

Unlocking Value: The What, Why and How of Spin-offs

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GIBSON DUNN

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AGENDA FOR TODAY'S WEBINAR

01 Overview of Spin-off Transactions

02 Key Separation Issues

03 Tax Planning

04 Capital Markets and Corporate Governance Considerations

OVERVIEW OF SPIN- OFF TRANSACTIONS

01

Why a Spin-Off?

Spin-Offs as Value-Enhancing Divestiture Alternative

- **Companies considering divestiture of a business increasingly have looked to spin-offs**
 - Attractive alternative to a traditional business unit or divisional sale
- **Spin-off transactions are viewed as a means to unlock value for shareholders on a tax-free basis**
 - Result in separation of divergent businesses, providing each separated business with the ability to focus solely on its own growth prospects and strategies
 - Ability to tailor incentive compensation arrangements to the applicable business
 - Shed businesses that do not fit Parent's business model and/or that may be undervalued in the market

Why a Spin-Off? (cont'd)

Spin-Offs as Value-Enhancing Divestiture Alternative

- **Spin-offs may position the separated businesses as more attractive acquisition candidates**
 - Create additional potential benefits for shareholders
 - But could also make the separated businesses targets for an unsolicited takeover
- **Subject to applicable tax limitations, it is possible to realize cash proceeds in connection with a spin-off**
 - Conduct an initial public offering of a portion of SpinCo prior to its full separation
 - Add debt to SpinCo's capital structure, and have SpinCo pay a dividend to Parent before its separation
 - Engage in spin-off backed by financial sponsor (sponsored spin)
 - Utilize other monetization and recapitalization strategies

Spin-Offs: Market Data

Over **\$1.2 trillion in value in separations** created over the last decade based on the equity values of the new companies on the first day of trading separately

Two-thirds of the S&P 500 have 3+ segments, demonstrating that corporations are now becoming more complex

Companies that execute spin-offs **generate 6% more shareholder returns on average in the two years post-close⁽¹⁾**

Spin-offs have a timeline of **10.7 months on average** from announcement to close

According to a survey conducted by EY in March 2023, **48% of global CEOs** expect to actively pursue a divestment, spin-off or IPO in the near term

36% of separation transactions closed between 2019 and 2022 resulted in a SpinCo market cap > 30% of the Parent's market cap at close

(1) Excess total shareholder returns is defined as the change in the company's equity value plus dividends paid out over the same period, starting with the day before announcement for Parent and the two years following close for Parent and SpinCo on a blended basis. Companies are indexed against specific S&P sector benchmarks.

Source: "Strategies for Successful Corporate Separations" by Goldman Sachs & Co. LLC and EY, available publicly at https://www.ey.com/en_us/services/strategy-transactions/strategies-for-successful-corporate-separations.

Separation

Alternatives: Spin Off

Steps:

- Parent transfers target business into stand-alone subsidiary (“SpinCo”)
- Parent distributes SpinCo stock to stockholders of Parent as of the record date for the spin-off
 - Note: in split-off alternative, Parent stockholders may exchange, on a pro rata or non-pro rata basis, Parent shares for SpinCo shares (typically at a discount to market to incentivize holders to tender into exchange)
- SpinCo is operated as a separate, publicly traded company

Tax:

- Generally Tax-free to both Parent and stockholder of Parent if requirements of IRC Section 355 are met

Approvals:

- Parent stockholder approval is not typically required

Timing:

- Generally 6-12 months following initial filing

Separation Subsidiary / IPO Spin

Steps:

- Parent transfers target business into stand-alone subsidiary (“NewCo”)
- NewCo completes initial public offering, which may include secondary sale of a portion of Parent’s interest and/or primary offering
 - Provides cash to Parent in connection with separation
- Parent’s remaining interest in NewCo is subsequently spun-off or split-off to complete separation

Tax:

- Parent must retain 80% voting control in IPO in order to ensure subsequent spin/split will be tax free

Timing:

- 12 months+ following initial filing

Separation Sponsored Spin

Steps:

- Similar to Spin-Off, but financial sponsor invests in SpinCo contemporaneously with the Spin
- Introduces a third party into the negotiation
 - Provides cash to Parent in connection with separation

Tax:

- Generally tax-free to both Parent and stockholder of Parent if requirements of IRC Section 355 are met
- Proceeds from sponsor investment generally tax free

