also the fee examiner in *In re AMR Corporation* (the chapter 11 cases of American Airlines and its parent and certain affiliates). Mr. Keach has also, *inter alia*, represented ad hoc committees in the Homebanc Mortgage, New Century TRS Holdings, and Nortel Networks cases in Delaware, as well as a public utilities commission in the FairPoint Communications case in the Southern District of New York.

Jolene Wee
Managing Director and Founder
JW Infinity Consulting, LLC
New York, NY

Jolene Wee is the Managing Director and Founder of JW Infinity Consulting, LLC. She has almost 20 years of finance and accounting experience and more than 15 years of restructuring experience. She has served in the role of Trustee, Expert Witness, Financial Advisor, Valuation Consultant and Forensic Consultant. Ms. Wee is a trusted advisor to fiduciaries, legal counsel, corporations, high net worth individuals, and public agencies on cross-border, restructuring, bankruptcy, litigation, fraud, financing, merger, and buyout matters. Her case experience included companies in the banking, e-commerce, healthcare, insurance, manufacturing, real estate, retail, and technology industries with revenues of up to $15B. She is a Chapter 11 (Subchapter V) bankruptcy trustee in Region 2 covering the Eastern and Southern Districts of New York and Region 4 covering Maryland, the District of Columbia and the Eastern District of Virginia.

Donald L. Swanson
Shareholder, Koley Jessen
Omaha, NE

Donald L. Swanson is a shareholder in the law firm of Koley Jessen P.C., L.L.O., in Omaha, Nebraska. He serves as a Subchapter V Trustee in the District of Nebraska. He has practiced business bankrupt-

cy law for more than three decades and represents all types of bankruptcy constituencies, including debtors, creditors, committees, trustees, and § 363 purchasers in both bankruptcy and non-bankruptcy courts. He also has extensive experience resolving multi-party disputes while representing committees and trustees. Mr. Swanson serves as Chair of the Nebraska Bankruptcy Court Mediation Committee and is a Certified Specialist in Business Bankruptcy Law by the American Board of Certification. He is also active in the American Bankruptcy Institute (currently serving on its Subchapter V Task Force) and holds a Peer Review Rating of "AV® Preeminent™" by Martindale. He also serves as Commissioner representing Nebraska on the Uniform Law Commission (ULC), where he is a member of ULC's Drafting Committee on assignments for benefit of creditors and a ULC Legislative Council Fellow.

Elizabeth M. Lally
Partner, Koley Jessen LLP
Omaha, NE

Elizabeth Lally is a Partner as Spencer Fane LLP where she solves complex banking and bankruptcy matters for businesses and financial institutions through proactive counsel, litigation, and alternative dispute resolution methods, providing consistently beneficial resolutions to protect her clients' interests. She provides a thorough understanding of how to navigate the difficult world of corporate insolvency and restructuring, having worked with some of the nation's top lending institutions. Ms. Lally's experience includes representing borrowers and lenders in complex financing transactions, debt restructuring, and out-of-court workouts as well as Chapter 7, Chapter 12, and Chapter 11 reorganizations and liquidations. She regularly represents debtors-in-possession and unsecured creditor committees in complex Chapter 11 reorganizations and liquidations, and is a Subchapter V Trustee for Region 12 covering Iowa and South Dakota. In addition to traditional financial services and bankruptcy matters, Ms. Lally represents bankruptcy trustees and other creditors in suspected bankruptcy fraud investigations and all resulting litigation. She has also worked with the FBI and the U.S. Trustee Program's Bankruptcy Fraud Program to recover funds for the victims of bankruptcy and wire fraud.

Alexandra Everhart Sickler
Archie Unterseher Endowed Professor of Law
University of North Dakota Law
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Alex Sickler is the Archie Unterseher Endowed Professor of Law at the University of North Dakota School of Law, where she teaches contracts, bankruptcy, and commercial law courses. Before joining UND, Professor Sickler was a trial attorney with the U.S. Trustee Program in Washington, D.C. While there, she litigated civil enforcement matters arising in consumer bankruptcy cases. Before that, she practiced bankruptcy and complex commercial litigation in the Washington, D.C. office of Weil, Gotshal & Manges, LLP and clerked for the Honorable S. Martin Teel, Jr., U.S. Bankruptcy Judge for the District of Columbia. Professor Sickler earned her B.A. from the College of William and Mary and her

J.D. with high honors from The George Washington University Law School, where she was named to the Order of the Coif and was an Articles Editor for *The George Washington International Law Review*.

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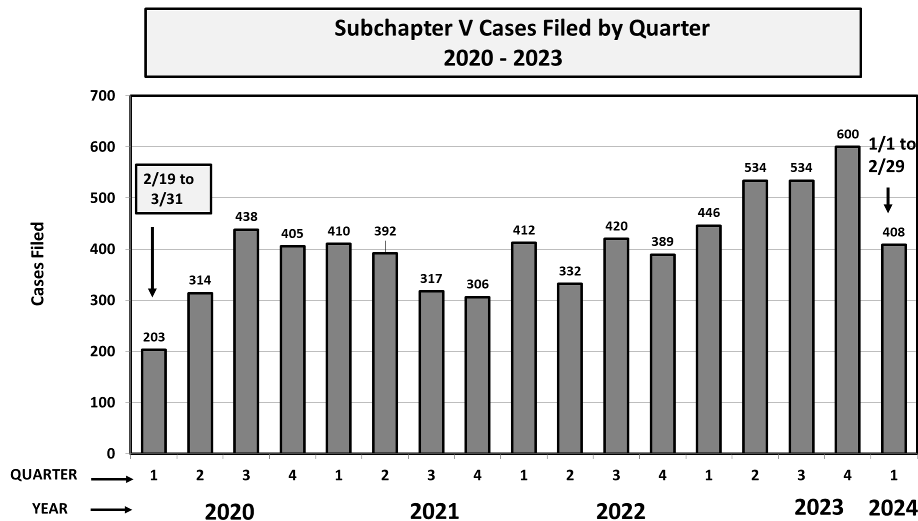
Appendix B: Subchapter V Statistical Summary

Data Notes: As with any empirical analysis, the data below offer only limited information and should be used as just one factor in the overall analysis of Subchapter V.[358] *For example, the ABI data only account for closed cases and do not capture any information about open cases still pending in the courts. The data also do not reflect the particular circumstances of any given case that might qualify the case as an outlier or strengthen any given data point. In addition, as noted in the footnote, there is no one comprehensive database collecting all potentially relevant data on Subchapter V cases.*

Subchapter V Filings:

The EOUST reports more cases filed than the ABI. However, without a case-by-case listing there is no way to verify the data, or to determine other case characteristics. Therefore, most of the data in this report is based on ABI data.

Between February 19, 2020, and February 29, 2024, there were 6,860 Chapter 11 cases filed under Subchapter V. They accounted for more than one quarter of all Chapter 11 case filings (25,741) during this period. As the following chart shows, Subchapter V filings were at record levels in 2023.



358 Sources of Data: There are two main sources of data on Subchapter V cases. The first source is the Executive Office for the United States Trustees (EOUST), which has posted summary Subchapter V data on its website since early 2023. Some of these data come from the Administrative Office of the United States Courts (AO) and are subject to an agreement between the two agencies that limits the disclosure of certain information. The EOUST data do not include cases filed in North Carolina and Alabama, because those two states are not administered by the US Trustee Program.

The second database was compiled by the American Bankruptcy Institute. It combines data from PACER with data from the Integrated DataBase (IDB) which is published by the Federal Judicial Center.

The EOUST data on case outcomes are more complete than the ABI data, because the data are based on the actual date of confirmation, dismissal, or conversion while the data used by the ABI only become available after a case has been statistically closed. Case closing may occur years after a case is confirmed, dismissed, or converted.

Subchapter V Filings by State:

Subchapter V cases have been filed in every state. Four states (Florida, California, Texas, and New York) have accounted for about 42 percent of all cases. The 22 states with more than 100 cases are as follows:

Subchapter V Cases Filed
2/19/2020 – 2/29/2023

State	Cases
Florida	948
Texas	761
California	705
New York	482
Georgia	282
Illinois	271
New Jersey	248
Tennessee	200
Arizona	189
Colorado	176
Pennsylvania	166
North Carolina	165
Nevada	148
Michigan	143
Louisiana	133
Maryland	121
Delaware	111
Ohio	110
Indiana	110
Washington	108
Virginia	106
Alabama	103

EOUST Summary Data Through February 29, 2024[359]

Subchapter V Filing Summary from EOUST: (The Government Fiscal Year is the 12-month period ending September 30 of each year.)

Time Period	Subchapter V Cases
Fiscal Year 2020	1,118
Fiscal Year 2021	1,716
Fiscal Year 2022	1,592
Fiscal Year 2023	1,987
Fiscal Year 2024	1,029

Chapter 11 Outcomes Through February 29, 2024 from EOUST:

Disposition	Chapter 11 Small Business (Non-Subchapter V)		Subchapter V
	FY 2017 – FY 2019	FY 2020 – FY 2023	FY 2020 – FY 2023
Pending Without Confirmed Plan	1%	8%	10%
Plan Confirmed	31%	20%	50%
Converted	15%	21%	11%
Dismissed	54%	51%	29%
Total	100%	100%	100%
Median Months to Confirmation	10.8	10.3	6.4
Median Months to Dismissal	6.0	3.8	4.5

Conclusions from EOUST Report:

- "Compared to other (non-subchapter V) chapter 11 small business cases, subchapter V cases have had approximately double the percentage of confirmed plans and half the percentage of dismissals, as well as a shorter time to confirmation."
- "***Of subchapter V cases with confirmed plans, 69 percent of the confirmed plans have been consensual plans.***[360]"

359 Source: https://www.justice.gov/ust/page/file/1499276/download.

360 Emphasis added. The ABI understands the use of the term "consensual" to represent plans that the courts confirm under section 1191(a) of the Bankruptcy Code based on the requisite classes of creditors voting to accept the plan. Thus, this data point may not capture plans confirmed under the section 1191(b) cramdown provisions of the Bankruptcy Code when no creditors vote against the plan, and potentially all active creditors affirmatively support the plan, but certain classes of creditors have not voted at all.

ABI Summary Data[361]

ABI Data on Outcomes:

Small Business and Subchapter V Cases Filed 2/19/2020 to 12/31/2023		
	Sub V Cases	Not Sub V Cases
Cases Filed	6,410	1,495
Cases Still Open	3,273	602
Total Closed or Converted	3,137	893
Confirmed	1,205	137
Dismissed	1,450	665
Converted and Closed	143	31
Converted and Still Open	277	45
Other Outcomes	62	15

The ABI data do show that Subchapter V cases have a much higher confirmation rate than cases in which the debtor does not elect to proceed under Subchapter V. Moreover, as of December 31, only 99 of the 6,410 Subchapter V cases included in the ABI database involved a debtor that needed to file a subsequent bankruptcy case.

Small Business and Subchapter V Cases Filed 2/19/2020 to 12/31/2023		
	Sub V Cases	Not Sub V Cases
Total Closed or Converted	3,137	893
Confirmed	38.4%	15.3%
Dismissed	46.2%	74.5%
Converted and Closed	4.6%	3.5%
Converted and Still Open	8.8%	5.0%
Other Outcomes	2.0%	1.7%

361 The following information in this summary is from the ABI database, as of the dates noted. The ABI database was compiled by combining information from PACER with information in the IDB. The ABI data on case outcomes are less complete because the IDB does not show the outcome unless the case has been converted to another chapter or statistically closed by the court. Also, 'Other Outcomes' includes intra-district and inter-district transfers and cases filed or closed in error.

Debt Amounts:

The Subchapter V debt limit was increased from $2,725,625 to $7,500,000 on March 27, 2020 (about six weeks after Subchapter V became available). The debt limits also reverted to their original amounts for several months during 2022. The following chart includes only cases filed during the periods when the Subchapter V debt ceiling was $7.5 million.[362]

About 26.2% of Subchapter V cases have been between the old and new debt limits.

Subchapter V Cases by Debt Amount Filed 2/19/2020 to 12/31/2023				
	Under $2,725,625	Up to $7,500,000	Over $7,500,000	Not Reported
Cases Filed	3,125	1,184	209	1,324
Cases Still Open	1,638	689	129	678
Total Closed or Converted	1,487	495	80	646
Confirmed	571	209	44	171
Dismissed	674	196	20	402
Converted and Closed	86	26	5	9
Converted and Still Open	133	59	11	40

The confirmation rate has been higher for cases with debts above the original limit. This gap is expected to rise slightly as more cases are closed by the courts.

Subchapter V Cases by Debt Amount Filed 2/19/2020 to 12/31/2023				
	Under $2,725,625	Up to $7,500,000	Over $7,500,000	Not Reported
Cases Filed	3,125	1,184	209	1,324
Total Closed or Converted	1,487	495	80	646
Percent Closed or Converted	47.6%	41.8%	38.3%	48.8%
Confirmed	38.4%	42.2%	55.0%	26.5%
Dismissed	45.3%	39.6%	25.0%	62.2%
Converted and Closed	5.8%	5.3%	6.3%	1.4%
Converted and Still Open	8.9%	11.9%	13.8%	6.2%
Other Outcomes	1.5%	1.0%	0.0%	3.7%

362 These data are based on raw numbers, with no independent investigation concerning whether the court or the parties subsequently determined the debt amounts to be higher or lower in the particular case. Thus, for example, a case showing on the docket as initially reporting debt above $7,500,000, may not in fact have noncontingent and liquidated debt above that amount.

Filings By Individuals:

About 21 percent of the Subchapter V cases were filed by individuals, who reported that a majority of their debt was business debt. The debt limits for Chapter 13 debtors were increased on June 21, 2022. Prior to this date 24.6% of Subchapter V cases were filed by individuals. Since this date only 16.4 percent of Subchapter V cases have been filed by individuals.

Confirmation rates have been much higher for the individuals who chose to proceed under Subchapter V.

