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The Big Short: How the Big Step of the Small Business Reorganization Act Fell Short

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NOTE

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I. INTRODUCTION

Imagine it is February 2020 and you own a small business.[1] You start hearing chatter about some virus overseas, but you do not pay too much attention to it.[2] Then, all of a sudden, this virus has taken over the media and before you know it, it is making its way throughout the United States.[3] As cases begin to rise and people start to panic, your state mandates you to shut down your business.[4] Fear of the unknown begins to contaminate your thoughts.[5] When will you be able to open back up your business?[6] How will you pay the business's rent in the meantime?[7] And what about supporting your family?[8] What seemed unfathomable just days before became reality for thousands of small business owners as the COVID-19 pandemic paralyzed the United States' economy.[9] So what relief can small business owners seek during these trying times?[10]

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1. *See* Tom Huddleston, Jr., *How Small Business Owners Are Coping with COVID-19 Pandemic: 'It Was My Civic Duty to Be a Part of the Solution,'* CNBC MAKE IT (Jan. 12, 2021, 11:12 AM), https://www.cnbc.com/2020/03/23/how-small-businesses-across-us-are-coping-with-covid-19-pandemic.html.
2. *See* Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC NEWS (Sept. 22, 2020, 11:55 AM), https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165.
3. *See id.*
4. *See* Huddleston, *supra* note 1; *see also* Amber N. Morris, *Small Business Debt in the Age of COVID-19*, 29 AM. BANKR. INST. L. REV. 131, 133 (2021) ("[A] series of state stay-at-home orders required all non-essential businesses to cease operations indefinitely.").
5. *See* Huddleston, *supra* note 1.
6. *See id.*
7. *See id.*
8. *See* MICHAEL KARPMAN ET AL., PARENTS ARE STRUGGLING TO PROVIDE FOR THEIR FAMILIES DURING THE PANDEMIC 2 (2020), https://www.urban.org/sites/default/files/publication/102254/parents-are-struggling-to-provide-for-their-families-during-the-pandemic_2.pdf.
9. *See* Huddleston, *supra* note 1.
10. *See* Anne Sraders, *A New Bankruptcy Law Could Prove a Big Help for Small Businesses. Here's Everything You Need to Know*, FORTUNE (May 11, 2020, 6:00 AM),

Small businesses account for 99.7% of all employers within the nation.[11] Despite their prominence, many small businesses tend to be more susceptible to failure because of financial instability.[12] Approximately 50% of all new businesses do not last more than five years while about 67% do not make it past ten years.[13] Unsurprisingly, small businesses make up many of these failures.[14] Although failure remains common, small businesses rarely seek court-supervised bankruptcy protection for several reasons.[15]

Chapter 11 reorganization, which helps businesses rehabilitate their assets, has historically hindered smaller businesses with its complexities, expenses, and length.[16] The burden on small businesses stems from the "one-size-fits-all" reorganization solution offered by the Bankruptcy Code ("Code"), pursuant to which mom and pop shops and Fortune 500 corporations follow identical procedures.[17] While complex debt and asset structures of large companies may necessitate disclosures,

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https://fortune.com/2020/05/11/recent-changes-to-bankruptcy-laws-could-prove-a-big-help-for-small-businesses-heres-everything-you-need-to-know.

11. U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., FREQUENTLY ASKED QUESTIONS 1 (2019) [hereinafter U.S. SMALL BUS. ADMIN.], https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/24153946/Frequently-Asked-Questions-Small-Business-2019-1.pdf (defining a small business as "an independent business having fewer than 500 employees"); *see Table of Size Standards*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/document/support--table-size-standards (last visited Oct. 13, 2021) (providing a calculator to determine how a business can assess its size, considering that the definition of "small" differs according to industry) (internal quotation marks omitted); *see also* Brian A. Blum, *The Goals and Process of Reorganizing Small Businesses in Bankruptcy*, 4 J. SMALL & EMERGING BUS. L. 181, 193 (2000) ("[I]t seems fair to say that the most readily identifiable attributes of smallness are the limited scale of business operations, resources, and personnel—both management and workers. The last mentioned characteristic (personnel) is particularly worth stressing because it is so strongly associated with the conception of small business.").

12. *See* Bruce A. Markell, *Small Business and Bankruptcy: Recent Changes in Kosovo and the United States Compared*, 27 U. MIA. INT'L & COMPAR. L. REV. 255, 257-58 (2020); *see also* Jack O'Connor, *The Small Business Reorganization Act: How It Started and Where It's Going*, BENEFITS PRO (Jan. 13, 2021, 8:35 AM), https://www.benefitspro.com/2021/01/13/the-small-business-reorganization-act-how-it-started-how-its-going-where-to-next-412-109839 ("Many small businesses face economic headwinds even *without* the specter of a pandemic interfering with their day-to-day operations.").

13. *See* U.S. SMALL BUS. ADMIN., *supra* note 11, at 2.

14. *See* Markell, *supra* note 12, at 257.

15. *See id.* at 258. *But see* Sarah O'Brien, *Ruby Tuesday Joins List of Companies Seeking Bankruptcy Protection. What to Do if Your Own Business Is Struggling*, CNBC (Oct. 8, 2020, 12:45 PM), https://www.cnbc.com/2020/10/08/ruby-tuesday-files-bankruptcy-here-are-options-for-struggling-firms.html (finding that a number of small businesses "may discover bankruptcy is the best way to move forward").

16. *See* Ethan D. Dunn, *Faster, Cost-Effective, and Streamlined Reorganization Under Subchapter V*, MICH. BAR J., June 2020, at 34, 35; *see also* AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012-2014 FINAL REPORT AND RECOMMENDATIONS 279-80 (2014) ("The utility of [C]hapter 11 for smaller companies is not a new concern. Shortly after the enactment of the Bankruptcy Code, commentators raised concerns regarding the ability of smaller debtors to confirm [C]hapter 11 plans.").

17. James B. Haines, Jr. & Philip J. Hendel, *No Easy Answers: Small Business Bankruptcies After BAPCPA*, 47 B.C. L. REV. 71, 73 (2005).

multi-layered plans, and voting that characterize traditional Chapter 11 cases, these features make successful reorganization difficult for small businesses.[18] When small businesses do attempt to reorganize under Chapter 11, bankruptcy courts regularly dismiss or convert the cases to Chapter 7.[19] As a result, small businesses have two practical options: liquidate their assets or close their doors without even attempting to reorganize.[20] Thus, Chapter 11 reorganization "works poorly or not at all for small businesses."[21]

As small businesses continually struggled with Chapter 11 filings, judges began using their discretionary power to speed up the pace of cases progressing too slowly and to swiftly dismiss or convert cases not likely to end in successful reorganization.[22] As concerns arose from the court-supervised, fast-track procedure, Congress decided to take action and made its first attempt to streamline small business reorganization by passing the Bankruptcy Reform Act of 1994 ("BRA").[23] Problems persisted for small business reorganization, so over a decade later, Congress made another attempt to assist small businesses when it passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[24] However, instead of helping small businesses, the BAPCPA created a new set of burdens on small business debtors attempting to reorganize under Chapter 11.[25] Despite various efforts,

18. NAT'L BANKR. CONF., A PROPOSAL FOR AMENDING CHAPTER 12 TO ACCOMMODATE SMALL BUSINESS ENTERPRISES SEEKING TO REORGANIZE 99 (2010).

19. *Id.* at 102 (finding that in one study, among businesses with debt under $2 million, "dismissal or conversion occurred in 77% of cases filed during 1998 and 66% of cases filed during 2006"); *see also* Haines & Hendel, *supra* note 17, at 75 ("Of course, there is quite a gap between a confirmed, consummated plan and dismissal or conversion after lengthy, inconclusive delay.").

20. Thomas R. Fawkes, *CARES Act, SBRA and Anticipated Wave of Subchapter V Filings*, AM. BANKR. INST. J., Aug. 2020, at 8, 8; *see also ABI Commission to Study the Reform of Chapter 11*, 23 AM. BANKR. INST. L. REV. 1, 8 (2015) [hereinafter *ABI Commission*] (suggesting that a business has more value to creditors and society as a whole if it reorganizes as opposed to liquidates); Blum, *supra* note 11, at 183 (stating that liquidation includes the sale of the business's assets "piecemeal," leading to the termination of the business, while reorganization allows the business to keep its assets in exchange for a commitment to reimburse creditors).

21. NAT'L BANKR. CONF., *supra* note 18, at 99.

22. Blum, *supra* note 11, at 205-06. Judge Small of the Eastern District of North Carolina started this fast-track system for small business cases in the late 1980s and then other courts began to follow his lead using a modified version of the process. *Id.* at 206 n.79.

23. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 217, 108 Stat. 4106, 4127-28; *see also* Blum, *supra* note 11, at 207-08, 211 (concluding that the Bankruptcy Reform Act ("BRA") attempted to fast-track the process for small business debtors).

24. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 431-47, 119 Stat. 23, 109-18; *see also* Haines & Hendel, *supra* note 17, at 76-80 (stating that the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") enumerated a new definition of a "small business debtor," expanded the duties of small business debtors, enhanced post-filing reporting requirements, increased the role of the United States Trustee, created exclusivity for small business debtors, and limited the availability of the automatic stay).

25. Haines & Hendel, *supra* note 17, at 81-82. Troubling BAPCPA provisions for small business debtors included the priority increase for administrative claims, the assurance of payment

little to no progress resulted for small businesses.[26] In 2019, Congress finally passed a meaningful amendment, the Small Business Reorganization Act ("SBRA"), which created Subchapter V specifically for small business debtors whose debts do not exceed \$2,725,625.[27] Despite the SBRA's benefits for smaller businesses, Congress set the debt limit too low, thus limiting the amount of small businesses that can take advantage of Subchapter V.[28]

This Note argues that while Congress took a big stride in the right direction for small businesses by passing the SBRA, it fell short in providing a viable reorganization process due to the arguably low debt limit.[29] This Note maintains that Congress should amend the SBRA by raising the debt limit to \$10 million.[30] This Note advocates for a potentially over-inclusive debt limit to ensure as many small businesses as possible can take advantage of the streamlined reorganization process.[31]

This Note starts by exploring the prominence of small businesses throughout the United States economy,[32] and their tragic history with the reorganization process.[33] Although the bankruptcy courts and Congress attempted to assist small businesses, this Note reveals how the court-supervised, fast-track procedure, as well as the BRA and BAPCPA, failed to provide meaningful help to small businesses that wished to reorganize.[34] A discussion of the SBRA and its notable changes for small business debtors and creditors,[35] along with the temporary debt increase as a result of COVID-19, conclude Part II.[36] Part III delves into the root of the issue with the SBRA, specifically that Congress set its \$2,725,625 debt limit far too low.[37] Part III goes on to

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for utility services not including administrative expense priority, and the expansion of grounds for conversion or dismissal. *See id.*

26. *See* Michael C. Blackmon, Note, *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, 345-47 (2019).

27. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079; *see* William L. Norton III & James Blake Bailey, *Individual Chapter 11 Cases Under New Subchapter V*, BRADLEY (Sept. 11, 2020), https://www.bradley.com/insights/publications/2020/09/individual-chapter-11-cases-under-new-subchapter-v (surpassing the \$2,725,625 debt limit excludes the debtor from filing a Subchapter V case).

28. *See infra* Parts II.E.2, III.A. Sections 1181–95 contain the provisions of the Small Business Reorganization Act ("SBRA"). 11 U.S.C. §§ 1181–95 (Supp. I 2018).

29. *See infra* Part III.A.

30. *See infra* Part IV.A.

31. *See infra* Part IV.A.

32. *See infra* Part II.A.

33. *See infra* Part II.A–C.

34. *See infra* Part II.D.

35. *See infra* Part II.E.

36. *See infra* Part II.F.

37. *See infra* Part III.A.

discuss three different past proposals to increase the debt limit.[38] Part IV of this Note argues that in order to allow more small- and medium-sized businesses to proceed under Subchapter V, Congress should increase the SBRA debt limit to $10 million.[39] Because a $10 million debt limit might extend too broadly, leading to resource issues in the bankruptcy courts, this Note proposes that Congress establish a commission to monitor the debt limit increase and evaluate whether Congress should adjust it accordingly.[40]

II. BIG CHANGES FOR SMALL BUSINESS REORGANIZATION THROUGHOUT HISTORY

Part II of this Note begins by exploring the importance of small businesses within the United States economy.[41] Although small businesses drive the economy, Chapter 11 has continued to pose issues for small business reorganization throughout history.[42] This Part goes on further by outlining the attempts by bankruptcy courts, then Congress, and recently the executive branch, to streamline the reorganization process for small business debtors, including most notably, the SBRA.[43]

A. *Why Small Businesses Need Access to Reorganizational Relief*

According to the United States Small Business Administration, more than thirty million small businesses drive the American economy.[44] In fact, small businesses make up the vast majority of the economy.[45] Smaller businesses consisting of 50 to 5,000 employees account for more employment in the United States than larger businesses with over 5,000 employees.[46] From 2000 to 2018, larger businesses created only 5.2 million net new jobs, while small businesses created 9.6 million, thus accounting for 64.9% of net new job creation in the allotted time period.[47]

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38. *See infra* Part III.B.
39. *See infra* Part IV.A.
40. *See infra* Part IV.A–B.
41. *See infra* Part II.A.
42. *See infra* Part II.B–C.
43. *See infra* Part II.D–F.
44. U.S. SMALL BUS. ADMIN., *supra* note 11, at 1.
45. *See id.* (writing that in 2016, the United States had 30.7 million small businesses and 19,699 large businesses).
46. 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 ("[I]n terms of output, the sheer number of mid-market firms accounts for the fact that, in aggregate, their revenues surpass those of the top 100 U.S. companies by capitalization and are equivalent to roughly 40[%] of the U.S. GDP. If the U.S. economy is to grow robustly, the actions of mid-market companies will be a big part of the story.").
47. U.S. SMALL BUS. ADMIN., *supra* note 11, at 1.

Although small- and medium-sized businesses remain a cornerstone of the American economy,[48] they face more preliminary difficulties and failures than larger entities.[49] Despite the fact that the majority of small businesses tend to survive the first year after starting up, only about half of them make it over five years.[50] Further, after ten years, only about one third of small businesses have lasted.[51] Small businesses fail for a myriad of reasons, from misreading the market to recruiting the wrong employees.[52] Though the number of small businesses continues to grow and the financial setbacks fail to subside, the Code has not adequately assisted small businesses in avoiding termination.[53]

Chapter 11 should create a viable reorganization process for all businesses, big, medium, and small.[54] Historically, Chapter 11 has been a saving grace for larger businesses in need of restructuring their debts, and it should do the same for small businesses.[55] Reorganization significantly contributes to the American economy by preserving jobs and investments.[56] Considering that small businesses drive the American economy, if more small businesses have the opportunity to go through the reorganization process successfully and "stay afloat," then immense benefits will disperse to various groups who depend on those small businesses, including employees, suppliers, and customers.[57]

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48. DELOITTE, *supra* note 46, at 6 ("The thousands of mid-market companies with annual revenues below $1 billion—the backbone of the American economy . . . form the vital center of U.S. employment and output.").

49. Blackmon, *supra* note 26, at 339.

50. U.S. SMALL BUS. ADMIN., *supra* note 11, at 2. "Four out of five establishments that started in 2017 survived until 2018 (79.4%). This percentage was similar to the average one-year survival rate from 2008 to 2018 of 78.7%." *Id.* Additionally, "[a]bout half of all establishments survive five years or longer. In the past decade, this ranged from a low of 45.4% for establishments started in 2006, and a high of 51.1% for those started in 2010." *Id.*

51. Katherine Gustafson, *What Percentage of Businesses Fail and How to Improve Your Chances of Success*, LENDINGTREE, https://www.lendingtree.com/business/small/failure-rate (Aug. 7, 2020).

52. *Id.* (noting additional reasons that small businesses fail such as a lack of demand for the particular good or service, cash flow issues, or failure to research competitors); AM. BANKR. INST., *supra* note 16, at 277 ("[E]stablished small and middle-market companies can experience failed acquisitions, underperforming product lines, overcapitalization, and other factors that contribute to financial distress and threaten their survival."); *see also* Blum, *supra* note 11, at 194 ("Of course, the failure of a small business, like that of a large one, could result from factors unrelated to size and beyond the debtor's control. For example, studies suggest that the nature of the business and the type of market in which it operates have an influence on the likelihood of failure. However, statistical studies, to the extent available, and anecdotal observations suggest that small businesses in financial difficulty frequently display one or a combination of problems that are particularly associated with size.").

53. *See* Markell, *supra* note 12, at 257-58.

54. Blackmon, *supra* note 26, at 345.

55. *Id.* at 344-45.

56. *Id.* at 345.

57. *Id.* at 339, 345; *see also* Fawkes, *supra* note 20, at 8 ("The health of the U.S. economy . . . is dependent on small businesses . . . being able to survive . . . .").

B. The Underpinnings of Chapter 11

As a result of the Bankruptcy Clause contained in the Constitution, "[b]ankruptcy is, and always will be, a vital part of the American economy and the judicial system . . . ."[58] The United States has one of the most well-developed reorganization systems across the globe, resulting primarily from the railroad failures of the nineteenth century.[59] The rise of interstate commerce, particularly by the use of railroads, led to demands for "uniform and efficient bankruptcy law throughout the United States," as railroads consistently failed.[60] Consequently, the Bankruptcy Act of 1898 ("BA") introduced the "basic conceptual underpinnings" of modern-day bankruptcy law, including the procedures for business bankruptcy.[61] Congress based the BA on a "rescue and rehabilitate" policy, intended to give the honest but unfortunate debtor a fresh start through meaningful relief from its debts, which remains the Code's mission today.[62]

C. Traditional Chapter 11 Issues for Small Businesses

Chapter 11 provides the process by which a debtor can reorganize its debts according to a plan.[63] Importantly, Chapter 11 was designed for large businesses with widespread operations and complex capital structures, not small companies that rely entirely on the skills of a single owner-manager and few employees.[64] As a result, reorganization is too expensive, lengthy, and complex for most small- and medium-sized businesses and the Code thus fails to achieve its goal of providing economic growth.[65]

58. Blackmon, *supra* note 26, at 340 (citing U.S. CONST. art. I, § 8, cl. 4).

59. *ABI Commission*, *supra* note 20, at 7-8.

60. Bradley Hansen, *Bankruptcy Law in the United States*, EH.NET (Aug. 14, 2001), https://eh.net/encyclopedia/bankruptcy-law-in-the-united-states. While railroads had swiftly expanded throughout the nineteenth century and originally led to high returns for investors, these returns started to decline. Gary Richardson & Tim Sablik, *Banking Panics of the Gilded Age*, FED. RSRV. HIST. (Dec. 4, 2015), https://www.federalreservehistory.org/essays/banking_panics_of_the_gilded_age. Then European investors began divesting their shares of American railroad bonds after European stock market crashes, depressing the market and causing many railroad firms to fail in the United States. *Id.*

61. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544; *ABI Commission*, *supra* note 20, at 8.

62. *See ABI Commission*, *supra* note 20, at 6, 8.

63. Barbra R. Parlin, *New Jersey Bankers Association Commercial Lending Committee: Small Business Bankruptcy Cases Under Subchapter V of Chapter 11*, HOLLAND & KNIGHT (June 25, 2020), https://www.hklaw.com/-/media/files/events/2020/06/small-business-bankruptcy-cases-under-subchapter-v-of-chapter-11.pdf?la=en.

64. NAT'L BANKR. CONF., *supra* note 18, at 98 ("The model for Chapter 11 was the publicly-traded manufacturer, not the local diner."); *see also* Blum, *supra* note 11, at 194 ("Because many small businesses are managed by just a single individual owner or a small group of owners, their fate is very much dependent on the managerial expertise of one or a handful of people.").

65. *See ABI Commission*, *supra* note 20, at 12, 63-64.

For example, a bankruptcy court charges a debtor a $1,167 case filing fee as well as a $571 miscellaneous administrative fee.[66] A debtor then has the exclusive right to file a plan within the first 120 days after filing its petition, with such period subject to extension for as much as eighteen months, which can cause a Chapter 11 case to last many years.[67] In most cases, debtors cannot retain stake of their equity according to the absolute priority rule,[68] creating further complications for small businesses attempting to reorganize.[69] Additionally, the United States Trustee's Office appoints a creditors' committee and a debtor must prepare disclosure statements to circulate to all creditors and other parties in interest, generating significant expenses.[70] The few small businesses that do succeed with Chapter 11 reorganization often "find that 20[%] or more of their assets were consumed by the administrative costs of the bankruptcy process."[71] In sum, Chapter 11 procedures are "less effective, or even valueless, where small businesses are concerned."[72]

D. *Preliminary Assistance for Struggling Small Businesses*

As small businesses continued to face challenges with traditional Chapter 11 provisions, Subpart 1 discusses how bankruptcy judges first

66. *Chapter 11 - Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Oct. 13, 2021) ("The fees must be paid to the clerk of the court upon filing or may, with the court's permission, be paid by individual debtors in installments.").