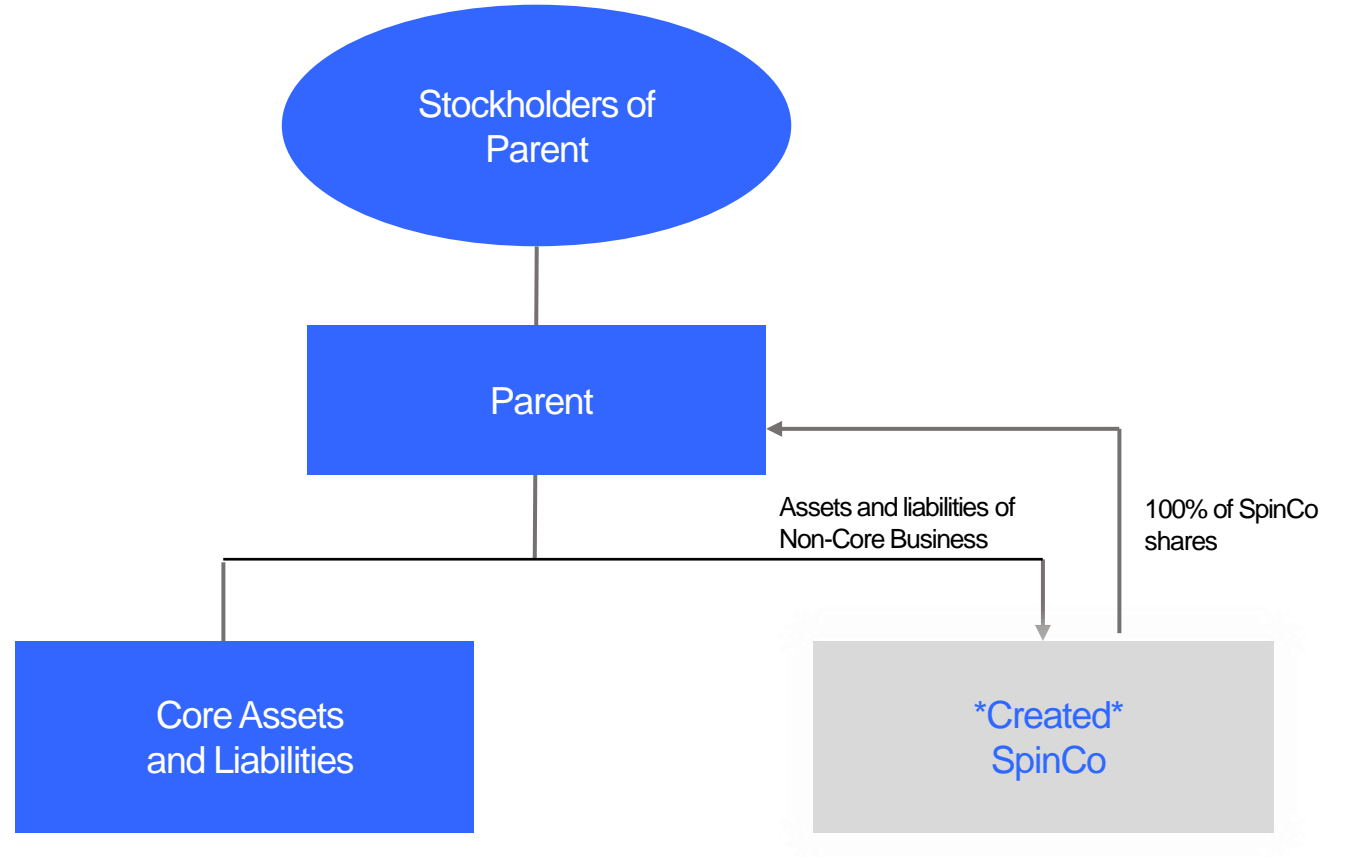
Timing:

- Similar to Spin-Off

Spin-Off Transaction Steps

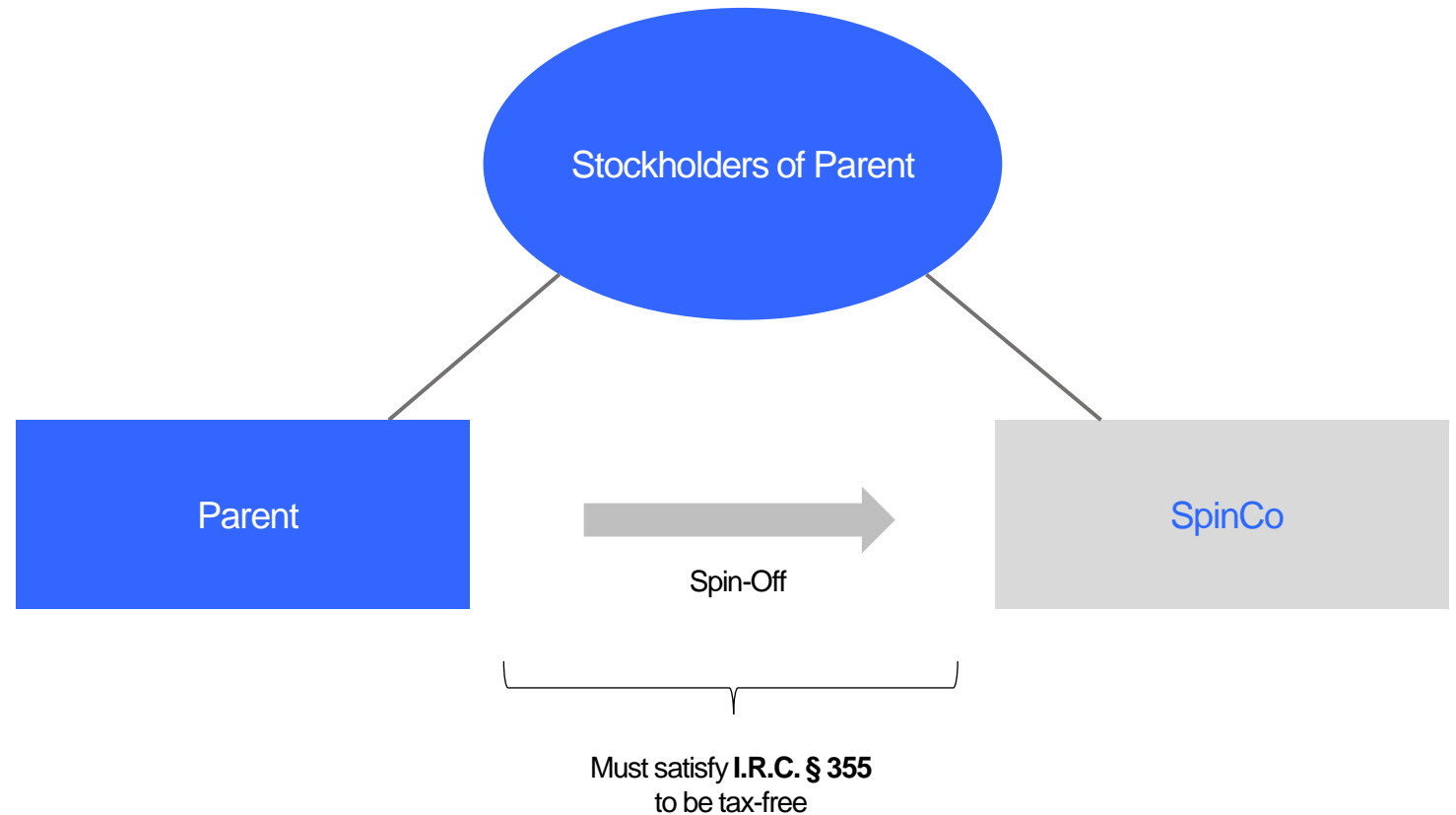
Step 1 assumes that the assets and liabilities of the business to be spun off are not held in a subsidiary of Parent. This step may not be necessary if the business to be spun off is already held in a subsidiary of Parent.