Cases Filed by Individuals 2/19/2020 to 12/31/2023		
	Sub V Cases	Not Sub V Cases
Total Filed	1,325	105
Total Closed or Converted	687	63
Confirmed	42.2%	12.7%
Dismissed	38.1%	74.6%
Converted and Closed	6.6%	3.2%
Converted and Still Open	10.5%	6.3%
Other Outcomes	2.6%	3.2%

***Pro Se* Cases:**

About 3.6 percent of Subchapter V debtors and 18.1 percent of other small business debtors file without an attorney. Nearly all of these cases are dismissed by the court. These results are similar to Chapters 12 and 13 *pro se* debtors.

Pro Se Cases Filed 2/29/2020 to 12/31/2023		
	Sub V Cases	Not Sub V Cases
Total Filed	230	270
Total Closed or Converted	187	168
Confirmed	1.1%	0.6%
Dismissed	89.8%	95.8%
Converted and Closed	5.3%	1.2%
Converted and Still Open	2.1%	1.8%
Other Outcomes	1.6%	0.6%

Appendix C: American Bankruptcy Institute Subchapter V Task Force Subchapter V Survey (2023)

Key Insights and Feedback About Subchapter V

I. Introduction

The American Bankruptcy Institute Subchapter V Task Force (Task Force) emailed a survey to ABI members and other insolvency professionals in late April 2023. The survey closed on July 31, 2023. The survey sought qualitative feedback from bankruptcy judges and bankruptcy professionals about their experiences with Subchapter V cases. The survey is attached to this summary of the key insights and feedback the Task Force received. In particular, the survey invited respondents to share:

- Whether they had a more positive or negative sentiment about Subchapter V by indicating a numerical score between five and one for this sentiment, five being the most positive and one being the most negative;
- Some aspects of Subchapter V that have worked well in their cases;
- Some aspects of Subchapter V that have not worked well in their cases;
- A desired change to Subchapter V; and
- Any other information they wanted to share about their experience with Subchapter V cases.

Below are key insights from the data on frequently reported positive and negative aspects of Subchapter V, along with frequently indicated suggestions for change to the subchapter.

II. Summary of Key Insights and Feedback

Role and background of respondents. Respondents from all federal circuits responded to the survey, with most having experience in the Fourth, Ninth, Tenth, and Eleventh Circuits. The majority of the 370 survey respondents were attorneys, with some bankruptcy judges, financial advisors, Subchapter V trustees, and government entities also represented. Most respondents had worked on 4 or more Subchapter V cases in the previous 12 months. Respondent attorneys indicated they typically

represent debtors, secured creditors, or unsecured creditors, and Subchapter V trustees, and government entities reported they represented themselves.

Average sentiment score. On average respondents had an overall positive view of Subchapter V. The average sentiment score about Subchapter V was 3.4 on a numerical scale of one to five, with five being the most positive and one being the most negative.

Amount of debt involved in the cases. The survey asked respondents to indicate how much noncontingent liquidated secured and unsecured debt is involved in the respondents' cases, according to three options: less than $2,500,000; $2,500,000 to $5,000,000; and more than $5,000,000. The survey asked respondents to indicate more than one of the three options, if appropriate. The frequency with which each option was indicated did not substantially vary:

- Less than $2,500,000 (selected 190 times)
- $2,000,000 to $5,000,000 (selected 255 times)
- More than $5,000,000 (selected 176 times).

Positive and negative aspects of Subchapter V and suggested changes.

- Frequently reported positive aspects of Subchapter V were its streamlined process, lower costs, Subchapter V trustee involvement, flexibility in plan confirmation, and equity retention.
- Frequently reported negative aspects of Subchapter V were uncertainty about Subchapter V trustee compensation and fees, strict deadlines, protection for unsecured creditors, lack of clarity about the role of the Subchapter V trustee, challenges determining contingent and unliquidated debt, challenges monitoring plan compliance, and nonparticipation by creditors.
- Frequently suggested changes to Subchapter V related to maintaining or raising the debt caps, clarification about the powers and duties of the Subchapter V trustee, use of interim compensation procedures to ensure payment of trustee fees, the ability of the Subchapter V trustee to file a plan, implementation of a deadline for plan confirmation, creditor protections, and expanded ability to modify confirmed consensual plans.

III. Positive Aspects of Subchapter V

Frequently reported positive aspects of Subchapter V according to survey responses include:

1. **Speed and efficiency of the process.** Many respondents mentioned the expedited timelines and deadlines helped move cases along more quickly compared to standard Chapter 11 cases, which saved time and costs.

2. **Role of the Subchapter V Trustee.** The presence of the Subchapter V trustee to facilitate negotiations, mediate disputes, and advise both debtors and creditors was described as beneficial by many respondents.

3. **Reduced costs.** The lack of quarterly fees, no required creditors' committee, streamlined reporting, and a simpler plan process helping to reduce professional fees and costs as compared to standard Chapter 11 cases were cited as positive aspects of Subchapter V.

4. **Confirmation standard.** The absence of the absolute priority rule, no need for an impaired accepting class, and the focus on projected disposable income made it easier for debtors to confirm plans over creditor objections.

5. **Nonconsensual confirmation**. The ability to achieve nonconsensual confirmation helped debtors in plan negotiations.

6. **Maintaining ownership.** Many debtor attorneys cited the ability of equity holders to retain ownership as a positive factor.

In summary, a streamlined process, lower costs, Subchapter V trustee involvement, flexibility in plan confirmation, and equity retention were frequently cited positive features of Subchapter V.

IV. Negative Aspects of Subchapter V

Frequently reported negative aspects of Subchapter V according to survey responses include:

1. **Subchapter Trustee Compensation.** Many respondents expressed concerns about Subchapter V trustees not getting paid fully in cases that are dismissed or converted before confirmation and indicated this could discourage qualified trustees from serving over time.

2. **Tight deadlines.** The expedited timeline of 90 days to file a plan was described as challenging in some cases, especially when extra time was needed to negotiate with creditors.

3. **High Subchapter V trustee fees.** Some respondents indicated that Subchapter V trustee fees were excessive in simpler cases.

4. **Inadequate creditor protections.** Some respondents stated that the subchapter favors debtors over creditors due to limited unsecured creditor rights and no committee representation.

5. **Uncertainty about the role of the Subchapter V Trustee.** Some respondents expressed concern that lack of clarity about the Subchapter V trustee's role caused confusion in the cases.

6. **Identifying contingent, unliquidated Debt.** Some respondents indicated guidance about identifying whether debt was contingent or unliquidated for calculating the debt cap would be helpful.

7. **Plan implementation and compliance.** Some respondents viewed monitoring plan compliance as a challenge, especially with no quarterly post-confirmation reports or trustee disbursements.

8. **Nonvoting creditors.** Some respondents reported that cases stayed open longer than necessary because creditors failed to return ballots.

In summary, Subchapter V trustee compensation and fees, strict deadlines, protection for unsecured creditors, lack of clarity about the role of the Subchapter V trustee, determining contingent and unliquidated debt, plan compliance, and nonparticipation by creditors were common areas of concern cited by survey respondents.

V. Suggested Changes or Improvements to Subchapter V

Frequently suggested changes or improvements to subchapter V include:

1. **Maintain the Current Debt Cap.** Many respondents called for making the existing $7,500,000 debt cap permanent. Some also called for permanently increasing the debt cap to $10 million or higher.

2. **Clarification about the Role of the Subchapter V Trustee.** Many respondents asked for additional guidance on the Subchapter V trustee's powers and duties, especially after the debtor has been removed from possession.

3. **Interim Compensation for Subchapter V Trustees.** Numerous respondents proposed requiring debtors to deposit or escrow funds at the outset of the case to ensure compensation for Subchapter V trustees.

4. **Allow Subchapter V Trustees to File Plans.** Many suggested giving the Subchapter V trustee the ability to file a plan if the debtor has been removed from possession or failed to timely file a plan.

5. **Deadline for Confirmation.** Some respondents proposed setting a hard deadline for plan confirmation to prevent cases from languishing.

6. **Increased Creditor Protections.** Some respondents recommended increased protections for creditors, such as application of the absolute priority rule, the requirement of a creditors' committee, or charging the Subchapter V trustee with duties to protect the interest of unsecured creditors.

7. **Plan Modifications.** Some responses requested the ability to modify confirmed consensual plans in instances of debtor default or debtor noncompliance.

In summary, frequently suggested changes to Subchapter V related to maintaining or raising the debt caps, clarification about the powers and duties of the Subchapter V trustee, use of interim compensation procedures to ensure payment of trustee fees, the ability of the Subchapter V trustee to file a plan, a deadline for plan confirmation, creditor protections, and expanded ability to modify confirmed consensual plans.

VI. Conclusion

The qualitative feedback from the survey indicates Subchapter V is generally achieving its goals of streamlining the reorganization process for smaller businesses. Respondents report an overall positive sentiment concerning the subchapter. The feedback also indicates that some aspect of the subchapter could benefit from reform or guidance.

Subchapter V Task Force Survey

The ABI Subchapter V Task Force needs your help. The Task Force is studying the operation of Subchapter V in practice, and it needs real-time input from the professionals working with the subchapter. Please take five minutes to answer the survey questions and add your experiences to the study. If you so choose, your survey responses may remain anonymous, however, understanding the survey respondents' professional demographics will aid in the Task Force's research and recommendations.

1. How many subchapter V cases have you worked on in the past 12 months?

None of the Above

1-4

5-9

10+

2. What role(s) do you typically serve in subchapter V cases? (Please check all that apply).

Judge
Attorney
Subchapter V Trustee
U.S. Trustee Program
Financial Advisor
Consultant
None of the Above
Other (please specify)

3. Which parties do you typically represent in subchapter V cases? (Please check all that apply)
   - Debtors
   - Secured creditors
   - Unsecured creditors
   - Government entity or agency
   - Subchapter V trustee (attorney or advisor to trustee)
   - None of the Above

4. Please identify the federal circuit(s) where you participate in subchapter V cases (check all that apply).
   - First Circuit
   - Second Circuit
   - Third Circuit
   - Fourth Circuit
   - Fifth Circuit
   - Sixth Circuit
   - Seventh Circuit
   - Eighth Circuit
   - Ninth Circuit
   - Tenth Circuit
   - Eleventh Circuit
   - D.C. Circuit

5. How much noncontingent liquidated secured and unsecured debt is involved in these cases? (Please check all that apply)
   - Less than $2.5 million
   - $2.5 million to $5 million
   - More than $5 million

6. Overall, do you have a more positive or negative sentiment about subchapter V as it relates to your practice? Please answer this question based on a number scale below, with 5 being the most positive and 1 being the most negative.

7. What are some aspects of subchapter V that have worked well in your cases?

8. What are some aspects of subchapter V that have not worked well?

9. If you could make one change to subchapter V (statutory or procedural), what would it be?

10. Is there anything else you would like to share about your experiences with subchapter V cases? (optional)

Appendix D: ABI Subchapter V Task Force Subchapter V Trustee Survey Results

Introduction

The American Bankruptcy Institute Subchapter V Task Force (Task Force) surveyed 265 Subchapter V trustees across all judicial districts.[363] The survey was emailed to the trustees on November 27, 2023, for online completion and closed December 15, 2023. Eighty-four Subchapter V trustees responded to the Task Force survey, a 32% response rate, although not all respondents answered all questions.[364]

Survey questions were designed to glean some insights about implementation of Subchapter V generally and the role of the Subchapter V trustee in particular. The responses are qualitative and provide a snapshot of the experiences about Subchapter V trustees who have a critical role in Subchapter V cases.

The survey asked Subchapter V trustees to respond to questions about compensation, expansion of their duties and powers, and the confirmation and postconfirmation success of the debtors in the cases in which they have been appointed. This summary includes information about Subchapter V trustee compensation relating to their hourly fees, how much they are awarded, how much they are paid, and whether an interim compensation procedure exists to secure payment of their fees. The summary also includes descriptions of how bankruptcy courts have expanded their duties and powers pursuant to court order. Finally, the results include some information about confirmation rates and postconfirmation business operations.

Although the survey results do not provide a comprehensive assessment, the results here do inform the larger discussion about how the subchapter is working and provide some insight about whether small businesses can effectively reorganize under the subchapter.

363 This includes Subchapter V trustees serving in North Carolina and Alabama.

364 No uniform minimum response rate exists, but commentary suggests that this is a good response rate for a qualitative survey administered online. *See, e.g,* Diane Lourdes Dick, *Equitable Powers and Judicial Discretion: A Survey of U.S. Bankruptcy Judges*, 94 Am. Bankr. L. J. 265, 267 (2020) (reporting a 14% response rate for a survey administered online and noting that paper surveys tend to have higher response rates than online surveys); Ralph Peeples, *The Uses of Mediation in Chapter 11 Cases*, 17 Am. Bankr. Inst. L. Rev. 401, 416 (2009) (reporting a 44% response rate for survey deployed in paper and online); Tse-Hua Shih & Xitao Fan, *Comparing Response Rates from Web and Mail Surveys: A Meta-Analysis*, 20 Field Methods 249, 257 (2008) (finding the average response rate for web surveys is 34%); Robert J. Niemic & Shannon Wheatman, *Survey of Bankruptcy Judges Regarding Use of Rule 7026 Mandatory Disclosure in Adversary Proceedings* (2004) (reporting a 36-38% response rate for an online survey by the Federal Judicial Center), https://www.uscourts.gov/sites/default/files/rule7026_2.pdf.

Part I: Background Questions

The first part of the survey asked Subchapter V trustees to identify the circuit(s) in which they were appointed, and to indicate the number of cases in which they have been appointed a Subchapter V trustee.[365] Almost all the Subchapter V trustees who responded to the survey serve in one federal circuit. Only two trustees who completed the survey serve in more than one federal circuit.

Eighty-four responses reported a total of 2,202 cases.[366] Notably, this number represents about a third of all Subchapter V cases filed at the time the survey was deployed. The lowest number of cases reported in the survey by a Subchapter V trustee was two while the highest number of cases reported was 100.