67. *See id.*

68. *See* Lance P. Martin, *Supreme Court Absolutely Affirms the Absolute Priority Rule*, WARD & SMITH, P.A. (Apr. 6, 2017), https://www.wardandsmith.com/articles/supreme-court-absolutely-affirms-the-absolute-priority-rule ("The Bankruptcy Code essentially requires that, absent consent, a senior class must be paid in full before junior classes of creditors and equity holders can receive any money or property under a Chapter 11 plan. This is called the 'absolute priority rule.'"); *see also* Am. Bankr. Inst., *Media Webinar on the New Bankruptcy Law*, YOUTUBE (Aug. 28, 2019) [hereinafter *ABI Media Webinar*], https://www.youtube.com/watch?v=EDe3srB9YLc&t=3s (finding it rare that debtors receive full creditor consent).

69. James Blake Bailey & William Norton III, *The Pros and Cons of the Small Business Reorganization Act of 2019*, JDSUPRA (Aug. 7, 2020), https://www.jdsupra.com/legalnews/the-pros-and-cons-of-the-small-business-70654 ("[A] dissenting class of unsecured creditors must be paid in full before any junior class can receive or retain property . . . . Hence, if the unsecured creditor class votes to reject a [C]hapter 11 plan, equity holders cannot receive anything unless the dissenting class is paid in full. Rather, the equity holders would have their shares in the company cancelled." (citations omitted)).

70. *See infra* notes 116, 118 and accompanying text; Parlin, *supra* note 63.

71. NAT'L BANKR. CONF., *supra* note 18, at 98.

72. Blum, *supra* note 11, at 205 ("To many observers, the seriousness of these concerns has been demonstrated by the low rate of fully successful small business reorganizations under Chapter 11."); *see also* AM. BANKR. INST., *supra* note 16, at 277 ("Chapter 11 is now viewed as too slow and too costly for the majority of middle-market companies to do anything other than sell its going concern assets in a 363 sale or to simply liquidate the company . . . [usually] almost exclusively for the sole benefit of the secured lender." (alteration in original)).

attempted to mitigate the problems.[73] Congress then decided to take action by passing a number of amendments to streamline the reorganization process.[74] Subpart 2 examines the BRA and its benefits, as well as its disadvantages, for small businesses.[75] Subpart 3 examines the BAPCPA and outlines how small businesses continued to struggle with the Chapter 11 reorganization process despite Congress's efforts.[76]

1. Bankruptcy Courts Attempt to Help Small Businesses

The first initiative in dealing with the reorganizational issues that had persisted for small businesses for decades came from the bankruptcy courts.[77] Starting in the late 1980s, bankruptcy judges began using their discretionary power to speed up cases.[78] "[T]he fast-track procedure provided for an early evaluation by an official equivalent to the U.S. Trustee" of all cases to decide if judges should subject certain cases to "an accelerated deadline for filing the plan."[79] The fast-track procedure did not offer specific guidelines for the determination; judges made decisions on a case-by-case basis and did not restrict their decisions to debtors of any defined size.[80] If a judge determined a case should receive accelerated treatment, the bankruptcy court would order the debtor to file a plan by a certain date, informally review the disclosure statement and provisionally approve it, and then combine the final disclosure statement approval hearing with the plan confirmation hearing.[81]

The fast-track procedure sped up the reorganization process without any harmful consequences on the success rate of reorganizations.[82] However, the judicial procedure may have exceeded the authority of the bankruptcy courts in some respects.[83] A separate policy concern arose that a "discretionary process, not mandated or regulated by the Code . . . [could] vary quite significantly in the details of its scope and

73. *See infra* Part II.D.1.
74. *See infra* Part II.D.2–3.
75. *See infra* Part II.D.2.
76. *See infra* Part II.D.3.
77. *See* Blum, *supra* note 11, at 205-06.
78. *Id.* at 206 ("The best known of these methods came to be known as the 'fast-track.'").
79. *Id.* at 206 & n.80 (explaining that in some states at the time, an official called the Bankruptcy Administrator performed the United States Trustee's functions).
80. *Id.* at 206 & n.81 (noting that the size of a debtor remained an important, but not determinative, factor).
81. *Id.* at 206-07.
82. *Id.* at 207.
83. *Id.* at 207-08 (reasoning that while courts have discretion to manage their dockets and make any necessary and appropriate orders to carry out the provisions of the Code, it remains unclear whether courts have discretion to provisionally approve disclosure statements).

nature."[84] As a result, it made sense for Congress to turn a streamlined reorganization process into statutory form by including it in the Code.[85]

2. The Bankruptcy Reform Act

Congress, realizing the hurdles that the Code imposed for small businesses, and recognizing the issues that a court-imposed solution created, first attempted to streamline the Chapter 11 process with the BRA in 1994.[86] After various compromises between the House of Representatives and the Senate, Section 217 of the BRA created a "fast-track" Chapter 11 option for small businesses.[87] The BRA created the definition of a "small business" case, setting a $2 million debt ceiling and combining the hearing on the disclosure statement with plan confirmation.[88] As a result, in a small business case, a debtor could file for Chapter 11 and immediately start soliciting votes on a plan, thus guaranteeing a rapid and cheaper process.[89] The BRA also established the National Bankruptcy Review Commission ("NBRC") to study the Code and make recommendations for any bankruptcy-related changes.[90] Thus, the NBRC had the power to explore small business reorganization.[91] Additionally, the BRA made Chapter 13 more widely available for proprietorships.[92] Consequently, critics argued that many small businesses may not choose to proceed under Chapter 11's new fast-track process, despite its speed, because its procedures remained complex.[93] Instead, critics believed small businesses may opt for the less burdensome Chapter 13 procedures.[94] Further, the $2 million debt limit

84. *Id.* at 208 ("This lack of consistency undermines the uniformity of bankruptcy practice.").

85. *Id.*

86. *See id.* at 207-08; Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 217, 108 Stat. 4106, 4127-28.

87. David G. Hicks, *The October Surprise: The Bankruptcy Reform Act of 1994—An Analysis of Title II—The Commercial Issues*, 29 CREIGHTON L. REV. 499, 520 (1996).

88. Bankruptcy Reform Act § 217.

89. Jeffrey T. Kucera et al., *Small Business Debtor Reorganization: An Overview of Chapter 11's New Subchapter V*, K&L GATES (Sept. 23, 2019), https://www.klgates.com/Small-Business-Debtor-Reorganization-An-Overview-of-Chapter-11s-New-Subchapter-V-09-23-2019.

90. Bankruptcy Reform Act §§ 602–04 (establishing a nine-member commission with a mandate to consider problems within the Code, to implore conflicting views, and to make recommendations to Congress); *see also* Bonnie Kay Donahue & W. David Edwards, *The Effect of the Bankruptcy Reform Act of 1994 on Commercial Lenders*, J. COM. LENDING (Jan. 1995), http://bi.gale.com.ezproxy.hofstra.edu/essentials/article/GALE%7CA165747O3/be8197c8e04d0ab1 ca2c7564819a83dd?u=nysl_li_hofs ("One of the most significant features of the reform act is the creation of the Bankruptcy Review Commission charged with undertaking a global evaluation of the bankruptcy system.").

91. *See* Bankruptcy Reform Act § 603.

92. Hicks, *supra* note 87, at 520; Blum, *supra* note 11, at 211.

93. *See, e.g.*, Hicks, *supra* note 87, at 520.

94. *See, e.g.*, *id.*; *see also* Cara O'Neill, *Chapter 13 v. Chapter 11 Bankruptcy for Small Business Owners*, NOLO, https://www.nolo.com/legal-encyclopedia/chapter-13-chapter-11-bankruptcy-small-business-owners.html (last visited Oct. 13, 2021) ("Most small business owners,

excluded many small businesses from filing Chapter 11 small business cases in the first place.[95]

3. The Bankruptcy Abuse Prevention and Consumer Protection Act

Upon realizing that small businesses still faced substantial obstacles following the BRA, Congress took further steps in passing the BAPCPA in 2005.[96] In doing so, Congress strengthened the role of the United States Trustee and reduced costs for small business cases by decreasing the role of the creditors' committee.[97] Under the BAPCPA, Congress created a newly enumerated definition of the "small business debtor" and provided a 180-day exclusivity period for a small business debtor to file a plan.[98]

Despite its benefits, the BAPCPA had disadvantages as well.[99] The Chapter 11 process consisted of many new post-petition documentation and reporting requirements, placing extreme burdens on small business debtors.[100] Additionally, with the BAPCPA came "significant hard and fast deadlines making it difficult for a smaller business with limited resources to reorganize . . . ."[101] Congress also hesitated on raising the debt limit for small business debtors from $2 million, further limiting the amount of small businesses able to take advantage of small business reorganization.[102]

E. The Big Step for Small Businesses

After Congress's preliminary attempts failed to properly satisfy the reorganizational needs of small businesses, Congress passed the SBRA in 2019, which created Subchapter V within Chapter 11, specifically for small business reorganization.[103] Subpart 1 discusses small business

when possible, choose Chapter 13 over Chapter 11 [because] . . . Chapter 11 . . . usually costs too much money . . . to be a realistic option for small business owners.").

95. *See* Blum, *supra* note 11, at 190, 212.

96. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 431–47, 119 Stat. 23, 109-18.

97. *See id.* §§ 432, 439.

98. *See* Haines & Hendel, *supra* note 17, at 76, 79.

99. *Id.* at 72.

100. *Id.*

101. Blackmon, *supra* note 26, at 346; *see also* AM. BANKR. INST., *supra* note 16, at 281 ("[C]ertain of the deadlines imposed by the BAPCPA amendments were particularly challenging and counterproductive for small business debtors.").

102. *See* Haines & Hendel, *supra* note 17, at 76.

103. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079; *see also* Blackmon, *supra* note 26, at 344, 353; Theresa A. Driscoll, *Countdown to the Small Business Reorganization Act of 2019: New Law Taking Effect in February 2020 May Make Chapter 11 Reorganization a Viable Option for Small Businesses*, MORITT HOCK & HAMROFF LLP (Nov. 7, 2019), https://www.moritthock.com/countdown-to-the-small-business-reorganization-act-of-2019-

debtor eligibility for Subchapter V.[104] Subpart 2 delves into the many notable changes for small business debtors as a result of the SBRA.[105] Subpart 3 notes that along with the substantial benefits provided to small business debtors by Subchapter V, several creditor protections from traditional Chapter 11 cases remain applicable.[106]

1. Who Qualifies as a Small Business Debtor?

Congress's enactment of the SBRA was "far more ambitious than the legislation preceding it."[107] The SBRA created an entirely redefined bankruptcy process for small business debtors by creating Subchapter V, as the legislation preceding it tried to promote small business reorganization while conforming to the restrictions of traditional Chapter 11.[108] According to the SBRA, a Subchapter V debtor must meet the definition of a "small business debtor," which the Code defines as a "person engaged in commercial or business activities . . . that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than [$2,725,625]."[109]

2. Notable Changes for Small Business Debtors

Subchapter V removes many traditional Chapter 11 requirements that previously made the bankruptcy process so expensive and problematic for small businesses.[110] First, an attractive feature of the SBRA is its voluntariness, allowing a debtor to elect whether to proceed under Subchapter V as a small business debtor.[111] Next, the Department

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new-law-taking-effect-in-february-2020-may-make-chapter-11-reorganization-a-viable-option-for-small-businesses ("Providing small business debtors with a reorganization remedy that is achievable under the Bankruptcy Code is necessary and long overdue.").