Step 1: Creation of SpinCo Subsidiary



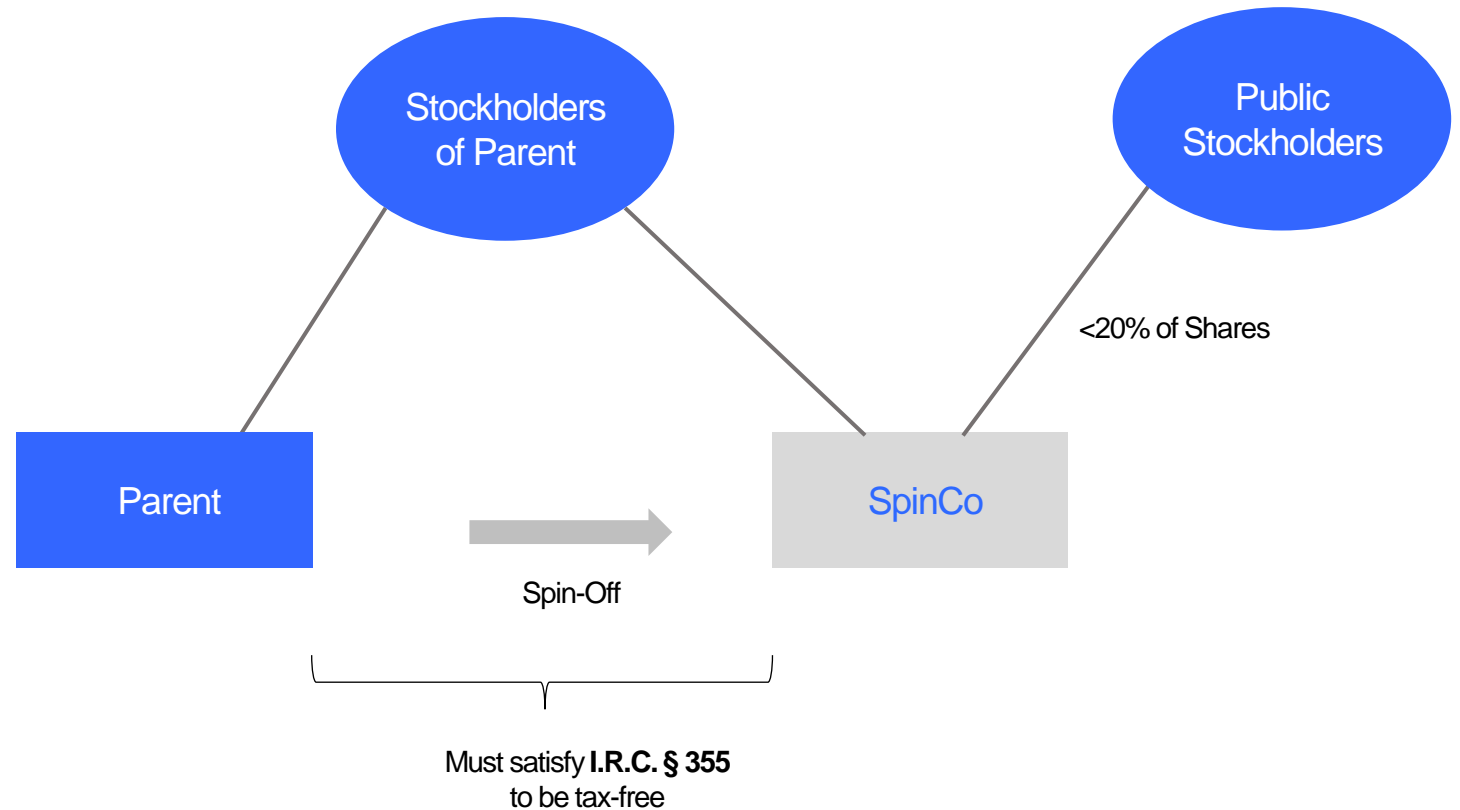
Spin-Off Transaction Steps (cont'd)

Step 2: Spin-Off SpinCo to Existing Stockholders



Spin-Off Transaction Steps (cont'd)

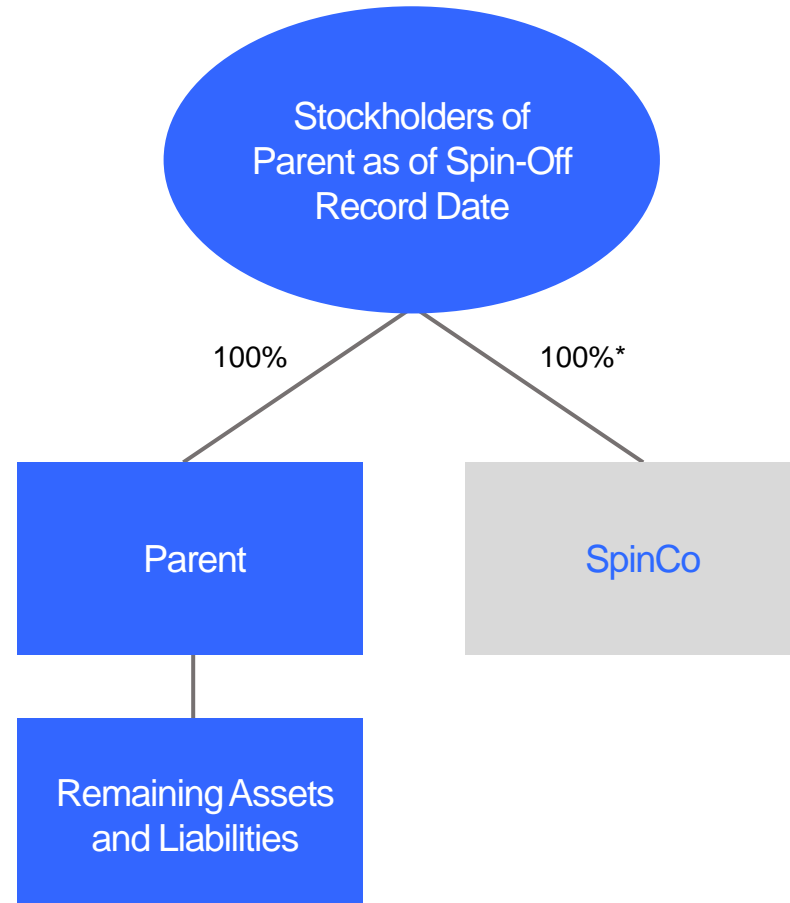
Step 2A: Conduct an Initial Public Offering of SpinCo prior to Spin-Off to Existing Stockholders



