


6-22-2020

## REVISING THE DEBT LIMIT FOR “SMALL BUSINESS DEBTORS”: THE LEGISLATIVE HALF-MEASURE OF THE SMALL BUSINESS REORGANIZATION ACT

Michael C. Blackmon

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjcfcl>

 Part of the [Agriculture Law Commons](#), [Banking and Finance Law Commons](#), [Bankruptcy Law Commons](#), [Business Organizations Law Commons](#), [Disaster Law Commons](#), [Law and Economics Commons](#), [Legislation Commons](#), [Secured Transactions Commons](#), and the [Securities Law Commons](#)

---

### Recommended Citation

Michael C. Blackmon, *REVISING THE DEBT LIMIT FOR “SMALL BUSINESS DEBTORS”: THE LEGISLATIVE HALF-MEASURE OF THE SMALL BUSINESS REORGANIZATION ACT*, 14 Brook. J. Corp. Fin. & Com. L. 339 (2020).

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol14/iss2/6>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of Corporate, Financial & Commercial Law by an authorized editor of BrooklynWorks.

# REVISING THE DEBT LIMIT FOR “SMALL BUSINESS DEBTORS”: THE LEGISLATIVE HALF-MEASURE OF THE SMALL BUSINESS REORGANIZATION ACT

## ABSTRACT

*Bankruptcy law changed drastically in 2019 with the passage of several bills. This Note will examine two of them. First, the Family Farmer Relief Act of 2019 raised the debt limit of the family farmer from \$4,411,400 to \$10,000,000. This enables more financially distressed family farmers to be eligible for Chapter 12 relief, a reorganizational tool designed for farmers. Second, the Small Business Reorganization Act of 2019 created Subchapter V – Small Business Debtor Reorganization in Chapter 11. This new Subchapter streamlined the reorganization process for small business debtors by removing roadblocks which often derail a reorganization of a small business. However, the bill is a Congressional half-measure because it could have broadened the definition of small business debtor to include medium-sized businesses by raising the debt limit embedded in the Bankruptcy Code’s definition of small business debtor. Chapter 11 is notorious for being a poor fit for small to medium-sized businesses with many of these debtors choosing liquidation rather than reorganization. This Note argues that the debt limit for the small business debtor should be raised from \$2,725,625 to \$7,500,000. This increase would allow more small to medium-sized business debtors to fall under the protective graces of Subchapter V. This Note will use the Family Farmer Relief Act of 2019 as a concrete example for when debt limits should be raised and will examine the Congressional rationale behind doing so. Additionally, this Note will use the American Bankruptcy Institute and the National Bankruptcy Conference recommendations for fixing the definition of the small business debtor as guidance for modifying the debt limit.*

## INTRODUCTION

“No more half-measures, Walter.”<sup>1</sup>

Small to medium-sized businesses are a driving force in the American economy. Small companies that have “50 to 5,000 employees account for more employment [throughout the American economy] than those with over 5,000.”<sup>2</sup> However, the harsh reality is that “small and middle-market enterprises are prone to preliminary setbacks and initial failures, and they can be among the hardest hit in economic downturns” but they remain an

---

1. *Breaking Bad: Half-Measures* (AMC television broadcast June 6, 2010).

2. DELOITTE, MID-MARKET PERSPECTIVES: AMERICA’S ECONOMIC ENGINE – COMPETING IN UNCERTAIN TIMES 6 (2011), <https://fdocuments.in/document/mid-market-perspectives-americas-economic-engine-competing-in-uncertain-times.html>.

essential cornerstone of the American economy.<sup>3</sup> The bankruptcy system allows for a critical “safety net for entrepreneurs” to exist while also “encourag[ing] lending because it is a tried-and-true [method] for creditors to recover as much as feasible when things go wrong for borrowers.”<sup>4</sup>

Bankruptcy is, and always will be, a vital part of the American economy and the judicial system thanks to the Bankruptcy Clause in the Constitution.<sup>5</sup> This area of law has “provided the United States with the most stable lending environment in the world” due to its protection of both Debtor’s and Creditor’s rights.<sup>6</sup> Bankruptcy law “directly or indirectly” affects millions of businesses and individual Americans.<sup>7</sup> Bankruptcy is designed to give debtors “overwhelmed with unimaginable debt[,] a fresh start through meaningful relief from their debt . . . and give them a new pathway to economic prosperity.”<sup>8</sup> The current iteration of bankruptcy law, enacted in 1978, can be found in the Bankruptcy Code (the Code).<sup>9</sup> This is an equitable section of federal law, which in an ideal world “is supposed to work for everyone,” debtor and creditor alike.<sup>10</sup> A critical component of the bankruptcy system is to “maximize creditor recovery” via an efficient administration and settlement of the debtor’s estate.<sup>11</sup>

In 2019, Congress drafted and passed new pieces of bankruptcy legislation.<sup>12</sup> On August 23, 2019, President Donald Trump signed three bankruptcy bills into law, which marked the first major upgrades to the Code since it was amended in 2005 with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).<sup>13</sup> This Note is

3. AM. BANKR. INST., *ABI Commission to Study the Reform of Chapter 11: 2012-2014 Final Report and Recommendations*, 23 AM. BANKR. INST. L. REV. 1, 297 (2015) [hereinafter *ABI Final Report*].

4. *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 7 (2019) (statement of Rep. Jim Sensenbrenner, Member, H. Judiciary Comm.), <https://ella.org/wp-content/uploads/2019/PDFs/062519-Transcript-Oversight-of-Bankruptcy-Law.pdf> [hereinafter *Judiciary Hearing*].

5. “The Congress shall have [p]ower [t]o . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . .” U.S. CONST. art. I, § 8, cl. 4.

6. *Judiciary Hearing*, *supra* note 4, at 4.

7. *Id.* at 3 (statement of Rep. Jerrold Nadler, Chairman, H. Judiciary Comm.).

8. *Id.* (statement of Rep. David Cicilline, Member, H. Judiciary Comm.).

9. See Brian A. Blum, *The Goals and Process of Reorganizing Small Businesses in Bankruptcy*, 4 J. SMALL & EMERGING BUS. L. 181, 184 (2000).

10. *Judiciary Hearing*, *supra* note 4, at 3 (statement of Rep. David Cicilline, Member, H. Judiciary Comm.).

11. 8A C.J.S. *Bankruptcy* § 2 (2020); 11 U.S.C. § 541 (2018) (stating that a bankruptcy estate is to be created upon the filing of a bankruptcy which shall contain all assets owned by the debtor at the time of the filing).

12. See Lisa Uhlman, *New Bankruptcy Laws Aim to Help Small Businesses, Farmers, Veterans*, 16 No. 10 WESTLAW J. BANKR. 06 (Sept. 19, 2019).

13. *Id.* The third bill, entitled Honoring American Veterans in Extreme Need Act (HAVEN) is beyond the scope of this article. *Id.* Additionally, BAPCPA was a massive overhaul to the Code in 2005 which made Chapter 12 permanent, imposed a number of conditions on individual debtors, and radically changed Chapter 11 small business cases. See generally 1 COLLIER ON BANKRUPTCY

concerned with two of these recently enacted bills: the Family Farmer Relief Act (FFRA) and the Small Business Reorganization Act (SBRA).<sup>14</sup> Both bills received bipartisan support and aim to make the Code more equitable for certain narrow classes of debtors—specifically family farmers and small business debtors.<sup>15</sup> In essence, the FFRA will allow more farmers to meet the Code’s definition of “family farmer”<sup>16</sup> by raising the debt limit for family farmers from roughly \$4.4 million to \$10 million.<sup>17</sup> This bill eliminated an unintentional barrier to Chapter 12 relief.<sup>18</sup> The FFRA is an example of how and why Congress moves debt limits for certain kinds of debtors.

Comparatively, the SBRA created a new subchapter within Chapter 11 entitled “Subchapter V – Small Business Debtor Reorganization.”<sup>19</sup> The changes to the Code via the SBRA went into effect on February 19, 2020.<sup>20</sup> This subchapter is exclusive to debtors who can meet the Code’s definition of “small business debtors.”<sup>21</sup> Congress intended to “streamline the

---

¶ 20.04 (Richard Levin & Henry J. Sommers eds., 16th ed. 2020) (discussing major bankruptcy legislative highlights, including BAPCPA, since the Code’s 1978 enactment).

14. Family Farmer Relief Act of 2019, Pub. L. No. 116-51, 133 Stat. 1075 (2019); Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019).

15. Uhlman, *supra* note 12.

16. See 11 U.S.C. § 101(18) (2018). The term “family farmer” means:

individual or [spousal unit] engaged in a farming operation whose aggregate debts do not exceed \$4,411,400 and not less than 50 percent of whose aggregate noncontingent, liquidated debts... on the date the case is filed, arise out of a farming operation owned or operated by such individual or [spousal unit], and such [persons] receive from such farming operation more than 50 percent of [their] gross income for — (i) the taxable year preceding; or (ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such [persons] was filed . . . .

*Id.*

17. H.R. REP. NO. 116-182, at 1 (2019).

18. *Id.* Chapter 12 is described as:

[A] specialized form of bankruptcy relief that addresses the distinct needs of family farmers by giving them the tools, under the protection of bankruptcy, to facilitate their financial rehabilitation. This form of bankruptcy relief permits family farmers who satisfy certain eligibility criteria to reorganize their debts pursuant to a repayment plan under the supervision of a bankruptcy trustee.

*Id.* at 2 (footnotes omitted).