104. *See infra* Part II.E.1.

105. *See infra* Part II.E.2.

106. *See infra* Part II.E.3.

107. Kucera et al., *supra* note 89.

108. *Id.*

109. Lei Wang Ekvall & Timothy Evanston, *The Small Business Reorganization Act: Big Changes for Small Businesses*, A.B.A. (Feb. 14, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/02/small-business-reorg; *see also* Richard A. Marshack & Tinho Mang, *Congress Acts! Chapter 11 Reorganization Tailored to Small Business*, ORANGE CNTY. LAW., Dec. 2019, at 34, 35 (defining contingent debt as "any condition to the liability on the debt" and stating that liquidated debt exists when the debtor or creditor can readily determine the amount of the claim).

110. Andrew M. Troop & Andrew V. Alfano, *CARES Act Expands Eligibility Under the Small Business Reorganization Act: What Distressed Small Businesses and Their Creditors Should Know*, PILLSBURY (Apr. 20, 2020), https://www.pillsburylaw.com/en/news-and-insights/cares-act-expands-eligibility-under-small-business-reorganization-act.html.

111. Blackmon, *supra* note 26, at 346 (noting that "[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,'" which allows a debtor to forego the speedy reorganization process or

of Justice appoints a Subchapter V Trustee for a small business debtor in order to monitor a debtor's affairs, assess a debtor's assets, consider a debtor's likelihood of success, and make recommendations to a debtor about plan confirmation.[112] Additionally, a Subchapter V debtor has exclusive power to file a reorganization plan, which varies from a traditional Chapter 11 case where the debtor's exclusive power to file a plan can be terminated.[113] Subchapter V also imposes a "truncated timeline" to file a plan, requiring a debtor to file a plan ninety days after filing the petition, and only extending the deadline in circumstances out of the control of the debtor,[114] differing drastically from Chapter 11's filing deadline of 120 days subject to extension for up to eighteen months.[115] Further, Subchapter V does not require a Chapter 11 disclosure statement, significantly reducing costs and accelerating plan confirmation.[116]

Rather than having a creditors' committee in every Chapter 11 case, Subchapter V only appoints a creditors' committee if ordered by a bankruptcy court for cause, eliminating even more costs.[117] Furthermore, Subchapter V exempts debtors from paying quarterly fees to the United States Trustee System Fund that traditional Chapter 11 debtors must pay.[118] In contrast to a traditional Chapter 11 case, a judge may confirm a plan in a Subchapter V case without acceptance by an impaired class of creditors.[119] Specifically, instead of confining debtors with the absolute priority rule, which prohibits debtors from retaining business

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scrutiny of a trustee under Subchapter V if desired); *see also* FED. R. BANKR. P. 1020(a) ("In a voluntary [C]hapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor.").

112. *See* 11 U.S.C. § 1183(a)–(b) (Supp. I 2018). *But see* Bailey & Norton, *supra* note 69 (referring to the mandatory appointment of a Subchapter V Trustee as a limitation on the debtor).

113. 11 U.S.C. § 1189(a) (Supp. I 2018); Parlin, *supra* note 63.

114. § 1189(b); Parlin, *supra* note 63.

115. *See supra* text accompanying note 67; Parlin, *supra* note 63; Dunn, *supra* note 16, at 35.

116. 11 U.S.C. § 1181(b) (Supp. I 2018); Troop & Alfano, *supra* note 110; Baran Bulkat, *What Is the Disclosure Statement in Chapter 11 Bankruptcy?*, ALLLAW, https://www.alllaw.com/articles/nolo/bankruptcy/disclosure-statement-chapter-11.html (last visited Oct. 13, 2021) (noting that after a debtor files a disclosure statement, which must contain adequate information regarding the debtor's financial affairs, "the court will hold a hearing to approve or reject it," contributing to the costs and length of Chapter 11).

117. § 1181(b); Blackmon, *supra* note 26, at 350 (stating that the lack of a creditor's committee, unless ordered by a bankruptcy court, benefits the debtor, who must generally pay committee expenses, by making reorganization "less financially burdensome").

118. Troop & Alfano, *supra* note 110.

119. Dunn, *supra* note 16, at 36 ("If all the requirements of 11 USC 1129(a) . . . are satisfied with respect to a plan, on request of the debtor, the court will confirm the plan notwithstanding the absence of an impaired accepting class of claims as long as the plan does not discriminate unfairly and is 'fair and equitable.'" (quoting 11 U.S.C. § 1191(b) (Supp. I 2018))); Robert Drummond, *SBRA & CARES Act: Relief in Federal COVID-19 Response Includes Chapter 11, Chapter 13 Bankruptcy Changes*, MONT. LAW., June 2020, at 16, 16 ("A court can confirm a plan under the SBRA even if all impaired classes vote to reject the plan.").

ownership over the objection of unsecured creditors,[120] Subchapter V allows small businesses to continue to own and manage their businesses throughout the bankruptcy process.[121] Lastly, unlike a traditional Chapter 11 case, where debtors must pay administrative expense claims on a plan's effective date or in the ordinary course of business, Subchapter V allows debtors to stretch out these payments over the course of the plan.[122] Therefore, Subchapter V affords small businesses a process that moves at "light speed by traditional Chapter 11 standards," and which imposes significantly less expenses and complexities.[123]

3. Continuing Creditor Protections with Subchapter V

Congress imposed three changes with the SBRA that have a direct effect on creditors: a judge can confirm a reorganization plan without the affirmative vote of creditors; creditors cannot file a plan; and the United States Trustee does not have to, and often will not, appoint a creditors' committee.[124] But this does not mean that creditors do not have a right to participate in a small business's restructuring.[125] In fact, creditors still have a number of rights when it comes to the SBRA, many of which remain unaltered from traditional Chapter 11 rights afforded to creditors.[126] First, small business debtors must give creditors at least as much as they would have received if the debtor had chosen

120. *See supra* notes 68-69 and accompanying text; Troop & Alfano, *supra* note 110 ("Under the absolute priority rule in non-Subchapter V cases, existing owners cannot retain equity in the debtor over the objection of a class of unsecured creditors, unless the class is paid in full or the owners contribute new capital into the company. Most often in small business cases, relinquishing equity is not a viable option for a small business, because the owners are the only managers willing or able to run the business. In addition, small business owners often do not have sufficient cash or ability to borrow to buy the debtor's reorganized equity. Therefore, creditor consent often is a prerequisite to confirming a non-Subchapter V case, giving creditors substantial leverage over the small business owner.").

121. § 1191; *see* Bailey & Norton, *supra* note 69 ("New Subchapter V does not include . . . limitations on equity retaining ownership. Now the court may confirm a plan over the objection of unsecured creditors as long as all projected disposable income of the debtor, to be received in a three-year period or such longer period as the court may approve but not to exceed five years, will be applied to the plan.").

122. § 1191(e); *see* Troop & Alfano, *supra* note 110.

123. *See* Lance P. Martin, *Understanding the New "Fast-Pass" Small Business Bankruptcy Process*, WARD & SMITH, P.A. (Mar. 24, 2020), https://www.wardandsmith.com/articles/understanding-the-new-fast-pass-small-business-bankruptcy-process. *But see* O'Brien, *supra* note 15 (noting that "a Subchapter [V] filing still comes with a hefty price tag: about $10,000 to $50,000, depending on the complexity of the case").

124. *What Creditors Need to Know About the Small Business Reorganization Act*, RUBIN & RUDMAN LLP (June 4, 2020) [hereinafter *What Creditors Need to Know*], https://www.rubinrudman.com/news/what-creditors-need-to-know-about-the-small-business-reorganization-act-2.

125. *Id.*

126. *Id.*

liquidation.[127] Second, secured creditors, which include any creditors who issue credit that is backed by collateral,[128] can elect to have their claims entirely secured by their collateral, "while receiving altered payment terms under the [p]lan."[129] Third, secured creditors can have their collateral adequately protected against reduction or can receive relief from the automatic stay, which otherwise halts any collection efforts by creditors, to realize on their collateral.[130] Finally, analogous to a traditional Chapter 11 case, plans under the SBRA must be feasible, which means that a creditor can object to the debtor's plan if it seems unlikely that the debtor will have the ability to make plan payments accordingly.[131]

While creditors often have negative attitudes about bankruptcy, when "faced with the possible alternative of their account debtor going out of business, creditors may find a process that provides them with a fair, albeit incomplete, recovery to be a better alternative."[132] With the new Subchapter V reorganization process, creditors may find the streamlined, more cost-efficient procedures "beneficial by making it easier for debtors to come up with a payment plan based on reasonably predictable standards."[133] Creditors can use the above-mentioned provisions, in applicable circumstances, to improve their recovery from

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127. 11 U.S.C. § 1129(a)(7) (discussing the provisions for plan confirmation); Troop & Alfano, *supra* note 110 ("To confirm its plan of reorganization, the small business debtor must satisfy the so-called Best Interest Test by providing creditors at least as much as they would receive if the debtor were liquidated and not reorganized.").

128. Julia Kagan, *Secured Creditor*, INVESTOPEDIA (Mar. 31, 2021), https://www.investopedia.com/terms/s/secured-creditor.asp ("In the case of a secured loan, collateral refers to assets that are pledged as security for the repayment of that loan.").

129. 11 U.S.C. § 1111(b)(2); Troop & Alfano, *supra* note 110 ("The effect of a section 1111(b)(2) election is to secure for the secured creditor any post-confirmation increase in the value of its collateral effectively upon its sale, at the expense of receiving payment on the unsecured deficiency part of its claim under the debtor's confirmed plan of reorganization.").

130. 11 U.S.C. § 362 (defining the automatic stay, which prevents creditors from pursuing debtors for amounts owed after debtors file for bankruptcy); Troop & Alfano, *supra* note 110.

