

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

DAVID G. CAMPBELL  
CHAIR

CHAIR OF ADVISORY COMMITTEE

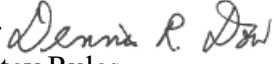
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DENNIS DOW  
BANKRUPTCY RULES

December 5, 2019

MEMORANDUM

TO: Honorable David G. Campbell, Chair  
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow, Chair   
Advisory Committee on Bankruptcy Rules

RE: REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

**I. Introduction**

On August 1, Congress passed the Small Business Reorganization Act of 2019 (“SBRA”), which creates a new subchapter V of chapter 11 for the reorganization of small business debtors. The President signed the legislation on August 23. It will go into effect 180 days after that date, which will be February 19, 2020.

The enactment of SBRA requires amendments to be made to a number of bankruptcy rules and forms, in some cases excepting subchapter V cases from provisions that apply generally to chapter 11 and in other cases making provisions expressly applicable to subchapter V cases. Because SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee seeks to have amended rules issued initially as interim rules for adoption by each judicial district. In addition, the Advisory Committee has approved amended and new forms pursuant to its delegated authority to make conforming and technical amendments to Official Forms.

By email vote in October, the Standing Committee approved for publication proposed interim rules and forms to implement SBRA. The package for publication consisted of eight rules and nine Official Forms, and it was published from October 16 to November 13. Twelve comments were submitted in response to the publication, five of which did not address the rules and forms in question. The other seven, which are discussed in this report, provided helpful

suggestions regarding the published rules and forms, as well as suggestions for amendments to additional rules. With respect to the latter category, it was pointed out that several existing rules use the disclosure-statement hearing date as the trigger for taking certain actions or the setting of dates by the court. Because there will generally be no disclosure statement in subchapter V cases, a different triggering event is needed for those cases.

Following the publication period, the Advisory Committee reviewed the rules and forms with revisions proposed in response to the comments. By email vote concluded on December 4, the Advisory Committee voted unanimously to seek the issuance of thirteen rules as interim rules, and it approved nine new or amended forms as Official Forms pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, subject to later approval by the Standing Committee and notice to the Judicial Conference.

At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules, and it anticipates seeking the Standing Committee's approval at the June meeting for publication of the rules and forms in August 2020.<sup>1</sup>

**Action Item. The Advisory Committee recommends that the following rule and form amendments and new rules and forms be approved as set out in Appendices A and B to this report; that the Standing Committee request approval from the Executive Committee of the Judicial Conference to distribute the interim rules to the district and bankruptcy courts for adoption; and that the Standing Committee inform the Judicial Conference at its next meeting of the promulgation of the Official Forms:**

- Rule 1007,
- Rule 1020,
- Rule 2009,
- Rule 2012,
- Rule 2015,
- Rule 3010,
- Rule 3011,
- Rule 3014,
- Rule 3016,
- Rule 3017.1,
- new Rule 3017.2,
- Rule 3018,
- Rule 3019,
- Official Form 101,
- Official Form 201,
- Official Form 309E,
- Official Form 309F,
- new Official Form 309E2,

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<sup>1</sup> Although the Official Forms will have been officially promulgated, it intends to seek publication of them under the regular procedure in order to ensure that the public has a thorough opportunity to review them.

- new Official Form 309F2
- Official Form 314,
- Official Form 315, and
- Official Form 425A.

## **II. Comments on the Published Rules and Forms**

No comments were received on proposed Interim Rules 1007, 2009, 2015, 3010, 3011, and 3016 or on proposed amendments to Official Forms 309E, 309F, and 315. The Advisory Committee voted to approve them as published

Comments on the remaining published rules and forms are discussed below.

### **A. Rule 1020 (Small Business Chapter 11 Reorganization Case).**

Judge Benjamin Kahn (Bankr. M.D.N.C.) and the National Conference of Bankruptcy Judges (“NCBJ”) addressed an issue that the Advisory Committee had considered in September—whether a delayed decision to elect to proceed under subchapter V should be allowed and, if so, under what circumstances. The Advisory Committee decided then to make no change to the rule to address the issue, with some members expressing the view that delayed elections could be handled through motion practice. The commenters had two different suggestions for how the issue might be addressed: by including a time limit in the rule for a delayed decision to proceed under subchapter V (subject to the court’s authority to allow an election after that date under specified circumstances) or to add language to the Committee Note indicating that the court has discretion to allow delayed elections on a case-by-case basis.

