

## CHAPTER 12

### SUBCHAPTER V: SMALL BUSINESS REORGANIZATION

#### 12.1 INTRODUCTION

**12.101 In General.** Through the Small Business Reorganization Act of 2019 (SBRA), Congress created subchapter V of chapter 11. Subchapter V is intended to provide a streamlined chapter 11 process to remove some of the obstacles to reorganization by providing an economically feasible and efficient option for small business debtors. Subchapter V is limited to individuals and entities that qualify as a “small business debtor” under the updated definition of the term by the SBRA. Under the SBRA, a small business debtor was defined as a person or entity engaged in commercial or business activities that has aggregate secured and unsecured noncontingent liquidated debts as of the date of filing of less than \$2,725,625.<sup>1</sup> This threshold debt amount was increased in April 2020 to \$7,500,000 under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and then subsequently extended in June 2022 by the Bankruptcy Threshold Adjustment and Technical Corrections Act (Corrections Act). The extended debt limit increase in the Corrections Act reverted back to \$3,024,725<sup>2</sup> on June 21, 2024, and the 2025 limit is \$3,424,000.<sup>3</sup>

Debtors who qualify for subchapter V must affirmatively elect such treatment, otherwise their case will proceed under traditional chapter 11 or the current provisions of chapter 11 governing small business cases will apply. For debtors that elect to proceed under subchapter V, there are a number of important differences from traditional chapter 11. Most importantly, subchapter V (i) modifies confirmation requirements including elimination of the absolute priority rule; (ii) provides for the appointment of a trustee designed to facilitate confirmation while the debtor remains in possession of assets and operates the business as a debtor-in-possession; (iii) changes several administrative and procedural rules; (iv) alters the rules for the debtor’s discharge; and (v) modifies the definition of property of the estate with regard to property an individual debtor acquires postpetition, including postpetition earnings.

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<sup>1</sup> This number continues to be adjusted for inflation pursuant to 11 U.S.C. § 104.

<sup>2</sup> See 11 U.S.C. § 101(51D).

<sup>3</sup> The Final Report of the American Bankruptcy Institute Subchapter V Task Force is available at <https://subvtaskforce.abi.org/>.

If the first few years after the enactment of the SBRA are any indication, subchapter V is an effective and popular tool for qualifying debtors. In comparing data from the Office of the United States Trustee, subchapter V has a substantially higher confirmation rate than non-subchapter V small business cases.<sup>4</sup> If the data is any indication, subchapter V is achieving its goals with a majority of cases reaching confirmation.

**12.102 Subchapter V Cases Are Chapter 11 Cases.** Though commonly referred to as “subchapter V” cases, it is important to note that subchapter V is part of chapter 11. As a result, many of the same issues, questions, requirements, and standards apply, such as cash collateral, assumption and rejection of leases, employment of professionals, and first-day motions. Those topics are addressed in detail in Chapter 11 of this book. This chapter addresses the areas in which a subchapter V case differs from a traditional chapter 11 filing.

## 12.2 PROCEEDING UNDER SUBCHAPTER V

**12.201 Election of Subchapter V.** Subchapter V is only applicable when a small business debtor, as defined by 11 U.S.C. § 1182, elects subchapter V treatment on the Voluntary Petition form.<sup>5</sup> In general, a debtor is eligible to elect subchapter V if the debtor: (i) is a “person”;<sup>6</sup> (ii) is engaged in “commercial or business activities”; (iii) does not have aggregate noncontingent liquidated debts in excess of the applicable debt limit; and (iv) at least 50 percent of debts arise from the debtor’s commercial or business activities.<sup>7</sup> However, a debtor cannot be a subchapter V debtor if they are (i) a member of a group of affiliated debtors that has aggregate noncontingent liquidated debts greater than the applicable debt limit, (ii) a corporation subject to reporting requirements under the Securities Exchange Act of 1934, or (iii) any debtor that is an affiliate of a

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<sup>4</sup> See Chapter 11 Subchapter V Statistical Summary Through December 31, 2024, Office of the United States Trustee, [www.justice.gov/ust/page/file/1499276/dl?inline](http://www.justice.gov/ust/page/file/1499276/dl?inline) (last visited Mar. 19, 2025) (percentage of non-subchapter V plans confirmed in fiscal years 2020-2023 was 23%; percentage of subchapter V confirmed plans in the same fiscal years was 52%).