131. *What Creditors Need to Know*, *supra* note 124 ("Some debtors may overestimate their ability to make payments in order to show that they are paying more than in a Chapter 7 liquidation or for other reasons. Creditors have a right to object to such a plan under the feasibility requirement.").

132. *Id.* ("Mention the word 'bankruptcy' to most creditors and their reaction is predictably negative.").

133. *Id.* For example:

> Banks will find that the ability of their customers to more easily shed unsecured debt will put the business in a healthier, more viable state. Landlords, too, will also find that their tenant, no longer overburdened with debt that it cannot pay, will be in a better position to pay rent.

Id.; *see also ABI Media Webinar*, *supra* note 68 (stating that creditors may come to value the SBRA and its provisions because it will not impair their interests any more than traditional Chapter 11 cases do, and it will be more efficient and less costly).

a Subchapter V debtor when necessary and to ensure that they get what they deserve out of the bankruptcy process.[134]

F. Steps After the Small Business Reorganization Act

As a result of the COVID-19 pandemic, in 2020 Congress passed another amendment in hopes of assisting small business debtors, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").[135] The CARES Act expanded eligibility for Subchapter V debtors by increasing the debt ceiling from $2,725,625 to $7.5 million, which was originally subject to a sunset clause that would reinstate the SBRA's former debt limit in March 2021.[136] However, the COVID-19 Bankruptcy Relief Extension Act of 2021 "was signed into law by President Biden on March 27, 2021, extending the key provisions . . . enacted in the CARES Act for another year."[137]

The CARES Act amendment to the SBRA makes its streamlined Chapter 11 procedures more widely available for a limited period of time.[138] "With the COVID-19 pandemic wreaking havoc on businesses large and small" in various industries throughout the United States, the modifications to the SBRA under the CARES Act have broadened accessibility to the reorganization process for debts acquired both prior to and as a result of the pandemic.[139] Many consider increasing the debt limit with the CARES Act a "great response" to the devastating economic issues derived from the pandemic.[140] However, "an economic recovery will need much more than a 'shot in the arm.'"[141] The COVID-19 pandemic "has continued much longer than originally

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134. Troop & Alfano, *supra* note 110.

135. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113, 134 Stat. 281, 310-12 (2020).

136. *See id.*; *see also* O'Connor, *supra* note 12 (noting that the debt limit change from the SBRA to the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") reflected "an increase of more than 300%").

137. Harriet Wallace, *Cares Act Bankruptcy Provisions Extended for Another Year*, JDSUPRA (Apr. 2, 2021), https://www.jdsupra.com/legalnews/cares-act-bankruptcy-provisions-7765213.

138. Fawkes, *supra* note 20, at 8 (declaring that the SBRA "was clearly not crafted in anticipation of a global pandemic"); *see also* Mark Bossi et al., *CARES Act Expands Eligibility Under Small Business Reorganization Act of 2019*, THOMPSON COBURN LLP (Mar. 27, 2020), https://www.thompsoncoburn.com/insights/blogs/credit-report/post/2020-03-27/cares-act-expands-eligibility-under-small-business-reorganization-act-of-2019 ("The increase in eligibility contained in CARES will increase the number of small businesses that can take advantage of this new law.").

139. Fawkes, *supra* note 20, at 8 (noting that "[a]ccessibility to the [C]hapter 11 process by small- and medium-sized businesses – and the ability of [these] debtors to use the protections of the Bankruptcy Code to restructure debt obligations, renegotiate leases and key supply contracts, and manage trade indebtedness" is the best way to help small businesses in the economy after the COVID-19 pandemic).

140. Nancy B. King, *Proposed SBRA Amendments to Propel the Post-COVID Recovery*, AM. BANKR. INST. J., April 2021, at 8, 80.

141. *Id.* at 9 (referring to the COVID-19 vaccine).

anticipated, and many businesses have been in pure survival mode without the time, money or personnel to reorganize around the core parts of their businesses."[142] Scholars have argued a March 2022 sunset clause is premature.[143]

The executive branch has also become involved in assisting small businesses.[144] President Biden adopted Senator Elizabeth Warren's comprehensive bankruptcy proposal, renaming it "The Biden Plan for Bankruptcy Reform."[145] While many of the reforms focus on consumer bankruptcy,[146] Biden has advocated for "fundamentally reshap[ing] our bankruptcy system . . . made worse by a once-in-a-generation economic crisis caused by Donald Trump's failed leadership . . . ."[147] With an unprecedented amount of small, middle market, and big businesses facing extreme financial distress, Biden has the American Bankruptcy Institute ("ABI") report from 2014 to rely on, which provides a detailed manual for reforms that are necessary to "better balance the goals of reorganizing business debtors and preserving jobs with the interests of creditors and stakeholders."[148] President Biden has shown a particular concern for small businesses since his first day in office, as he has

142. *Id.*

143. *Id.*

144. *See Fact Sheet: The Build Back Better Agenda Will Provide Greater Tax Fairness for Small Businesses*, WHITE HOUSE (Aug. 19, 2021) [hereinafter *Fact Sheet*], https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/19/fact-sheet-the-build-back-better-agenda-will-provide-greater-tax-fairness-for-small-businesses.

145. Mette H. Kurth & Dan Mette, *The Biden (aka Warren) Plan for Bankruptcy Reform*, N.Y. L.J. (Sept. 18, 2020, 3:02 PM), https://www.law.com/newyorklawjournal/2020/09/18/the-biden-aka-warren-plan-for-bankruptcy-reform (noting that Warren named her proposal "Fixing Our Bankruptcy System to Give People a Second Chance"); *see also* Douglas MacMillan & Jonathan O'Connell, *Americans' Debts Are Mounting, Putting New Focus on Biden's Role Opposing Bankruptcy Protections*, WASH. POST (Oct. 27, 2020, 6:00 AM), https://www.washingtonpost.com/business/2020/10/27/biden-bankruptcy-reform ("Fifteen years ago, Senate Republicans thanked Joe Biden for helping them pass [the BAPCPA] over the objections of consumer advocates and liberal Democrats. But this year, with millions of Americans out of work and buried under mounting home, medical and student loan debt, the former vice president changed his position on the 2005 bankruptcy law, saying he supports many of the protections he rejected then . . . [when he] pushed a theory that bankruptcy protections were letting too many people off the hook for debts and putting too much of the burden of unpaid bills on creditors.").

146. *The Biden Plan for Bankruptcy Reform*, BIDEN HARRIS DEMOCRATS, https://joebiden.com/bankruptcyreform (last visited Oct. 13, 2021) (describing that the plan will "[e]xpand people's rights to take care of themselves and their children while they are in the bankruptcy process[,] . . . [e]nd the absurd rules that make it nearly impossible to discharge student loan debt in bankruptcy[,] . . . [l]et more people protect their homes and cars in bankruptcy so they can start from a firm foundation when they start to pick up the pieces and rebuild their financial lives . . . [and h]elp address shameful racial and gender disparities that plague our bankruptcy system").

147. MacMillan & O'Connell, *supra* note 145 ("[A]dvocates say changes are badly needed and that bankruptcy reform has not been a priority of President Trump, who has boasted of how his companies repeatedly used bankruptcy law in the past to protect his wealth and 'make deals better.'").

148. Kurth & Mette, *supra* note 145; *see* AM. BANKR. INST., *supra* note 16, at 275.

"focused on providing [them] with the tools and resources they need to reopen, rehire, and rebuild," granting billions of dollars in relief to small businesses alone.[149] Having already extended the CARES Act debt limit,[150] as well as providing other avenues of relief to small businesses, Congress, along with the Biden administration, may take further steps to revamp the reorganization process for small businesses in the wake of the COVID-19 pandemic.[151]

III. WHEN SMALL IS STILL TOO BIG

Part III of this Note contends that although the SBRA took a big stride in the right direction for small business reorganization, it fell short in providing adequate assistance due to its low debt limit of $2,725,625.[152] Part III continues by analyzing three debt limit increase proposals to better assist small businesses with the reorganization process.[153] These proposals provide support for the argument that a $2,725,625 debt limit falls too low.[154]

A. Why a $2.7 Million Limit Is Still Too Low for Small Business Debt

Despite the clear benefits to debtors and creditors afforded by the SBRA, a debt ceiling at $2,725,625 excludes many small businesses from reorganizing under Subchapter V.[155] A low debt limit means limited applicability.[156] Many small businesses will consult bankruptcy

149. *See Fact Sheet*, *supra* note 144; *see also* Todd Simmens, *Highlights of Consolidated Appropriations Act, 2021*, BDO U.S., https://www.bdo.com/insights/tax/federal-tax/new-stimulus-package-passed-december-21-2020 (Jan. 21, 2021) ("The Consolidated Appropriations Act, 2021, a massive tax, funding, and spending bill that contains a nearly $900 billion coronavirus aid package was passed by Congress . . . to bolster the economy [and] provide relief to small businesses . . . . The bill earmarks . . . $284 billion for a new round of forgivable small-business loans under the Paycheck Protection Program (PPP) and contains a number of important changes to the PPP. It expands eligibility for loans, allows certain particularly hard-hit businesses to request a second loan, and provides that PPP borrowers may deduct PPP expenses attributable to forgiven PPP loans in computing their federal income tax liability and that such borrowers need not include loan forgiveness in income.").

150. *See supra* text accompanying notes 135-37.

151. *See* Kurth & Mette, *supra* note 145.

152. *See infra* Part III.A.

153. *See infra* Part III.B.

154. *See infra* Part III.B.

155. Blackmon, *supra* note 26, at 345-46, 352.

156. Parlin, *supra* note 63 (contending that an "[i]ncrease to [the] debt ceiling greatly expands [the] universe of persons [and] entities that may benefit"); Ruiqi Chen, *Bankruptcy Bills Could be 'More Muscular,' Advocates Say*, BLOOMBERG L. (Aug. 7, 2019, 1:18 PM), https://news.bloomberglaw.com/bankruptcy-law/bankruptcy-bills-could-be-more-muscular-advocates-say?context=article-related ("[T]his debt limit is too low to be widely effective.").

attorneys "only to learn that, ironically, they are too poor to reorganize" under Subchapter V.[157]

Congress must increase the debt limit to provide meaningful help for small businesses.[158] Over $2 million is a considerable amount of money, but for many small business with any significant secured debt, this limit falls "unrealistically low."[159] Small businesses encompass way more than mom and pop shops and can accumulate millions of dollars of debt without categorizing as large companies operating in various locations.[160] Of course, businesses "larger than the typical 'mom and pop' shop, but . . . still privately owned or closely held . . . are not immune from financial distress, whether COVID-19 induced or otherwise . . . ."[161] In passing the SBRA and setting the debt limit at $2,725,625, Congress excluded numerous "small entities with unsophisticated financial structures and . . . an unenergized creditor constituency."[162]

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157. Amy E. Vulpio, *New Subchapter V May Be the Bankruptcy Lifeline Small Businesses Need to Survive COVID-19*, WHITE & WILLIAMS LLP, https://www.whiteandwilliams.com/resources-alerts-New-Subchapter-V-May-be-the-Bankruptcy-Lifeline-Small-Businesses-Need-to-Survive-COVID-19.html (Apr. 15, 2020).