19. H.R. REP. NO. 116-171, at 58, (2019). Chapter 11 is described as

[A] form of bankruptcy relief that is typically used by businesses to reorganize their financial affairs. Under the protection of chapter 11, a debtor is given a ‘financial breathing spell’ from most creditor collection efforts. This protection allows the chapter 11 debtor to continue its business operations while formulating a plan of reorganization to repay its creditors. In general, the chapter 11 process requires the debtor to propose a plan of reorganization pursuant to which the debtor commits to repay its creditors.

*Id.* at 2. Chapter 7 “is a form of bankruptcy relief that provides for the orderly liquidation of the debtor’s assets for distribution to its creditors.” *Id.*

20. Uhlman, *supra* note 12; Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 No. 10 BANKR. L. LETTER, 1 (Oct. 2019).

21. H.R. REP. NO. 116-171, at 58 (2019).

bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs” through the SBRA.<sup>22</sup> However, the SBRA’s one legislative shortcoming is its failure to raise the debt limit for small business debtors. This should be resolved with future legislation.

Numerous scholars have called for the debt limit to be raised in the SBRA. Sam Gerdano, Executive Director of the American Bankruptcy Institute (ABI), stated that the SBRA was a “fine first step,” but the law is not muscular enough in part because the debt limit was set too low.<sup>23</sup> Robert J. Keach, a member of the ABI, endorsed the SBRA but claimed that the current debt limit of roughly \$2.7 million “is simply too low to provide meaningful help for small and medium-sized companies.”<sup>24</sup> One judge noted that while the “SBRA is a welcome addition to the Code” the “debt limits should have been higher.”<sup>25</sup> The SBRA did not sufficiently modify the definition of the “small business debtor” due to retaining a debt limit that is set too low. The current debt limit will exclude medium-sized businesses who could take advantage of new Subchapter V provisions. Dealing with small to medium-sized businesses in Chapter 11 is an issue that has confounded both the ABI and the National Bankruptcy Conference (NBC), organizations focused solely on bankruptcy matters.<sup>26</sup>

Definitions, found in Section 101 of the Code, help determine which Chapter a debtor can file under provided the debtor can match the Code’s definition.<sup>27</sup> Debt limits, embedded in the Code’s definitions, help set what Chapter or Subchapter a debtor may file under.<sup>28</sup> For example, Chapter 12 requires that the debtor meet certain criterion, such as being a farmer or fisherman with regular annual income, in addition to not exceeding a debt

---

22. *Id.* at 1.

23. Ruiqi Chen, *Bankruptcy Bills Could Be ‘More Muscular,’ Advocates Say*, BLOOMBERG L., (Aug. 7, 2019), [https://www.bloomberglaw.com/product/blaw/document/XFP8F5H8000000?criteria\\_id=4136c0576cc558530973f7b3f6a56e2c&searchGuid=f7e25aeb-6fd9-43d8-b95d-c2f52e2d867d](https://www.bloomberglaw.com/product/blaw/document/XFP8F5H8000000?criteria_id=4136c0576cc558530973f7b3f6a56e2c&searchGuid=f7e25aeb-6fd9-43d8-b95d-c2f52e2d867d).

24. ROBERT J. KEACH, AM. BANKR. INST., TESTIMONY OF AMERICAN BANKRUPTCY INSTITUTE 5 (June 19, 2019), <https://docs.house.gov/meetings/JU/JU05/20190625/109657/HRG-116-JU05-Wstate-KeachR-20190625.pdf> [hereinafter ABI TESTIMONY] (ABI’s testimony submitted in the Hearing on Oversight of Bankruptcy Law and Legislative Proposals).

25. Hon. Jim D. Pappas, *Let’s Talk Bankruptcy Reform (or How I Would “Improve” the Bankruptcy Code)*, 62 ADVOCATE (IDAHO ST. B. ASS’N) 22, 23 (2019).

26. *ABI Final Report*, *supra* note 3, at 299; NAT’L BANKR. CONFERENCE, A PROPOSAL FOR AMENDING CHAPTER 12 TO ACCOMMODATE SMALL BUSINESS ENTERPRISES SEEKING TO REORGANIZE 1 (Jan. 3, 2010), [nbconf.org/wp-content/uploads/2015/07/NBC-Small-Business-Rept-Dec-17-2009.pdf](http://nbconf.org/wp-content/uploads/2015/07/NBC-Small-Business-Rept-Dec-17-2009.pdf) [hereinafter NAT’L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12].

27. *See generally* 11 U.S.C. § 101 (2018) (providing definitions in the Code); 2 COLLIER ON BANKRUPTCY, *supra* note 13, ¶ 101.00 (discussing a general overview of 11 U.S.C. § 101).

28. *See generally* 11 U.S.C. § 109 (providing who may be a debtor under which chapter or subchapter in the Code); 2 COLLIER ON BANKRUPTCY, *supra* note 13, ¶ 109.01 (discussing the basics of how 11 U.S.C § 109 works and what kind of debtor may be entitled to certain kinds of relief such as liquidation or reorganization).

limit to be entitled to Chapter 12 reorganizational relief.<sup>29</sup> On the other hand, Chapter 11 has specific provisions and subsections devoted to whether the debtor is a railroad, a flesh and blood individual, a corporation, or a small business.<sup>30</sup> A debt limit can become an unintentional barrier for debtors seeking a specific form of relief.

Raising the debt limit in the definition of small business debtor is the simplest means to enable more small to medium-sized business to be eligible for Subchapter V. Both the ABI and the NBC recommended a debt threshold of \$10 million for small to medium-sized business debtors in their respective recommendations.<sup>31</sup> However, a more appropriate debt threshold for a small to medium-sized business debtor is that it should echo, rather than mirror, the new debt limit of the family farmer. Specifically, Congress should set the debt threshold at \$7.5 million for small business debtors. This would expand the definition to include medium-sized businesses who could benefit from the new Subchapter V procedures. Moreover, it is a solution that has been proposed before, but it was not passed into law.<sup>32</sup> Sweeping in more small to medium-sized business debtors would lead to more successful reorganization plans that will affect innumerable local communities.<sup>33</sup> Additionally, this figure will recognize that the work and debts of a family farmer are fundamentally different than those of a small business.<sup>34</sup>

Part I of this Note will offer a brief background to the SBRA and will look to the newfound benefits that small business debtors will receive from the SBRA. Part II will discuss the FFRA as a concrete example of what triggers the need for raising a debt threshold and why Congress must consider modifying the debt limit of a small business debtor. Part III will look to the NBC's model for revamping Chapter 11 bankruptcy procedures because many of its proposals can be seen in the DNA of the SBRA. Part IV will examine the ABI's recommended replacement definition for the "small business debtor," which it calls the "small or medium-sized enterprise" with some comparisons to the SBRA's modified definition. Lastly, Part V will propose a new debt limit for small business debtors which will broaden the scope of Subchapter V to extend to medium-sized businesses.

---

29. *See generally id.*

30. *See generally id.*

31. *ABI Final Report, supra* note 3, at 299; NAT'L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26, at 15.

32. *See* S. 3675, 111th Cong. (2010) (proposing 11 U.S.C.A. § 1183(1)(B)(i) describing debt liabilities for a small business enterprise to be set at \$7,500,000).

33. *Judiciary Hearing, supra* note 4, at 19–20 (statement of Robert Keach, Past President and Co-Chair, Commission to Study the Reform of Chapter 11, American Bankruptcy Institute).

34. This is not to say that those businesses that cannot conceivably survive, should survive. Bankruptcy is not meant to save a business which is beyond repair. The Code cannot, nor should it, fix a business that has no viability. *ABI Final Report, supra* note 3, at 307.

## I. CHAPTER 11'S NEW DIGS: SUBCHAPTER V – “SMALL BUSINESS DEBTOR RELIEF”

Subchapter V can only be utilized by a debtor that meets the Code's definition of a “small business debtor.”<sup>35</sup> Under the SBRA, if a debtor does not meet the definition of a small business debtor, then that debtor is prevented from filing under the new Subchapter V provisions of the Code. Therefore, it is imperative that the term small business debtor is defined in a way to not exclude potential debtors who could use it as a reorganizational avenue.

### A. THE CONGRESSIONAL RATIONALE BEHIND THE SBRA

The congressional rationale behind the SBRA is simple. Traditional Chapter 11 procedures “work[ed] poorly or not at all for small businesses.”<sup>36</sup> This may be because Chapter 11, as a judicial mechanism for reorganization of a debtor's business affairs, “was designed for large corporations with extensive operations and complex capital structures.”<sup>37</sup> Experts recognize “that Chapter 11 should not be used to delay the inevitable failure of a company” but instead should be deployed by “companies possessing viable business models.”<sup>38</sup> Additionally, experts do not recommend a “‘one-size-fits-all’ approach to Chapter 11” because there is a difference between large mega-corporations and a small to medium-sized business.<sup>39</sup> Moreover, small to medium-sized businesses make up the vast majority of Chapter 11 cases rather than large scale corporations.

Based on a data set of Chapter 11 cases filed in 2004 and 2007, the ABI recommended certain modifications to Chapter 11.<sup>40</sup> When looking at the survey, at a base level, there are two major kinds of Chapter 11 debtors: (1) those with assets of less than \$10 million and (2) those with assets of more than \$10 million.<sup>41</sup> Despite the splashy headlines, big businesses did not make up the majority of Chapter 11 cases in the survey.<sup>42</sup> In fact, 91.4% of debtors filing for Chapter 11 had assets of less than \$10 million<sup>43</sup> and 86.7% of debtors filing for Chapter 11 had liabilities of \$10 million or less.<sup>44</sup> Therefore, a majority of Chapter 11 cases are not big businesses but are

---

35. H.R. REP. NO. 116-171, at 28 (2019).

36. *Judiciary Hearing*, *supra* note 4, at 13 (statement of Rep. Ben Cline, Member, H. Judiciary Comm.).

