

# SBRA: SMALL BUSINESS REORGANIZATION ACT

(aka Subchapter V)

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## PURPOSE OF THE NEW LEGISLATION

- 1  
Seek the speedy proposal and implementation of a consensual plan
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Reduce cost to debtors
- 3  
Quicker return to creditors

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## HIGHLIGHTS OF THE SBRA

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## ONLY CERTAIN DEBTORS MAY ELECT TO BE A SUBCHAPTER V SMALL BUSINESS DEBTOR

Must fit the “small business debtor” definition of 11 U.S.C. § 101(51D).

- “Person engaged in commercial or business activities.”
- Total noncontingent liquidated debt less than \$3,024,725.
- At least 50% of the debt must have arisen “from the commercial or business activities of the debtor.”
- May be an affiliate of a small business debtor so long as aggregated debt remains below \$2.7M.
- Not a single asset real estate debtor.

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## SUBCHAPTER V IS A CHOICE FOR SMALL BUSINESS DEBTORS

Debtors that fit within the “small business debtor” definition of 11 U.S.C. § 101(51D) have the option of continuing as a small business case under the small business provisions OR continuing under subchapter V.

Debtors must affirmatively elect subchapter V treatment or their case will proceed under the small business provisions. 11 U.S.C. § 103(i)

Subchapter V debtors must file the small business case documents (tax return, balance sheet, statement of operations & cash-flow statement) with their petition. 11 U.S.C. § 1187(a)

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## KEY ELEMENTS OF THE SBRA

Streamlined requirements

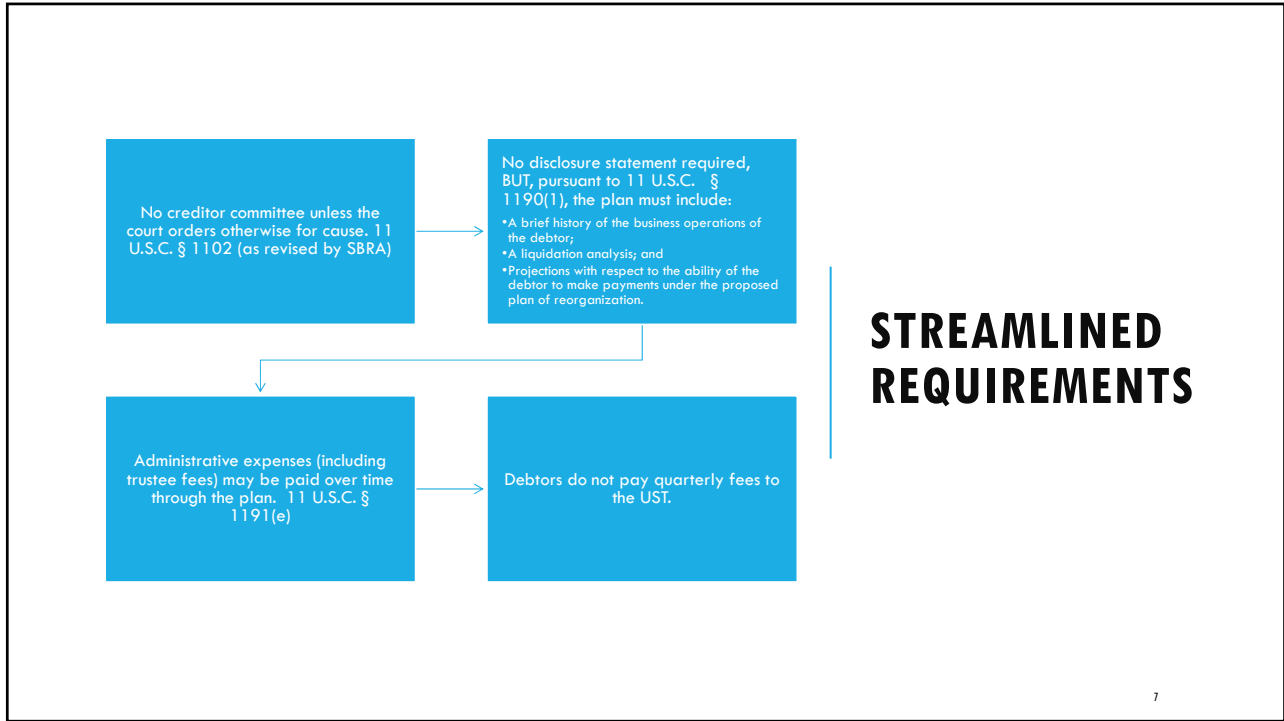
Additional benefits for debtors

Tighter timeline (with limited extensions)