Federal Circuits in which Respondents Serve as Subchapter V Trustees (84 Responses)

Federal Circuit	Responses (Percentage)	Responses (Number)
First Circuit	4.76%	4
Second Circuit	7.14%	6
Third Circuit	10.71%	9
Fourth Circuit	11.90%	10
Fifth Circuit	10.71%	9
Sixth Circuit	10.71%	9
Seventh Circuit	7.14%	6
Eighth Circuit	7.14%	6
Ninth Circuit	16.67%	14
Tenth Circuit	3.57%	3
Eleventh Circuit	14%	12
D.C. Circuit	1.19%	1

Part II: Subchapter V Fees & Compensation

The survey next asked Subchapter V trustees to respond to a series of questions about their fees and compensation.[367] The Task Force was interested in the range of hourly fees charged by Subchapter V

365 Question: 1: Identify the federal circuit(s) in which you have been appointed as Subchapter V trustee. [Please check all that apply.]

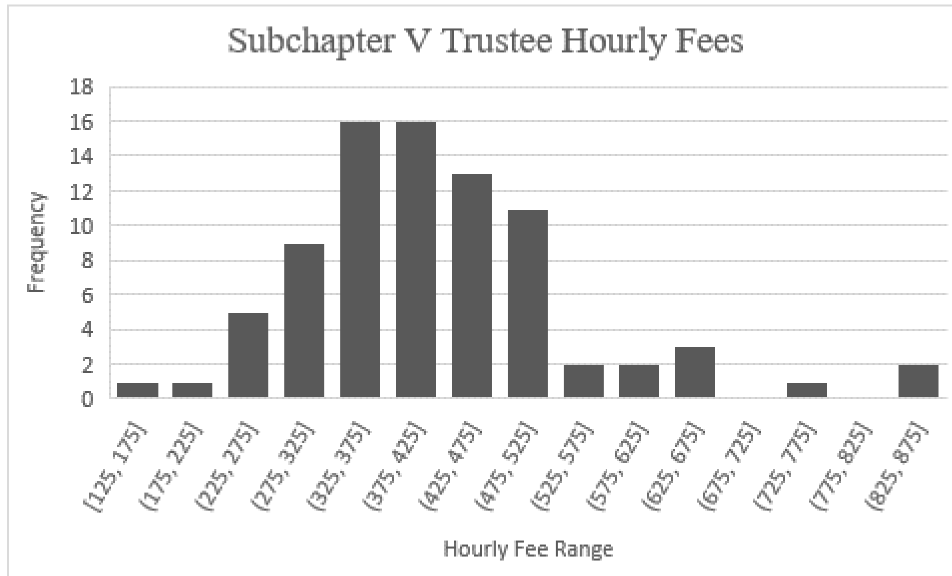
366 Question 2: In how many cases have you been appointed as Subchapter V trustee?

367 Question 3: What is your hourly fee? (85 responses)

trustees. The survey also asked Subchapter V trustees to report the range of fees typically awarded in a case and whether and how often Subchapter V trustees are paid less than their awarded fees.

A. Subchapter V Trustee Fees

Subchapter V trustees were asked to report their hourly fee rates. Thirty-nine percent of the Subchapter V trustees responding to the survey report fees between $325–$425 per hour. Twenty-nine percent report an hourly fee between $425–$525 per hour.



The Task Force also asked Subchapter V trustees a series of questions about their professional fees to collect some information about their hourly fees, the range of fees they are typically awarded in a case, whether they collect amounts less than their fee awards, and whether their districts have interim compensation procedures.

The Task Force invited Subchapter V trustees to indicate the range within which the professional fees they are awarded most often fall.[368] Fifty-five percent of Subchapter V trustees who responded to this question indicated that they are typically awarded $5,000 to $10,000 in fees in a Subchapter V case. Twenty-eight percent of Subchapter V trustees report that they are typically awarded fees in the range of $11,000 to $15,000.

Eighty-six percent of the survey respondents (or 70 out of 81) report having been paid less than the amount of professional fees they were awarded.[369] Subchapter V Trustees were asked, as a follow-up question, to indicate the number of cases in which they had been paid less than the full amount of fees

368 Question 4: Please indicate the range within which the professional fees you are awarded in a Subchapter V case most often fall. (82 responses)

369 Question 5 (81 responses): Have you ever been paid less than the amount of professional fees you have been awarded? Yes or no.

they were awarded. The respondents indicated that they were not paid the full amount of fees they were awarded in a total of 379 cases.[370] This represents about 17% of the 2,202 cases reported in the survey.[371]

B. Interim Compensation Procedures

The Task Force asked Subchapter V trustees to report whether the district where they serve has an interim compensation procedure, and if so to describe that procedure.[372] About 44% of Subchapter V trustees responding to the question (27 out of 62) indicated they have an interim compensation or fee escrow procedure for Subchapter V trustees in the district(s) where they serve. Fifty-six percent (35 out of 62) reported that no such procedure exists where they serve.

The responses described both informal interim compensation procedures and formal ones, meaning those required by local rule or standing order. Some trustees reported the use of an informal escrow procedure. Money is escrowed for fees if the trustee files a motion requesting it. A few trustees noted that often the escrow does not get funded.

Some trustees indicated that their districts have a formal procedure that requires escrow of a specified amount per month ($1,000). Many others said they file an interim fee application. Some Subchapter V trustees indicated that their fees are included as a line item in the debtor's budget in cash collateral orders.

Part III: Expansion of Powers and Duties of the Subchapter V Trustee

Part III of the survey asked some questions about the expansion of the Subchapter V trustee's duties and powers pursuant to court order. [373]

A. Expansion of Duties

Here, 42 Subchapter V trustees responding to the survey report that their duties have never been expanded pursuant to court order under section 1183(b)(2). The remaining responses indicated that their duties had been expanded under section 1183(b)(2) in 59 total cases:

- 23 Subchapter V trustees in one case each, representing 23 cases;
- Seven Subchapter V trustees in two cases each, representing 14 cases;

370 Question 6: In how many cases have you been paid less than the full amount you were awarded?

371 Some survey respondents did not enter a numerical answer for Question 6 and instead responded "several," "unknown," "most", etc. These were not counted.

372 Question 7: Is there an interim compensation or fee escrow procedure for subchapter V trustees in the district(s) where you serve? (62 responses); Question 8: Describe the interim compensation procedures. ([#] responses).

373 Question 9: In how many cases in which you have been appointed as a Subchapter V trustee have your duties been expanded pursuant to court order under section 1183(b)(2)? (80 responses); Question 10: In how many cases in which you have been appointed as a Subchapter V trustee have your powers been expanded pursuant to court order under section 1185? (77 responses)

- Three Subchapter V trustees in three cases each, representing nine cases;
- Two Subchapter V trustees in four cases each, representing eight cases; and
- One Subchapter V trustee in five cases, representing five cases.

When asked to describe how their duties have been expanded,[374] Subchapter V trustees described their expanded duties as follows.

- Investigate the debtor's finances (many answers stated this phrase generally). Specific examples include:
  - Review and report on the debtor's finances;
  - Review and report on whether debtor followed the sales process;
  - Investigate insider loans for cash collateral purposes;
  - Investigate avoidance actions.
- Operate the business (several answers stated this phrase generally). More specific examples include:
  - Control over sales proceeds pending plan approval;
  - Control debtor's bank accounts while business operations continued postconfirmation;
  - Control cash.
- Other ways trustees reported their duties have been expanded pursuant court order include:
  - Report on the debtor's operations;
  - Prepare the monthly financials;
  - Take control of the sale of the debtor assets;
  - Determine whether creditors' claims were noncontingent for eligibility purposes;
  - Liquidate assets, analyze and prosecute causes of action and objections to claims, and make distributions to creditors after confirmation;
  - Serve as settlement conference facilitator on a myriad of contested matters and adversary proceedings.

B. Expansion of Powers.

Here, 55 Subchapter V trustees responding to the survey report that their powers have never been expanded pursuant to court order under section 1185. The remaining responses indicated that their powers had been expanded under section 1185 in 32 total cases:

374 Question 9a: If your duties have expanded, please describe how they have been expanded under section 1183(b)(2). (24 responses)

- 13 Subchapter V trustees in one case each, representing 13 cases;
- Four Subchapter V trustees in two cases each, representing eight total cases;
- Two Subchapter V trustees in four cases each, representing eight total cases;
- One Subchapter trustee in three cases, representing three cases.

When asked to describe how their powers have been expanded,[375] Subchapter V trustees described their expanded powers as follows:

- Upon removal of the debtor in possession, powers were expanded to operate the debtor's business and to encompass the same rights, powers, and duties as a Chapter 11 trustee would have in a traditional Chapter 11 case (except the ability to file a plan);
- Appointed on an interim basis to manage day-to-day affairs of the business while reviewing other shareholders as replacement for the removed debtor;
- Conduct a sale of debtor's assets under section 363 of the Bankruptcy Code;
- Carry out liquidating plan;
- Review potential avoidance actions for Chapter 7 liquidation analysis purpose;
- Negotiate in mass tort scenarios to reduce claims against the estate.

Part IV: Plan Confirmation and Postconfirmation Results

The fourth and final part of the Task Force survey asked Subchapter V trustees to indicate how many cases in which they have been appointed have had consensual and nonconsensual confirmed plans, respectively[376], and asked the trustees to report whether those debtors' businesses are still operating.[377] Survey responses declined for this set of questions, so the total number of cases represented in the responses declined overall. As a result, the data for these questions address only 1,608 of those 2,202 previously reported cases.[378]

375 Question 10a: If your powers have expanded, please describe how they have been expanded pursuant to court order under section 1185. (17 responses)

376 Question 11: How many of the cases in which you have been appointed as the subchapter V trustee have had consensual confirmed plans? (70 responses); Question 13: How many of the cases in which you have been appointed as the subchapter V trustee have had nonconsensual confirmed plans? (69 responses).

377 Question 12: How many debtors with consensual confirmed plans have businesses that are still operating? (67 responses); Question 14: How many debtors with nonconsensual confirmed plans have businesses that are still operating? (63 responses).

378 Some respondents did not respond to the last four survey questions, which asked about plan confirmation and postbankruptcy operation, so there is no confirmation data for 532 of the 2,202bcases reported in the aggregate in response to Question 2.

The responding Subchapter V trustees indicated that 908 total plans (632 consensual and 276 nonconsensual) were confirmed out of the 1,608 cases represented in the responses to this set of questions. Those numbers reflect a 56% confirmation rate, which is not far from the 50% plan confirmation rate reported by the U.S. Trustee Program.[379] That means that the remaining cases reported by the Subchapter V trustees responding to the questions in this part of the survey were either pending or resolved other than through a confirmed plan at the time they responded to the survey.

According to the responses, 89% percent of the businesses with consensual confirmed plans are still operating (514 of 579 cases), while 79% of those debtors with nonconsensual confirmed plans have businesses that are still operating (213 of 270 cases).[380]

379 *See* U.S. Trustee Program, Chapter 11 Subchapter V Statistical Summary Through Feb. 29, 2024, available at https://www.justice.gov/ust/page/file/1499276/dl. According to the survey responses, 39% of these confirmed plans were consensual (632 out of 1,608 cases) and 17% were nonconsensual (276 out of 1,608 cases). This number is low as compared with the U.S. Trustee Program's 69% rate for consensual confirmed plans, *see supra id.,* and likely reflects, in part, the drop in number of survey responses to this question.

380 Again, the responses to Questions 12 and 14, asking how many business with consensual confirmed and nonconsensual confirmed plans were still operating, declined, so the overall number of cases represented in the calculation dropped.

Appendix E: American Bankruptcy Institute Subchapter V Task Force Hearing Witness List

General Experiences with Subchapter V (June 9, 2023)

- Hon. Hannah L. Blumenstiel, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Northern District of California
- Hon. Lori V. Vaughan, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Middle District of Florida
- Katharine Clark, Partner, Thompson Coburn LLP
- John-Patrick M. Fritz, Levene, Neale, Bender, Yoo & Golubchik L.L.P.
- Richardo I. Kilpatrick, President, Kilpatrick & Associates, P.C.
- David Mawhinney, Hart Advisory PLLC
- Brian L. Shaw, Member, Cozen O'Connor
- Michael St. James, St. James Law P.C.