Spin-Off Transaction Steps (cont'd)

Final ownership may depend on transaction structure utilized for the spin-off and whether Parent retains any equity in SpinCo. Parent must relinquish control (as defined in the Internal Revenue Code) as a result of the spin-off (stock representing 80% of voting power of stock of SpinCo) for tax-free treatment.

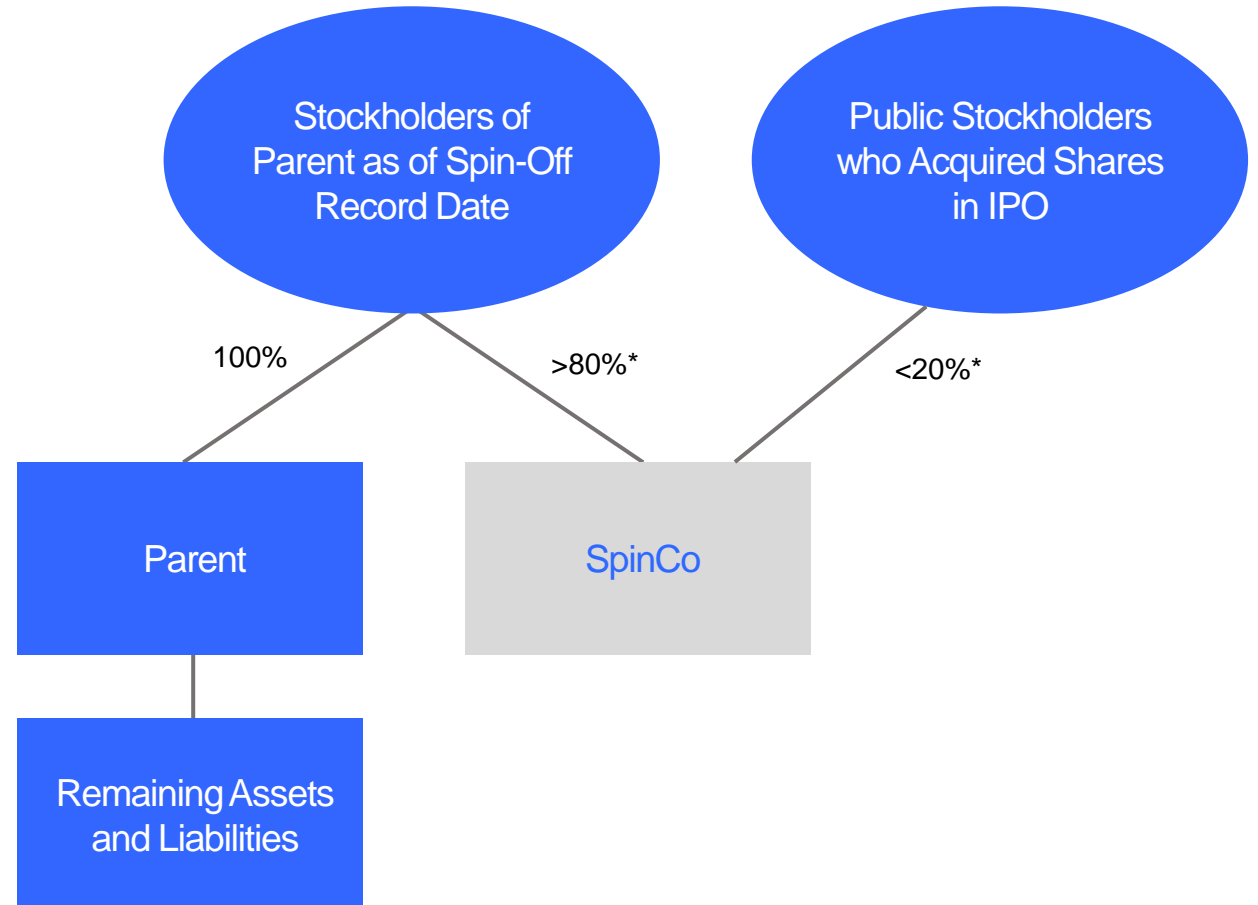
Step 3: End Result of Spin-Off



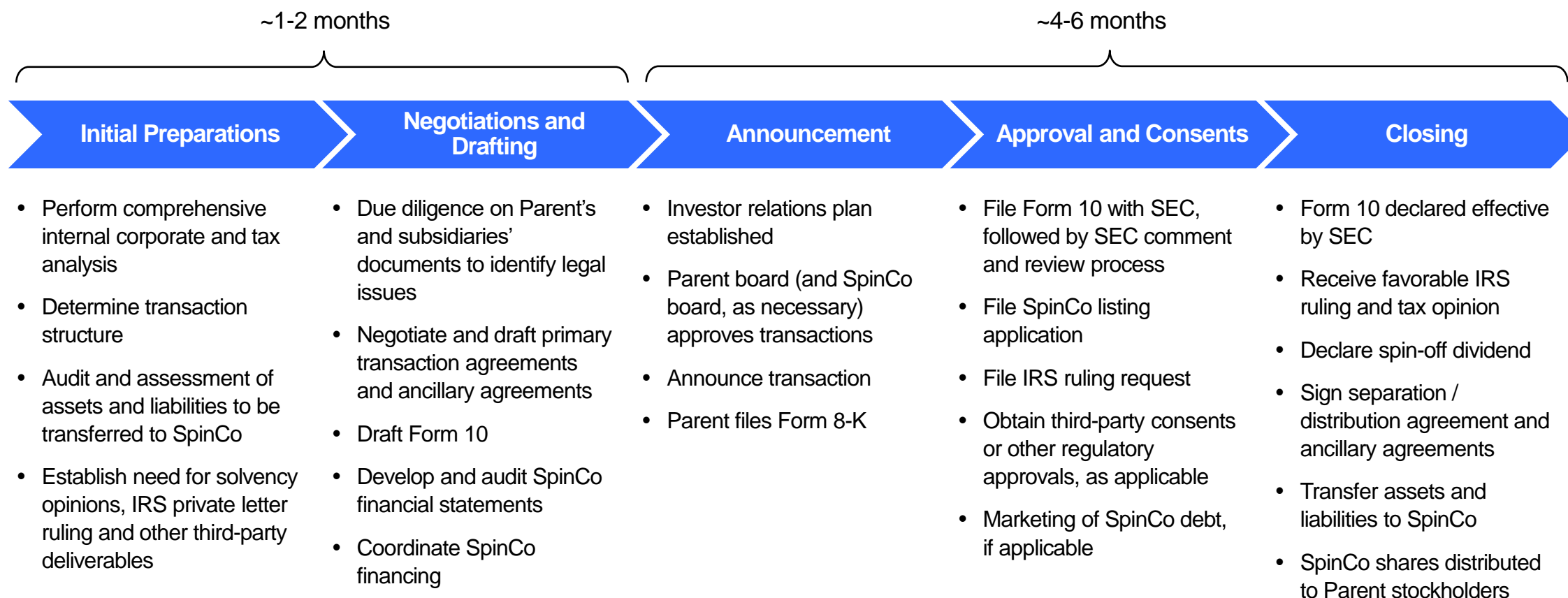