37. NAT'L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26.

38. *ABI Final Report*, *supra* note 3, at 307.

39. *Id.* at 306–307.

40. *Id.* at 309–310.

41. *Id.* There are other kinds of debtors that file under Chapter 11, such as railroad companies or individual flesh and blood debtors. However, this Note will focus on businesses of all sizes.

42. *Id.*

43. *Id.* Moreover, 98.3% of businesses filing for Chapter 11 have less than \$50 million in assets. *Id.*

44. *Id.*

“family owned businesses, entrepreneurial ventures and startup companies [that] form the backbone of the American economy.”<sup>45</sup>

Congress recognized that the Code currently “makes it difficult for small businesses to reorganize and forces them to use alternatives that often lead to liquidation.”<sup>46</sup> The need to carve out a new part of the law was necessary because “judges, practitioners, and academics have known for decades that Chapter 11 work[ed] poorly or not at all for small businesses” due to it being “too expensive, too complicated and too time consuming for small business debtors and their creditors.”<sup>47</sup> Indeed, it is important for Chapter 11 to be a viable pathway for all businesses because it “has for many years been the key to survival for firms that need to reorganize their debts so they can continue in business. Reorganization—preserves jobs, investments, and valuable contributions to our economy.”<sup>48</sup>

The Subchapter V provisions will enable more “small business debtors” to avoid falling into “alternatives [to Chapter 11] that often lead to liquidation” because the reorganization process “is time-consuming and needlessly expensive.”<sup>49</sup> If more small businesses can successfully reorganize their debts and stay afloat, then the benefits of a successful reorganization will ripple out to “employees, suppliers, customers, and others who rely on that [small] business.”<sup>50</sup> Thus, the SBRA “holds the promise of improving the likelihood of reorganization for a viable small business debtor by reducing the time, expense of a proceeding, and eliminating certain legal impediments to confirmation of a Chapter 11 plan.”<sup>51</sup> The SBRA substantially changes the bankruptcy system for the small business debtor by giving it an alternative to liquidation.

## B. THE BENEFITS OF THE SBRA’S PROVISIONS

Under the SBRA, “small business owners [can] retain a stake in the company if the reorganization plan [does not] discriminate unfairly and is fair and equitable with respect to each class of claims or interests.”<sup>52</sup> The “attractive features of Subchapter V may well, at the margins, entice *more* debtors to file Chapter 11 who, in prior years, would not have sought to

---

45. *Id.* at 297.

46. *Judiciary Hearing, supra* note 4, at 13 (statement of Rep. Ben Cline, Member, H. Judiciary Comm.).

47. NAT’L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26, at 2.

48. *Judiciary Hearing, supra* note 4, at 8 (statement of Rep. Doug Collins, Ranking Member, H. Judiciary Comm.).

49. *Id.* at 13 (statement of Rep. Ben Cline, Member, H. Judiciary Comm.).

50. *Id.*

51. Melissa A. Peña & Bruce J. Wisotsky, *Chapter 11’s New Subchapter V: What You Need to Know About the SBRA*, N.J.L.J. (Feb. 6, 2020 11:00 AM), <https://www.law.com/njlawjournal/2020/02/06/chapter-11s-new-subchapter-v-what-you-need-to-know-about-the-small-business-reorganization-act/>.

52. *Judiciary Hearing, supra* note 4, at 13 (statement of Rep. Ben Cline, Member, H. Judiciary Comm.).



reorganize under Chapter 11.”<sup>53</sup> Listed below are the primary features of Subchapter V.

### 1. The Ability to Choose – BAPCPA or Subchapter V

One attractive feature of the SBRA is the ability to choose. A debtor, who meets the current definition of small business debtor, has a choice of proceeding as either a Subchapter V case or as a BAPCPA “small business case.”<sup>54</sup> Notably, “Subchapter V is a voluntary chapter, and if a debtor does not believe it can be reorganized on the fast track, or [does not] want the scrutiny of a trustee, the debtor is not compelled to elect to be a small business debtor under [S]ubchapter V.”<sup>55</sup> Even with the ability to choose, BAPCPA reporting and operational requirements also apply to Subchapter V debtors.<sup>56</sup> There is no escaping the reporting of debts owed to creditors nor should there be.<sup>57</sup>

However, small business debtors will likely proceed as a Subchapter V case because BAPCPA’s procedures are less advantageous.<sup>58</sup> The BAPCPA regime comes with significant hard and fast deadlines making it difficult for a smaller business with limited resources to reorganize, as exemplified below:

Chapter 11 contains four crucial provisions regarding the filing and confirmation of a small business debtor’s reorganization plan. The first is § 1121(e)(1), which gives these debtors the exclusive right to file a plan during the 180 days after the order for relief. Next, § 1121(e)(2) states the plan must be filed within 300 days of the order for relief. Third, § 1121(e)(3) states that these time periods may be extended only if the debtor shows by a preponderance of the evidence that the court is likely to confirm a reorganization plan within a reasonable time, a new deadline is set when the extension is granted, and the court signs an order extending the deadline before the existing deadline expires. Finally, § 1129(e) provides that once the plan is filed, it must be confirmed within 45 days unless the confirmation deadline is extended pursuant to § 1121(e)(3).<sup>59</sup>

---

53. Brubaker, *supra* note 20, at 6.

54. *Id.* at 4. A “small business case” is defined in the code as a case that follows BAPCPA procedures. *See* 11 U.S.C. § 101(51C) (2018).

55. A. THOMAS SMALL, REVISED TESTIMONY OF A. THOMAS SMALL ON BEHALF OF THE NATIONAL BANKRUPTCY CONFERENCE 6 (July 2, 2019), [https://www.fjc.gov/sites/default/files/REVISED\\_TESTIMONY\\_OF\\_A\\_THOMAS\\_SMALL.pdf](https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf)

56. *See* Brubaker, *supra* note 20, at 9.

57. *See* 11 U.S.C. § 1116 (2018).

58. Brubaker, *supra* note 20, at 4.

59. Tyler Ferguson, *Between Devil and Deep Blue Sea: The Chapter 11 Plan and the Small Business Debtor*, AM. BANKR. INST. J. 16, 16 (Oct. 2012).

In a voluntary bankruptcy<sup>60</sup> under BAPCPA, the debtor must state in the petition whether or not the debtor is a small business debtor.<sup>61</sup> On the other hand, in an involuntary bankruptcy, the debtor must “file within 14 days after entry of the order for relief a statement” contesting the validity of the petition or to contest being labeled as a “small business debtor” by its creditors.<sup>62</sup> Under the BAPCPA regime, “[t]he debtor’s statement as to whether it is a small business debtor generally controls the status of a Chapter 11 case as a small business case, unless the court enters an order finding that the debtor’s statement is incorrect.”<sup>63</sup> If that debtor’s debt is “under a specified amount as of the date of the filing of the petition,” then that debtor is considered a “small business debtor” and would have been required to follow small business procedures under BAPCPA.<sup>64</sup> A debtor that fails to disclose that it is a small business debtor faces significant consequences, such as “a determination that the small business debtor deadlines apply from the petition date, even if the non-designation is not corrected or is not deemed incorrect by the court until much later in the case.”<sup>65</sup> The effect of disclosing this notifies the court that the debtor must be subject to the scheduling orders of a “small business debtor.”<sup>66</sup>

## 2. The Duties of a Debtor in Possession/Standing Trustee

In a Subchapter V case, the debtor may serve as a debtor in possession (DIP) unless they are removed “for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor.”<sup>67</sup> The DIP should develop a reorganization plan that appeases its creditors and attempt to get its plan confirmed in the ninety day exclusivity window the debtor has to file a plan.<sup>68</sup> Additionally, unlike in a traditional Chapter 11, in a Subchapter V case the DIP does not have to file a separate disclosure statement because the debtor’s proposed plan serves as both the plan and the disclosure statement.<sup>69</sup>

---

60. A voluntary bankruptcy is a case which is filed by the debtor on their own volition. *See* 11 U.S.C. § 301 (2018).

61. *See* 8A C.J.S. *Bankruptcy* § 64 (2020).

62. *See id.* An involuntary bankruptcy is one in which the debtor is thrown into bankruptcy by its creditors. In an involuntary bankruptcy, the debtor will have time to contest the filing of his case before an order of relief is entered. *See* 11 U.S.C. § 303.

63. 8A C.J.S. *Bankruptcy* § 65 (2020).

64. *Id.* at § 64; *see* 11 U.S.C. § 101(51D) (2018) (stipulating that the specified amount was roughly \$2.7 million).

65. *ABI Final Report*, *supra* note 3, at 313.

66. *See* 8A C.J.S. *Bankruptcy* § 64 (2020).

67. Brubaker, *supra* note 20, at 9.

68. *Id.* at 9–10.

69. *Id.* at 10–11.

The SBRA “requires the United States Trustee to appoint a trustee in every Subchapter V case.”<sup>70</sup> These trustees are to handle disbursement of plan payments and “otherwise participat[e] in the reorganization process.”<sup>71</sup> Primarily, the trustee “will work with the small business debtor and its creditors to facilitate the development of a consensual plan of reorganization.”<sup>72</sup> The duties of a Subchapter V trustee “are a mix of those under Chapters 7 and 11 with some variations.”<sup>73</sup> The United States Trustee, the Justice Department’s bankruptcy monitoring program, has put in place “250 new trustees at the ready to assist with small business cases” as a result of the SBRA.<sup>74</sup>

### 3. Bye-bye Absolute Priority, Hello “Best Efforts”

The Subchapter V election provides an added benefit for debtors unable to get a consensual reorganization plan confirmed under Section 1191(a)<sup>75</sup> with cramdown provisions found in Section 1191(b).<sup>76</sup> Once the Subchapter V choice is made, “several provisions of the [Code] no longer apply” such as section 1129(b) which Subchapter V “replaces [with the] new section

---

70. Jeffrey Barber, *Small Business Reorganization Act of 2019 Goes into Effect February 2020*, NAT’L L. REV. (Oct. 3, 2019), <https://www.natlawreview.com/article/small-business-reorganization-act-2019-goes-effect-february-2020>.