Eligibility Issues (June 23, 2023)

- Hon. Paul M. Black, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Western District of Virginia
- Hon. Kesha L. Tanabe, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of Minnesota
- Hon. Benjamin A. Kahn, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Middle District of North Carolina
- Sumner A. Bourne, Partner, Rafool & Bourne, PC
- Karen Cordry, Bankruptcy & State Defensive Litigation Chief Counsel, National Association of Attorneys General (*in memoriam*)
- Robert J. Gonzales, Emerge Law, PLC
- Adam R. Prescott, Shareholder, Bernstein, Shur, Sawyer & Nelson, P.A.
- Daniel A. Velasquez, Partner, Latham, Luna, Eden & Beaudine, LLP

Role of the Subchapter V Trustee (July 14, 2023)

- Hon. Craig T. Goldblatt, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of Delaware
- Hon. Meredith S. Grabill, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Eastern District of Louisiana
- Hon. Deborah L. Thorne, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Northern District of Illinois
- Marc E. Albert, Partner, Stinson LLP
- Amy Denton Mayer, Shareholder, Stichter, Riedel, Blain & Postler, P.A.
- Mark D. Hildreth, Partner, Shumaker, Loop & Kendrick, LLP
- Susan K. Seflin, Partner, BG Law

Operation of the Case (July 28, 2023)

- Hon. Scott M. Grossman, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Southern District of Florida
- Hon. Michael E. Romero, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of Colorado
- Hon. Elizabeth S. Stong, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Eastern District of New York
- Craig M. Geno, Law Offices of Craig M. Geno, PLLC
- Geoff Groshong, Groshong Law PLLC
- Nancy Isaacson, Partner, Greenbaum Rowe Smith & Davis LLP
- Benjamin Zaslav, Director, Hilco Real Estate

Confirmation Issues (September 8, 2023)

- Hon. Martin R. Barash, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Central District of California
- Hon. Craig A. Gargotta, Chief U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Western District of Texas
- Jeffrey S. Ainsworth, Branson Law PLLC

- Daniel E. Etlinger, Underwood Murray PA
- Rebecca F. Redwine, Hendren, Redwine, & Malone, PLLC

Postconfirmation Issues (September 22, 2023)

- Hon. Andrew B. Altenburg Jr., U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of New Jersey
- Hon. Mary Jo Heston, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Western District of Washington
- Hon. Catherine Peek McEwen, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Middle District of Florida
- Eyal Berger, Partner, Akerman, LLP
- Keri L. Riley, Partner, Kutner, Brinen, Dickey, Riley, P.C.
- Ciara L. Rogers, Partner, Waldrep Wall Babcock & Bailey, PLLC
- Dennis J. Shaffer, Senior Counsel, Whiteford, Taylor & Preston LLP

Final Wrap-up Hearing/General Experiences with Subchapter V (October 12, 2023)

- Hon. Laurel M. Isicoff, U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Southern District of Florida
- Hon. Robert H. Jacobvitz, Chief U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the District of New Mexico
- Hon. Stacey G.C. Jernigan, Chief U.S. Bankruptcy Judge, U.S. Bankruptcy Court for the Northern District of Texas
- H. David Cox, Cox Law Group, PLLC
- Professor Brook E. Gotberg, Brigham Young University J. Reuben Clark Law School
- Brad W. Odell, Partner, Mullin, Hoard, Brown, LLP
- Heidi J. Sorvino, Co-Chair, Financial Restructuring and Bankruptcy Practice and Managing Partner, White & Williams, LLP

Appendix F – Subchapter V LBRs by State and District / Division

Appendix – Subchapter V LBRs by State and District / Division

State	Division	Comments, LBR Links, and Court Website Links
Alabama	M.D. Ala.	No specific LBRs on SubV readily apparent https://www.almb.uscourts.gov/sites/almb/files/local_rules/ALMBLocalRuleseffectiveJuly1%2C2019.pdf https://www.almb.uscourts.gov
Alabama	N.D. Ala.	No specific LBRs on SubV readily apparent https://www.alnb.uscourts.gov/court-info/local-rules-and-orders/local-rules https://www.alnb.uscourts.gov
Alabama	S.D. Ala.	No specific LBRs on SubV readily apparent https://www.alsb.uscourts.gov/local-rules-0 https://www.alsb.uscourts.gov
Alaska	Alaska	**LBR 3003-1 Proofs of Claim in Chapter 9 and 11 Cases, Including Small Business Debtors Filing Under Subchapter V of Chapter 11** (a) **Deadline for Filing**. (2) *Chapter 11- Subchapter V Small Business Debtor*. The deadline for filing proofs of claim in a chapter 11 case filed as a small business debtor under subchapter V is seventy (70) days from the date of the order for relief. https://www.akb.uscourts.gov/court-info/local-rules-and-orders/local-rules https://www.akb.uscourts.gov/
Arizona	D. Ariz.	No specific LBRs on SubV readily apparent https://www.azb.uscourts.gov/local-rules https://www.azb.uscourts.gov
Arkansas	E.D. Ark. W.D. Ark	No specific LBRs on SubV readily apparent https://www.areb.uscourts.gov/local-rules https://www.areb.uscourts.gov
California	C.D. Cal.	**LBR 2015-3. <u>PRECONFIRMATION REQUIREMENTS FOR SUBCHAPTER V DEBTORS, DEBTORS IN POSSESSION, AND TRUSTEES</u>** **(a)** **<u>Applicability</u>**. This LBR only applies to cases proceeding under subchapter V of chapter 11 of the Bankruptcy Code. **(b)** **<u>Subchapter V Status Report</u>**. Unless otherwise ordered by the Court, not later than 14 days before the date of the first-scheduled status conference, the debtor must: (1) file a completed Subchapter V Status Report, local form **F 2015-3.1.SUBV.STATUS.RPT**, executed by both the debtor and the debtor's counsel, if any; and

		(2) serve a copy of the Subchapter V Status Report on the trustee, the United States trustee, and all parties in interest. **(c)** **Monthly Operating Reports**. The debtor must file with the Court timely subchapter V monthly operating reports (“MORs”) on the appropriate Official Form (Official Form B 425C) required by section 308 of the Bankruptcy Code and in accordance with the timing requirements of FRBP 2015(a)(6). If the debtor is removed as debtor in possession, the obligation to file MORs shall be the obligation of the subchapter V trustee in possession, unless the Court orders otherwise. LBR 2090-1. **(d)** **Complete Inventory**. Upon written motion pursuant to LBR 9013-1, filed by a party in interest, including the subchapter V trustee, the Court may direct the debtor to file a complete physical inventory of the debtor’s property as of the date (1) the petition was filed, or (2) the case was converted to chapter 11, subchapter V. **(e)** **Subchapter V Trustee’s Estimate of Fees and Expenses**. Unless otherwise ordered by the Court, not later than 14 days before the deadline to file any proposed plan, the Subchapter V Trustee must: (1) file a completed Notice of Subchapter V Trustee’s Estimated Fees and Expenses for Purposes of Plan Confirmation, local form **F 2015- 3.2.SUBV.TRUSTEE.FEE.EST;** and (2) serve a copy of the Subchapter V Trustee’s Estimated Fees and Expenses on the debtor, counsel for the debtor, and the United States trustee. **LBR 3003-1. BAR DATE IN CHAPTER 11 CASES** **(a)** **Claims Bar Date.** (1) **General.** In chapter 11 cases, except for subchapter V cases, the claims bar date will be set by the Court either on its own motion or upon a motion filed pursuant to LBR 9013-1(q). (2) **Subchapter V Cases.** In subchapter V cases, unless otherwise ordered, the claims bar date will be 70 days after, and for claims by governmental units 180 days after, the latest of: (1) the date of entry of the order for relief, (2) the date of conversion of the case to chapter 11, subchapter V, or (3) the date of the amendment of the petition to designate the case as a subchapter V case. In the case of conversion or re-designation of a case to subchapter V, any previously- set bar date will govern, unless otherwise ordered. **(b)** **Timing of Bar Date Notice.** (1) **General.** Unless otherwise ordered, in chapter 11 cases, except for subchapter V cases, the debtor in possession or chapter 11 trustee, as applicable, must file and serve the bar date notice on all parties entitled to notice within 7 days of the entry of the order setting the bar date.

		(2) **Subchapter V Cases.** Unless otherwise ordered, in subchapter V cases, the debtor in possession or subchapter V trustee in possession, as applicable, must file and serve the bar date notice within 7 days of (1) the date of entry of the order for relief, (2) the date of conversion of the case to chapter 11, subchapter V, or (3) the date of the amendment of the petition to designate the case as a subchapter V case. **(c)** **Mandatory Form Notice of Bar Date.** Any entity providing notice of the claims bar date must use the mandatory Court-approved form F 3003-1.NOTICE.BARDATE. **LBR 3014-1. ELECTION UNDER 11 U.S.C. § 1111(b) BY SECURED CREDITOR IN SUBCHAPTER V CASES** **(f)** **Election Deadline.** (1) **Section 1125 Does Not Apply.** In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, the election under 11 U.S.C. § 1111(b) must be made not later than the date set for filing objections to the plan or another date that the Court may fix. (2) **Section 1125 Applies.** In a subchapter V case in which the Court has ordered that a combined disclosure statement and plan be filed or that 11 U.S.C. § 1125(f)(3) applies, the election under 11 U.S.C. § 1111(b) must be made not later than the date fixed for objections pursuant to FRBP 3017.1(a)(2) or another date that the Court may fix. **LBR 3017-2. CHAPTER 11 DISCLOSURE STATEMENT – APPROVAL IN SMALL BUSINESS CASES AND WHEN REQUIRED IN SUBCHAPTER V CASES** **(g)** **Applicability.** This LBR applies in a small business case or in a case under subchapter V of chapter 11 in which the Court has ordered that 11 U.S.C. § 1125 applies. **(h)** **Conditional Approval of Disclosure Statement.** The court may, on application of the plan proponent or without an application, conditionally grant a motion for approval of a disclosure statement filed in accordance with 11 U.S.C. § 1125(f) and FRBP 3016. **(i)** **Procedure for Requesting Conditional Approval of Disclosure Statement.** The plan proponent may file a motion, without complying with LBR 9013-1(d) or LBR 9013- 1(o), for conditional approval of the disclosure statement, asking that the hearing on the adequacy of the disclosure statement be combined with the hearing on plan confirmation. The motion must be supported by a declaration establishing grounds for conditional approval and accompanied by a proposed order consistent with FRBP 2002(b) that conditionally approves the disclosure statement and establishes: (1) A date by which the holders of claims and interests may accept or reject the plan; (2) A date for filing objections to the disclosure statement; (3) A date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and (4) A date for the hearing on confirmation of the plan.

		(j) **Objections and Hearing on Final Approval.** (1) The debtor must file and serve a notice of the dates set forth above, together with a copy of the disclosure statement and plan, on all creditors and the United States trustee. **LBR 3020-2. POSTCONFIRMATION REQUIREMENTS IN A SUBCHAPTER V CASE** **(a)** **Applicability.** This LBR only applies to cases proceeding under subchapter V of chapter 11 of the Bankruptcy Code. **(b)** **Consensual Plan.** Upon confirmation of a consensual plan, unless the confirmation order provides otherwise, the following rules and procedures apply: (1) Postconfirmation Reporting. Upon confirmation of a consensual plan, the debtor must file and serve postconfirmation quarterly reports in accordance with LBR 3020-1(b) and (c). If the debtor is removed as debtor in possession, the subchapter V trustee in possession must file and serve postconfirmation quarterly reports, unless the Court orders otherwise. **(k)** Substantial Consummation Report. Not later than 14 days after the date of the entry of the order confirming the plan, the debtor must file a report stating whether the plan has been substantially consummated and, if not, providing a projected date when substantial consummation is expected to occur and the steps necessary for substantial consummation to occur. **(l)** Extensions of Projected Date of Substantial Consummation. If the projected date for substantial consummation must be extended, the debtor must file a supplemental report specifying the new projected date, the progress made toward consummation of the plan, the steps necessary for substantial consummation to occur, and the reasons for the delay. The supplemental report must be filed and served as soon as possible, but at least not later than 14 days after the previously projected date of substantial consummation. **(m)** Notice of Substantial Consummation. Not later than 14 days after the debtor's consensual plan has been substantially consummated, the debtor must file a notice of substantial consummation and serve this notice on the subchapter V trustee, the United States trustee, and the 20 largest unsecured creditors. **(n)** Termination of the Subchapter V Trustee's Services. Upon substantial consummation of a consensual plan, the subchapter V trustee's services will terminate automatically, unless otherwise provided in the plan or ordered by the Court. **(c)** **Nonconsensual Plan.** Upon confirmation of a nonconsensual plan, unless the confirmation order provides otherwise, the following rules and procedures apply:

		(1) Distributions. The subchapter V trustee must collect plan payments and make distributions to creditors, unless otherwise provided for in the plan or confirmation order. (2) Postconfirmation Reporting. Upon confirmation of a nonconsensual plan, the subchapter V trustee must file and serve postconfirmation quarterly reports in accordance with LBR 3020-1(b) and (c). **LBR 3022-1. FINAL DECREE AND CLOSING A CHAPTER 11 CASE** **(o) Motion for Final Decree.** After an estate is fully administered in a chapter 11 reorganization case, a reorganized debtor, chapter 11 trustee, or subchapter V trustee in possession may file a motion for a final decree using the procedure of LBR 9013-1(d) or (o). Notice of the motion must be served upon all parties upon whom the plan was served. **(p) Motion for Order Closing Case on Interim Basis.** If a chapter 11 estate is substantially consummated, but not fully administered, the reorganized debtor, chapter 11 trustee, or subchapter V trustee in possession, may file a motion for an order closing case on an interim basis using the procedure of LBR 9013-1(d) or (o). **LBR 3022-2. FULL ADMINISTRATION IN A SUBCHAPTER V CASE** **(a) Applicability.** This LBR only applies to cases proceeding under subchapter V of chapter 11 of the Bankruptcy Code. **(b) Consensual Plan.** (1) Subchapter V Final Report and Account. Within 60 days after the final distribution to creditors under a consensual plan, the debtor must file with the Court, and serve upon all parties upon whom the plan was served, a subchapter V final report and account of administration of the estate (UST Form 101-11(V)-FR) ("Subchapter V Final Report and Account"), whereupon the debtor must seek entry of a final decree closing the case. (2) Final Decree. After the debtor has filed its Subchapter V Final Report and Account, the debtor must file a motion for final decree pursuant to LBR 3022- 1(a) supported by a declaration under penalty of perjury showing that: (A) the services of the subchapter V trustee have terminated, (B) the estate has been fully administered, (C) all adversary proceedings, contested matters and other disputes, including appeals, have been resolved by a final, non-appealable order or dismissed, and (D) there are no remaining matters for which the Court must continue to exercise jurisdiction. The debtor must also lodge a proposed final decree. Nothing herein is intended to prevent the debtor from seeking interim or early closure of the case. **(c) Nonconsensual Plan.** (1) Subchapter V Final Report and Account. Within 60 days after the final distribution to creditors under a nonconsensual plan, the subchapter V trustee must file with the Court,

		and serve upon all parties upon whom the plan was served, a Subchapter V Final Report and Account of administration of the estate, whereupon the subchapter V trustee must seek entry of a final decree closing the case. (2) Final Decree. Upon the subchapter V trustee's filing of a Subchapter V Final Report and Account in a case in which the plan is a confirmed nonconsensual plan, the subchapter V trustee must file a motion for final decree pursuant to LBR 3022-1(a) supported by a declaration under penalty of perjury showing that: (A) the estate has been fully administered, (B) all adversary proceedings, contested matters, and other disputes, including appeals, have been resolved by a final, non-appealable order or dismissed, and (C) there are no remaining matters for which the Court must continue to exercise jurisdiction. The subchapter V trustee must also lodge a proposed final decree. (3) Termination of the Subchapter V Trustee's Services. Upon entry of the final decree, the subchapter V trustee's services will terminate. https://www.cacb.uscourts.gov/local-rules Local Forms: Subchapter V Status Report MANDATORY https://www.cacb.uscourts.gov/sites/cacb/files/documents/forms/F2015-3.1.SUBV_.STATUS.RPT_.pdf Subchapter V Trustee's Estimated Fees and Expenses for Purposes of Plan Confirmation https://www.cacb.uscourts.gov/sites/cacb/files/documents/forms/F2015-3.2.SUBV_.TRUSTEE.FEE_.EST_.pdf https://www.cacb.uscourts.gov
California	E.D. Cal.	**LBR 3003-2** Filing Proofs of Claim in Subchapter V Chapter 11 Small Business Debtor Reorganization Cases Unless otherwise ordered by the Court, and except as provided in Fed. R. Bankr. P. 3003(c)(3), a proof of claim or interest in a case filed under Subchapter V of Chapter 11 must be filed within 70 days after the date of the order for relief in the case, unless the claimant is a governmental unit, in which case a proof of claim shall be filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide for filing a proof of claim or interest in a Subchapter V case. https://www.caeb.uscourts.gov/LocalRules https://www.caeb.uscourts.gov