Assistance of a subchapter V trustee

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## ADDITIONAL PROVISIONS

- Only the debtor may file a subchapter V plan. 11 U.S.C. § 1189(a)
- Individual debtors may cramdown a mortgage on their principal residence if the loan proceeds were used "primarily in connection with the small business of the debtor" and not to purchase the residence. 11 U.S.C. § 1190(3)
- The debtor may hire a professional even if that professional is a creditor.
  - Professional is "not disqualified for employment . . . solely because [the professional] holds a [prepetition] claim of less than \$10,000 . . ." 11 U.S.C. § 1195
- Section 1141(d)(5) does not apply to individuals who elect to be subchapter V debtors. 11 U.S.C. § 1181(a)
  - Debtors who confirm consensual plans receive a discharge upon confirmation.
  - Debtors who confirm cramdown plans receive a discharge after 3 to 5 years of payments. 11 U.S.C. § 1192

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## SBRA CASES WORK ON A TIGHT SCHEDULE

UST appoints subchapter V trustee and sets 341 meeting within 24 to 48 hours of filing.

UST conducts initial debtor interview (IDI) about 10 days after case filing.

341 meeting held as close as possible to 21 days after filing, depending on the location of the meeting.

The court holds a status conference not later than 60 days after the case is filed "to further the expeditious and economical resolution of a case under this subchapter." 11 U.S.C. § 1188(a)

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

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## SBRA CASES WORK ON A TIGHT SCHEDULE *CONTINUED*

Not later than 14 days before the status conference, "the debtor shall file with the court and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." 11 U.S.C. § 1188(c)

The debtor shall file a plan not later than 90 days after the petition date, except that the court may extend the period "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b)

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## SBRA'S TWO CONFIRMATION TRACKS

A **consensual** plan may be confirmed under 11 U.S.C. § 1191(a) if all the requirements of 1129(a) are met—other than paragraph 15 (imposing chapter 13 means test to define disposable income).

A **cramdown** plan may be confirmed under 11 U.S.C. § 1191(b) if all the requirements of 1129(a) are met—other than paragraphs 8 (requiring acceptance by each impaired class), 10 (requiring acceptance by at least one impaired non-insider class), and 15—and the plan “does not discriminate unfairly, and is fair and equitable” with respect to each impaired class that has not accepted the plan.

\*The absolute priority rule does not apply.

\* “Fair and equitable” as defined in 11 U.S.C. § 1191(c) requires that in addition to secured creditors retaining liens and being paid at least the value of the secured creditor’s interest in property, the debtor must pay at least projected disposable income over 3 to 5 years towards the plan.

The confirmation track affects discharge timing, payment options, trustee duties, and modification options.

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## SBRA CASES HAVE BOTH A TRUSTEE AND A DIP

Subchapter V trustee is appointed at the beginning of the case.

- Primary pre-confirmation task is to “facilitate the development of a consensual plan of reorganization.” 11 U.S.C. § 1183(b)(7)
- Services generally terminate upon substantial consummation of a consensual plan.
- Trustee remains in place to distribute plan payments if a cramdown plan is confirmed.

DIP may be removed for cause. 11 U.S.C. § 1185

- If DIP is removed, the trustee will operate the business. 11 U.S.C. § 1183(b)(5)

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## SUBCHAPTER V TRUSTEES

SBRA allows for either standing or case-by-case trustees. 11 U.S.C. § 1183(a)

Both standing and case-by-case trustees have the same duties.

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## SUBCHAPTER V TRUSTEE DUTIES

In general, the subchapter V trustee will evaluate the viability of the business and prospects for reorganization.

Upon appointment, under 11 U.S.C. § 1183(b)(1), the trustee shall perform the duties specified in section 704(a)(2), (5)-(7), and (9):

- Be accountable for all property received;
- Examine proofs of claim and object as needed; oppose the debtor's discharge, if advisable;
- Furnish information concerning the estate requested by a party in interest, unless the court orders otherwise;
- Make a final report; and
- File an account of the administration of the estate with the court and the UST.