The Advisory Committee preferred the NCBJ’s suggestion of a Committee Note addition, although it concluded that it would be better for the addition to adopt a neutral stance rather than take a position on an issue left open by SBRA. Should a court exercise authority to allow a delayed election, it is likely that one of the court’s prime considerations in ruling on a request to make a delayed election would be the time restrictions imposed by subchapter V to which Judge Kahn referred, so his concerns would largely be addressed.

The following sentence was added to the end of the first paragraph of the Committee Note: “The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.”

### **B. Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting).**

The NCBJ made a stylistic suggestion, which was accepted by the Advisory Committee.

**C. Official Forms 101** (Voluntary Petition for Individuals Filing for Bankruptcy) and **201** (Voluntary Petition for Non-Individuals Filing for Bankruptcy).

The International Council of Shopping Centers commented that Line 14 of Official Form 101 and Line 12 of Official Form 201 should be modified to include instructions, in a case where the debtor has elected to proceed under Subchapter V, to make rental payments directly to a lessor of non-residential real property after the filing of a petition. The Advisory Committee made no change in response to this comment for two reasons. First, the issue of how payments to landlords will be made is not one that is appropriate for the petition to address. And second, because a requirement that rental payments be made directly by the debtor in all subchapter V cases would be controversial, especially in certain districts that follow a different practice in chapter 13 cases, it should not be added to the petition without prior publication of the proposed requirement.

**D. Official Form 309E2** (Notice of Chapter 11 Bankruptcy Case—For Individuals or Joint Debtors under Subchapter V).

Walter Oney, a software developer, made a number of stylistic and technical suggestions, most of which were accepted.

NCBJ raised concern about the sentence in Section 11 of the form that read, “However, in some cases the debts will not be discharged until all or a substantial portion of payments under the plan are made. See 11 U.S.C. § 1192.” It commented that the sentence should be deleted because it is both unnecessary and legally inaccurate. Although the Advisory Committee did not fully agree that the sentence was inaccurate, it agreed with NCBJ that there is no need to address the timing of the entry of the discharge itself in the notice. The Advisory Committee therefore voted to delete the sentence.

**E. Official Form 309F2** (Notice of Chapter 11 Bankruptcy Case—For Corporations or Partnerships under Subchapter V).

Mr. Oney made stylistic and technical suggestions about this form that were similar to his suggestions about Official Form 309E2, and most were accepted.

**F. Official Form 314** (Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization).

NCBJ suggested some technical corrections, which were accepted.

**G. Official Form 425A** (Plan of Reorganization for Small Business Under Chapter 11).

The greatest number of comments received following publication addressed this form. In addition to some stylistic suggestions that were accepted, three commenters—Judge Robert Drain (Bankr. S.D.N.Y.), David Mawhinney, and NCBJ—correctly pointed out that the proposed amendments to the form failed to take account of the “special rule” in Code § 1191(e) for the treatment of administrative expense claims in subchapter V plans that are confirmed non-

consensually. The Advisory Committee voted to revise Article 3.02 of the model plan to include an alternative provision appropriate for those plans.

Judge Drain also commented that the model plan should recognize the possibility of more than one class of (a) secured claims and (b) unsecured claims by enabling the addition of such classes to the form. Article 2—Classification of Claims and Interest—already has instructions to add more classes as needed, and Article 4 does so for priority and secured claims. Because this comment did not relate to the proposed amendments specific to SBRA, the Advisory Committee made no change in response to it.

The International Council of Shopping Centers made a comment that paralleled the group's comments about the petition forms. It sought the addition of an instruction to a subchapter V debtor to make rental payment directly to a lessor. The Advisory Committee voted to make no change. First, because the use of Official Form 425A is not mandatory, the proposed instruction would not necessarily achieve the commenter's desired goal. And second, § 1194(b) of the Code, added by SBRA, provides that "the trustee shall make payments to creditors under the plan." This provision is limited to plans confirmed non-consensually and is subject to alteration by the plan or the order of confirmation. Nevertheless, it is inconsistent with a rule or form instructing all subchapter V debtors to make rental payments directly. At least in cases in which the plan is confirmed under § 1191(b), Congress seems to have preferred having the trustee make payments unless a different determination is made on an individual case basis.

Judge Kahn suggested that Official Form 425A should contain a box to check if a debtor designates the plan as intended to contain adequate information under Rule 3016(b). This comment is not specific to subchapter V plans. Indeed, because a disclosure statement is generally not required under subchapter V, in most such cases there will be no need to designate that the plan provides adequate information. The Advisory Committee voted to take no action in response to this comment.