California	N.D. Cal.	No specific LBRs on SubV readily apparent https://www.canb.uscourts.gov/procedures/local-rules https://www.canb.uscourts.gov
California	S.D. Cal.	No specific LBRs on SubV readily apparent https://www.casb.uscourts.gov/rules-procedures https://www.casb.uscourts.gov
Colorado	D. Col.	No specific LBRs on SubV readily apparent https://www.cob.uscourts.gov/local-rules https://www.cob.uscourts.gov
Connecticut	D. Conn.	**LBR 3014-1** Time For Secured Creditor to Exercise Election under Bankruptcy Code Section 1111(b) in Subchapter V Case. Unless the Court rules that Section 1125 applies, an election of the application of Section 1111(b) of the Code by a class of secured creditors in a Chapter 11 subchapter V case may be made at any time on or before seven (7) days after the filing of the Debtor's Initial Plan of Reorganization, or such later time as the Court may establish. https://www.ctb.uscourts.gov/local-rules-effective-august-2-2021 https://www.ctb.uscourts.gov
Delaware	D. Del.	**LBR 3016-1 Plan and Disclosure Statement Documents and Required Forms in Subchapter V Cases**. (a) Redline or Blackline of Plan and Disclosure Statement Documents. Parties filing an amended disclosure statement or plan (or any related document thereto that is amended post filing) shall include in the filing a document showing all changes made to the last version of the document on file. (b) Required Forms in Subchapter V Cases. A Subchapter V debtor must file Local Forms 136 Subchapter V Status Report and Local Form 137 Subchapter V Small Business Plan. https://www.deb.uscourts.gov/local-rules-and-orders LF 136 Subchapter V Status Report https://www.deb.uscourts.gov/sites/default/files/LF%20136%20DE%20Subchapter%20V%20Status%20Report.pdf Local Form 137 (Subchapter V Small Business Plan) https://www.deb.uscourts.gov/sites/default/files/LF%20137%20DE%20Subchapter%20V%20Small%20Business%20Debtor%27s%20Plan%20of%20Reorganization%20or%20Liquidation_0.pdf https://www.deb.uscourts.gov
Florida	M.D. Fla.	**LBR 2081-1 (11)(d)** Monthly Operating Reports in Small Business Cases. Each month, Small Business Debtors as defined in 11 U.S.C. § 101(51D) and Subchapter V Debtors as defined in 11 U.S.C. § 1182 shall complete and file the Schedule of Receipts and Disbursements (also required of Chapter 11 Business Debtors), following as Appendix A. The Schedule may be filed without the referenced

		attachments. In addition to filing the Schedule included herein as Appendix A, Small Business Debtors and Subchapter V Debtors shall also file a Check Register in the form following as Appendix B, which shall identify all checks issued by the debtor during the reporting month and all outstanding checks issued before the commencement of the debtor's bankruptcy case which were permitted to clear during the applicable reporting period. Small Business Debtors and Subchapter V Debtors shall complete and file a separate Check Register for each bank account from which checks are drawn. These requirements are in addition to the completion and filing of the Small Business Monthly Operating Report prescribed or promulgated by the Judicial Conference. **LBR 3022-1 FINAL REPORT/DECREE (CHAPTER 11)** (a) Chapter 11 Subchapter V Proceedings. Unless extended by the Court, on or before the later of 30 days after the granting of a discharge in a case under Chapter 11 Subchapter V (Small Business Debtor Reorganization), or 30 days after the disposition of all adversary proceedings or contested matters, whichever is later, the debtor's attorney shall file a motion for final decree. This deadline shall apply in both individual and non-individual debtors under Subchapter V. https://www.flmb.uscourts.gov/localrules/ https://www.flmb.uscourts.gov
Florida	N.D. Fla.	No specific LBRs on SubV readily apparent https://www.flnb.uscourts.gov/local-rules https://www.flnb.uscourts.gov
Florida	S.D. Fla.	No specific LBRs on SubV readily apparent https://www.flsb.uscourts.gov/general-orders **Administrative Order: AO 2022-09 Status of Interim SBRA Bankruptcy Rules Adopted by Administrative Orders 2020-02 and 2022-06 upon the effective date of the Amended Federal Rules of Bankruptcy Procedure on December 1, 2022**: On June 20, 2022, this Court entered Administrative Order 2022-06 "Adoption of Amended SBRA Interim Bankruptcy Rule 1020 to Reflect BTATC Act Implementation", adopting the recommendation of the Advisory Committee on Bankruptcy Rules that this revised Interim Rule be adopted as a SBRA Local Interim Rule while the BTATC Act Subchapter V limit is in effect. Accordingly, it is **ORDERED** as follows: 1. Interim SBRA Bankruptcy Rule 1020 adopted by this Court under Administrative Order 2022-06 shall remain in effect while the BTATC Act Subchapter V limit is in effect unless otherwise ordered by this Court. 2. The other Interim SBRA Bankruptcy Rules adopted by Administrative Order 2020-02 are replaced by the amended Federal Rules of Bankruptcy Procedures effective December 1, 2022, and Administrative Order 2020-02 is abrogated. Amendments can be viewed on the Pending Rules and Forms Amendments page of the United States Courts website. 3. The Clerk is directed to provide notice on the Court website of entry of this Order and to update affected Local Rules, Local Forms, and procedures to reflect the provisions of this Order.

		https://www.flsb.uscourts.gov/local-rules https://www.flsb.uscourts.gov
Georgia	M.D. Ga.	**LBR 3001-1**. **PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS** Claims and Equity Security Interests (amended February 24, 2020) (e) **Bar Date for Filing Claims in Subchapter V Chapter 11 Reorganization Cases**. For all bankruptcy petitions filed under Subchapter V of Chapter 11, the bar date for filing proofs of claim or interest shall be 70 days after docketing of the order for relief of the Subchapter V Chapter 11 case. For cause shown, the Court shall consider extending the time to file proofs of claim upon the filing of an appropriate motion or request within the 70-day period. **LBR 3022-2. Final Report/Decree in Subchapter V Cases (Chapter 11) (added February 24, 2020**) (a) If the confirmed plan is subject to 11 U.S.C. § 1191(a) (a "consensual plan") the Subchapter V small business debtor will conform to the following provisions: (1) **Projected Dates for Substantial Consummation.** Chapter 11 Subchapter V small business debtors shall file with the Clerk of Court within 14 days of the date of the entry of the order confirming the plan of reorganization, a report specifying the projected date for substantial consummation as defined in 11 U.S.C. § 1101(2). The report shall describe the action that is to be taken to reach substantial consummation. If the projected date for substantial consummation must be extended, the debtor shall file a supplemental report specifying the new projected date, the progress made toward consummation of the plan, the action remaining to be taken toward substantial consummation, and the reasons for the delay. (2) **Application for Final Decree**. Upon substantial consummation as defined in 11 U.S.C. § 1101(2), the Subchapter V Chapter 11 debtor shall comply with the procedures contained in the Clerk's Instructions, file a final report and final account in compliance with 11 U.S.C. § 704(a)(9), file an application for final decree, and submit a proposed final decree. (b) If the confirmed plan is subject to 11 U.S.C. §1191(b) (a "non-consensual plan"), upon completion of all payments under the confirmed plan, the debtor shall comply with the procedures contained in the Clerk's Instructions, file a final report and final account in compliance with 11 U.S.C. § 704(a)(9), and file a Certificate of Plan Completion and Request for Discharge. https://www.gamb.uscourts.gov/USCourts/local-rules-and-clerks-instructions https://www.gamb.uscourts.gov
Georgia	N.D. Ga.	No specific LBRs on SubV readily apparent https://www.ganb.uscourts.gov/local-rules Amended and Restated General Order No. 30-2020 **DateSigned:** *12/10/2020*

		This Order provides for the application of Interim Bankruptcy Rules in cases filed under Subchapter V of Title 11 of the United States Code and for the modification of Official Forms 309E2 and 309F2 to add a new paragraph 10 which sets a deadline for a secured party to make an election under 11 U.S.C. §1111(b). https://www.ganb.uscourts.gov/content/amended-and-restated-general-order-no-30-2020 https://www.ganb.uscourts.gov
Georgia	S.D. Ga.	No specific LBRs on SubV readily apparent https://www.gasb.uscourts.gov/local-rules https://www.gasb.uscourts.gov
Hawaii	D. Haw.	**LBR 2015-2**. Appointment of Subchapter V Trustee Unless the court orders otherwise, the debtor must tender to the Subchapter V Trustee the sum of $1,000 no later than 14 days after the filing of the Notice of Appointment of Subchapter V Trustee. Any party in interest may file a motion to adjust the amount of the deposit. The debtor shall include the deposit in any cash collateral budget. The Subchapter V Trustee must hold these funds in escrow for the purpose of compensation for services rendered and reimbursement for expenses. Payment of compensation and reimbursement to the Subchapter V Trustee from the escrowed funds is subject to allowance and approval by the court under sections 503(b), 330, 331 and 1194 of the Bankruptcy Code, Bankruptcy Rule 2016 and LBR 2016-1. Failure of the debtor to tender the required amount within 14 days after the filing of the Notice of Appointment is cause for dismissal of the case. **LBR 3003-1**. Chapter 11 Claims Bar Date Unless the court orders otherwise, proofs of claim or interest required to be filed in a chapter 11 case under Bankruptcy Rule 3003 must be filed within 90 days after the first date set for the meeting of creditors called under § 341. In a chapter 11 case under subchapter V, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under subchapter V of chapter 11. https://www.hib.uscourts.gov/local-rules-and-general-orders https://www.hib.uscourts.gov
Idaho	D. Idaho	**LBR 3014.1 SECTION 1111(b) ELECTIONS Pursuant to Fed. R. Bankr. P. 3014**, if (1) the court has entered an order conditionally approving a disclosure statement, (2) the disclosure statement and the plan are combined and no hearing on the disclosure statement is held, or (3) the court has not ordered application of § 1125 in a case under chapter 11 subchapter V, then the election under § 1111(b) shall be made no later than fourteen (14) days before the first scheduled confirmation hearing date. **LBR 3020.1 CHAPTER 11 PRECONFIRMATION MEMORANDUM** b. In a chapter 11 subchapter V case, the plan proponent shall, not less than five (5) days prior to the confirmation hearing, file a memorandum containing the proponent's response to any objections to plan confirmation, and a statement as to how each requirement of 11 U.S.C. § 1191 is satisfied. https://www.id.uscourts.gov/clerks/rules_orders/Bankruptcy_Local_Rules.cfm https://www.id.uscourts.gov

Illinois	C. D. Ill.	No specific LBRs on SubV readily apparent https://www.ilcb.uscourts.gov/local-rules-procedures-and-standing-orders https://www.ilcb.uscourts.gov
Illinois	N.D. Ill.	No specific LBRs on SubV readily apparent https://www.ilnb.uscourts.gov/court-info/local-rules-and-orders/local-rules https://www.ilnb.uscourts.gov
Illinois	S.D. Ill.	No specific LBRs on SubV readily apparent https://www.ilsb.uscourts.gov/local-rules https://www.ilsb.uscourts.gov
Indiana	N.D. Ind.	No specific LBRs on SubV readily apparent https://www.innb.uscourts.gov/court-info/local-rules-and-orders https://www.innb.uscourts.gov
Indiana	S.D. Ind.	**LBR B-4004-2. DISCHARGE IN SUB V CHAPTER 11 CASE** (a) Discharge in Case Confirmed Under §1191(a) If the case has been confirmed under 11 U.S.C. §1191(a) and the Debtor is an individual, the Court shall enter the discharge immediately after entry of the confirmation order. (b) Discharge in Case Confirmed Under §1191(b) (1) Notice of Completion of §1192 Payments The entity administering the confirmed plan shall file a Notice of Completion of § 1192 Payments after the Debtor has made the number of payments required to be eligible for a discharge. A sample form is available on the Court's website. (2) The Debtor's Required Pleadings Within 30 days after the filing of the Notice of Completion of § 1192 Payments, the Debtor shall file a Motion for Entry of Discharge and a Certification of Eligibility for Discharge. Each Debtor in a joint case shall file a separate Certification. Sample forms are available on the Court's website. (3) Service and Notice The Debtor shall serve a copy of the Motion for Entry of Discharge and a Certification of Eligibility for Discharge on the trustee. The trustee shall have 21 days from the date of filing to object to the Motion or the Certification. (4) Closing and Reopening If no Motion for Entry of Discharge is filed, the case may be closed without entry of a discharge after filing of the trustee's final report. If the case has been closed and the Debtor seeks entry of the discharge, the Debtor must first file a motion to reopen the case. (5) Request for Hardship Discharge If the Debtor seeks a discharge under 11 U.S.C. §1141(d)(5), the Debtor shall file a Motion for Hardship Discharge and a Certification of Eligibility for Discharge. The requirement to file a Certification of Eligibility for Discharge is waived if the Debtor seeking the hardship discharge is

		deceased and a verified statement of the Debtor's death has been filed as required by S.D.Ind. B-1016-1. A sample Certification is available on the Court's website. https://www.insb.uscourts.gov/content/local-rules https://www.insb.uscourts.gov
Iowa	N.D. Iowa	**LBR 3011-1 Deposit and Distribution of Unclaimed Funds** (b) Deposit by Chapter 11 Subchapter V, 12, or 13 Trustee If any funds remain unclaimed after the final distribution of funds is made in a Chapter 11 Subchapter V, 12, or 13 case as required by 11 U.S.C. § 347(a), the trustee shall file a 19 Motion to Pay Into the Court Registry any remaining funds. Upon entry of a final order granting such motion, the trustee shall pay the remaining funds into the Court Registry and shall provide the Court's finance officer a list of the last known names and address of the unpaid claimants and the amounts they are entitled to receive, as required by the Federal Rule of Bankruptcy Procedure 3011. https://www.ianb.uscourts.gov/local-rules
Iowa	S.D. Iowa	No specific LBRs on SubV readily apparent
Kansas	D. Kan.	**INTERIM LBR 1020.1 CHAPTER 11 REORGANIZATION CASE FOR SMALL BUSINESS DEBTORS OR DEBTORS UNDER SUBCHAPTER V** Federal Rule of Bankruptcy Procedure 1020 applies in the Bankruptcy Court for the District of Kansas but, effective April 25, 2020, is amended on an interim basis to state: (a) **DEBTOR DESIGNATION**. In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor or a debtor as defined in § 1182(1) of the Code and, if the latter, whether the debtor elects to have subchapter V of chapter 11 apply. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor or a debtor as defined in § 1182(1) of the Code and, if the latter, whether the debtor elects to have subchapter V of chapter 11 apply. The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect. (b) **OBJECTING TO DESIGNATION.** The United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later. (c) **PROCEDURE FOR OBJECTION OR DETERMINATION**. Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; the creditors included on the list filed under Rule 1007(d) or, if a committee has been appointed under § 1102(a)(3), the committee or its authorized agent; and any other entity as the court directs.