158. Chen, *supra* note 156. Sam Gerdano, executive director of the American Bankruptcy Institute ("ABI"), called the SBRA "a 'fine first step' towards creating better small business bankruptcy protections, but [noted that] the law could be more 'muscular.'" *Id.* Beth Milito, senior executive counsel of the National Federation of Independent Businesses, stated that the bill was "a good start." *Id.* Bruce Markell, a bankruptcy professor at Northwestern Pritzker School of Law, noted that "[i]t's like putting a band aid on a really bad cut. It's going to do a little to help and it addresses the problem, but it's not enough." *Id.* Robert J. Keach, a fellow of the American College of Bankruptcy, a former president of the ABI, and the co-chair of the ABI's Commission to Study the Reform of Chapter 11, stated in an ABI webinar, "a lot of us would have liked to have seen the debt limit here . . . higher." *ABI Media Webinar*, *supra* note 68; *see also* Memorandum from Roger Cox (on file with author) ("[T]his appears to be a well-intentioned step, but the debt limit will severely limit SBRA's applicability to very small 'mom & pop' debtors.").

159. Memorandum from Roger Cox, *supra* note 158 (arguing that as a result of the low debt limit, Subchapter V "may end up effectively being more of a large Chapter 13 . . . than a small Chapter 11").

160. Haines & Hendel, *supra* note 17, at 88-89; Chen, *supra* note 156 ("It doesn't take a business[] of much size to run up $2.7 million in debt."); *see also* M. Douglas Flahaut & Justin A. Kesselman, *COVID-19 Stimulus Legislation Aims to Make Chapter 11 Easier for Many More Small Businesses*, ARENT FOX (Mar. 27, 2020), https://www.arentfox.com/perspectives/alerts/covid-19-stimulus-legislation-aims-make-chapter-11-easier-many-more-small (finding that small businesses, especially those in major cities and population centers, will not have much luck reorganizing with a debt limit of $2,725,625); *What's the Average Small Business Loan Amount?*, PROTECT L. GRP., https://sba-attorneys.com/whats-the-average-small-business-loan-amount (last visited Oct. 13, 2021) (noting that in 2018, the average small business loan amounted to $663,000, but based on the amount necessary for the specific business in question, small business loans can range from $13,000 to over $1.2 million).

161. Brett S. Theisen & Natasha Songonuga, *Subchapter V Bankruptcy for Middle Market Debtors*, GIBBONS (Sept. 17, 2021), https://www.gibbonslaw.com/resources/publications/subchapter-v-bankruptcy-for-middle-market-debtors.

162. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079; Norton & Bailey, *supra* note 27; Haines & Hendel, *supra* note 17, at 89.

Concrete data concerning the impact of the SBRA and the $2,725,625 debt ceiling remains sparse considering the fact that the SBRA went into effect on February 19, 2020, and the CARES Act raised the debt limit shortly thereafter on March 27, 2020.[163] However, even before Congress passed the SBRA, many argued that the small business reorganization process needed a high debt limit.[164] Scholars have offered different debt limit proposals.[165]

B. *So What Have Scholars Proposed in the Past?*

Critics seem to agree that Congress should set the debt limit above $2,725,625 for small businesses, but arguments vary as to just how high Congress should raise it.[166] Subpart 1 discusses why the NBRC recommended a $5 million debt limit.[167] Subpart 2 explores the arguments for a $7.5 million debt limit.[168] Finally, Subpart 3 analyzes why the ABI and the National Bankruptcy Conference ("NBC") argued for a $10 million debt limit.[169]

1. How About a $5 Million Debt Limit?

Following the enactment of the BRA, the NBRC recommended that Congress increase the debt limit to $5 million.[170] The NBRC recommended defining the term "small business debtor" as "any debtor in a case under Chapter 11 . . . which has aggregate noncontingent, liquidated secured and unsecured debts as of the petition date or order for relief of five million dollars . . . or less . . . ."[171] The NBRC argued that a $5 million debt limit would include approximately 85% of all businesses seeking bankruptcy reorganization at the time, thus

163. *See ABI: Nearly 500 Small Businesses File for Bankruptcy Under Subchapter V Provision*, ABFJOURNAL (June 26, 2020), https://www.abfjournal.com/dailynews/abi-nearly-500-small-businesses-file-for-bankruptcy-under-subchapter-v-provision; Ed Flynn, *Bankruptcy by the Numbers: Subchapter V's First 1,000 Cases*, AM. BANKR. INST. J., Nov. 2020, at 30, 43 ("Total small business filings have been higher since the SBRA took effect on Feb. 19, 2020, compared to previous years. However, this might be a result of the higher debt ceiling for small business eligibility, which went into effect on March 27, 2020, so the jury is still out on whether the SBRA has led to additional filings by small businesses.").

164. *See, e.g.*, NAT'L BANKR. REV. COMM'N, 1 BANKRUPTCY: THE NEXT TWENTY YEARS 630, 632 (1997).

165. *See* Blackmon, *supra* note 26, at 343.

166. *See id.* at 342-43.

167. *See infra* Part III.B.1.

168. *See infra* Part III.B.2.

169. *See infra* Part III.B.3.

170. *See* NAT'L BANKR. REV. COMM'N, *supra* note 164, at 626.

171. *Id.* ("Selecting a definition of small business for purposes of bankruptcy requires a series of trade-offs between accuracy and precision, in light of the availability and quality of information available to classify the small business debtor at the outset of a bankruptcy case.").

expanding the scope of a small business case.[172] The NBRC supported its argument for an increased debt limit with evidence that indicated that creditor participation, an important check on a debtor's conduct under Chapter 11, generally does not exist in cases with businesses who have less debt than $5 million.[173]

2. What About $7.5 Million?

A solution proposed in 2010, but not passed into law, advocated for increasing the debt limit to $7.5 million.[174] The bill proposed defining a "small business enterprise debtor" as a "debtor . . . engaged in commercial or business activities . . . that has aggregate noncontingent, liquidated, secured, and unsecured debts as of the date of the order for relief . . . in an amount equal to not more than $7,500,000 . . . ."[175] Based on data presented by the ABI, a $7.5 million debt limit would include approximately 78% to 86.7% of small and medium business debtors.[176]

Moreover, Congress's $7.5 million CARES Act debt limit, although temporary, has helped small- and medium-sized businesses tremendously thus far.[177] From February 19, 2020 to October 9, 2020,

172. *Id.* at 632. The National Bankruptcy Review Commission ("NBRC") offered tables which break down liabilities and gross amount of income by million-dollar categories, showing data from Alabama, San Francisco, Delaware, Philadelphia, Chicago, and Dallas, and then calculating the average percentage of businesses that each debt limit would capture. *Id.* at 630-32; *see also* AM. BANKR. INST., *supra* note 16, at 287 (presenting more recent data from 2004 and 2007, finding that if Congress set the debt limit at $5 million, it would capture about 78% of all business debtors).

173. NAT'L BANKR. REV. COMM'N, *supra* note 164, at 632 ("[T]he available data indicate that creditor participation at the level of debt selected so often tends to be absent that imposition of the higher standards for small business cases is necessary.").

174. *See* Small Business Jobs Preservation Act of 2010, S. 3675, 111th Cong. § 1183 (2010), https://www.congress.gov/bill/111th-congress/senate-bill/3675/text.

175. *Id.* The bill also proposed additional amendments to bankruptcy law prescribing requirements for reorganization of a small business enterprise debtor, including, among other things, amendments to appointment and duties of the Trustee, rights of the debtor in possession, filing and contents of the reorganization plan, confirmation of the reorganization plan, and distribution of payments and funds. *See id.* §§ 1184–86, 1189–90, 1193, 1196.

176. Blackmon, *supra* note 26, at 364 & n.218.

177. *See* Fawkes, *supra* note 20, at 8; Anthony W. Austin, *The CARES Act – Amendments to the Small Business Reorganization Act*, FENNEMORE (Mar. 31, 2020), https://www.fennemorelaw.com/the-cares-act-amendments-to-the-small-business-reorganization-act ("The CARES Act almost triples [the] debt limit and allows far more businesses to take advantage of this crucial program at a time when many small businesses will be severely impacted by the economic slowdown. . . . By opening up the SBRA to more debtors, Congress has created a mechanism by which small businesses can seek the protections of a bankruptcy filing, restructure their debts, and emerge from bankruptcy with a viable business model."); O'Connor, *supra* note 12 ("Even in its infancy, Subchapter V has shown itself to be an attractive option for small businesses . . . in need of relief. But the availability of that relief should not be curtailed simply because the CARES Act amendment to the SBRA is slated to sunset next year. If Subchapter V is going to maintain its relevance in the short *and* long term, it should continue to be available to as many businesses as possible; retaining the $7.5 million debt limit increase from the CARES Act is one way to do this.").

the first 1,000 small business debtors elected to file for Subchapter V.[178] In this eight-month period, just under 20% of all Chapter 11 cases filed were Subchapter V cases.[179] In twenty-two states as well as the District of Columbia, at least 50% of the Chapter 11 cases filed have been under Subchapter V.[180] In its first full year, "a total of 1,643 Subchapter V cases were filed across the country. That represents about 23% of the total Chapter 11 cases filed during the same period."[181] The most common types of businesses for Subchapter V debtors thus far include those from a variety of industries most disrupted by the pandemic, such as restaurants and bars, health care, retail, construction, real estate, manufacturing, hotels, fitness, and taxi services.[182] Although the CARES Act made clear that the increased debt limit resulted as an emergency measure directed at the COVID-19 pandemic, the CARES Act debt limit exemplifies the immense benefits to small businesses, particularly how many more can reorganize, when Congress sets the debt limit at $7.5 million.[183]

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178. Flynn, *supra* note 163, at 31 ("Subchapter V case filings started out strong in February 2020. They dropped off during late March and April, likely due to the shutdowns as a result of the pandemic. However, filings have increased each month since April, and during each of the last four full months filings have set new records.").