NCBJ commented that the existing "Article I: Summary" should be left on the first page of the form because it is the most important information for creditors. The Advisory Committee voted to make no change. The proposed Background section for subchapter V plans is required by § 1190 of the Code. The discussion of the debtor's business and history, the liquidation analysis, and the discussion of the debtor's ability to make plan payments and operate are required to be included in the plan because there will generally be no disclosure statement in subchapter V cases. These sections provide background information useful in assessing the plan. As such, it does not make sense to put them at the end of the plan or to break up the plan by putting them somewhere in the middle.

## **II. Comments Suggesting Additional Rules for Amendment**

### **A. Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case).**

Judge Hannah L. Blumenstiel (Bankr. N.D. Cal.) commented that Rule 3014 should be amended, and the Advisory Committee agreed. The rule requires a creditor to make any § 1111(b) election prior to the conclusion of the hearing on the disclosure statement or, if the

disclosure statement is conditionally approved and a final hearing on it is not held, not later than the date fixed by the court under Rule 3017.1(a)(2) for filing objections to the disclosure statement. Because § 1181(b) renders § 1125 inapplicable to cases under subchapter V and thereby makes disclosure statements unnecessary (unless the court orders otherwise), there will not be a hearing on a disclosure statement in such cases. Rule 3014 therefore needs to provide a different triggering event or a deadline for the 1111(b) election in such cases.

The amendment approved by the Advisory Committees leaves the timing of such a deadline up to the court. It adds the following sentence to Rule 3014: “In a case under subchapter V of chapter 11 in which § 1125 of the Code does not apply, the election may be made not later than a date the court may fix.”

**B. Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case).**

Judge Kahn and NCBJ pointed out that, although there will generally not be a disclosure statement in subchapter V cases, the court can order that § 1125 does apply in a particular case. An option provided by § 1125(f)(3) in small business cases is conditional approval of the disclosure statement by the court prior to the solicitation of votes on the plan, with final approval to be considered at the confirmation hearing. Rule 3017.1 prescribes the procedure for the conditional and final approvals. Rule 3017.1, however, now only applies to “small business cases,” a term that does not include subchapter V cases. The Advisory Committee, agreeing with the need to amend Rule 3017.1, voted to add “or in a case under subchapter V of chapter 11” to the title and subdivision (a) of the rule to expand its coverage.

**C. Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement).**

NCBJ commented that because disclosure statements are not required in subchapter V cases, the Rules currently provide no mechanism to trigger the setting of various dates by the court. Rule 3017(c) provides that “[o]n or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.” In a subchapter V case, however, if there is no disclosure statement to approve, there needs to be another authorization for the court to set dates for voting on the plan and for the confirmation hearing that does not refer to approval of the disclosure statement. The same is true for the other date-setting provisions in Rules 3017 and 3018 that refer to approval of the disclosure statement.

In order to provide for such date setting by the court in subchapter V cases, the Advisory Committee approved a new rule—Rule 3017.2—that authorizes courts in subchapter V cases in which there is no disclosure statement to (a) fix a time within which the holders of claims and interests may accept or reject the plan; (b) fix a date on which an equity security holder or creditor whose claim is based on a security must be the holder of record of the security in order to be eligible to accept or reject the plan; (c) fix a date for the hearing on confirmation; and (d) fix a date for transmission of the plan, notice of the time within which the holders of claims and interests may accept or reject the plan, and notice of the date for the hearing on confirmation.

**D. Rule 3018** (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

The amendment of Rule 3017.1 and the addition of Rule 3017.2 necessitate changes to Rule 3018(a) to take account of the new authorizations for the setting of dates. The Advisory Committee approved amendments to Rule 3018(a) that add references to date setting under Rules 3017.1 and 3017.2.

**E. Rule 3019** (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case)

Judge Benjamin Kahn noted that Rule 3019 governs the modification of a chapter 11 plan in an individual case, but that subdivision (b) is limited to requests “under § 1127(e)” to modify the plan after confirmation. He commented that the rule should similarly apply to a request for modification under § 1193(b) or (c), the Code provisions applicable in subchapter V cases.

The Advisory Committee agreed. Rather than just adding the additional Code sections to subdivision (b), however, the Advisory Committee approved a new subdivision (c) that makes the provisions of (b) applicable to subchapter V cases. Subdivision (b) is currently limited to individual debtor cases because § 1127(e) only allows a chapter 11 plan to be modified after confirmation if the debtor is an individual. New § 1193(b) and (c), however, allow post-confirmation modification in any subchapter V case, regardless of the identity of the debtor.