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# SUBCHAPTER V TRUSTEE DUTIES *CONTINUED*

The trustee will take part in the IDI conducted by the UST and in the status conference and other hearings scheduled by the court. 11 U.S.C. § 1183(b)(3)

The UST generally will preside at the creditors' meeting, but the trustee will be expected to attend and participate.

The trustee is charged with facilitating the development of a consensual plan of reorganization and ensuring that the debtor commences making timely payments under any confirmed plan. 11 U.S.C. § 1183(b)(7) and (4)

# SUBCHAPTER V TRUSTEE DUTIES *CONTINUED*

If there is a claim for a domestic support obligation with respect to the debtor, the trustee must furnish the required notices. 11 U.S.C. § 1183(b)(6)

For cause, and upon request of a party in interest, the court may require the trustee to also perform the duties specified in section 1106(a)(3), (4), and (7):

Investigate the conduct and financial condition of debtor, and any other matter relevant to the case;

File a report of any investigation conducted; and,

After confirmation, file any such reports that are necessary or as the court orders. 11 U.S.C. § 1183(b)(2)



## SUBCHAPTER V TRUSTEE COMPENSATION — GENERALLY

Standing and case-by-case trustees are compensated under different statutes.

Initially, the UST will appoint case-by-case trustees to administer cases rather than standing trustees.

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## SUBCHAPTER V CASE-BY-CASE TRUSTEE COMPENSATION

Subchapter V case-by-case trustees will be paid under 11 U.S.C. § 330.

Unlike compensation for chapter 7 trustees, subchapter V case-by-case trustees' compensation is not based on disbursements.

\* SBRA conforming amendments specifically make section 326(a) inapplicable to subchapter V cases, which precludes determining compensation based on disbursements.

Instead, case-by-case trustees must apply for fees and expenses under section 330 and establish that fees are reasonable (likely based on time spent and a reasonable hourly rate) and expenses are actual and necessary.

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## COURT MAY AUTHORIZE THE SUBCHAPTER V TRUSTEE TO OPERATE THE DEBTOR'S BUSINESS

If the court orders pursuant to section 1185 that the debtor shall no longer be a debtor in possession, the subchapter V trustee shall operate the debtor's business. 11 U.S.C. § 1183(b)(5)

Section 1183(b)(5) requires the trustee to:

- File any required schedules and statements;
- File periodic operating reports;
- Serve as the administrator of any employee benefit plan;
- Make reasonable efforts to transfer patients from a closing health care business to a new provider offering similar services; and,
- For any year in which a tax return has not been filed, furnish such information as may be required by the applicable governmental entity.

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## HANDLING FUNDS AND MAKING DISTRIBUTIONS

The subchapter V trustee might (or might not) handle funds and make distributions.

### Pre-confirmation:

- Section 1194 permits, but does not require, a debtor to make adequate protection payments through the subchapter V trustee, with the permission of the bankruptcy court. 11 U.S.C. § 1194(c)
- If the subchapter V trustee holds funds pre-confirmation, then upon confirmation, section 1194 directs that the trustee either distribute those funds in accordance with a confirmed plan or return those funds to the debtor after deducting any (1) unpaid administrative expenses, (2) adequate protection payments due to a secured lender, and (3) fees owing to the trustee. 11 U.S.C. § 1194(a)

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# HANDLING FUNDS AND MAKING DISTRIBUTIONS *CONTINUED*

## Post-confirmation

- If a consensual plan is confirmed, the trustee's services will terminate upon substantial consummation of the plan. 11 U.S.C. § 1183(c)(1)
- If a cramdown plan is confirmed, the trustee shall make payments to creditors under the plan, except as otherwise provided in the plan or confirmation order. 11 U.S.C. § 1194(b)

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# UNITED STATES TRUSTEE PROGRAM IS DEDICATED TO MAKING SBRA WORK

The intent of Congress is to provide small business debtors a heightened opportunity to effectuate a consensual plan and offer a new type of trustee to assist in this effort.

The USTP will move promptly to select and train individuals who will be available to perform the new subchapter V trustee functions on February 19, 2020.

The USTP will endeavor to provide training to bankruptcy constituencies before the effective date of the law.

The USTP will carry out its oversight responsibilities in SBRA cases in close coordination with the subchapter V trustees.

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