		LBR 3003.1 AUTOMATIC CLAIMS BAR DATE IN CHAPTER 11, SUBCHAPTER V, CASES WHEN FILED (a) Subchapter V Cases. In a Chapter 11, Subchapter V, case, unless otherwise ordered, the claims bar date will be 70 days after, and for claims by governmental units 180 days after, the latest of: (1) the date of entry of the order for relief, (2) the date of conversion of the case to Chapter 11, Subchapter V, or (3) the date of the amendment of the petition to designate the case as a Subchapter V case. In the case of conversion or re-designation of a case to Subchapter V, any previously set bar date will govern, unless otherwise ordered. (b) **Non-Subchapter V Cases**. This rule does not apply to Chapter 11 cases not designated as Subchapter V. https://www.ksb.uscourts.gov/local-rules https://www.ksb.uscourts.gov
Kentucky	E.D. Ky.	No specific LBRs on SubV readily apparent https://www.kyeb.uscourts.gov/court-info/local-rules-and-orders https://www.kyeb.uscourts.gov
Kentucky	W.D. Ky.	No specific LBRs on SubV readily apparent https://www.kywb.uscourts.gov/local-rules https://www.kywb.uscourts.gov
Louisiana	E.D. La.	No specific LBRs on SubV readily apparent https://www.laeb.uscourts.gov/court-info/local-rules-and-orders https://www.laeb.uscourts.gov
Louisiana	M.D. La.	No specific LBRs on SubV readily apparent https://www.lamb.uscourts.gov/rules-and-forms https://www.lamb.uscourts.gov
Louisiana	W.D. La.	No specific LBRs on SubV readily apparent https://www.lawb.uscourts.gov/court-info/local-rules-and-orders https://www.lawb.uscourts.gov
Maine	D. Me.	No specific LBRs on SubV readily apparent https://www.meb.uscourts.gov/local-rules https://www.meb.uscourts.gov
Maryland	D. Md.	**LBR 1002-2 ELECTION TO PROCEED UNDER SUBCHAPTER V OF CHAPTER 11** (a) Election on Petition. A debtor who qualifies under 11 U.S.C. § 1182 may elect to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code by selecting that option on the debtor's bankruptcy petition.

		(b) Election After Petition. If a debtor who qualifies under 11 U.S.C. § 1182 elects to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code *after* the debtor files a bankruptcy petition under Chapter 11, the Court grants a motion filed by the debtor to convert a pending case to one under Chapter 11, or the Court grants (or the debtor consents to) an involuntary petition against the debtor, the debtor must file an amended bankruptcy petition selecting the option to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code. **LBR 1009-1 NOTICES TO CREDITORS (I) OMITTED FROM OR INCORRECTLY LISTED ON MASTER MAILING MATRIX OR (II) AFFECTED BY AMENDMENT TO SCHEDULE** (d) Notice of Amendment of Schedules in Chapter 9 and Chapter 11 Cases. Whenever the debtor or the trustee in a Chapter 9 or a Chapter 11 case amends the debtor's schedules to change the amount, nature, classification, or characterization of a debt owing to a creditor, the debtor or the trustee must, within fourteen (14) days of filing, transmit notice of the amendment to the creditor, which notice must conspicuously identify the claims being amended, and provide notice of the creditor's right to file a proof of claim by the later of: (1) the bar date (if any); or (2) either (A) thirty (30) days from the date of notice in a case proceeding under Subchapter V or (B) sixty (60) days from the date of the notice in all other cases in Chapter 9 and Chapter 11. The debtor or the trustee must file a certificate of service of the notice within seven (7) days after service. **LBR 2016-1 COMPENSATION OF PROFESSIONALS** (a) Applications for Compensation by Professionals. Unless the Court orders otherwise, all professionals seeking compensation pursuant to 11 U.S.C. §§ 327, 328, 330, and 331, including attorneys, accountants, examiners, investment bankers, financial advisors, real estate advisors, and Subchapter V trustees, must prepare and submit their applications for compensation in accordance with the Guidelines attached as Appendix D to these Rules. **LBR 2072-1 ACCESS TO INFORMATION IN CHAPTER 11 CASES** Unless otherwise ordered by the Court, a committee appointed under 11 U.S.C. § 1102 or a trustee appointed in a Subchapter V case is not required to provide access to information to the extent that such information has been reasonably designated by the party providing such information as non-public, proprietary, privileged, work product, or otherwise confidential. **LBR 3003-1 TIME FOR FILING PROOFS OF CLAIM IN CHAPTER 11 CASES** Except as provided in 11 U.S.C. § 502(b)(9), in a Chapter 11 case, other than a case under Subchapter V, a proof of claim is timely filed if it is filed not later than ninety (90) days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a), unless a different date is fixed by the Court. Except as provided in 11 U.S.C. § 502(b)(9), in a case under Subchapter V, a proof of claim is timely filed if it is filed not later than seventy (70) days after entry of the order for relief, unless a different date is fixed by the Court. **LBR 3022-1 ADMINISTRATION OF CONFIRMED CHAPTER 11 PLANS**

		(a) Subchapter V Cases. In a Chapter 11 case proceeding under Subsection V, the debtor or other party administering the confirmed plan must comply with the following requirements: (1) Notice of Substantial Consummation. Within fourteen (14) days after a confirmed Chapter 11, Subchapter V plan is substantially consummated (as defined in 11 U.S.C. § 1101(2)), the debtor or plan administrator must file with the Court and serve on the trustee, the United States Trustee, and all parties in interest notice of such substantial consummation pursuant to 11 U.S.C. § 1183(c)(2). The notice must include a certification that includes a summary report of the disbursements, distributions, and transfers that have been made pursuant to the plan; a description of other acts taken to consummate the plan; and a description of any matters involving consummation of the confirmed plan that have not been fully resolved. (2) Post-Confirmation Progress Reports. The debtor or plan administrator must file with the Court and serve on the United States Trustee reports of progress towards full administration of the plan until the Court enters a final decree. The first report must be filed no later than six (6) months after entry of the order of confirmation. Subsequent reports must be filed every six (6) months thereafter. (3) Discharge Order. In a case involving a consensual plan confirmed under 11 U.S.C. § 1191(a), the Court will issue a discharge order as appropriate under 11 U.S.C. § 1141(d) upon confirmation of the plan. In a case involving a non-consensual plan confirmed under 11 U.S.C. § 1191(b), the Court will issue a discharge order as appropriate under 11 U.S.C. § 1192 after completion of all plan payments. (4) Motion for Final Decree. Upon full administration of the plan as defined in paragraph (c) of this Rule, the debtor or plan administrator must file with the Court and serve on the trustee, United States Trustee, and all parties in interest a motion for a final decree and to close the case. The motion must be substantially in the form of Local Bankruptcy Form N–1 (for non-individuals) or Local Bankruptcy Form N–2 which includes a request for entry of a discharge (for individuals) and must be accompanied by a certification of full administration. The certification must include a final summary report of the disbursements, distributions, and transfers that have been made pursuant to the plan. (5) Final Decree. The Court may enter a final decree and close the case at any time after the plan has been fully administered. **LBR 9001-1 DEFINITIONS AND RULES** Unless otherwise ordered by the Court, the definitions of words and phrases in Federal Bankruptcy Rule 9001 and the definitions adopted by reference therein apply in these Local Bankruptcy Rules and orders entered by the Court. In addition, the following words and phrases used in these Rules have the meanings stated: (l) "Subchapter V" means subchapter V of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1181, *et seq.* debtor, and a co-owner of property of the estate. (l) "Subchapter V" means subchapter V of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1181, *et seq.* debtor, and a co-owner of property of the estate.

		(l) "Subchapter V" means subchapter V of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1181, *et seq.* **LBR 9029-2 INTERIM SUBCHAPTER V BANKRUPTCY RULE** To implement the provisions of the Small Business Reorganization Act of 2019, a national interim Federal Bankruptcy Rule 1020 has been promulgated and is adopted and incorporated as Appendix I of the Local Bankruptcy Rules. The interim Federal Bankruptcy Rule 1020 is effective in this district until such time as the regular rule making process is concluded and the interim Federal Bankruptcy Rule is implemented as a final rule. https://www.mdb.uscourts.gov/files/localrules_07.pdf https://www.mdb.uscourts.gov
Massachusetts	D. Mass.	No specific LBRs on SubV readily apparent https://www.mab.uscourts.gov/massachusetts-local-bankruptcy-rules
Michigan	E.D. Mich.	No specific LBRs on SubV readily apparent https://www.mieb.uscourts.gov/sites/mieb/files/Local%20Bankruptcy%20Rules.pdf
Michigan	W.D. Mich.	No specific LBRs on SubV readily apparent – No website readily apparent
Minnesota	D. Minn.	No specific LBRs on SubV readily apparent https://www.mnb.uscourts.gov/content/local-rules https://www.mnb.uscourts.gov
Mississippi	N.D. Miss.	**LBR 3003-1. Filing of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases**. (c) Filing proof of claim. (3) Time for filing. (i) Unless otherwise ordered by the court, all persons and entities that assert a claim, as defined in section 101(5) against the debtor which arose on or prior to the filing of the Chapter 11 petition shall file a proof of such claim on or before the date that is 120 days (or 70 days in a case filed under Subchapter V of Chapter 11) after the date of the order for relief, except that proofs of claim filed by governmental units must be filed on or before the date that is 180 days after the date of the order for relief. https://www.msnb.uscourts.gov/rules-and-fees https://www.msnb.uscourts.gov
Mississippi	S.D. Miss.	**LBR 3003-1. Filing of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases**. (c) Filing proof of claim. (3) Time for filing. (i) Unless otherwise ordered by the court, all persons and entities that assert a claim, as defined in section 101(5) against the debtor which arose on or prior to the filing of the Chapter 11 petition shall file a proof of such claim on or before the date that is 120 days (or 70 days in a case filed under Subchapter V of Chapter 11) after the date of the order for relief, except that proofs of claim

		filed by governmental units must be filed on or before the date that is 180 days after the date of the order for relief. https://www.mssb.uscourts.gov/local-rules https://www.mssb.uscourts.gov
Missouri	E.D. Mo.	**LBR 2015-3 - Duty of Debtor in Chapter 11 Case** **C. Subchapter V Specific Duties** No later than seven (7) days after the filing of the Notice of Appointment of Trustee, the debtor must tender to the Subchapter V Trustee the sum of $1,000.00. The Subchapter V Trustee will hold these funds in escrow for the purpose of compensation for services rendered and reimbursement for out-ofpocket expenses. The dollar amount for deposit is subject to adjustment by the Court upon the request of any interested party. Payment of compensation and reimbursement to the Subchapter V Trustee from the escrowed funds is subject to allowance and approval by further order of the Court under Sections 503(b), 330, 331 and 1194 of the Bankruptcy Code, Federal Rule of Bankruptcy Procedure 2016 and Local Rule 2016-1. Failure of the debtor to tender the required amount within seven (7) days after notification of the appointment of the Subchapter V Trustee is cause for dismissal of the case. **LBR 3003 - Additional Proof of Claim Filing Provisions for Chapter 11 Cases.** **A. Claims Bar Date**. 2. In Subchapter V cases, unless otherwise ordered, the claims bar date will be seventy (70) days after the petition date, and for claims by governmental units 180 days after the petition date, unless the Bankruptcy Code or order of the court provide a later date. https://www.moeb.uscourts.gov/sites/moeb/files/USBC%20EDMO%20Local%20Rules%20Rev%20120123.pdf https://www.moeb.uscourts.gov
Missouri	W.D. Mo.	No specific LBRs on SubV readily apparent – No website readily apparent
Montana	D. Mont.	**LBR 1020-1. Chapter 11 Reorganization Case for Small Business Debtor or Debtor Under Subchapter V.** (a) Debtor Designation. In a voluntary Chapter 11 case, debtor shall state in the petition whether debtor is a small business debtor or debtor as defined under 11 U.S.C. § 1182(1) and, if the latter, whether debtor elects to have subchapter V of Chapter 11 apply. In an involuntary Chapter 11 case, debtor shall file a statement as to whether debtor is a small business debtor or debtor as defined under 11 U.S.C. § 1182(1) within 14 days after entry of the order for relief and, if the latter, whether debtor elects to have subchapter V of Chapter 11 apply. The status of the case as a small business case or a case under subchapter V of Chapter 11 shall be in accordance with debtor's statement under this subdivision unless and until the Court enters an order finding that debtor's statement is incorrect. (b) Objecting to Designation. The United States trustee or a party in interest may file an objection to debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of