Spin-Off Transaction Steps (cont'd)

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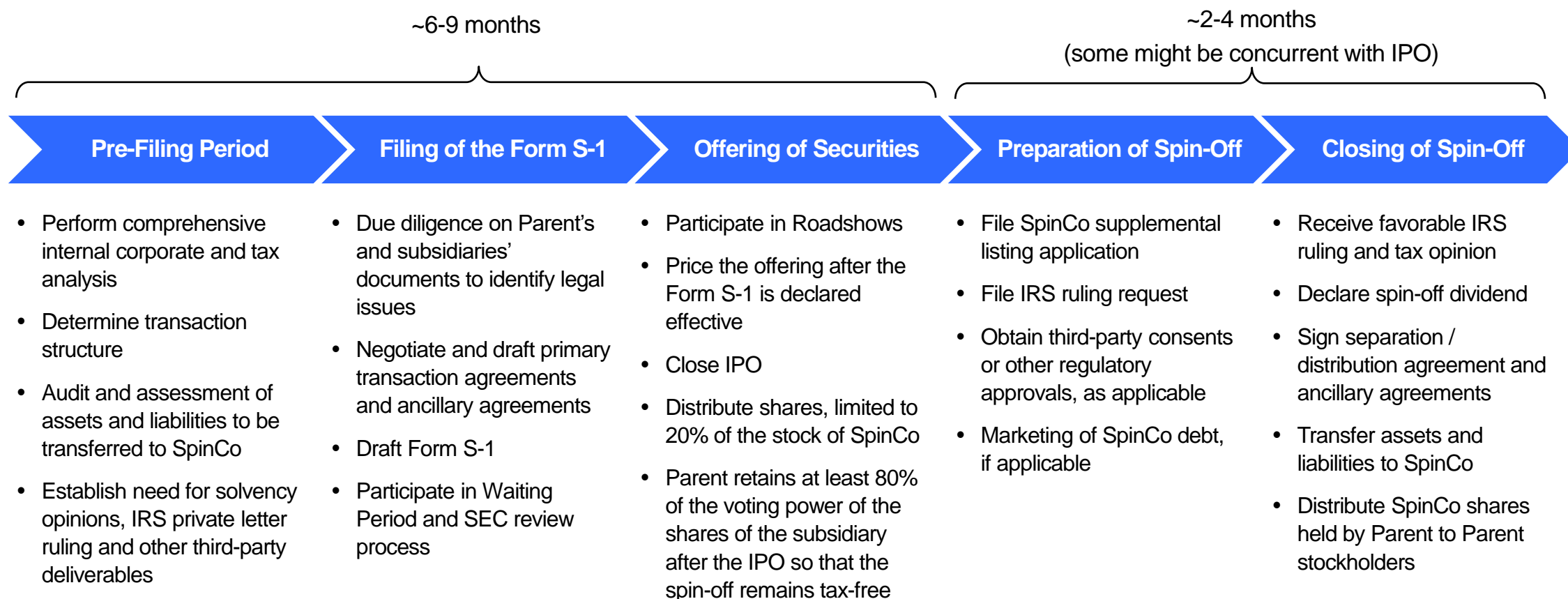
Step 3A: End Result of Spin-Off after IPO



Illustrative Timeline of Spin-Off Transaction



Illustrative Timeline of Carveout IPO plus Spin



KEY SEPARATION ISSUES

02

Role of the Board

Board Action Required

The role of the Parent board of directors in connection with a spin-off includes:

