



October 23, 2023

Members of the Subchapter V Task Force
American Bankruptcy Institute
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Alexandria, VA 22314

Dear Members of the Task Force:

The American Bankers Association (ABA)¹, and the Independent Community Bankers of America (ICBA)², are providing this statement as our joint industry views on the challenges lenders face associated with the operation of Subchapter V of the Bankruptcy Code.

Overview

We believe it is vitally important for bankruptcy policy makers in Congress to consider the costs and benefits of any bankruptcy law change to *all* stakeholders. Importantly, these stakeholders include not just trustees, judges, debtors, and creditors. The largest stakeholder community, which is often ignored, is the larger population of borrowers – whether business borrowers in the case of Subchapter V or consumers. It is well accepted by industry participants that elevated risks of default and non-payment are related to both the cost and availability of credit in general.

In the context of Subchapter V, the law is too new for our members to confidently assess the true effect on credit availability to small businesses. However, if Subchapter V eligibility requirements are liberalized further or the temporary, COVID-era changes are made permanent, it is likely that non-bankrupt, solvent small business will confront tighter and more costly credit requirements. Such an outcome would slow small business growth and could trigger additional and unnecessary business failures.

In the current economic environment, bankruptcy law changes that would restrict access to credit for small business would be doubly unwise. The Federal Reserve has launched a nearly unprecedented

¹ The American Bankers Association is the voice of the nation's \$23.5 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2.1 million people, safeguard \$18.6 trillion in deposits and extend \$12.3 trillion in loans.

² The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding \$5.8 trillion in assets, \$4.8 trillion in deposits, and \$3.8 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

increase in interest rates, which is impacting the cost and availability of credit. The proposed changes in small business bankruptcy law would create a “perfect storm” that worsens credit conditions for small businesses. Based on recent feedback we have received from lenders that are our member institutions, it would be beneficial to both debtors and creditors for business owners to be required to invest new capital in order to use Subchapter V. This is of concern to many lenders as the number of Subchapter V cases are increasing in certain parts of the country. Many lenders also believe that the increased debt limit was intended to be a temporary measure and should be permitted to expire.

Problematic Provisions of Subchapter V

Public policy choices frequently involve trade-offs. This is true of Subchapter V as well. The fundamental choice made by Congress when originally enacting Subchapter V was to speed the bankruptcy process for the smallest of small businesses by eliminating certain paperwork requirements and severely curtailing the rights of creditors.

As noted by our members, the elimination of the absolute priority rule and the right of creditors to vote on a plan of reorganization removed key oversight and accountability mechanisms. Under Subchapter V as originally enacted, the actual effect on lenders should in theory be limited. However, as the Task Force knows, Congress dramatically raised the debt eligibility limits to \$7.5 million during the COVID pandemic. It is too soon to tell whether expanded Subchapter V has achieved its goals. It is reasonable, however, to conclude on a preliminary basis, based on time-tested standards that examine bankruptcy risk and credit standards, that Subchapter has or will result in burdens on small businesses generally. In our view:

- The temporary increase in the Subchapter V debt limit should be permitted to expire.
- The manner in which debt is calculated for purposes of Subchapter V should be revised to include insider debt to avoid the obvious misuse of this fast-track process to circumvent accountability.
- The GAO or a similar non-partisan entity should be tasked with reviewing the effectiveness of Subchapter V
- Factors to consider in such a review should include how many plans fail to confirm, how many plans fail after a confirmation and the effect of Subchapter V on credit conditions for otherwise solvent small business to include the perspective of risk management professionals who operate inside small business lenders.

Conclusion

In the current economic environment – increased borrowing costs, capital constraints due to regulation and the possibility of a recession – it is crucial that policy makers in Congress intensely focus on fostering an environment where small businesses can flourish. We believe that the costs and burdens on small businesses would greatly outweigh any speculative benefit from liberalizing Subchapter V such as making the temporary \$7.5 million threshold permanent.

Thank you for considering our views.