		creditors held pursuant to 11 U.S.C. § 341(a) or within 30 days after any amendment to the statement, whichever is later. (c) Procedure for Objection or Determination. Any objection or request for a determination under this Local Rule shall be governed by Fed. R. Bankr. P. 9014 and served on debtor, debtor's attorney, United States Trustee, trustee, creditors included on the list filed under Fed. R. Bankr. P. 1007(d), or if a committee has been appointed under 11 U.S.C. § 1102, the committee or its authorized agent and any other entity as the Court directs. https://www.mtb.uscourts.gov/rules-statutes https://www.mtb.uscourts.gov
Nebraska	D. Neb.	**LBR 2015-1. Subchapter V Status Report** In cases under Subchapter V of Chapter 11, the debtor must timely file a status report under 11 U.S.C. § 1188(c), using the form in Appendix D. Appendix D Subchapter V Status Report The debtor submits this status conference report pursuant to 11 U.S.C. § 1188(c). 1. Background. Briefly describe the nature of the debtor's business or occupation, the reasons for filing bankruptcy and the desired goals of a reorganization plan. 2. Plan. Identify whether the debtor intends to propose a consensual or non-consensual plan and the reason for the type of plan to be proposed. 3. Parties. Identify key parties, by name and category (secured, priority, unsecured, equity, trustee, other), with whom the debtor must communicate to confirm a plan. For each party, identify any important discussions that have occurred, or any reasons discussions have not occurred. 4. Efforts. Describe efforts the debtor has undertaken to develop a plan of reorganization and any actions contemplated to formulate the plan. Also, if the debtor intends to propose a consensual plan, explain the steps being taken to achieve support for the plan. 5. Obstacles. Identify what the debtor believes to be significant obstacles or challenges to the confirmation of a plan, such as valuation disputes, claim adjudication, adversary proceeding litigation, or significant motions that may be filed. 6. Collateral. Identify who creditors should contact to inspect any collateral. Also, if the debtor anticipates a need to use cash collateral, identify the cash collateral and the secured parties with an interest in such collateral. 7. Other. Identify any additional information the debtor believes would be helpful to thecourt or parties in interest (e.g., executory contracts or unexpired leases, sale or surrender of real or personal property, any unusual circumstances, or any reason the debtor cannot file a plan within the 90-day deadline of 11 U.S.C. § 1189(b). [SIGNATURE BLOCK]

		LBR 3015-3. Plans, Objection to Confirmation, and Amendments D. **Plan Amendments**. In cases under Subchapter V of Chapter 11, Chapter 12, or Chapter 13, an amended plan filed before a plan is confirmed supersedes any previously filed plan. No resistance deadline may be set for an amended plan for a date earlier than 14 days after the meeting of creditors is concluded. If an amended plan is filed while objections to a previously filed plan are pending, the debtor must notify the objecting parties an amended plan was filed, and the court will not act on the previously filed plan or objections. E. **Redline Version**. In cases under Subchapter V of Chapter 11 and under Chapter 12, if a debtor files an amended plan, the debtor must file, under the event Notice of Modified / Amended Plan, a version of the amended plan with all changes clearly and conspicuously indicated (such as truck changes, redline, or similar method). The debtor does not have to serve this version of the amended plan. **LBR 3015-4. Dismissal on Payment Default** A. **Notice of Default**. If the debtor defaults on a plan payment to the trustee, the trustee may file and serve the debtor a notice of payment default in a case under Subchapter V of Chapter 11, Chapter 12, or Chapter 13. The notice must state the amount of the default and the date on which the next scheduled payment is due. The notice must also state that under this Local Rule, the court may dismiss the debtor's bankruptcy case unless, within 21 days after the notice, the debtor either cures the default and makes all payments due or makes other arrangements acceptable to the trustee. The notice must state the specific calendar date by which the payment default must be cured. **LBR 3020-1. Deposit; Confirmation of Plan** – Chapters 9, 11, and 12 A. **Deposit**. The debtor in a case under Subchapter V of Chapter 11 must pay the trustee an advance fee and expense deposit within five days after the petition is filed and each month thereafter until a Subchapter V plan is confirmed. The amount to be paid is stated in Appendix H. The trustee must keep the advance deposit in a segregated account. The trustee may apply the advance deposit to any trustee compensation approved by the court. The trustee must return any excess amount to the debtor within ten business days after the court approves the trustee's final application for compensation. The debtor must include the amounts paid under this Local Rule in the debtor's proposed cash collateral budget. Appendix H Trustee Fees in Subchapter V of Chapter 11 and in Chapter 12 cases Subchapter V of Chapter 11 The advance deposit the debtor must pay the trustee in a case under Subchapter V of Chapter 11 is: Due Date Amount Within 5 days of the Petition Date $1,000.00 Each Month $500.00 on the same day of the month as the petition date until a Subchapter V plan is confirmed or until the total amount held by the trustee is $3,000. If the advance deposit drops below $3,000 because the trustee was paid authorized compensation from the deposit, the debtor must restart payments until the advance deposit again reaches $3,000. https://www.neb.uscourts.gov/local-rules

		https://www.neb.uscourts.gov
Nevada	D. Nev.	**LBR 3003. FILING PROOF OF CLAIM IN CHAPTER 11 REORGANIZATION CASE.** (b) In a case under subchapter V of chapter 11, a proof of claim must be filed not later than seventy (70) days after the order of relief. **LBR 3022.2. INDIVIDUAL SUBCHAPTER V OF CHAPTER 11 DISCHARGES.** (a) An individual debtor under subchapter V of chapter 11 seeking entry of discharge must complete and file the local certificate of compliance form, and serve a copy of the certificate of compliance on all creditors. (b) If the debtor fails to file the certificate of compliance, the case may be closed without entry of a discharge. (c) Upon entry of a discharge, and in the absence of any unresolved administrative issues, a final decree closing the case will be entered by the clerk. https://www.nvb.uscourts.gov/rules-forms/rules/local-rules/ https://www.nvb.uscourts.gov
New Hampshire	D. N.H.	No specific LBRs on SubV readily apparent – No website readily apparent
New Jersey	D.N.J.	**LBR 1020-1. Subchapter V Designation** (a) Designation within 14 days after filing. A debtor that did not elect in the original petition to have subchapter V of chapter 11 apply, may make the election by filing an amended petition within 14 days of the date of filing, or in an involuntary petition, file a statement within 14 days of the order for relief. All subchapter V deadlines will run from the date of the filing of the original petition or the order for relief. (b) Designation after 14 days. After the initial 14-day period, a debtor must file a motion seeking permission to have subchapter V of chapter 11 apply. Any request for an extension of the subchapter V deadlines must be part of the motion and the motion must be served on the parties designated in Bankruptcy Rule 1020 (c). 2023 Comment This Rule is new. It addresses the procedures for opting for subchapter V after the petition has been filed or an order for relief has been entered. The debtor must promptly email chambers to inform the assigned judge of either (i) the amended petition, or (ii) in an involuntary case, a statement consistent with Federal Rule of Bankruptcy Procedure 1020(a), so that the correct deadlines may be set in the case. Failure of the debtor to ensure that the deadlines are updated on the court's docket does not excuse compliance with the deadlines in subchapter V. **LBR 3011-1. Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, or Chapter 13** (a) Deposit. A trustee must file Local Form Notice Depositing Unclaimed Funds Pursuant to D.N.J. LBR 3011-1 to deposit unclaimed funds into the court's registry without court order. (b) Payment of unclaimed funds. (1) All claimants must use Local Form Application for Payment of Unclaimed Funds. (2) A claimant must be: (A) the Owner of Record (original payee) or its legal successor; or

		(B) the Owner of Record's assignee or its legal successor. (3) The application must include the supporting documentation identified in the Instructions for Filing an Application for Payment of Unclaimed Funds. (4) The application must be served on the United States Attorney for the District of New Jersey and Local Form Certification of Service must be filed. (5) The application must include Local Form Order Granting Application for Payment of Unclaimed Funds. (c) Objection. Unless a party in interest files an objection within 21 days of the filing of the application, the request will be considered by the court without a hearing. 2020 Comment The title of this Rule is amended to include Subchapter V of Chapter 11 due to the enactment of the Small Business Reorganization Act of 2019. This Rule is amended to conform with the adoption of Director's Form 1340 (to be effective December 1, 2019) by the Judicial Conference of the United States. If an objection is timely filed in accordance with subsection (c) the court will schedule a hearing. In a closed case, no motion to reopen is required and no reopening fee will be charged. https://www.njb.uscourts.gov/local-rules-and-orders https://www.njb.uscourts.gov
New Mexico	D. N.M.	No specific LBRs on SubV readily apparent https://www.nmb.uscourts.gov/court-info/local-rules-and-orders https://www.nmb.uscourts.gov
New York	E.D.N.Y.	No specific LBRs on SubV readily apparent https://www.nyeb.uscourts.gov/local-bankruptcy-rules-united-states-bankruptcy-court-eastern-district-new-york https://www.nyeb.uscourts.gov
New York	N.D. N.Y.	No specific LBRs on SubV readily apparent https://www.nyeb.uscourts.gov/local-bankruptcy-rules-united-states-bankruptcy-court-eastern-district-new-york https://www.nyeb.uscourts.gov
New York	S.D.N.Y.	No specific LBRs on SubV readily apparent https://www.nysb.uscourts.gov/content/local-rules https://www.nysb.uscourts.gov
New York	W.D. N.Y.	No website found
North Carolina	E.D.N.C.	**LBR 3014-1 ELECTION UNDER § 1111(b) BY SECURED CREDITOR IN SUBCHAPTER V CASE** In a case under subchapter V of chapter 11 in which § 1125 of the Bankruptcy Code does not apply, an election of application of § 1111(b)(2) of the Bankruptcy Code by a class of secured creditors may be made at any time within the time fixed by the court for filing written acceptances or rejections of the Debtor's plan or within such later time as the court may fix prior to expiration of the period provided herein. http://www.nceb.uscourts.gov/sites/nceb/files/local%20rules%2012-1-23_0.pdf

		http://www.nceb.uscourts.gov
North Carolina	M.D.N.C.	**LBR 2007.1-1 TRUSTEES & EXAMINERS (CH. 11)** **(b) Appointment of Trustee in a Subchapter V Case.** If the court has not appointed one or more standing trustees to serve in cases under subchapter V of chapter 11, the bankruptcy administrator must promptly file a notice identifying the disinterested individual who will serve as the trustee in a subchapter V case, including the individual's name and address. **LBR 3003-1 CHAPTER 11 CLAIMS** **(b) Period for Filing Chapter 11 Claims in a Case under Subchapter V.** In a chapter 11 case under subchapter V, non-governmental units must file proofs of claim (if required to be filed) within 70 days after the order for relief, unless the court orders otherwise prior to expiration of such period. **LBR 3014-1 ELECTION UNDER 11 U.S.C. § 1111(b) Subchapter V Case.** In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, a class of secured creditors may elect to apply 11 U.S.C. § 1111(b)(2) within 14 days after service of the first plan or within such later time as the court may fix prior to expiration of such period. http://www.ncmb.uscourts.gov/court-info/local-rules-and-orders/local-rules http://www.ncmb.uscourts.gov
(North Carolina	W.D.N.C.	**LBR 3001-1 Claims and Equity Security Interests** (c) Time for Filing Proof of Claim or Interest in a Cahpter 11 Case. Pursuant to Federal Rule of Bankruptcy Procedure 3003(c)(3) and unless otherwise ordered by the court, a proof of claim or interest shall be timely if filed: (1) In a case filed under Subchapter V of Chapter 11, within 70 days after the order for relief; https://www.ncwb.uscourts.gov/sites/ncwb/files/WDNC%20Bankruptcy%20Local%20Rules%20Sept%202021.pdf https://www.ncwb.uscourts.gov
North Dakota	D.C. N.D.	No specific LBRs on SubV readily apparent http://www.ndb.uscourts.gov/local-rules-and-orders http://www.ndb.uscourts.gov
Ohio	N.D. Ohio	No LBRs on Sub https://www.ohnb.uscourts.gov/file-list/local-bankruptcy-rules https://www.ohnb.uscourts.gov
Ohio	S.D. Ohio	No specific LBRs on SubV readily apparent https://www.ohsb.uscourts.gov/court-info/local-rules-and-orders https://www.ohsb.uscourts.gov
Oklahoma	E.D. Okla.	No website found
Oklahoma	N.D. Okla.	No specific LBRs on SubV readily apparent

		https://www.oknb.uscourts.gov/court-info/local-rules-and-orders https://www.oknb.uscourts.gov
Oklahoma	W.D. Okla.	No specific LBRs on SubV readily apparent https://www.okwb.uscourts.gov/local-rules-and-orders-0 https://www.okwb.uscourts.gov
Oregon	D. Or.	No specific LBRs on SubV readily apparent https://ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/bankruptcy-procedure https://ord.uscourts.gov
Pennsylvania	E.D. Pa.	No specific LBRs on SubV readily apparent https://www.paeb.uscourts.gov/court-info/local-rules-and-orders https://www.paeb.uscourts.gov
Pennsylvania	M.D.Pa.	No specific LBRs on SubV readily apparent https://www.pamb.uscourts.gov/court-info/local-rules-and-orders https://www.pamb.uscourts.gov
Pennsylvania	W.D.Pa.	No specific LBRs on SubV readily apparent https://www.pawb.uscourts.gov/court-info/local-rules-and-orders https://www.pawb.uscourts.gov
Rhode Island	D.R.I.	**LBR 3020-1 CHAPTER 9 AND 11 CONFIRMATION** **(b) Documents Required Seven Days Prior to Confirmation Hearing in Subchapter V Cases.** Not less than seven (7) days prior to the hearing on confirmation, the debtor shall provide the following to the Court, the local office of the United States trustee, and any other party specified by the Court: **(1)** A proposed order of confirmation of the plan in substantially the same form as R.I. Local Form 3020-1.5; **(2)** A certification of compliance with the requirements of 11 U.S.C. § 1191, or in the alternative, evidence of such compliance at the hearing; and **(3)** Any other documents necessary for plan confirmation. **(c) Proof of Deposit Due Seven Days Prior to Confirmation Hearing, if Applicable.** Proof of deposit shall be filed with the Clerk of Court at least seven (7) days prior to the hearing on confirmation, if applicable. A copy of the bank statement showing the amount on deposit in accordance with Fed. R. Bankr. P. 3020(a) is required. The amount of the deposit must be equal to the initial distribution for all classes on the effective date of the plan. Any party waiving payment from funds on deposit must file a written waiver within the time indicated herein. **(d) Failure to timely file the documents set forth in subdivisions (a) and (b) of this LBR** may result in the vacating of the hearing on confirmation, and it will be the responsibility of the plan proponent to notify all creditors and interested parties thereof. 2/19/20 This rule is reorganized to distinguish the documents to be filed prior to confirmation of regular Chapter 11 cases from those under subchapter V.