179. *Id.* at 31, 42 ("However, this figure is misleading because since the pandemic, [C]hapter 11 filing figures have been skewed by the large number of related filings by subsidiaries in a corporate group. Most of the related filings occur in the largest [C]hapter 11 cases, and most of these cases are filed in the Southern District of New York, the District of Delaware and the Southern District of Texas. If we exclude these three districts from the calculation of [S]ubchapter V frequency, about 36[%] of [C]hapter 11 cases have been [S]ubchapter V.").

180. *Id.* at 42.

181. David Brennan, *The First Year of the New Bankruptcy Law for Small Businesses: Subchapter V of the Bankruptcy Code, the Small Business Reorganization Act*, DENVER BUS. J. (May 19, 2021), https://www.bizjournals.com/denver/news/2021/05/19/first-year-new-bankruptcy-law-for-small-businesses.html; *see also* Teadra Pugh, *Analysis: Four Statistical Snapshots of Subchapter V's 1st Year*, BLOOMBERG L. (Feb. 22, 2021, 1:06 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-four-statistical-snapshots-of-subchapter-vs-1st-year ("The Middle District of Florida takes the prize for the most Subchapter V cases filed during its first year with more than 140 cases. Districts within Florida, California, and Texas rounded out the top five.").

182. Ed Flynn, *Weekly Bankruptcy Analysis: April 5-11, 2021*, AM. BANKR. INST., https://abi-org.s3.amazonaws.com/Covid19/stats/Weekly_Update_Apr_5-11_2021.pdf (last visited Oct. 13, 2021).

183. *See* Flahaut & Kesselman, *supra* note 160.

> The case filings in the Bankruptcy Court for the District of Delaware . . . reveal that of the [twenty-nine] Subchapter V cases filed there, six (20%) had debtors who became eligible for Subchapter V as a result of the increased liability limit provided by the CARES Act. Another seven (24%) were re-designated when the debtor or an affiliate exceeded the statutory debt limit. If these patterns are typical of other courts and remain consistent, they could bolster arguments for extending the expiration date of the $7.5 million liability limit beyond March . . . or even further increasing the debt limit.

Teadra Pugh, *Analysis: Small Change to SBRA Makes a Big Bankruptcy Difference*, BLOOMBERG L. (Nov. 30, 2020, 1:06 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-small-change-to-sbra-makes-a-big-bankruptcy-difference. *But see* O'Brien, *supra* note 15 (finding that even after the CARES Act increased the SBRA's debt limit, small businesses may not wish to take advantage of Subchapter V because "[m]ost business owners are concerned primarily with getting

3. Does a $10 Million Debt Limit Work?

Both the ABI and the NBC recommended a debt threshold of $10 million.[184] The ABI recommended a "small[-] or medium-sized enterprise" be defined as a business debtor with "[n]o publicly traded securities in its capital structure or in the capital structure of any affiliated debtors whose cases are jointly administered . . . and . . . [l]ess than $10 million in assets or liabilities on a consolidated basis with any debtor or nondebtor affiliates as of the petition date."[185] The ABI found a $10 million debt limit would capture approximately 85% to 90% of all Chapter 11 filings.[186] The ABI split two major kinds of Chapter 11 debtors between those who had more than $10 million in debt and those who had less than $10 million in debt.[187] The ABI noted that businesses with $10 million or less in assets or liabilities made up the majority of Chapter 11 cases, and consisted of the small- and medium-sized businesses which the current law did not serve well.[188] The ABI reasoned that sweeping in the most small business debtors with a $10 million debt limit would allow for the bankruptcy process to better serve small business debtors' reorganizational needs.[189]

The NBC also recommended a $10 million debt limit.[190] The NBC proposed making Chapter 12 available to a "small business enterprise," defining it "as a corporate or non-corporate person—other than a family farmer or family fisherman—who is engaged in a business or commercial activity and has total debts not exceeding $10 million, provided at least fifty percent of the debt arises from the person's

out from under their liability for business debt, and that's better done using a personal Chapter 7 or Chapter 13 filing[.]").

184. AM. BANKR. INST., *supra* note 16, at 279; NAT'L BANKR. CONF., *supra* note 18, at 112.

185. AM. BANKR. INST., *supra* note 16, at 279. The ABI further recommended that if a business debtor has no publicly traded securities in its capital structure or in the capital structure of any affiliated debtors whose cases are jointly administered with the debtor's case but has more than ten million and less than fifty million in assets or liabilities, "the debtor may file a motion seeking to be treated as a [small- or medium-sized enterprise] in its [C]hapter 11 case." *Id.* Additionally, the ABI concluded by recommending that Congress delete the "small business case" and "small business debtor" provisions entirely. *Id.*

186. *Id.* at 287-88 (providing data collected by "Professor Anne Lawton to prepare several analyses of [C]hapter 11 debtors' assets and liabilities based on the datasets she built for [C]hapter 11 filings in 2004 and 2007").

187. *Id.* at 287 (observing "a natural breaking point in the data at the $10 million threshold").

188. *ABI Commission*, *supra* note 20, at 309-11 (noting that 91.4% of Chapter 11 debtors had assets under $10 million and 86.7% of Chapter 11 debtors had liabilities under $10 million).

189. *See* ROBERT J. KEACH, TESTIMONY OF AMERICAN BANKRUPTCY INSTITUTE 5 (2019), https://docs.house.gov/meetings/JU/JU05/20190625/109657/HHRG-116-JU05-Wstate-KeachR-20190625.pdf.

190. *See* NAT'L BANKR. CONF., *supra* note 18, at 112. *But see* Donald L. Swanson, *Small Business Reorganization Act of 2019: Frequently Asked Questions & Some Answers*, AM. BANKR. INST., https://www.abi.org/feed-item/small-business-reorganization-act-of-2019-frequently-asked-questions-some-answers (last visited Oct. 13, 2021) (stating that more recently, the National Bankruptcy Conference ("NBC") suggested that Congress increase the debt limit to $7.5 million).

business or commercial activities."[191] After analyzing the problems small businesses faced with traditional Chapter 11 reorganization, and highlighting the success that Chapter 12 brought for family farmers, the NBC advocated for amending Chapter 12 to include small businesses and increasing the debt limit to $10 million.[192]

Further, Congress passed the Family Farmer Relief Act of 2019 ("FFRA"), increasing the Chapter 12 debt limit from $4.4 million to $10 million.[193] Like the SBRA's debt limit, "[t]he old [FFRA] debt limit . . . became an unintentional hurdle to entering Chapter 12 that many distressed farmers could not leap over."[194] The increased debt limit expanded the definition of a "family farmer" and benefited a larger group of farmers facing financial difficulties.[195] The FFRA's $10 million debt limit provides further support for a $10 million debt limit for the SBRA because it seems "odd that farmers can have a $10 million debt limit but anyone else can only have $2.7 million."[196]

IV. HOW TO SAVE SMALL BUSINESSES

This Note argues that Congress should raise the SBRA's debt limit to $10 million.[197] Part IV contends that a newly established commission should monitor the impact of the debt limit expansion in order to determine whether Congress should alter it after two years.[198] With these changes to the SBRA, small businesses will have the opportunity to take

191. NAT'L BANKR. CONF., *supra* note 18, at 112-13 (proposing that Congress keep intact a "small business debtor" definition and debt limit, leaving businesses with a choice between filing as a "small business debtor" or a "small business enterprise").

192. *Id.* at 105, 112. The NBC wanted to amend Chapter 12 to include both family farmers and fishermen, as well as small businesses, because Chapter 12 had "proven to be a viable, low-cost reorganization procedure" that could provide a "time-tested, successful model for efficient reorganization of small businesses." *Id.* at 98, 112.

193. Family Farmer Relief Act of 2019, Pub. L. No. 116-51, § 2, 133 Stat. 1075, 1075; *see* Blackmon, *supra* note 26, at 358.

194. Blackmon, *supra* note 26, at 356 (noting that as a result, family farmers could not take advantage of the benefits that Chapter 12 had to offer); *see also* Swanson, *supra* note 190 ("Relief under the SBRA is modeled on [C]hapter 12 relief. Chapter 12 came into existence in 1986 because farmers had difficulty getting plans confirmed under [C]hapter 11. The SBRA exists today because small businesses have had difficulty getting plans confirmed under [C]hapter 11.").

195. Blackmon, *supra* note 26, at 358.

196. Chen, *supra* note 156.

197. *See infra* Part IV.A. It may seem tempting to do away with debt limits altogether and instead follow a system where a number of attributes define whether a small business can use Subchapter V. *See* Blum, *supra* note 11, at 236. However, prior to the SBRA, the NBRC considered but rejected this idea on the grounds that a plethora of litigation would likely follow if a set of attributes or circumstances determined who could file for Subchapter V. *Id.*; *see also* AM. BANKR. INST., *supra* note 16, at 288 (discussing whether to include any factors or qualifications in the small business debtor definition, but rejecting the idea because it may make the definition "overcomplicated").

198. *See infra* Part IV.B.

advantage of the reorganizational help that they so desperately deserve.[199]

A. The Best Solution Is an Over-Inclusive One

Congress should raise the debt ceiling to $10 million as both the ABI and the NBC proposed.[200] When considering past proposed debt limits—$5 million, $7.5 million, and $10 million—Congress should set the debt limit higher at $10 million, as opposed to setting it lower at $5 million or $7.5 million.[201] If the debt limit falls too low, it will reduce the effectiveness of any reform for small business debtors by excluding them from taking advantage of the reforms.[202] If the debt limit is too high, it will include at least some debtors who do not need protection from the streamlined, cheaper, more-controlled procedures.[203] No debt limit will perfectly include all those it should while excluding all those who do not need protection.[204] When considering whether to make reform over-inclusive or under-inclusive, erring on the over-inclusive side would cause less harm.[205] Thus, Congress should amend the SBRA debt limit to $10 million, creating the potential result of over-including bigger businesses as opposed to under-including small and medium businesses that need the help of the bankruptcy process to survive.[206]

As alluded to above,[207] a $10 million debt ceiling may not be a good use of resources when applying "an expedited and more strongly supervised process beyond those debtors who exhibit the attributes that make them necessary."[208] A risk always prevailed that debtors may try to classify some debts as contingent or unliquidated to "squeeze into"

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199. *See infra* Part IV.

200. *See ABI Commission*, *supra* note 20, at 310-11 (arguing that a $10 million debt limit would benefit small businesses with the reorganization process); NAT'L BANKR. CONF., *supra* note 18, at 105, 112 (comparing small businesses and Chapter 11 to family farmers and Chapter 12 and arguing that Congress should amend Chapter 12 to include small businesses and raise the debt limit to $10 million).

201. *See supra* Part III.B; *see also* Blum, *supra* note 11, at 236 ("[T]he debt limit should be set at a high level.").

202. Blum, *supra* note 11, at 192; *see also* Bailey & Norton, *supra* note 69 (arguing that a low debt limit restricts Subchapter V to a "narrow group of debtors").