- Approve material agreements and other legal documentation
- Approve any pre-spin internal reorganization transactions
- Appoint initial public SpinCo board and senior management
 - Appointment of independent directors is typically not effective until the spin-off is completed
- Declare dividend of SpinCo stock to Parent stockholders

Director Fiduciary Duties

Directors need to be mindful of their fiduciary duties in approving the spin-off transactions, as follows:

- **Duty of Care:** directors should fully inform themselves of all material information that is reasonably available and act as reasonably prudent persons in similar situations would act
- **Duty of Loyalty:** directors must act in good faith in the honest belief that their decision is in the best interests of Parent stockholders, and their decision must not be motivated by self-interest
- Parent board's fiduciary duties are owed to Parent stockholders (not to the future stockholders of SpinCo)
- Directors' actions in approving a spin-off will generally be entitled to the benefit of the business judgment rule presumption if they have fulfilled their duties of care and loyalty

Role of the Board (cont'd)

In evaluating a spin-off, the Board must obtain a full picture of the value-increasing potential of the transaction as well as the attendant costs and risks, in each case weighed against transaction alternatives, including the alternative of maintaining the status quo.

Liability for Unlawful Dividends

- Under Delaware law, a corporation may pay dividends out of its “surplus” or net profits for the current or prior year
- Parent board must conclude that the value of SpinCo stock to be dividended does not exceed Parent’s surplus or net profits for the current or prior year
- Directors may be held personally liable under Delaware law for negligence in connection with a dividend not lawfully paid from available funds
- Directors are protected from liability for unlawful dividends made in reliance on reports of officers, employees, board committees or experts
- Parent board should review evidence provided by Parent management with respect to surplus, and may obtain analyses/appraisals from experts to determine adequacy of surplus
- Board should also receive viability analysis from chief financial officer of Parent with respect to each of Parent’s and SpinCo’s ability to finance its anticipated operations and capital requirements following the spin-off
- Board should also obtain a solvency opinion from a valuation firm

Separation of **Assets and Liabilities**

Host of complex and interrelated issues to be considered, including:

- Determination of assets and liabilities to be allocated to SpinCo
- Effecting the separation of SpinCo in a cost- and tax-efficient manner
- How to separate integrated SpinCo assets/businesses from Parent's retained businesses
 - e.g., IT assets can be shared by affiliates in ways that are not immediately obvious
- Responsibility for historical SpinCo liabilities
- Arrangements regarding any shared assets and liabilities
 - Are shared asset and liability arrangements short-term or long-term?
 - On what basis will use of shared assets and responsibility for related costs be determined?
 - Who will be responsible for maintenance of shared assets and employee training?
 - How will decisions be made regarding settlement of shared liabilities?
- Allocation of benefits and burdens of contracts involving both SpinCo's assets and Parent's retained assets
- Replacement of Parent guarantees of SpinCo obligations and vice versa
- Sufficiency of SpinCo assets
 - Refers to SpinCo's capability of operating on a stand-alone basis
 - Transaction agreement may contain a representation on this point
 - Regardless of representation, parties need thorough due diligence to ensure SpinCo has necessary infrastructure and systems to operate as an independent company on "day one"
 - Transition services arrangement may be necessary

Key Considerations

Companies contemplating a spin-off should be aware that the documentation and implementation process can be complex, requiring significant advance preparation.

Business Considerations

- Establish business purpose of spin-off
- Define the scope of the businesses, assets and liabilities (including any “shared” assets and liabilities) to be separated
- Identify any commercial, indemnification and other arrangements expected to continue between the separated businesses post-spin, including ongoing shared services (legal, financial, HR, etc.)

Transaction Structure

- Spin-off can be coupled with a variety of monetization and recapitalization techniques
- Assess transaction alternatives and attendant costs/risks
- Indebtedness covenant analysis
 - Does the spin-off amount to a transfer of "all or substantially all" assets for purposes of Parent debt obligations
- Impact on existing material contracts
 - Assignment/change of control analysis
 - Parent guarantees, including government guarantees

Viability of Each Entity

- Fraudulent conveyance
 - Transfer of assets and liabilities to SpinCo is generally not for reasonably equivalent value
 - Transfers may be voidable if Parent and SpinCo do not meet solvency/capital requirements following the transfer
- Consider obtaining solvency opinion with respect to Parent and SpinCo post-spin
- SpinCo needs adequate resources and infrastructure to bridge transition to independence

Key Considerations (cont'd)

Tax Consequences of Spin-Off

- Determine whether spin-off is expected to qualify as a tax-free transaction
- Obtain opinions from tax counsel
- Consider obtaining private letter ruling from the IRS

Liquidity and Capital Resources

- Consider capital allocation of indebtedness
- Common for SpinCo to pay dividend to Parent in connection with a spin-off
- Impact of any distribution or other monetization on respective capital structures of Parent and SpinCo must be assessed

Required Approvals

- Parent and SpinCo board approvals
 - Issues material to board's ultimate decision must be identified, considered and resolved
 - We will discuss director fiduciary duties on a subsequent slide
- No stockholder approval required under Delaware law
- SEC registration and review of Form 10
 - Similar process as for an IPO
 - There may be several rounds of SEC comments
- Need to determine whether the spin-off would breach or require consents under material agreements
 - Third party consents may be required for contracts with anti-assignment or change of control provisions
- Need to determine whether the spin-off would impair Parent's ability to comply with its retained contracts

Key Considerations (cont'd)

SpinCo Financial Statements

- Preparing GAAP financial statements may be difficult if historically SpinCo's business has not been separately reported
- Availability of financial statements impacts ability to effect a transaction and transaction timing
- Audited financial statements required for Form 10 Information Statement
- Audited financial statements likely required for related financing transactions

Parent Financial Statements

- Parent may need to file pro forma financial statements showing the disposition of SpinCo
- SpinCo Controls
 - Need to determine if SpinCo has necessary internal controls over financial reporting, as well as disclosure controls and procedures, to produce financial statements and reports required of reporting companies
- SpinCo may need to upgrade its systems, including purchasing computer hardware and software and hiring additional personnel for finance, accounting, information technology and legal staff