71. *Id.*

72. Press Release, U.S. Dep’t of Justice, *U.S. Trustee Program Ready to Implement the Small Business Reorganization Act of 2019* (Feb. 19, 2020), <https://www.justice.gov/opa/pr/us-trustee-program-ready-implement-small-business-reorganization-act-2019>.

73. THOMAS J. SALERNO ET AL., *ADVANCED CHAPTER ELEVEN BANKRUPTCY PRACTICE* § 1.2B (2020) A Subchapter V trustee’s duties include:

[A]ccounting for all of the property received by the company; examining and rejecting any claims against the company; conducting a review of the company’s financial conditions and business operations; reporting any fraud or misconduct to the bankruptcy court; appearing at the status conference and materially significant hearings; producing a final report of the case for the bankruptcy court; assisting as necessary the facilitation of a plan of reorganizations; distributing certain company property in accordance with the plan of reorganization; and confirming the company’s adherence of the court-approved plan of reorganization during the payment period.

*Id.*

74. Alex Wolf, *Small Business Bankruptcy Law Rolls Out with New Trustees*, BLOOMBERG L. (Feb. 19, 2020, 3:31 PM), <https://news.bloomberglaw.com/bankruptcy-law/small-business-bankruptcy-law-rolls-out-with-new-trustees>.

75. *See* 8 COLLIER ON BANKRUPTCY, *supra* note 13, ¶ 1180.14 (“A consensual plan may be confirmed under section 1191(a) only if all of the requirements of section 1129(a), other than section 1129(a)(15), are met.”).

76. *See* 8 COLLIER ON BANKRUPTCY, *supra* note 13, ¶ 1180.14 (“Small business debtors in chapter 11, because of creditor apathy and lack of debtor resources, frequently have difficulty meeting some of the confirmation requirements of section 1129(a).”). So, a nonconsensual, cramdown plan can be met via 1191(b) so long as the plan “does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.” *See id.* (quoting 11 U.S.C. 1191(b) (2020)).

1191.”<sup>77</sup> A major feature of Subchapter V is the elimination of the absolute priority rule<sup>78</sup> which could be used by creditors to derail reorganization plans.<sup>79</sup>

The absolute priority rule in Chapter 11 raises the issue that some small business owners may be unable to retain their ownership stake in the business after reorganization.<sup>80</sup> A common feature of smaller businesses is a “unified ownership and management” structure that emphasizes an owner’s personal stake in seeing the business thrive.<sup>81</sup> Subchapter V features no absolute priority rule which essentially precludes certain creditors from receiving a distribution until higher priority creditors are paid in full.<sup>82</sup>

Newly enacted section 1191 “permits confirmation of a [reorganization] plan so long as the plan does not discriminate unfairly and is fair and equitable with respect to any dissenting impaired classes” of creditors.<sup>83</sup> This will enable a “plan to be confirmed, even if there are no accepting impaired classes.”<sup>84</sup> Sections 1129(a)(8), (10), and (15) do not apply in the new Subchapter V which means that a plan can be accepted and confirmed

---

77. Brian Gifford & Laura Atack, *Chapter 11’s Double Whammy on Individual Debtors*, 38 AM. BANKR. INST. J. 16, 75 (Oct. 2019).

78. *See* Blum, *supra* note 9.

The absolute priority rule, set out in section 1129(b)(1), is one of the fundamental principles of creditor protection in a Chapter 11 case. Section 1129 provides two bases for plan confirmation. Either the debtor must have obtained acceptance of the plan by each impaired class of claims or interests, so that the plan can be confirmed consensually (that is, on the basis of approval by a majority of claimants in each class) under section 1129(a), or the debtor must satisfy the provisions of section 1129(b) to impose the confirmation on a dissenting class of claims or interests (known as a “cramdown”). The absolute priority rule comes into effect when a cramdown confirmation is sought. Section 1129(b)(1) provides that where the plan has not been accepted by each impaired class of claims or interests, the debtor cannot have the plan confirmed unless it does not “discriminate unfairly” against and is “fair and equitable” to all nonaccepting impaired classes.

*Id.* at 209 n.90.

79. *See* Uhlman, *supra* note 12.

80. *See* ANNE LAWTON, AM. BANKR. INST., CONFIRMING THE PLAN: THE ABSOLUTE PRIORITY RULE PROBLEM 9 (2015), [https://s3.amazonaws.com/abi-org/Newsroom/Headlines/Ch11SME\\_3rd.pdf](https://s3.amazonaws.com/abi-org/Newsroom/Headlines/Ch11SME_3rd.pdf).

81. *Id.*

82. *See* David L. Gay & Yolanda P. Strader, *Big Changes for Small Business Bankruptcies*, NAT’L L. REV. (Feb. 12, 2020), <https://www.natlawreview.com/article/big-changes-small-business-bankruptcies>.

83. Gifford & Atack, *supra* note 77.

84. *Id.*

regardless of classes involved so long as the plan is “fair and equitable.”<sup>85</sup> Section 1191(c)(2) mandates that debtors follow the “best-efforts” requirements which is appropriately found in “Chapters 12 and 13 and in individual-debtor Chapter 11 cases.”<sup>86</sup> Newly enacted section 1191(c)(2)(A) provides that for a plan to be “fair and equitable” then “all of the projected disposable income of the debtor,” to be received in the three to five year period following the plan’s confirmation, must be used to pay its creditors.<sup>87</sup> Essentially, “[a] court can confirm a plan under the SBRA even if all impaired classes vote to reject the plan.”<sup>88</sup> This change will permit more plans to be confirmed provided the debtor can propose a plan that the court is willing to approve.

#### 4. The Elimination of a Creditor’s Committee

One massive change to bankruptcy law that flows from the SBRA is the elimination of Creditor’s Committees in all small business cases regardless of whether a Subchapter V election is made.<sup>89</sup> “Unless otherwise ordered by the court, no creditor’s committee will be formed” which is beneficial to the debtor who is “generally obligated to pay committee expenses.”<sup>90</sup> The SBRA “reverse[ed] the operative default rule for all Chapter 11 small business debtors (including a ‘small business case’ in which the small business debtor does *not* elect Subchapter V).”<sup>91</sup> In every small business case filed now, the debtor will have lowered administrative expenses, thereby making reorganization less financially burdensome for all small business debtors.

#### C. THE NEW DEFINITION FOR A “SMALL BUSINESS DEBTOR” CROSS-REFERENCED WITH THE “FAMILY FARMER”

The SBRA modified the definition for the small business debtor.<sup>92</sup> For instance, the SBRA introduces a clause mandating that more than 50% of the

---

85. H.R. REP. NO.116-171, at 61 (2019). Section 1129 lays out the elements which need to be met before a court can confirm a plan for reorganization. *See* 11 U.S.C. § 1129 (2018). The elements need not be discussed in total here. Section 1129(a)(8) requires that each class of claims has accepted the plan or is not impaired under the plan. *See* 11 U.S.C. § 1129(a)(8). Section 1129(a)(10) requires that if an impaired class of creditors exists then at least one impaired creditor must vote to accept the plan. *See* 11 U.S.C. § 1129(a)(10). Section 1129(a)(15) applies to individuals debtors filing for Chapter 11 which is beyond the scope of this note and need not be discussed here. *See* 11 U.S.C. § 1129(a)(15).

86. Brubaker, *supra* note 20, at 13; H.R. REP. NO.116-171, at 61.

87. H.R. REP. NO.116-171, at 61.

88. Gay & Strader, *supra* note 82.

89. Peña & Wisotsky, *supra* note 51.

90. *Id.*

91. Brubaker, *supra* note 20, at 9.

92. *See* H.R. REP. NO. 116-171, at 24–25. The term “small business debtor” is defined as:

debtor's debt must come from operating the business.<sup>93</sup> Cross-referencing with the definition of "family farmer," it is apparent that this added provision originates from the Code's definition of "family farmer" which requires that 50% of the family farmer's annual debt and income must come from endeavors tied directly to the running of a farm.<sup>94</sup> The new definition of "small business debtor" simplifies this "by specifying that a debtor will qualify for Subchapter V only if at least half of that debtor's liquidated, noncontingent debts are attributable to commercial or business activities."<sup>95</sup>

The SBRA particularly mandates that the "statutory term 'single asset real estate' (SARE)" is excluded from the definition of small business debtor and therefore SARE debtors are not allowed to follow Subchapter V procedures.<sup>96</sup> The Code defines a small business debtor as "a person engaged in commercial or business activities . . . that has aggregate noncontingent liquidated secured and unsecured debts . . . in an amount not more than [\$2.7 million]."<sup>97</sup> Under the old definition, there was no distinction for public or non-public companies who filed as small business debtors.<sup>98</sup> However, under the newly enacted definition, a small business debtor does not include "a corporation subject to the reporting requirements under . . . the Securities Exchange Act of 1934."<sup>99</sup> Again, the SBRA's drafters drew inspiration from

---

a person engaged in commercial or business activities . . . 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 . . . in an amount not more than [\$2,725,625] . . . *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 that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than [\$2,725,625] . . . 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 corporation that – (I) is 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)); and (II) is an affiliate of a debtor.).

*Id.* (Figure replaced with updated figure as found in 11 U.S.C. § 101(51D) (2018)) (emphasized language reflects changes to the Code).