203. Blum, *supra* note 11, at 192-93. "The large size of the debt ceiling favors inclusiveness, but it casts a net that covers almost every business under Chapter 11 . . . ." *Id.* at 236.

204. *See id.* at 192-93.

205. *See id.* at 193; *see also Over-Inclusive Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/o/over-inclusive (last visited Oct. 13, 2021) ("The term over-inclusive means that the law includes persons who are not appropriate for the designated group. This is opposed to being under-inclusive, where a law leaves out persons appropriate to belong in the designated group.").

206. *See* Blum, *supra* note 11, at 192-93.

207. *See supra* note 203 and accompanying text.

208. Blum, *supra* note 11, at 237.

Subchapter V.[209] However, increasing the debt limit will allow big businesses with high contingent and unliquidated debts that could reorganize under traditional Chapter 11 to qualify as a "small business debtor" under Subchapter V.[210] Big businesses squeezing into Subchapter V may flood bankruptcy courts.[211] Nevertheless, unless serious resource issues arise, the best approach starts with a more inclusive standard, restricted by the option to cut the debt limit back accordingly if time indicates that it extends too broadly, creating substantial inefficiency or hardship.[212]

But why not just keep the $7.5 million CARES Act debt limit and use that as a basis to examine resources and related complications?[213] The COVID-19 pandemic has created one bump in our national economy, despite the decades of reorganization problems faced by small businesses.[214] It remains uncertain whether the statistics associated with "Subchapter V utilization [were] driven by . . . the COVID pandemic and the resulting devastation of small businesses . . . ."[215] As a result, Congress should not base an analysis for a problem that has persisted throughout history on completely unprecedented times.[216]

B. A New Commission to the Rescue!

Adjustment of the proposed $10 million debt limit may become necessary as its reach and scope become more evident.[217] As a result, when raising the debt limit, Congress should also include a section establishing a commission, with similar powers to those that existed for

209. Troop & Alfano, *supra* note 110.

210. *Id.* ("For example, a midsize business—with over 100 employees and $20 million in annual revenue—that is subject to $150 million in litigation claims, would qualify for Subchapter V as long as its noncontingent and unliquidated claims . . . total less than $7.5 million [under the CARES Act]."); *see also* Marshack & Mang, *supra* note 109, at 35 (noting that the SBRA's small business debtor definition "can exclude a surprising amount of known (albeit contingent and/or unliquidated) claims, and allow more persons or businesses to qualify than one might expect. In other words, a debtor may qualify for relief under Subchapter V even if its balance sheet shows over $5 million of debt, so long as all debt in excess of $2,725,625 is contingent and unliquidated").

211. *See* Blum, *supra* note 11, at 237.

212. *Id.*

213. *See* Brennan, *supra* note 181.

214. *See* Fawkes, *supra* note 20, at 8.

215. Brennan, *supra* note 181; *see supra* notes 178-81 and accompanying text.

216. *See supra* Part II.C–D; *see also* Marc Barreca et al., *Reports and Reflections from Chief Bankruptcy Judges Regarding the Effects of the COVID-19 Pandemic on Their Courts and Their Responses to It*, 29 NORTON J. BANKR. L. & PRAC. 177, 182 (2020) ("It is unclear whether the COVID-19 pandemic will have an impact on the likelihood that businesses will be able to reorganize . . . . The short- and long-term economic ramifications of the pandemic are far from clear, but disruptions to consumer spending, credit availability, and the supply chain, as well as wide-spread unemployment, could present potential obstacles for . . . businesses . . . seeking to reorganize and restructure their debts.").

217. *See* Blum, *supra* note 11, at 247.

the NBRC, but with the sole focus of assessing the SBRA debt limit.[218] Specifically, the Commission should review the impact of the $10 million debt limit after two years and create a report for Congress.[219] In its report, the Commission should include the statutory change itself to adjust the $10 million debt limit, if the Commission believes it is necessary, along with problems, if any, associated with the $10 million debt limit and how the adjustment will help mitigate those problems.[220] When preparing its report, the Commission should consider the presence of bankruptcy court resource issues, big business usage of Subchapter V, and Subchapter V availability to small and medium businesses.[221]

First, when considering the presence of bankruptcy court resource issues, the Commission should investigate the number of judges available compared to the number of cases filed, the caseload of each judge, the time intervals from filing to plan confirmation for each case, and the appropriateness of the result of each case.[222] For this factor, the most important concern is whether enough bankruptcy judges, as well as

218. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 602–03, 108 Stat. 4106, 4147. Modeled after the NBRC, the duties of the Commission should include studying issues related to the Subchapter V debt limit, examining the advisability of proposals with regard to these issues, submitting a report to Congress, and soliciting differing views regarding Subchapter V. *See id.* § 603; *National Bankruptcy Review Commission*, FED. REG., https://www.federalregister.gov/agencies/national-bankruptcy-review-commission#:~:text (last visited Oct. 13, 2021) ("Pursuant to the [BRA], the [NBRC] was terminated on November 20[,] 1997 following the submission of its final report.").

219. *See supra* note 200 and accompanying text; *National Bankruptcy Review Commission*, *supra* note 218.

220. *See, e.g.*, Jim Schonrock et al., *The National Bankruptcy Review Commission*, FINDLAW, https://corporate.findlaw.com/finance/the-national-bankruptcy-review-commission.html (Mar. 26, 2008) (stating that the NBRC's recommendation to limit the dischargeability of credit card debt included "[t]he suggested statutory change itself . . . accompanied by sixteen pages of text, including an explanation of existing law concerning credit card debt, some of the problems associated with it, and some of the changes suggested to the [NBRC]").

221. *See* Blum, *supra* note 11, at 237.

222. *See Caseflow Management Resource Guide*, NCSC, https://www.ncsc.org/topics/court-management/caseflow-management/resource-guide (last visited Oct. 13, 2021) ("Caseflow management is the coordination of court processes and resources so that court cases progress in a timely fashion from filing to disposition. Judges and administrations can enhance justice when a court supervises case progress from the time of filing, sets meaningful events and deadlines throughout the life of a case, and provides credible trial dates.").

> When the system is stressed, resources get misallocated. For example, when Circuit City filed for bankruptcy during the 2008-2009 financial crisis, the court authorized the company to borrow $1.1 billion in order to keep it alive. But it was a zombie; two months later, Circuit City announced it would liquidate. More broadly, judges and lawyers make more mistakes when courts are overwhelmed, cases take longer, and smaller businesses are more likely to be dismissed . . . .

Geoff Colvin, *Pandemic Fallout Is About to Overwhelm the Bankruptcy System—And Hit Small Businesses Hardest*, FORTUNE (Nov. 24, 2020, 1:16 PM), https://fortune.com/2020/11/24/bankruptcy-covid-economy-small-business.

bankruptcy attorneys, remain available to handle the caseload.[223] Next, when considering big business usage of Subchapter V, the Commission should look into the size of the businesses filing Subchapter V cases, how many of the bigger businesses presumably could have survived under traditional Chapter 11 reorganization, whether the bigger businesses have contributed to an overflow of cases, what types of big businesses have filed for Subchapter V, and the benefits Subchapter V has provided for bigger businesses.[224] Third, when considering Subchapter V availability to small and medium businesses, the Commission should determine the number of small and medium businesses able to take advantage of Subchapter V, whether the debt limit excludes any businesses on the smaller end from Subchapter V, the types of smaller businesses using Subchapter V, and the benefits that Subchapter V has provided for small- and medium-sized businesses.[225] After reviewing these three factors, the Commission should determine whether in the past two years the $10 million debt limit has accomplished what it set out to accomplish: to help small businesses with the reorganization process.[226] Then, if necessary, the Commission should advise Congress how to adjust the debt limit accordingly.[227]

V. CONCLUSION

Struggling small businesses have faced decades of reorganizational issues.[228] As a cornerstone of the United States economy, it is vital that small businesses survive.[229] However, when small businesses face financial problems and turn to the bankruptcy system, they rarely see success.[230] Chapter 11 has placed hurdle after hurdle in the way of small

223. *See* Colvin, *supra* note 222 (noting that "[t]here are not enough bankruptcy judges," and as a result, judges and lawyers may find themselves overwhelmed during times of financial distress).

224. *See, e.g.*, *Table F-2– Bankruptcy Filings (June 30, 2020)*, U.S. CTS., https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2020/06/30 (last visited Oct. 13, 2021) (providing a chart of all Chapter 11 filings within a one-year period, separated by each judicial district, which the Commission could use as a model when gathering data concerning the number and size of big businesses filing for Subchapter V); *see also* Blum, *supra* note 11, at 236 (noting that even large businesses may benefit by a change in procedure with regard to Chapter 11 reorganization because efficient disposition of most cases presumably would be enhanced by close monitoring by the appointed Subchapter V Trustee, an increase in the speed of the case with specified time restrictions, and a presumption against extensions).

225. *See, e.g.*, *Table F-2– Bankruptcy Filings (June 30, 2020)*, *supra* note 224; *see also* Flynn, *supra* note 163, at 31 (noting that when assessing the success of Subchapter V, it would also be beneficial to consider "[h]ow many cases propose a consensual plan vs. how many propose a cramdown . . . [and h]ow many plans are confirmed").

226. *See supra* note 103 and accompanying text.

227. *See, e.g.*, Schonrock et al., *supra* note 220.

228. *See supra* Part II.C–D.

229. *See supra* Part II.A.

230. *See supra* Part II.C.

businesses attempting to reorganize their debts, ranging from its complex nature, to its lengthy process and its outrageous fees.[231] The SBRA had the most potential in helping small businesses reorganize their debts when compared to previous efforts,[232] but the big step simply fell short in that Congress set its debt limit too low at $2,725,625.[233] With numerous small businesses excluded from the Subchapter V procedures because they have too much debt, small businesses must use traditional Chapter 11 if they want to reorganize their debts.[234] Thus, for a number of small businesses, the reorganization process presents the same difficulties that it presented before Congress passed the SBRA.[235]

To cure the problems that small businesses face with the reorganization process, this Note proposes that Congress amend the SBRA.[236] In order to allow all struggling small businesses to take advantage of the SBRA and reap the benefits from the streamlined, cost-efficient reorganization process, Congress must increase the debt limit.[237] The United States economy is relying on it.[238]

*Nicole C. Cipriano**

231. *See supra* Part II.C.
232. *See supra* Part II.D–E.
233. *See supra* Part III.A.
234. *See supra* Part III.A.
235. *See supra* Part II.C.
236. *See supra* Part IV.
237. *See supra* Part IV.A.
238. *See supra* Part II.A.

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