

Temporary and Permanent Changes Made to the New Small Business Reorganization Act of 2019 as a Result of the Coronavirus Aid, Relief, and Economic Security Act Enacted March 27

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On August 23, 2019, President Donald Trump signed into law the Small Business Reorganization Act of 2019 (SBR Act), which became effective last month. On March 27, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was enacted in response to the COVID-19 global pandemic. New subchapter V under chapter 11 of the US Bankruptcy Code eliminates some of the more costly elements of traditional chapter 11 relief, such as disclosure statements, and in some ways is modeled after expedited procedures used in chapter 12 and 13 cases. Subchapter V was designed to promote simplicity and efficiency for reorganization of small-business debtors. The CARES Act temporarily raises the eligibility debt ceiling from \$2,725,625 to \$7,500,000 for new cases filed between March 28, 2020, and March 27, 2021. A permanent change to the SBR Act made by the CARES Act is the elimination of eligibility to file for subchapter V relief for any affiliate of a public company.

Unchanged highlights of new subchapter V include the following:

- While the concept of debtor-in-possession is retained, the SBR Act also requires the United States Trustee to appoint a trustee in every subchapter V case, which may include the appointment of standing trustees. The trustee is not an operational trustee but, rather, serves a role similar to a chapter 12 or 13 trustee in disbursing plan payments. The trustee will also be responsible for assisting the debtor in formulating a plan and otherwise participating in the reorganization process.
- An unsecured creditors committee may not be appointed in a subchapter V case unless ordered by the court for cause.
- Within 60 days of the petition (unless extended by the court due to circumstances “for which the debtor should not justly be held accountable”), the court must hold a status conference to determine how best to proceed with the case.

- A plan must be filed within 90 days of the petition date. The court can extend this deadline if circumstances for which the debtor should not be held accountable exist. Moreover: ?Only a debtor may file a plan.
 - The plan must contain some information traditionally addressed in disclosure statements, such as a brief history of the business operations, a liquidation analysis, and a projection of the debtor's ability to make payments under the proposed plan.
 - The plan length may be no less than three years and no more than five years, and all disposable income must be dedicated to the plan.
 - In a significant departure from chapter 13 practice, the subchapter V plan may modify the rights of a secured lender with a lien on the principal residence if the "new value" received from the loan was not used primarily to acquire the residence **and** was used primarily in connection with the small business. This will enable debtors to alter the terms of home equity loans and second mortgages obtained for business purposes.
 - The plan may be approved if it is feasible, does not unfairly discriminate, and is fair and equitable as to nonconsenting, impaired classes of creditors.
- Under the SBR Act, a discharge is not granted until the debtor completes all payments due within the first three years of the plan, or such longer period not to exceed five years as the court may fix. The discharge applies to all debts addressed by the plan except for debts (1) on which the last payment is due after the first three years of the plan, or such other time fixed by the court not beyond five years, or (2) that are otherwise non-dischargeable.

The SBR Act leaves some issues unanswered. For example, it is unclear what interest rate applies to secured loans under confirmed plans. Will it be the contract rate or some presumptive rate established by local rule, as is the case with chapter 13 cases in many jurisdictions? It is also unclear how courts will apply prior chapter 12 and chapter 13 precedents to new subchapter V cases.

The SBR Act could impact many lenders. It may result in more filings by debtors who cannot afford the traditional chapter 11 process. Debtors will be able to more easily obtain confirmation of plans over creditor dissent and to cram lenders down on the value of residential collateral used for business loans. At the same time, it should generally be a faster process that overall may reduce costs for creditors and provide greater chances of repayment due to the involvement of a trustee.

Due to the economic conditions caused by the global pandemic and the temporarily heightened debt limits under the CARES Act, increased bankruptcy filings are likely in the coming months under the recently enacted subchapter V chapter 11 provisions.

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