93. *Id.*

94. See 11 U.S.C. § 101(18) (2018) (requiring the "family farmer" to have an annual income that comes from the operation of the farm).

95. Brubaker, *supra* note 20, at 5.

96. *Id.* at 7; see 11 U.S.C. § 101(51B) (defining "single asset real estate" as "real property constituting a single property or project, other than residential real property with fewer than 4 residential units which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental hereto").

97. 11 U.S.C. § 101(51D).

98. See *id.*; H.R. REP. NO. 116-171, at 24–25. Prior to this bill, the ABI recommended excluding public companies from the definition of "small business debtor." See ABI TESTIMONY, *supra* note 24. The old definition for small business debtor did not include any language regarding public companies. See 11 U.S.C. § 101(51D).

99. H.R. REP. NO. 116-171, at 25.

the definition of a family farmer for the new definition for a small business debtor. The definition for a “family farmer” mandates that a “publicly traded corporation” shall not be considered a family farm.<sup>100</sup>

#### D. LEGISLATIVE HALF-MEASURE OF THE SBRA

The failure to raise the debt threshold with the SBRA is the half-measure which must be resolved with future legislation. The Code, instituted by Congress, indexes debt thresholds that are updated every three years due to inflation,<sup>101</sup> Congress may intervene by modifying the debt limits if inflation no longer tracks with reality. The FFRA is a prime example of Congress bypassing the Code’s indexing provisions by modifying a debt threshold in order to make specific provisions of the Code more effective.<sup>102</sup> The FFRA modified the Code’s definition of a family farmer by raising the debt threshold to a \$10 million ceiling thereby sweeping in more family farmer debtors.<sup>103</sup>

Congress did not extend this same courtesy to the small business debtor with the SBRA. This is the SBRA’s one significant flaw.<sup>104</sup> By keeping the debt limit at the same level, more financially distressed small or medium-sized businesses, who could be seeking the aid of bankruptcy courts, will not be swept under the protective umbrella of the new Subchapter V provisions.<sup>105</sup> The SBRA’s solution to helping small business debtors is analogous to “putting a band aid on a really bad cut” insofar as it provides some help but is insufficient because it “doesn’t take a business of much size to run up \$2.7 million in debt” in today’s economy.<sup>106</sup>

Moreover, the ABI’s single criticism for all the bankruptcy bills recently passed was aimed squarely at the debt threshold set for the “small business debtor.”<sup>107</sup> The ABI deemed this figure to be “too low to provide meaningful help for small and medium-sized companies.”<sup>108</sup> The ABI suggested that a debt limit of \$10 million to be incorporated into the SBRA identical to the

---

100. 11 U.S.C. § 101(18).

101. *See id.* at § 104 (indexing numerous things by forcing the bankruptcy practitioner to cross reference with definitions found in 11 U.S.C. § 101). For example, the “family farmer” and the “small business debtor” are indexed and the aggregate numbers contained in the definitions move upward every three years tied with inflation starting from April 1, 1998. The next time numbers will adjust for inflation is April 1, 2022. *See* 2 COLLIER ON BANKRUPTCY, *supra* note 13, ¶ 104.02.

102. H.R. REP. NO. 116-182, at 3 (2019).

103. *Id.* at 9.

104. There are other flaws of course but the debt limit is the most glaring. *See* Barber, *supra* note 70 (“The act leaves some issues unanswered. For example, it is unclear what interest rate applies to secured loans under confirmed plans.”). Additionally, it is “unclear how courts will apply prior Chapter 12 and Chapter 13 precedents to new Subchapter V cases.” *Id.* However, these issues are beyond the scope of this note.

105. ABI TESTIMONY, *supra* note 24.

106. Chen, *supra* note 23.

107. *Judiciary Hearing*, *supra* note 4, at 20 (statement of Robert Keach, Past President and Co-Chair, Commission to Study the Reform of Chapter 11, American Bankruptcy Institute).

108. ABI TESTIMONY, *supra* note 24.

family farmer under the FFRA.<sup>109</sup> It recommended that Congress increase “the debt limit to \$10 million for small businesses,” which would better reflect a greater percentage of small to medium-sized businesses and their liabilities.<sup>110</sup> The ABI still offered its support for the SBRA, noting that it “is a good start” and that with “some tweaking it can be an even more effective remedy.”<sup>111</sup>

The rationale for the SBRA was to ensure that small business debtors will have a better chance at implementing successful reorganization plans by streamlining the bankruptcy process specifically for them.<sup>112</sup> Despite providing a massive overhaul of reorganization procedures, the bill does not sweep in a greater number of financially distressed small to medium-sized businesses who could have taken advantage of newly enacted procedures but for the debt limit remaining too low.<sup>113</sup> Therein lies the legislative half-measure that is the SBRA. It is a law designed to help small business debtors. However, by not broadening the Code’s definition of small business debtor, the SBRA excludes potential debtors, medium-sized business owners, that could also benefit from the reorganizational mechanisms provided by the SBRA. Subchapter V provides debtors with “a powerful suite of tools to negotiate a deal with its creditors and, if negotiations break down, Subchapter V provides a simplified method of confirming a Chapter 11 plan over a creditor’s objection.”<sup>114</sup> Without Subchapter V protections, medium-sized businesses will face the perniciousness of a traditional Chapter 11 where it is more likely that the business will be liquidated if negotiations break down, or if it stays afloat,<sup>115</sup> it will survive without the original business owner retaining an ownership stake due to Chapter 11’s absolute priority rule.

#### **E. THE TRADITIONAL PROBLEMS OF A TRADITIONAL CHAPTER 11**

Much of the concern with this debt limit stems from the fact that Chapter 11 is not a good fit for small to medium-sized businesses. Additionally, during a financially distressing time, it is not unheard of for small business owners to unintentionally exceed the current threshold of \$2.7 million because of “increase[d] borrowings secured by the business assets in an attempt to remain afloat.”<sup>116</sup> This increased borrowing can lead to exceeding permissible liabilities that pushes a debtor into a traditional Chapter 11

---

109. *Judiciary Hearing*, *supra* note 4, at 20 (statement of Robert Keach, Past President and Co-Chair, Commission to Study the Reform of Chapter 11, American Bankruptcy Institute).

110. *Id.*

111. *Id.*

112. H.R. REP. NO. 116-171, at 1–3, 5 (2019).

113. ABI TESTIMONY, *supra* note 24.

114. Richard A. Marshack & Tinho Mang, *Congress Acts! Chapter 11 Reorganization Tailored to Small Business*, 61 ORANGE COUNTY LAW. 34, 37 (Dec. 2019).

115. *See infra* Section I.E.

116. ABI TESTIMONY, *supra* note 24.



reorganization process<sup>117</sup> because the debtor unwittingly incurred over \$2.7 million in debt.<sup>118</sup>

Traditional Chapter 11 does not “work for small and medium-sized businesses because the [Code] places unrealistic and artificial deadlines on small and medium-sized businesses” which prevents them from restructuring.<sup>119</sup> “Complex creditor voting requirements and navigating a vexing ‘absolute priority rule’ are frequently obstacles to a prompt reorganization. And if the debtor [cannot] confirm a plan, its creditors can propose one,” which may result in the creditor taking “control of the assets and case from an individual debtor or debtor-entity’s owners.”<sup>120</sup> A traditional Chapter 11 case contains several provisions which could place a debtor on the path to a faulty reorganization due to stringent deadlines regarding the filing of a plan.<sup>121</sup> Debtors who inadvertently fail to comply with a Chapter 11 deadline, such as confirming a reorganization plan, may inevitably be pushed into a straight Chapter 7 liquidation procedure via conversion.<sup>122</sup>

The liquidation of small businesses which fail to meet the Code’s new, slightly modified, definition of “small business debtor” would be felt throughout local economies.<sup>123</sup> These businesses at issue are “small and middle-market enterprises” which include “family owned businesses, entrepreneurial ventures, and startup companies.”<sup>124</sup> The ABI is not alone in its criticism and demand for the revision of the Chapter 11 model for small business. The NBC offered similar criticisms regarding small business reorganization with its report published in 2010. However, the NBC offered full support of the SBRA via a released statement in 2019.<sup>125</sup>

Furthermore, the ABI pointed out to Congress that, of the roughly 18,000 small businesses that filed under Chapter 11 between 2008 and 2015, only “27% of those companies confirmed a reorganization plan.”<sup>126</sup> This number is low on its face but lacks context. In fact, “more than 48% of the non-small

---

117. *Id.*

118. Chen, *supra* note 23.

119. ABI TESTIMONY, *supra* note 24, at 4.

120. Pappas, *supra* note 25, at 22.

121. Only a debtor may file a plan within 120 days of the order for relief. *See* 11 U.S.C. § 1121(b) (2018). If the debtor has not filed a plan, then a party in interest may file a plan. *See id.* at § 1121(c).

122. *See* 11 U.S.C. § 1112(b)(4)(J) (2018) (explaining that conversion to a Chapter 7 liquidation can occur upon a “failure to . . . confirm a plan within the time fixed by this title or by order of the court.”).

123. ABI TESTIMONY, *supra* note 24.

124. *ABI Final Report*, *supra* note 3.

125. *Small Business Reorganization Act Result of Hard Work by NBC*, NAT’L BANKR. CONF. (Sept. 13, 2019) <https://myemail.constantcontact.com/-NBC—Small-Business-Reorganization-Act-Signed.html?soid=1117323027893&aid=Y8ZTygrQ7Sc> (“As enacted, the Act incorporates much of the NBC’s recommended provisions and also reflects continued input by NBC [members] directly with staff on Capitol Hill. We are quite pleased with the outcome which reflects the extended, dedicated work of the [NBC and its members.]”).