<sup>5</sup> See Official Forms 101, 201.

<sup>6</sup> Person, as defined by 11 U.S.C. § 101(41), includes individuals, corporations, and partnerships. A limited liability company is considered a person. See, e.g., *In re QDN, LLC*, 363 Fed. Appx. 873, 876 n.4 (3d Cir. 2010); *In re CWNevada, LLC*, 602 B.R. 717 (Bankr. D. Nev. 2019); *In re 4 Whip, LLC*, 332 B.R. 670, 672 (Bankr. D. Conn. 2005); *In re ICLNDS Notes Acquisition, L.L.C.*, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio 2001); see also *In re Asociación de Titulares de Condominio Castillo*, 581 B.R. 346, 358-60 (B.A.P. 1st Cir. 2018) (collecting cases).

<sup>7</sup> See 11 U.S.C. § 1182(1); see also 11 U.S.C. § 101(51D)(A).

corporation subject to SEC reporting requirements.<sup>8</sup> While the definition of a small business debtor on its face appears straightforward, many of the reported cases in the early years of the SBRA involved the interpretation of the elements.

Without the election of subchapter V, the debtor's case could continue as a small business case under section 101(51C) if it is within the debt limits. The SBRA amended the definition of "small business case" in section 101(51C) of the Bankruptcy Code to exclude a subchapter V debtor. Thus, a "small business case" is a case in which a small business debtor has not elected application of subchapter V.

Bankruptcy Rule 1020(b) allows for a party in interest or the United States trustee to object to the debtor's election of subchapter V. Objections are required to be filed within 30 days after the conclusion of the section 341 meeting of creditors or within 30 days after an amendment to the designation electing subchapter V is filed, whichever is later.<sup>9</sup> Unlike other deadlines for objections (namely, objections to exemptions), the deadline to object to the election of subchapter V treatment is set as of the conclusion (not as of the date first set) of the section 341 meeting and, as a result, may lapse after other deadlines in the case if the meeting of creditors is held open. Generally, the burden is on the debtor to establish its eligibility if a party in interest lodges an objection.<sup>10</sup>

Written into Bankruptcy Rule 1020(b), there seems to be a mechanism to allow a delayed petition amendment to elect subchapter V. However, the SBRA provisions in the Bankruptcy Code do not clearly address if there is an ability to do so. Bankruptcy Rule 1020(a) requires a debtor in a voluntary case to elect subchapter V in the petition, and a debtor in an involuntary case must file a statement electing subchapter V within 14 days after the order for

<sup>8</sup> See 11 U.S.C. § 1182(1); see also 11 U.S.C. § 101(51D)(B).

<sup>9</sup> Fed. R. Bankr. P. 1020(b). The Federal Rules of Bankruptcy Procedure were amended April 2, 2024, effective December 1, 2024, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

<sup>10</sup> *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403, 405 (B.A.P. 9th Cir. 2022); *National Loan Invs., L.P. v. Rickerson (In re Rickerson)*, 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021); *Lyons v. Family Friendly Contracting LLC (In re Family Friendly Contracting LLC)*, No. 21-14213-TJC, 2021 Bankr. LEXIS 2945, at \*7, 2021 WL 5540887, at \*2 (Bankr. D. Md. Oct. 26, 2021); *In re Vertical Mac Constr., LLC*, No. 6:21-bk-01520-LVV, 2021 Bankr. LEXIS 2285, at \*4, 2021 WL 3668037, at \*2 (Bankr. M.D. Fla. July 23, 2021); *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021); *In re Blue*, 630 B.R. 179, 187 (Bankr. M.D.N.C. 2021); *In re Offer Space, LLC*, 629 B.R. 299, 304 (Bankr. D. Utah 2021); *In re Ikalowych*, 629 B.R. 261, 275 (Bankr. D. Colo. 2021); *In re Johnson*, No. 19-42063-ELM, 2021 Bankr. LEXIS 471, at \*11, 2021 WL 825156, at \*4 (Bankr. N.D. Tex. Mar. 1, 2021); *In re Thurmon*, 625 B.R. 417, 419 n.4 (Bankr. W.D. Mo. 2020).

relief.<sup>11</sup> The 2022 Advisory Committee Note to Rule 1020 states that the “rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.”<sup>12</sup> A delayed amendment to elect subchapter V creates a deadline issue as there are strict deadlines under sections 1188 and 1189 of the Bankruptcy Code for the bankruptcy court to hold the required status conference and the debtor to file a plan.