		Subdivision (b)(1) of the rule incorporates in subchapter V cases the new local form of confirmation order, R.I. Local Form 3020-1.5 **LBR 3016-1 CHAPTER 11 - PLAN [Amended 2/19/2020]** **(a) Subchapter V Cases.** For subchapter V cases, the debtor may use Official Form 425A - *Plan of Reorganization for Small Business Under Chapter 11*, which may be altered to fit the circumstances of the case. https://www.rib.uscourts.gov/local-rules-0 https://www.rib.uscourts.gov
South Carolina	D.S.C.	**LBR 2083-1: CHAPTER 11 SUBCHAPTER V CASES – GENERAL** A debtor, who elects to proceed as a subchapter V case, shall file with the Court not later than 14 days before the date of the status conference a Subchapter V Status Report in substantial conformance with the Court's local form. **LBR 4004-2: SUBCHAPTER V DISCHARGE – NON-CONSENSUAL PLANS** a. **Discharge Following the Completion of Plan Payments.** As soon as practicable following the completion by the debtor or trustee of all payments under a plan confirmed under 11 U.S.C. § 1191(b), the debtor shall file a Certification of Plan Completion and Request for Discharge in substantial conformance with the Court's local form, and a hearing notice in conformance with the Court's local form prescribed by Local Rule 9013-4. b. **Objections.** Any party objecting to the granting of a discharge pursuant to paragraph (a) shall, within twenty-one (21) days after service of the Certification of Plan Completion and Request for Discharge, serve an objection upon the debtor, debtor's counsel, and the trustee and file the objection with the Court. https://www.scb.uscourts.gov/local-rules https://www.scb.uscourts.gov
South Dakota	D.S.D.	**LBR 1007-1. Lists (other than mailing list of creditors), Schedules, Statements, and Payment Advices; Extension of Time to File.** (g) Chapter 11 statement under 11 U.S.C. § 1116(1). A debtor in a small business chapter 11 case and a debtor who has elected to be a debtor under subchapter V of chapter 11 shall file a statement regarding certain business records using the form at Appendix 1D and attach thereto, when applicable, the business records required by 11 U.S.C. § 1116(1)(A). **LBR 1017-1. Voluntary Conversion to Chapter 11.** Any debtor voluntarily seeking conversion of the debtor's case from chapter 7, 12, or 13 to chapter 11 shall state in the motion to convert whether the debtor qualifies as a small business debtor as defined by 11 U.S.C. § 101(51C) and (51D) and whether the debtor elects to proceed under subchapter V of chapter 11. **LBR 2015-3. Filing Reports.** (b) Unless otherwise ordered, a monthly operating report or a post-confirmation report by a debtor in possession or a trustee in a chapter 11 case, other than a chapter 11 small business case or a chapter 11

		case where the debtor has elected to be a debtor under subchapter V, shall be filed with the Court in compliance with the United States Trustee's "Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11." **LBR 3016-1. Chapter 11 Plan Required Content.** (a) Each chapter 11 plan shall: (1) be entitled "[insert name of proponent]'S PLAN DATED [insert the date the proponent signs the plan]," e.g., "DEBTOR'S PLAN DATED DECEMBER 19, 2024"; (2) set forth in a separate paragraph the plan term in months, the date of the first payment being made under the plan, the date of the last payment being made under the plan, and the names of the creditors holding nondischargeable claims and secured claims that will continue to receive payments after the plan term ends; (3) not include repetitive descriptions of claims or claim treatment or unnecessarily repeat information from any attendant disclosure statement; and (4) be signed and dated by the proponent and any attorney for the proponent. (c) In addition to the requirements set forth in paragraph (a) above, a plan by a debtor who has elected to be a debtor under subchapter V of chapter 11 shall conform either to: (1) Official Form 425A; or (2) Appendix 3A of these local bankruptcy rules, excluding Parts 1, 2.2, 7.2 (unless the debtor is an individual), and 8 and any references to chapter 13 and "nonstandard provisions," incorporating the relevant portions of Official Form 425A, including Articles 7 and 9, incorporating the relevant portions of Official Form 425B, including part II and paragraphs D and G of part III, and including the information required by 11 U.S.C. § 1190. **LBR 3016-2. Disclosure Statement in a Small Business Case.** Pursuant to 11 U.S.C. § 1125(f)(1) or 11 U.S.C. §§ 1181(b) and 1187(c) and unless otherwise ordered, a plan filed in a small business chapter 11 case or in a chapter 11 case in which the debtor has elected to be a debtor under subchapter V is deemed to contain adequate information and the proponent of the plan shall not prepare, file, and serve a disclosure statement with the plan. https://www.sdb.uscourts.gov/court-info/local-rules-and-orders https://www.sdb.uscourts.gov
Tennessee	E.D. Tenn.	No specific LBRs on SubV readily apparent https://www.tneb.uscourts.gov/court-info/local-rules-and-orders/local-rules
Tennessee	M.D.Tenn.	No specific LBRs on SubV readily apparent But there is a pdf of Step by Step Instructions: https://www.tnmb.uscourts.gov/sites/tnmb/files/tfr/SBRA_PP_for_public_website.pdf https://www.tnmb.uscourts.gov/court-info/local-rules-and-orders https://www.tnmb.uscourts.gov
Tennessee	W.D. Tenn.	No specific LBRs on SubV readily apparent https://www.tnwb.uscourts.gov/TNW/LBKRules.aspx

		https://www.tnwb.uscourts.gov
Texas	E.D. Tex	No specific LBRs on SubV readily apparent https://www.txed.uscourts.gov/?q=rules-and-orders https://www.txed.uscourts.gov
Texas	N.D. Tex.	No specific LBRs on SubV readily apparent https://www.txnd.uscourts.gov/rules-and-orders https://www.txnd.uscourts.gov
Texas	S.D. Tex.	No specific LBRs on SubV readily apparent https://www.txs.uscourts.gov/sites/txs/files/Local_Rules_August_11_2023_FINAL.pdf https://www.txs.uscourts.gov
Texas	W.D. Tex.	No specific LBRs on SubV readily apparent - No website readily apparent
Utah	D. Utah	**LBR 3003-1 CHAPTER 11 BAR DATE FOR FILING PROOF OF CLAIM OR INTEREST** (a) Claims Bar Date in Chapter 11 Cases. (2) Subchapter V Cases. Unless otherwise ordered by the court, in subchapter V cases, the claims bar date will be 70 days after, and for claims by governmental units 180 days after, the later of: (i) the date of entry of the order for relief, (ii) the date of conversion of case to chapter 11, subchapter V, or (iii) the date of the amendment of the petition to designate the case as a subchapter V case. https://www.utb.uscourts.gov/local-rules-and-orders https://www.utb.uscourts.gov
Vermont	D. Vt.	**LBR 3014-1. SECTION 1111(B) ELECTION IN SUBCHAPTER V CASE.** s may make an election under § 1111(b) not later than 30 days after the debtor files a subchapter V plan, or such later or earlier date as the Court may order. https://www.vtb.uscourts.gov/local-rules https://www.vtb.uscourts.gov
Virginia	E.D.Va.	There appear to be interim procedures, but the rules that posted as of 1/31/2024 have many paragraphs stricken. https://www.vaeb.uscourts.gov/sites/vaeb/files/LBR%20changes%20effective%201-29-2024.pdf https://www.vaeb.uscourts.gov
Virginia	W.D.Va.	No specific LBRs on SubV readily apparent https://www.vawb.uscourts.gov/?q=court-info/local-rules-and-orders https://www.vawb.uscourts.gov
Washington	E.D. Was.	**LBR 3017-1 Disclosure Statement and Plan - General** (c) Disclosure Statement in Case of Small Business Debtor and in Subchapter V Small Business Debtor Reorganization Cases if §1125 is applicable. (1) A motion for an order determining that a separate disclosure statement is not necessary or for conditional approval of a disclosure statement shall be on seven (7) days notice and hearing to the United States trustee pursuant to LBR 2002-1.

		(2) The proposed disclosure statement and plan shall be filed as an attachment to the motion. (3) If either of the above motions is granted, then the proponent of the plan shall promptly file the approved combined plan or conditionally approved disclosure statement and plan, as appropriate, and comply with LBR 3018-1. **LBR 3021-1 Post-Confirmation Reporting Requirements in Chapter 11 Small Business and Subchapter V Cases** (a) In all chapter 11 small business and subchapter V cases, the reorganized debtor or any other party authorized to administer the confirmed plan must file quarterly post-confirmation reports using the appropriate mandatory form until a final decree is entered or the case is dismissed or converted to another Bankruptcy Code chapter. (b) Jointly Administered Cases. Each reorganized debtor and any other party authorized to administer the confirmed plan in jointly administered cases must file separate post- confirmation reports on a non-consolidated and non-consolidating basis consistent with any requirements set forth by the United States Trustee. (c) In the cases of small business debtors (as defined in 11 U.S.C. § 101(51D)) and subchapter V debtors (as defined in 11 U.S.C. § 1182), post-confirmation reports should continue to be filed in compliance with the form, timing, and service requirements established by 11 U.S.C. § 308, 11 U.S.C. § 1187, Fed. R. Bankr. P. 2015(a), and the Local Bankruptcy Form 3021-1. https://www.waeb.uscourts.gov/local-bankruptcy-rules https://www.waeb.uscourts.gov
Washington	W.D. Was.	**LBR RULE 2015-1. DEBTOR IN POSSESSION DUTIES** **(a) Chapter 11 Monthly Financial Reports**. A small business or subchapter V chapter 11 debtor in possession or trustee shall file with the court a monthly financial report using Official Form B 425C, available on the court's website (www.uscourts.gov) or such other form as the Court may direct established by the United States Trustee in accordance with 28 U.S.C. § 589b. https://www.wawb.uscourts.gov/local-bankruptcy-rules-landing https://www.wawb.uscourts.gov
West Virginia	N.D. W.Va.	No specific LBRs on SubV readily apparent https://www.wvnb.uscourts.gov/court-info/local-rules-and-orders/local-rules General Order 21-5 Establishing an Initial Deposit for Cases Filed Under Subchapter V of Chapter 11. Summary: Ordered that cases filed under Subchapter V of Chapter, Debtor's Attorney shall segregate and hold $1000.00. Pro Se Debtor's must tender to Sub V Trustee $1000.00 to be held in escrow for Trustee compensation with approval of Court. https://www.wvnb.uscourts.gov/court-info/local-rules-and-orders/general-orders https://www.wvnb.uscourts.gov

West Virginia	S.D.W. Va.	No specific LBRs on SubV readily apparent https://www.wvsb.uscourts.gov/court-info/local-rules-and-orders/local-rules https://www.wvsb.uscourts.gov
Wisconsin	E.D. Wis.	No specific LBRs on SubV readily apparent https://www.wieb.uscourts.gov/local-rules https://www.wieb.uscourts.gov
Wisconsin	W.D.Wis.	No specific LBRs on SubV readily apparent https://www.wiwb.uscourts.gov/court-info/local-rules-and-orders https://www.wiwb.uscourts.gov
Wyoming	D. Wyo.	No specific LBRs on SubV readily apparent https://www.wyb.uscourts.gov/court-info/local-rules-and-orders https://www.wyb.uscourts.gov
District of Columbia	D.D.C.	**LBR 3003-1 CLAIMS IN CHAPTER 11 CASES** (a) Claims Bar Date. In a Chapter 11 case, the Clerk shall give notice of the bar date with the notice for the meeting of creditors. Unless a different date is subsequently ordered by the Court: (3) in a chapter 11 case under subchapter V of chapter 11, other than a claim of a governmental unit, a proof of claim is timely if filed no later than seventy (70) days after the date of the entry of the order for relief, unless a different date is fixed by the Court. **LBR 3011-1 UNCLAIMED FUNDS** (a) Deposits of Unclaimed Funds. Deposits of unclaimed distributions by chapter 7, 11, 12, 13, and subchapter V trustees may be made without leave of Court. **LBR 3014-1 ELECTION UNDER 11 U.S.C. § 1111(b) BY SECURED CREDITOR IN SUBCHAPTER V CHAPTER 11 CASE** In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, an election of 11 U.S.C. § 1111(b)(2) by a class of secured creditors shall be made no later than fourteen (14) days following the filing of the plan, or such other date as the Court may direct. **LBR 3022-1 FINAL REPORT/DECREE (CHAPTER 11)** (a) Chapter 11 Subchapter V Proceedings. Unless extended by the Court, on or before the later of thirty (30) days after the granting of a discharge in a case under chapter 11 Subchapter V (Small Business Debtor Reorganization), or thirty (30) days after the disposition of all adversary proceedings or contested matters, whichever is later, the debtor's attorney shall file a motion for final decree. This deadline shall apply to both individual and nonindividual debtors under Subchapter V. https://www.dcb.uscourts.gov/local-rules-orders https://www.dcb.uscourts.gov
Puerto Rico	D.P.R.	No specific LBRs on SubV readily apparent https://www.prb.uscourts.gov/?q=court-info/local-rules-and-orders https://www.prb.uscourts.gov/
U.S. Virgin Islands	D.V.I.	No website found