126. ABI TESTIMONY, *supra* note 24, at 4.

business debtors confirmed plans while only a little over a quarter of the small business debtors did so.”<sup>127</sup> These non-small business debtors would have primarily been debtors who exceeded the debt threshold put in place at the time the data was collected. Strikingly, small business debtors had a success rate of less than half of the success rate for non-small business debtors.<sup>128</sup> The lack of success for small business debtors is due in large part to the “deadlines imposed by the BAPCPA amendments [that are] particularly challenging and counterproductive for small business debtors”<sup>129</sup> or because they lack the “management or financial resources to attempt to remain in Chapter 11 long enough to reorganize.”<sup>130</sup>

The benefits of the new Subchapter V procedures will go a long way towards helping those small business debtors who currently qualify for its protective relief.<sup>131</sup> However, these new procedures, despite their best intentions, ultimately prove underinclusive given that the provided debt limit does not accurately reflect the current reality of businesses filing for Chapter 11 relief.<sup>132</sup> A relevant rationale and a concrete example for raising the debt limit on a narrow class of debtor can be found within the FFRA.

## II. FFRA AND THE CONGRESSIONAL RATIONALE BEHIND INCREASING THE FAMILY FARMER’S DEBT THRESHOLD

Chapter 12 is a process specifically designed with farmers in mind.<sup>133</sup> Chapter 12 relief was born out of the “farm crisis of the late 1980s,” and in 1986, Congress provided farmers with Chapter 12 as a reorganizational tool for bankruptcy relief.<sup>134</sup> It was meant to be a temporary fix during an agricultural crisis.<sup>135</sup> However, its popularity and usefulness as a reorganizational tool led to its permanent codification in 2005 with the enactment of BAPCPA.<sup>136</sup> A Chapter 12 case is “typically administered by a trustee” and “[m]any districts have a standing [C]hapter 12 trustee.”<sup>137</sup> A standing trustee is appointed by the U.S. Trustee within a given district and

---

127. Anne Lawton, *An Argument for Simplifying the Code’s “Small Business Debtor” Definition*, 21 AM. BANKR. INST. L. REV. 55, 91 (2013).

128. *Id.* at 92.

129. *ABI Final Report*, *supra* note 3, at 302.

130. *Id.* at 302 n.1006 (citing *Written Statement of Holly Felder Etlin: ASM Field Hearing Before the ABI Comm’n to Study the Reform of Chapter 11*, at 1–2 (Apr. 19, 2013)).

131. Brubaker, *supra* note 20, at 4.

132. *Judiciary Hearing*, *supra* note 4, at 20 (statement of Robert Keach, Past President and Co-Chair, Commission to Study the Reform of Chapter 11, American Bankruptcy Institute).

133. Rebecca R. Garcia & Jan M. Sensenich, *Chapter 12 and the Challenge of the New Farm Crisis*, 38 AM. BANKR. INST. J. 14, 14 (Feb. 2019).

134. *Id.*

135. *Id.*

136. *Id.*; see also 8 COLLIER ON BANKRUPTCY, *supra* note 13 ¶ 1200 LH (explaining that Chapter 12 was conceived as being a temporary measure that was set to expire on October 1, 1993 but was subsequently extended again and again until it became a permanent part of the Code via BAPCPA in 2005).

137. Garcia & Sensenich, *supra* note 133.

will monitor “all cases under a given chapter” with “active and steady involvement” throughout the reorganization process.<sup>138</sup> A Chapter 12 case does not have an absolute priority rule, a disclosure statement, or a process where creditors vote on the reorganization plan; if a trustee is appointed, they will stay on the case until the reorganization plan is completed in total.<sup>139</sup> Chapter 12, unlike Chapter 11, has more relaxed deadlines where “periodic payments can be structured around the farm’s cash-flow cycles.”<sup>140</sup> So quarterly or annual payments are acceptable in the reorganization process rather than monthly periodic payments as seen in most Chapter 11 reorganizations.<sup>141</sup>

#### A. THE DEFINITION OF THE FAMILY FARMER PRE-FFRA

When thinking of a farmer, one probably conjures up a pop-cultural image like *American Gothic* by Grant Wood. However, the Code is more concerned with specific and provable facts for its definition.<sup>142</sup> Prior to the enactment of the FFRA, the Code defined a “family farmer” to include an “individual or [spousal unit] engaged in a farming operation whose aggregate debts do not exceed \$4,411,400 and not less than 50 percent of whose aggregate noncontingent, liquidated debts . . . arise out of a farming operation owned or operated by such individual or [spousal unit].”<sup>143</sup> The Code also requires that the “gross annual income” arising out of farming operations should amount to “more than 50 percent of” the farmer’s income for that year.<sup>144</sup> If a debtor failed to meet any part of the criterion set forth above, then that debtor would be precluded from filing for Chapter 12 relief.<sup>145</sup>

#### B. THE UNINTENTIONAL HURDLE OF THE OLD DEBT CEILING

The old debt limit of \$4.4 million became an unintentional hurdle to entering Chapter 12 that many distressed farmers could not leap over.<sup>146</sup> This led to “Chapter 12 [becoming] an inaccessible tool for today’s farm families.”<sup>147</sup> Before the FFRA, it was common for a “family farmer” to be forced to file for a general Chapter 11 which is designed for reorganizing

---

138. Henry E. Hildebrand III, *Report: Amend Chapter 12 to Allow Small Businesses to Reorganize*, 29 AM. BANKR. INST. J. 32, 32 (Mar. 2010).

139. Garcia & Sensenich, *supra* note 133.

140. *Id.*

141. *Id.*

142. *See* 11 U.S.C. § 101(18) (2018).

143. *Id.*

144. *Id.*

145. *See id.* at § 109 (defining who may file under which Chapter of the Code, and including “Family Farmers” as debtors that may file under Chapter 12); *Judiciary Hearing, supra* note 4, at 14 (statement of Rep. Antonio Delgado, Member, H. Comm. on Small Business).

146. *Judiciary Hearing, supra* note 4, at 14 (statement of Rep. Antonio Delgado, Member, H. Comm. on Small Business).

147. *Id.*

businesses rather than farms specifically.<sup>148</sup> Congress members recognized that the “outdated filing cap [left] farmers without options to restructure or repay their debt.”<sup>149</sup> Therefore, the FFRA was designed to modernize “Chapter 12 to account for the higher levels of investment needed to farm in today’s family-farming setting.”<sup>150</sup>

A financially distressed farmer can easily and unintentionally exceed the debt limit in the Code’s definition of a “family farmer.”<sup>151</sup> This is due to the complexity required to run a modern family farm where debt can skyrocket due to the requisite large purchases and maintenance costs.<sup>152</sup> For instance, farmers usually need to purchase trucks, combines, threshers, and other pieces of large agricultural equipment along with storage facilities.<sup>153</sup> This does not factor in purchasing land, seeds for crops, or livestock, all of which are necessary, expensive purchases for maintaining a farm.<sup>154</sup>

Another rationale behind modifying the debt limit for the “family farmer” was the increasing number of Chapter 12 filings over the last several years.<sup>155</sup> Recently, farmers have started to feel an economic crunch due to uncontrollable factors.<sup>156</sup> A “spike in farm bankruptcy filings” demonstrates that the agricultural industry is experiencing “ongoing signs of distress . . . as farm operators are borrowing at record levels and enduring commodity price declines, destructive weather patterns, and global trade disputes.”<sup>157</sup> Hovering in the background of the FFRA was the ongoing crisis in many farming communities stemming from stagnating income and agricultural catastrophes.<sup>158</sup> Additionally, there are likely more farmers in need of Chapter 12 bankruptcy relief than those who actually file because some farmers do not know that Chapter 12 is an option for them or that it even exists.<sup>159</sup>

---

148. Uhlman, *supra* note 12; H.R. REP. NO. 116-182, at 2 (2019).

149. *Judiciary Hearing, supra* note 4, at 14 (statement of Rep. Antonio Delgado, Member, H. Comm. on Small Business).

150. *Id.* at 4 (statement of Rep. Sensenbrenner, Member, H. Judiciary Comm.).

151. See Alexandria C. Quinn, *The Next Generation of Chapter 12 Bankruptcy: Revising the Remedy*, 22 DRAKE J. AGRIC. L. 245, 261 (2017).

152. *See id.*

153. *Id.*

154. *Id.*

155. *Farm Loan Delinquencies and Bankruptcies are Rising*, FARM BUREAU (July 31, 2019), <https://www.fb.org/market-intel/farm-loan-delinquencies-and-bankruptcies-are-rising> (explaining that Chapter 12 bankruptcy filings have risen 13% with many of these filings situated in the Midwest).

156. *Judiciary Hearing, supra* note 4, at 14 (statement of Rep. Antonio Delgado, Member, H. Comm. On Small Business).

157. Alex Wolf, *U.S. Farm Bankruptcies Spike Amid Trade War, New Debt Cap*, BLOOMBERG L. (Dec. 2, 2019), <https://www.bloomberglaw.com/start> (search in search bar for “U.S. Farm Bankruptcies Spike Amid Trade War”; then follow “U.S. Farm Bankruptcies Spike Amid Trade War” hyperlink under “Results for All Bloomberg Law”).

158. Garcia & Sensenich, *supra* note 133, at 14; *Judiciary Hearing, supra* note 4, at 14 (statement of Rep. Antonio Delgado, Member, H. Comm. on Small Business).