## 12.202 Eligibility.

**A. Debt Limit.** The SBRA originally adopted the debt limit for a small business debtor as defined in section 101(51D), however, the onset of the Coronavirus pandemic shortly after enactment resulted in a temporary increase in the debt limit for subchapter V cases to \$7,500,000. On June 20, 2024, the Bankruptcy Code reverted to the requirement that a debtor must be a small business debtor as defined by section 101(51D).<sup>13</sup>

The debt limit, analogous to cases under chapter 12 or chapter 13, focuses on liquidated noncontingent debt. This requires all events giving rise to the debt to have occurred before the filing of the petition and the amount to be readily determined.

## B. Commercial or Business Activities.

**1. In General.** Only individuals or entities engaged in commercial or business activities may be subchapter V debtors.<sup>14</sup> It is accepted that such business does not have to be profit motivated.<sup>15</sup>

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<sup>11</sup> Fed. R. Bankr. P. 1020(a).

<sup>12</sup> See, e.g., *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 342 (Bankr. S.D. Fla. 2020) (“[N]othing in the text of Rule 1009 or Interim Rule 1020 prevents a small business debtor from filing an amended petition to elect to have Subchapter V apply to its case, even if it had not previously elected to proceed under Subchapter V (or even if it filed its case before Subchapter V became effective).”); see also *In re Bello*, 613 B.R. 894, 895-96 (Bankr. E.D. Mich. 2020) (permitting debtor who had originally filed a chapter 13 case, then converted to chapter 11, to subsequently amend his petition to elect to proceed under subchapter V); *In re Blanchard*, No. 19-12440, 2020 Bankr. LEXIS 1909, at \*7-8, 2020 WL 4032411, at \*3 (Bankr. E.D. La. July 16, 2020) (overruling United States trustee’s objection to debtors amending their petition to elect subchapter V status after United States trustee had filed a motion to convert their case to chapter 7); *In re Bonert*, No. 2:19-bk-20836-ER, 2020 Bankr. LEXIS 1783, at \*20-23, 2020 WL 3635869, at \*2-3 (Bankr. C.D. Cal. June 3, 2020) (overruling objection of creditors committee to debtors amending their petition to elect to proceed under subchapter V). However, the Bankruptcy Court for the Western District of Virginia did not allow for the debtor to convert his case to one under subchapter V. See *In re Wetter*, 620 B.R. 243, 255 (Bankr. W.D. Va. 2020).

<sup>13</sup> The debt limit for 2025 is 3,024,725.

<sup>14</sup> See 11 U.S.C. § 1182(1); see also 11 U.S.C. § 101(51D) (definition of small business debtor).

<sup>15</sup> See, e.g., *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403, 413 (B.A.P. 9th Cir. 2022) (“[N]o profit motive is required for a debtor to qualify for subchapter V relief. To hold otherwise would

The more complicated question arises when a business is no longer operational or an individual debtor has changed employment. In those cases, as an initial matter, courts have had to determine whether the debtor is required to be engaged in commercial or business activities at the time of filing, whether the debtor has to be involved in the same commercial or business activity from which the debt arose, and what types of activities are “commercial or business.”

**2. Activities on the Petition Date.** The majority view is that the debtor does not need to be “maintaining its core or historical operations on the petition date” but that it must be engaged in “some type of commercial or business activities.”<sup>16</sup> But, other courts have found that a debtor must be *currently* engaged in commercial or business activities, finding that the plain meaning of “engaged in” means being actively and currently involved.<sup>17</sup>

**3. Whether the Debtor Must Be Involved in the Same Activity.** A subchapter V debtor must still have some activity in its small business, even if it is just winding down. Courts have determined that a debtor cannot elect subchapter V if the business has been sold, the debtor had no intent to return to the business, and the debtors were not engaged in any new or ongoing commercial or business activities.<sup>18</sup> However, the majority of courts have held that the commercial or business activities as of the petition date does not have to be the same commercial or business activity from which the debtor’s debts arose.<sup>19</sup> It is clear that for individual small business debtors, if their only income and activity as of the petition date is through W-2

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wrongfully exclude nonprofits and other persons that lack such a motive.”); *In re Ellingsworth Residential Cmty. Ass’n*, 619 B.R. 519 (Bankr. M.D. Fla. 2020) (a nonprofit homeowner’s association was eligible for subchapter V election).