Listing on the Exchange

- Need to determine if SpinCo will meet initial listing requirements
- Need to determine if Parent will meet continued listing requirements following the spin-off
 - Requirements include total shareholders, per share price, number of market makers and market value of public float

Employee Matters

- Allocate management and human resources between Parent and SpinCo
- Benefits and compensation issues
- Determine treatment of equity awards in the spin-off

Major Documents

- Contracts

Separation and Distribution Agreement

- Key operative document; provides for internal reorganization
- Transfer of assets and liabilities
- Distribution of SpinCo shares
- SpinCo financing arrangements
- Mutual release of historical liabilities
- Indemnification for transferred/retained liabilities
- May contain post-closing working capital adjustment mechanism

Other Separation Agreements

- Tax Matters Agreement
 - Governs rights, responsibilities and obligations with respect to tax matters
- Employee Matters Agreement
 - Sets forth agreements regarding employment, compensation and benefits
- Transition Services Agreement or Administrative Services Agreement
 - Governs services provided by Parent following spin-off, whether for limited time or longer

Other Separation Agreements (cont'd)

- Litigation Management Agreement
 - Details transfer of litigation/investigation matters from Parent to SpinCo
- Insurance Matters Agreement
 - Allocates rights regarding insurance policies

Contractual Assignments / Consents

Other Ancillary Agreements (as needed)

- Manufacturing and Supply Agreement
- Real Estate Agreements
- Research and Development Agreement
- Licenses
- Other Intercompany Agreements

TAX PLANNING

03

Tax Planning

Spin-Offs Must Satisfy Certain Requirements to Qualify as Tax-Free

- Motivated in whole or substantial part by a corporate business purpose
- Continuity of shareholder interest and business enterprise
- Parent must have “control” of SpinCo (80% voting stock) immediately before and distribute “control” in the spin-off
- Both corporations engaged in an active trade or business
- Not a “device” for distribution of earnings and profits
- Other statutory requirements (e.g., sections 355(e), (f), and (g))
- Pre-spin restructuring, cross-border transactions raise additional considerations

Tax Planning (cont'd)

Private Letter Rulings

- Ruling practice has changed over the years
- IRS periodically publishes new procedural guidelines (including no-rule areas)
- Current 12-week fast-track program encourages ruling requests
- IRS recently broadened scope of issues it will address in rulings
- Companies also obtain legal opinions (as alternative or addition to private letter rulings)

Tax Planning (cont'd)

Spin-Offs Involving Debt

- Parent may receive leveraged distribution (or have SpinCo assume existing debt) up to tax basis in assets contributed to SpinCo
- Debt-for-debt or equity-for-debt exchange allows Parent to de-lever further (no basis limit)
- Debt exchanges must satisfy a number of requirements
- IRS currently reviewing standards for private letter rulings involving debt exchanges

Tax Planning (cont'd)

“Morris Trust” Considerations

- Acquisitions of 50% or more of the stock (by vote or value) in Parent or SpinCo as part of a plan that includes the spin-off causes spin-off to be taxable to Parent under section 355(e) (but not shareholders)
- Whether spin-off and acquisition are part of plan based on facts and circumstances
- Acquisitions within two years of spin-off presumed part of plan
- Regulations provide several safe harbors— if satisfied, section 355(e) will not apply
- IRS has issued private letter rulings addressing various legal issues under section 355(e)

CAPITAL MARKETS AND CORPORATE GOVERNANCE

04

SEC Registration and Review Process

SEC Review

The SEC process is similar in scope and complexity to an IPO. The registration statement can be submitted confidentially to the SEC to minimize public scrutiny during the review process. SEC first-round comments are expected 30 days after filing.

1934 Act or 1933 Act Registration

Most spinoff transactions are required to be registered only under the 1934 Act, using Form 10. If the distribution is not *pro rata* or stockholders make an investment decision with respect to the distribution of SpinCo shares, then the transaction must be registered under the 1933 Act, using Form S-1 or S-4 (for split-off). The scope and content of required disclosure is virtually identical in either circumstance.

Key Differences Between 1933 and 1934 Act Registrations

In a 1933 Act registration, SpinCo, its directors and officers would be subject to strict securities law liability for material misstatements or omissions (with a diligence defense for directors and officers.) In a 1934 Act registration, SpinCo would be subject to 10b-5 liability and directors and officers would have more limited exposure (with stronger defenses.)

In addition, a 1933 Act registration would be subject to “gun jumping” and other communications restrictions that would affect the investor relations process by subjecting it to greater potential liability and SEC filing requirements.

Form 10 / Information Statement

In a 1934 Act spin registration, disclosure is contained in an "Information Statement" filed as exhibit to the Form 10. Once SEC review is complete and the record date for distribution is established, the Information Statement is distributed to SpinCo stockholders. "Notice and Access" delivery is available and can provide substantial saving on printing and mailing costs if transaction timing permits. Form 10 is not required to be signed by directors, does not require an accountant's consent and does not require SEC filing fees.