159. Garcia & Sensenich, *supra* note 133, at 56.

Therefore, loosening the current restrictions on filing for Chapter 12 relief was the necessary reaction to the precarious financial future for the modern day farmer.<sup>160</sup> Bankruptcy lawyers across the Midwest noticed that many of their clients who were farmers had liabilities exceeding the old debt threshold.<sup>161</sup> Moreover, there is an expectation that “the surge in [Chapter 12] bankruptcy filings [will] continue, especially as international trade pacts remain unsigned and more family farmers become eligible to seek Chapter 12 relief.”<sup>162</sup> Congress took note of these swirling catastrophes and implemented a new debt limit to better reflect the debt reality for many modern farmers.<sup>163</sup>

### C. THE UPDATED DEBT CEILING FOR THE FAMILY FARMER

The FFRA expanded the definition for the “family farmer” by changing one crucial criterion—it moved the debt threshold from roughly \$4.4 million to \$10 million.<sup>164</sup> This expanded definition of “family farmer” substantially benefits a larger group of financially distressed farmers seeking the aid of the bankruptcy court under the protective umbrella of Chapter 12.<sup>165</sup> Thus, family farmers with liabilities exceeding \$4.4 million are now able to file Chapter 12 reorganization plans.<sup>166</sup> The new debt limit may also have other benefits beyond simply making more family farmers eligible for Chapter 12. “Struggling farmers could also benefit from the cap increase without ever filing for bankruptcy because it gives them some leverage in out-of-court negotiations with lenders.”<sup>167</sup>

### D. CRITICISMS OF THE FFRA

The FFRA had significant support as both “the Farm Bureau and the National Farmers Union supported the bill”;<sup>168</sup> however, this bill is not without its critics. Prior to the bill’s passage, the American Bankers

---

160. *Judiciary Hearing*, *supra* note 4, at 14–15 (statement of Rep. Antonio Delgado, Member, H. Comm. on Small Business).

161. Alexandria C. Quinn, *The Next Generation of Chapter 12 Bankruptcy: Revising the Remedy*, 22 *DRAKE J. AGRIC. L.* 245, 248 (2017); *see* Uhlman, *supra* note 12.

162. Wolf, *supra* note 157.

163. *Judiciary Hearing*, *supra* note 4, at 15 (statement of Rep. Antonio Delgado, Member, H. Comm. on Small Business); H.R. REP. NO. 116-182, at 3 (2019).

164. *See* H.R. REP. NO. 116-182, at 9; 11 U.S.C. § 101(18) (2018).

165. H.R. REP. NO. 116-182, at 3.

166. *Id.* at 4.

167. Wolf, *supra* note 157.

168. *Id.*

Association expressed an outright disapproval of the FFRA.<sup>169</sup> Its statement concluded that the newly proposed debt limit for family farmers will harm current and future farmers who will need to take on debt in order to operate.<sup>170</sup> The American Bankers Association's primary concern was that "credit terms would tighten considerably for many family farms, with a disproportionate impact on the most distressed farms in need of credit."<sup>171</sup> It noted examples of average farm debt in two Midwestern farmland states, Nebraska and Iowa, as a reason for not increasing the debt limit for the family farmer.<sup>172</sup> The "average total liabilities for large farms in Iowa averaged \$1.6 million," while the "average farm debt [in Nebraska hovered around] \$1.3 million."<sup>173</sup> It further argued that the FFRA would lead to "increas[e] borrowing costs and decrease the availability of credit for farmers."<sup>174</sup> Nevertheless, the bill passed with widespread bipartisan support.

#### E. A CONCRETE EXAMPLE FOR THE FUTURE

Therefore, for the foregoing reasons, the FFRA is a useful model. It provides a concrete example of why the Code should be modified for a narrow class of debtor. The most compelling explanation is that when a provision of the Code designed for a narrow class of debtor, excludes a significant chunk of debtors who could also fit that class, then Congress should step in and modify the Code. This will enable more debtors to potentially benefit from these specific provisions.

### III. NATIONAL BANKRUPTCY CONFERENCE REVISED SMALL BUSINESS REORGANIZATION MODEL

In January 2010, the NBC published its report on how to best reorganize a small business.<sup>175</sup> Chapter 11 was not working for small businesses because it is a relief procedure designed with large corporations in mind rather than small businesses.<sup>176</sup> The NBC advocated that Chapter 11 needed to be modified to better suit the needs of small business debtors.<sup>177</sup> The NBC did not recommend a massive overhaul but instead promoted expanding Chapter

---

169. See AM. BANKERS ASS'N, STATEMENT FOR THE RECORD ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE JUDICIARY COMMITTEE OF THE UNITED STATES HOUSE OF REPRESENTATIVES 1 (June 25, 2019), <https://www.aba.com/-/media/documents/testimonies-and-speeches/statement-record-house-judiciary-subcommittee-chapter12-bankruptcy.pdf?rev=be9fa8b76efc45c88aacc5b775c96fd8>.

170. *Id.* at 7.

171. *Id.* at 5.

172. *Id.* at 7.

173. *Id.*

174. *Id.*

175. NAT'L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26.

176. *Id.* at 2.

177. *Id.* at 1.

12 to include “small business debtors.”<sup>178</sup> The basis underlying the recommendation was that Chapter 12 is a reorganizational method “proven to be useful” and could be used to increase the viability of reorganizing a small business debtor.<sup>179</sup> To the NBC, a modified Chapter 12 would better serve small business reorganizations by “sav[ing] a significant number of viable small businesses from liquidation” and “lower[ing] the costs of business failure for both small businesses and their creditors.”<sup>180</sup> This would align with the reorganizational spirit of Chapter 11.

#### **A. THE NBC RECOMMENDED DEFINITION: THE “SMALL BUSINESS ENTERPRISE”**

The NBC proposed that a new definition, “small business enterprise,” be added to the Code’s definitional section.<sup>181</sup> The NBC defined a small business enterprise “as a corporate or non-corporate person—other than a family farmer or family fisherman—who is engaged in a business or commercial activity” that does not have more than \$10 million in debt, provided that “at least fifty percent of the debt arises from the person’s business or commercial activities.”<sup>182</sup> The NBC noted that its definition for a small business enterprise is “broader than the Code’s current definition of a small business debtor, which includes any business with total debt not exceeding” \$2.7 million.<sup>183</sup> The NBC did not propose a modification to, or removal of, the Code’s definition of a “small business debtor.”<sup>184</sup> Instead, the NBC felt that a small business owner “should remain free to use Chapter 11 if that [was] a preferable option” provided the small business owner could meet the Code’s definition of a “small business debtor.”<sup>185</sup>

#### **B. CROSS-REFERENCING THE NBC MODEL WITH THE SBRA**

The freedom to choose a path for reorganization is an important point for the NBC’s proposal and one that is also codified in the SBRA.<sup>186</sup> The SBRA grants debtors who file for Chapter 11 the option of choice. A debtor is free to choose whichever process suits it better, either the BAPCPA provisions or the new provisions under Subchapter V.<sup>187</sup>

Additionally, the NBC definition for “small business enterprise” is similar to the SBRA’s definition for a “small business debtor.”<sup>188</sup> Under the

---

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 15.

182. *Id.*

183. *Id.*

184. *Id.* at 16.

185. *Id.*

186. *Id.*; H.R. REP. NO. 116-171, at 28 (2019).

187. H.R. REP. NO. 116-171, at 24.

188. *Id.* at 24–25.

SBRA, a “small business debtor” must have at least 50% of their debt arising from business operations just like in the NBC model for small business enterprise.<sup>189</sup> Moreover, the NBC proposal retained the Code’s definition for “small business debtor.”<sup>190</sup> Therefore, if a debtor hypothetically could meet definitions for both a “small business enterprise” and a “small business debtor,” then the debtor could retain the freedom to file under Chapter 12 or under the Chapter 11 small business case provisions created by BAPCPA.<sup>191</sup> This is similar to the SBRA granting debtors the freedom to choose either Subchapter V or BAPCPA.

#### **IV. THE AMERICAN BANKRUPTCY INSTITUTE RECOMMENDATIONS FOR SMALL BUSINESSES IN CHAPTER 11**

The ABI, like the NBC, acknowledged that Chapter 11 has many problems.<sup>192</sup> It was “too slow and too costly for the majority of middle-market companies to do anything other than sell its” assets.<sup>193</sup> The ABI recognized that, far too often, reorganization plans fail.<sup>194</sup> This led to the ABI’s recommendations for small businesses debtors filing for Chapter 11 detailed below.

##### **A. ABI’S RECOMMENDED DEFINITION FOR SMALL-TO-MEDIUM ENTERPRISES IN COMPARISON TO THE SBRA**

The ABI sought to introduce one all-encompassing definition to cover a wide swath of debtors who were too big to be “small business debtors” but too small to be considered a mega-corporation. The ABI recommended the deletion of “small business debtor” from the Code’s definitional section and suggested it be replaced with the term “small or medium-sized enterprise.”<sup>195</sup> To meet the definition of a “small or medium-sized enterprise” the debtor should not be publicly traded and must have “[l]ess than \$10 million in assets or liabilities on a consolidated basis” at the time the petition is filed.<sup>196</sup> Additionally, the ABI recommended that the definition should not include a “single asset real estate” debtor.<sup>197</sup>

---

189. NAT’L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26, at 15; H.R. REP. NO. 116-171, at 24–25.

190. NAT’L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26, at 16.

191. *Id.*

192. *ABI Final Report*, *supra* note 3, at 297–98.

193. *Id.* at 298.

194. *Id.* at 299.

195. *Id.* at 299–300.

196. *Id.* at 299.

197. *Id.* at 300; *see also* 11 U.S.C. § 101(51B) (2018).



