

Katten Partners Discuss Spinoffs With *Law360*

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Katten partners Mark Wood, head of the Securities practice, and Saul Rudo, head of the Transactional Tax Planning practice, shared the advantages for clients pursuing spinoffs as an alternative to a traditional merger. Mark noted that if a company is considering a spinoff, they are already reviewing their options with professional advisers. He stated, "Sometimes there's not an obvious buyer, you haven't run a full sale process, or you have determined that a sale of the business is just not the right approach, but you recognize that you can unlock value and provide that increased value to existing shareholders in a manner like Gap hopes it is accomplishing with the Old Navy spinoff. With a sale, you're getting whatever the current value is for that business unit, but your shareholders are then not benefiting from future upside that you might be able to capture by having separated those businesses."

Saul discussed one of the chief shareholder benefits of a spinoff, noting that while the rules are complicated, a qualifying spinoff is potentially a tax-free distribution to shareholders. "In a spinoff, shareholders can own both businesses without incurring tax, while in a sale they own only the remaining business, and while that remaining business will have some additional cash, it may have to pay a lot in taxes. You have to weigh that. It can be a substantial factor."

Another factor that Mark raised was that spinoffs do not normally require a shareholder vote. He stated, "Without a vote, there cannot be the type of proxy disclosure claims we have frequently seen in other situations, and a board's decision to pursue a spinoff should generally be entitled to business judgement rule protection." While a spinoff mitigates some of the risks of shareholder lawsuits, it is important to make sure that attorneys have "dotted all their i's and crossed their t's" when filing the Form 10 with the SEC. "There can still be legal claims, including by shareholders based upon the disclosure in the Form 10 and subsequent filings and by creditors if things don't go well later." (["Why A Spinoff Like Gap's Could Work For Your Client," March 5, 2019](#))

CONTACTS

For more information, contact your Katten attorney or any of the following attorneys.



Mark D. Wood

+1.312.902.5493

mark.wood@katten.com



Saul E. Rudo

+1.312.902.5664

saul.rudo@katten.com

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