Preparing to be Public

- *Goal:* Position business to be well received and perform positively over the long term
- *Product:* Preparation of key registration document requires collaboration between management, many parts of the business, bankers and counsel
 - Preliminary structuring matters
 - Prepare audited standalone financials and pro-formas
 - Debt and finance arrangements
 - Board composition and corporate governance
 - Develop investor relations messaging
- *Process:* Multiple workstreams proceeding concurrently and touching all parts of the company

Notes on the Process

Significant planning and preparation:

- Extensive company effort to draft SEC disclosure document, prepare financial statements, collect due diligence
- Careful coordination among management, investment bankers, auditors, legal counsel and others is important throughout process

Anticipating and addressing issues early improves execution:

- Advance planning can help speed process, allowing access to a broader market window and minimizing distraction of management and disruption of underlying business
- Drafting and diligence prior to SEC filing can take at least one to two months; SEC review process can take three months (or, in the event of significant issues, longer)
- SEC comment process requires multiple rounds of quick turnaround on complicated issues with input from many stakeholders

Issues to consider and address in advance:

- Accounting, internal control, communications strategy, corporate housekeeping
- **Burden on accounting staff is especially intense**
- Time required to prepare financial statements can be result in delays/lengthen timeline

Separation Debt Financing – Overview

In connection with the separation, debt capital structure of SpinCo must be established; pay down or “transfer” of Parent debt rebalances debt load between Parent and SpinCo

- Debt capitalization typically completed prior to separation
- Considerations
 - Timing
 - Registered vs. unregistered offering
 - Form of the transaction(s)
 - Leveraging Form 10 process and documentation for the debt offering
 - Special terms of the debt
- *Essential due diligence for any separation transaction:* review of the “merger covenant” (“All or Substantially All” or “AOSA”) in Parent indenture.
- AOSA covenant prohibits the disposal of “all or substantially all” of the assets of the obligor of the debt unless **all** assets conveyed to a single acquirer that assumes the debt obligation.

Separation Debt Financing – Form of the Transaction(s)

<i>New Issue + Repurchase</i>	<i>Par-for-Par Exchange Offer</i>	<i>Intermediated Exchange</i>
<ul style="list-style-type: none"> • New bonds issued by SpinCo for cash • Special dividend to Parent • Redemption and/or tender offer by Parent for existing bonds • Offering document based on Form 10 • Redemption or Offer to Purchase 	<ul style="list-style-type: none"> • SpinCo offers to exchange new bonds for existing Parent bonds • Cash premium paid to participating bondholders • No cash proceeds to SpinCo • Offering document based on Form 10 	<ul style="list-style-type: none"> • Tender offer by underwriters for existing Parent bonds • Underwriters agree to exchange tendered bonds for new SpinCo bonds • New SpinCo bonds sold by underwriters for cash • No cash proceeds to SpinCo • Offer to Purchase (used by underwriters) • Offering document based on Form 10

Separation Debt Financing – Details

Disclosure in bond offering will require:

- Business description, selected financial data, MD&A and risk factors copied from the Form 10 (either registered or unregistered offering)
- Description of the Notes typically based on Parent precedent and comparable bond offerings
- Transaction-specific disclosure (e.g. Description of the Exchange Offer and Description of the Differences between the Notes in a Par-for-Par Exchange)
- Initial purchasers and counsel due diligence

In an offering prior to completion of the separation, bond purchasers may expect certain *special provisions*, including:

- Parent guarantee of the bonds, which is automatically and unconditionally released upon completion of the Spin
- Special Mandatory Redemption in the event the Spin is not completed by specified date
 - Typically a 1% premium paid at redemption
 - Escrow of the proceeds no longer customary due to complexity and cost considerations

Corporate Governance Considerations

SpinCo's structure and governance must reflect, like Parent, a fully self-sufficient, operational public company, but there is also an opportunity for a "fresh start."

Status as a "controlled" vs. "non-controlled" company is an important consideration.

Governance Structure

- Ensure constituent documents are appropriate for a public company
- Consider SpinCo's unique stance as a newly public company, rather than replicating Parent's governance structure
 - SpinCo is likely to be **smaller and potentially more vulnerable to activists**
 - It is typical (and easier) for newly public companies to implement anti-takeover protections, such as classified board, for cause removal, supermajority provisions, no stockholder written consent or special meeting right, etc.
 - **BUT** consider the reaction of SpinCo's shareholder base
 - Impact of large institutional investors and proxy advisory firms
 - This may be less of a concern in a subsidiary IPO spin, as long as SpinCo remains "controlled" post-IPO

Corporate Governance Considerations (cont'd)

Board & Management Composition

- Generally desirable to **choose individuals with knowledge of the business** being spun off
 - The Parent board and the management team are likely to be very interested in who will serve on SpinCo's board of directors and management team
 - To the extent SpinCo will need to have an entirely independent board and independent committees within one year post-spin, timing becomes even more important
- **Diversity, qualifications and expertise** (including that of an audit committee expert)
 - Start considering post-spin board schedule early to maximize post-spin participation and attendance
 - Stock exchange requirements regarding independence of board and committee members
 - **Form 10 Spin:** Generally, SpinCo will have a one-year grace period to comply
 - **Form S-1 Spin:** Generally, Parent maintains control for some period of time post-IPO
 - If Parent owns more than 50% of voting power after the IPO, SpinCo will be a "controlled company"
 - As such, SpinCo will be exempt from the board and committee independence requirements (other than the audit committee independence requirements) and will then have a one-year grace period to comply after the loss of controlled company status

Corporate Governance Considerations (cont'd)

Board & Management Composition (cont.)

- **Overlapping directors** between SpinCo and Parent can present dilemmas
 - **Conflicts of Interest:** Directors who owe fiduciary duties to both Parent and SpinCo should not participate in decisions at either company about arrangements between them
 - **Corporate Opportunity Doctrine:** Issues could arise if Parent and SpinCo businesses overlap
 - Consider addressing fiduciaries' obligations to present different categories of opportunities to each company in separation agreement and governing documents
 - Where there are overlapping directors, certificates of incorporation often include a corporate opportunity waiver for such directors
 - **Section 8 of Clayton Act:** Bars companies that engage in competing businesses from having overlapping directors

Nomination Rights

- **Form 10 Spin:** Parent generally does not have any board and/or committee nomination rights
- **Form S-1 Spin:** Parent may have some board and/or committee nomination rights post-IPO depending on level of control (similar to sponsor-backed IPOs) with such rights eventually going away as the level of control decreases below a certain percentage of ownership

The background features a stylized, abstract architectural structure composed of numerous thin, dark lines that curve and sweep across the frame, creating a sense of depth and movement. The lines are set against a light blue gradient background that transitions from a darker shade on the left to a lighter shade on the right.

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