<sup>16</sup> *In re RS Air, LLC*, 638 B.R. at 410; see also *In re Blanchard*, 2020 Bankr. LEXIS 1909, 2020 WL 4032411; *In re Bonert*, 2020 Bankr. LEXIS 1783, 2020 WL 3635869; *In re Wright*, No. 20-01035-HB, 2020 Bankr. LEXIS 1240, 2020 WL 2193240 (Bankr. S.C. Apr. 27, 2020).

<sup>17</sup> *In re Thurmon*, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020); see also *National Loan Invs., L.P. v. Rickerson (In re Rickerson)*, 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021) (eligibility requires the debtor to be engaged in commercial or business activities on the petition date); *In re Blue*, 630 B.R. 179, 188-89 (Bankr. M.D.N.C. 2021) (collecting and discussing cases); *In re Offer Space, LLC*, 629 B.R. 299, 305-06 (Bankr. D. Utah 2021); *In re Ikalowych*, 629 B.R. 261, 280-83 (Bankr. D. Colo. 2021); *In re Johnson*, No. 19-42063-ELM, 2021 Bankr. LEXIS 471, at \*3-4, 2021 WL 825156, at \*6-7 (Bankr. N.D. Tex. Mar. 1, 2021) (advancing three reasons: (i) engaged does not refer to past involvement; (ii) subchapter V is to facilitate expedience; and (iii) “engaged in” applicable to railroads under subchapter IV of chapter 11 and chapter 12 applies contemporaneously).

<sup>18</sup> See *In re Thurmon*, 625 B.R. at 423.

<sup>19</sup> See *In re Fama-Chiarizia*, 655 B.R. 48, 68-69 (Bankr. E.D.N.Y. 2023); *In re Offer Space, LLC*, 629 B.R. at 306.



employment, that is insufficient to meet the involvement in commercial or business activity standard.<sup>20</sup>

**4. Business Activities Includes Winddown.** If a business is no longer operational, courts have evaluated whether the principal or the entity itself is eligible based on activities such as winding down the business affairs. This is a fact-specific analysis, but the majority of courts to consider the question have held that business activities are not limited to ongoing business operation activities. At least one court has found that keeping the empty shell of the former business entity open did not qualify as being “engaged” in business activities.<sup>21</sup> In general, courts apply a totality of the circumstances test to determine whether activities were sufficient commercial or business activities.<sup>22</sup> As a result, the term “commercial or business activities” is generally applied in an exceptionally broad manner, including “any private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so).”<sup>23</sup> Based on this interpretation, winddown activities, such as interactions with the lender and a landlord, cleanup and turnover of leased premises, assisting with payroll, dealing with tax accountants and tax issues, and organization and storage of business records, constitute sufficient commercial or business activities.<sup>24</sup> In individual cases, receipt of a material contribution to the debtor’s income as a part-time independent contractor and rental of her former residence have been held to be within the scope of commercial or business activities.<sup>25</sup>

**C. Conversion or Revocation.** Despite the default position of the debtor remaining in possession in subchapter V, the SBRA provided for the situation where a debtor may need to be removed from possession.<sup>26</sup> The standard for removal (also referred to as “dispossession”) is “cause” including fraud, dishonesty, incompetence, or gross mismanagement. A removed debtor

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<sup>20</sup> See, e.g., *In re Rickerson*, 636 B.R. at 429.

<sup>21</sup> *Id.*

<sup>22</sup> *In re Ikalowych*, 629 B.R. at 284-85.

<sup>23</sup> *Id.* at 276.

<sup>24</sup> *Id.* at 285-86; see also *In re Offer Space, LLC*, 629 B.R. at 303 (the debtor was not operating as a business and was only attempting to realize value from its assets and pay creditors).

<sup>25</sup> *In re Blue*, 630 B.R. 179 (Bankr. M.D.N.C. 2021).

<sup>26</sup> 11 U.S.C. § 1185(a).