Cross-referencing with the SBRA, the recommendations proffered by the ABI are somewhat incorporated.<sup>198</sup> The SBRA is for small businesses which are not publicly traded, and the SBRA is not to be used by a single-asset real estate debtor.<sup>199</sup> However, there are two primary differences between the ABI and the SBRA.<sup>200</sup> First, the ABI recommended that the debt liability for “small or medium-sized enterprises” be set at \$10 million.<sup>201</sup> As previously stated, the SBRA made no such change to the debt liabilities of its debtors.<sup>202</sup> Second, the ABI has no recommendation for what percentage of debt must arise out of the operation of the business.<sup>203</sup> It is a flat debt limit set at \$10 million with little concern of how the debt originated.<sup>204</sup> The SBRA, in contrast, requires that at least 50% of the debt must arise from running the business.<sup>205</sup>

The ABI found a “natural breaking point in the data at the \$10 million threshold” for debt liabilities would capture about 86.7% of “small business debtors.”<sup>206</sup> If the liabilities were set to \$5 million then that would capture about 78%.<sup>207</sup> The ability to sweep in a super-majority of “small business debtors” is a critical reason for the ABI’s recommendation of increasing the debt limit to \$10 million because Chapter 11 would then be able to better serve this class of debtor’s reorganizational needs.<sup>208</sup>

## V. A PROPOSED SOLUTION

The debt limit contained in the Code’s definition for the “small business debtor” must be raised.<sup>209</sup> Congress should modify the Code’s current definition of the “small business debtor” to include the higher debt thresholds discussed in what the ABI calls “small or medium-sized enterprises” and what the NBC calls “small business enterprises.”<sup>210</sup> Increasing the debt limit will sweep in more “small business debtors” and thus make Subchapter V a more efficient and more equitable process to a larger number of debtors who lack the resources to stay in a traditional Chapter 11. Incorporating the ABI and NBC’s recommendations for raising the debt limit into the Code’s definition of “small business debtor” will ensure that a super-majority of

---

198. H.R. REP. NO. 116-171, at 24–25 (2019).

199. *Id.*

200. *ABI Final Report*, *supra* note 3, at 298; H.R. REP. NO. 116-171, at 24–25.

201. *ABI Final Report*, *supra* note 3, at 299.

202. H.R. REP. NO. 116-171, at 24–25.

203. *See ABI Final Report*, *supra* note 3, at 299–300. The ABI’s proposed definition has no mention of any percentage of debt arising out of the operation of the business.

204. *Id.*

205. H.R. REP. NO. 116-171, at 24–25.

206. *ABI Final Report*, *supra* note 3, at 310.

207. *Id.*

208. ABI TESTIMONY, *supra* note 24, at 5.

209. 11 U.S.C. § 101(51D) (2018); H.R. REP. NO. 116-171, at 24–25.

210. *ABI Final Report*, *supra* note 3, at 299; NAT’L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26, at 15.

debtors have a chance at successfully reorganizing their debts pursuant to new Subchapter V provisions under the SBRA.<sup>211</sup>

Bringing in more potential debtors can, and should be, the goal of future legislation amending the Code. Debt limits provide a necessary, quick determination of what provisions of the Code apply to which kinds of debtors.<sup>212</sup> However, both the NBC and ABI advocate that the debt limit should be raised to \$10 million in order to incorporate such enterprises.<sup>213</sup> Setting the debt limit this high may be too big a leap because the work of a “family farmer” and the work of a “small business debtor” are radically different. A “small business debtor” includes a broader range of work whereas a “family farmer” is in a narrower field. Additionally, a “family farmer’s” debts are more readily anticipated due to necessary purchases, such as land and farming equipment, which are subject to fluctuations and inflation that inevitably drive up debt for farmers.

The figure could be reasonably similar to the proportion of how the Code treated the debt liabilities between the “small business debtor” and the “family farmer” under the old definitions of the Code prior to the FFRA’s ratification.<sup>214</sup> A debt limit in proportion to the old definitions might be potentially more agreeable for Congress. The “family farmer’s” debt limit was originally \$4.4 million.<sup>215</sup> The “small business debtor’s” debt limit was set at roughly \$2.7 million.<sup>216</sup> The difference between the old numbers is roughly 61%. If one were using the old figures and tried to keep the numbers within the same proportion in a proposed debt limit, then Congress could raise the debt limit for the “small business debtor” to roughly \$6.1 million.

However, a more seismic shift that would include more medium-sized businesses in the definition of small business debtors would be to move the debt limit to \$7.5 million. This figure is what the NBC originally recommended Congress should enact in a 2010 bill the NBC helped draft.<sup>217</sup> Given the close relationship between the finalized SBRA and the 2010 NBC report proposals, Congress has a penchant for listening to the NBC. Both proposals include the right to choose a reorganizational path. Both require that at least half of the debt requirement should come out of the operation of the business. The SBRA also features some sprinkling from the ABI regarding incorporating the exclusion of both SARE debtors and publicly

---

211. *ABI Final Report*, *supra* note 3, at 299; NAT’L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26, at 15.

212. *See* 11 U.S.C. § 109 (2018).

213. *ABI Final Report*, *supra* note 3, at 299; NAT’L BANKR. CONFERENCE, PROPOSAL FOR AMENDING CHAPTER 12, *supra* note 26, at 15.

214. *Compare* 11 U.S.C. § 101(51D) (setting the debt limit for a small business debtor at \$2,725,625), *with* 11 U.S.C. § 101(18) (setting the debt limit for the family farmer at \$4,411,400).

215. 11 U.S.C. § 101(18).

216. *Id.* at § 101(51D).

217. *See* S. 3675, 111th Cong. (2010) (proposed 11 U.S.C.A. § 1183(1)(B)(i) to describe debt liabilities for a small business enterprise); Brubaker, *supra* note 20, at 6.

traded companies. Moreover, a debt limit of \$7.5 million would roughly cover between 78% and 86.7% of small to medium-sized debtors.<sup>218</sup> This debt limit would still recognize that the absolute priority rule in a traditional Chapter 11 is retained for larger businesses who are likely to have far more creditors than a medium-sized business. Therefore, a reasonable legislative solution is to echo, rather than mirror, the newly enacted debt threshold for the “family farmer” found in FFRA.<sup>219</sup> This new recommended threshold would still recognize that there is a fundamental difference in the nature of debts for a “family farmer,” which can be anticipated, and a “small business debtor,” which are more variable due to the diversity of medium-sized business.

In 2020, the parameters of the SBRA are rapidly evolving and changing. The COVID-19 pandemic, which is currently ravaging the United States and the rest of the world, spurred the passage of the Coronavirus Aid, Relief and Economic Security Act (CARES Act).<sup>220</sup> This was signed into law on March 27, 2020 and certain provisions highlight the dynamic nature of debt limits.<sup>221</sup> A section of the “CARES Act promises to provide greater access to bankruptcy relief for small businesses”<sup>222</sup> by expanding the debt limit of the small business debtor in Chapter 11’s Subchapter V relief to \$7.5 million.<sup>223</sup> Many business debtors will now have access to Subchapter V as an option for reorganization, and this expansion “may offer certain businesses an important avenue to recover from the economic blows of the COVID-19 pandemic.”<sup>224</sup> However, a one-year sunset provision in the CARES Act provides that the debt limit “will return to \$2,725,625.”<sup>225</sup> This temporary increase is an acknowledgement that the debt limit for the small business debtor was set too low. It is unfortunate that it took a global pandemic to incite Congressional action to increase this debt limit for Subchapter V cases only. Again, the one-year sunset provision is yet another Congressional half-measure for the small business debtor as the problem will return once this provision expires. Furthermore, it should not have taken a global pandemic

---

218. *ABI Final Report*, *supra* note 3, at 309–310.

219. *See* H.R. REP. NO. 116-182, at 9 (2019) (setting the new debt limit for a family farmer at \$10 million).

220. CARES Act, H.R. 748, 116th Cong. (2020).

221. Claudia Grisales et al., *President Trump Signs \$2 Trillion Coronavirus Rescue Package Into Law*, NPR (Mar. 27, 2020), <https://www.npr.org/2020/03/27/822062909/house-aims-to-send-2-trillion-rescue-package-to-president-to-stem-coronavirus-cr>.

222. Eric B. Fisher, *COVID-19 Stimulus Package Temporarily Expands Availability of Small Business Reorganization Act*, NAT’L L. REV. (Mar. 27, 2020), <https://www.natlawreview.com/article/covid-19-stimulus-package-temporarily-expands-availability-small-business>.

223. H.R. 748, § 1113(a)(1). This section creates a temporary definition classified as Debtor to be used in Subchapter V. *Id.*

224. Fisher, *supra* note 222.

225. *Id.*; *see* H.R. 748, § 1113(a)(5) (replacing the temporary term “debtor” with the original term of “small business debtor”).

to recognize that the debt limit needs to be drastically raised. This temporary increase to \$7.5 million should be made permanent.

## CONCLUSION

Overall, it is nonsensical for Congress to create new procedures for small business debtors only to exclude some debtors that could benefit from Subchapter V's set of reorganizational tools. Congress should therefore rectify its legislative half-measure by permanently increasing the debt limit of the small business debtor with future legislation. Raising the debt limit to \$7.5 million or to the formulaic \$6.1 million would sweep in more small to medium-sized businesses. Regardless of the final figure, the debt limit should be raised so more distressed businesses can take advantage of Subchapter V.

*Michael C. Blackmon\**

---

\* University of Iowa, May 2011; J.D. Candidate, Brooklyn Law School, 2021. Firstly, thanks to my wife, Min Kim, for providing support especially when deadlines were approaching. Special thanks to Professor Edward Janger for helping me restructure my note in literally one five-minute conversation. Thank you to Professor Michael Gerber for helping me make sense of the Code. Finally, thank you to my son John, who could have made this process easier but nevertheless motivated me to work harder.