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CORPORATE & COMMERCIAL **ALERT**

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The spread of the COVID-19 disease has had a very rapid and deeply disruptive effect on the global economy.

CLIFFE DEKKER HOFMEYR

Is this a good time to consider delisting from the JSE?

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The COVID-19 pandemic has had a profound effect on the international and local financial markets. In addition to this, prior to the pandemic and extended lockdown, South Africa's economy had been in a recession and the equity market faced limited growth. While the current conditions have created massive challenges for businesses, could these uncertain times present an opportunity for listed companies to consider going private?

Why do companies delist and what is behind this trend?

In the last few years, there has been an emerging trend in South Africa where a number of listed companies have voluntarily delisted from the Johannesburg Stock Exchange (JSE). There are a number of factors which may have led these companies to make this decision, which have been stated in their delisting announcements and which have been discussed in the media by analysts. These factors include, amongst others:

- The main benefit of being listed on a stock exchange is the ability to raise funding from the public. For small and medium companies (in terms of market capitalisation), raising funding may be difficult and expensive.
- The JSE is highly regulated and being listed adds an additional layer of compliance with securities laws (notably the Financial Markets Act 19 of 2012 and the JSE Listings Requirements) which could be expensive and burdensome. Listed companies face intense public scrutiny and risk censure from the JSE, share price crashes and litigation should there be any instances of non-compliance.
- Shareholder approval is required for many transactions and there are restrictions on dealing which may prove prohibitive to the founding or controlling shareholders' strategy in some contexts.
- Smaller and medium cap securities tend to be undervalued and discounted, although the underlying business may have real value and potential.
- Large institutional investors such as pension funds are primarily interested in investing in large corporations and may overlook small and medium cap companies, whose securities tend to have lower liquidity, making investment unattractive and realisation difficult.
- There is also a rise in investment in indexed exchange-traded funds (ETFs), and these indexes focus primarily on large cap companies.
- In the South African market, it may be easier to achieve and maintain Broad-Based Black Economic Empowerment ownership objectives (e.g. 51% ownership) in the unlisted environment.

Is this a good time to delist?

In the light of the economic recession, price volatility and poor prospects of growth in the South African equity market - compounded by the extreme pressure that the COVID-19 pandemic and extended lockdown is placing on most businesses, companies in certain sectors and especially small and medium cap companies will be feeling a cash flow crunch and may have seen a big drop in their share prices.

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Is this a good time to consider delisting from the JSE?*...continued*

The founders and controlling shareholders of certain companies which are currently undervalued may find that this is the perfect time to delist.

While this may cause despair, for some companies it may present a prime opportunity to effect a change in strategy going forward. The founders and controlling shareholders of certain companies which are currently undervalued may find that this is the perfect time to delist. The founders and controlling shareholders will be able to take advantage of the current market conditions and low share prices to make an attractive offer to minority shareholders.

Once delisted, the company will save major costs as a result of operating in an unlisted environment and may be able to increase efficiency, have the ability to create a different capital structure, create more flexibility to restructure and have the ability to pursue the sale or acquisition of assets more easily. For entities that have struggled to raise capital on an exchange, it may make sense to look to alternative funding opportunities such as private equity or venture capital investors.

What is the process for delisting from the JSE?

A delisting of shares from the JSE is regulated by the JSE Listings Requirements.

In order to delist at the request of the issuer company, the issuer company will need to take the following steps:

- The issuer company must make written application to the JSE requesting removal of its securities from the exchange and setting out the reasons for delisting. The JSE may grant this request once the below requirements are met.
- A circular must be sent to all shareholders, which will need to comply with all the usual requirements for circulars, and include the following:
    - the reasons for removal;
    - the offer to be made to all shareholders and the terms and conditions of the offer;

Is this a good time to consider delisting from the JSE?*...continued*

Shareholder approval for the removal of a listing need not be sought, and a circular need not be sent to the shareholders, where the listing of such shares is intended to be removed pursuant to (i) a takeover offer or (ii) the completion of a scheme of arrangement.

- a fairness opinion from an independent expert;
- a statement by the board of directors of the issuer company that the offer is fair to the shareholders and that the board has been so advised by an independent expert; and
- the circular must request approval from the shareholders at a general meeting for the approval of the removal of the listing, prior to issuer making the written application to the JSE.

- The delisting must be approved by at least 50% of the shareholders present or represented at the general meeting, excluding any controlling shareholder, its associates and any party acting in concert or any other party which the JSE deems appropriate.
- The delisting will also require exchange control approval from the Financial Surveillance Department of the South African Reserve Bank.

Notwithstanding the above, the JSE Listings Requirements do provide for an exception to the above. Shareholder approval for the removal of a listing need not be sought, and a circular need not be sent to the shareholders, where the listing of such shares is intended to be removed following:

- a takeover offer, where the shares have become subject to section 124 of the Companies Act 71 of 2008 (Companies Act) (ie the "*squeeze out*" provisions in the circumstances where the offer has been accepted by 90% of the shareholders) and notice has been given by the offeror of its intention to cancel the listing of the shares in the initial offer document or in any subsequent circular sent to shareholders; or
- the completion of a scheme of arrangement with shareholders in terms of sections 114 and 115 of the Companies Act, as a result of which either all the shares have been acquired or the JSE is satisfied that the issuer company no longer qualifies for listing (the JSE must be consulted for a ruling in this regard).

Is this a good time to consider delisting from the JSE?*...continued*

Should a company wish to pursue a delisting, it will need to decide whether it is comfortable to delist irrespective of whether the offer is accepted by some, most or all of the minority shareholders.

In most instances, in the case of a voluntary delisting of a small or medium cap company, the controlling shareholder(s) who wish to stay in the company post delisting will make an offer to all the remaining shareholders. It is also possible for a third party to make the offer or to provide the funding. As stated above, the offer needs to be fair to the shareholders, and attractive enough to be approved by the majority, and thus it is usually made at a premium to the current share price.

Should a company wish to pursue a delisting, it will need to decide whether it is comfortable to delist irrespective of whether the offer is accepted by some, most or all of the minority shareholders. In the case of a delisting pursuant to a voluntary offer, a number of minority shareholders may not accept the offer and will therefore remain shareholders in an unlisted environment. Even if such shareholders retain only a very modest percentage of a company's shares, this could still limit the company's ability to sanction corporate actions speedily, albeit possibly less so than in a listed environment. For this reason, in practice, where companies are able to obtain sufficient support from shareholders who are not excluded from voting, such companies will often effect a delisting by way of a scheme of arrangement in terms of sections 114 and 115 of the Companies Act, as the acquisition of shares pursuant to a scheme of arrangement (which will require the support of at least 75% of all shareholders eligible to vote) is binding on all shareholders. Usually, a scheme of arrangement is proposed concurrently with a separate general offer on the basis that the general offer will be conditional on the scheme of arrangement being unsuccessful.

Once delisted, a company should have more flexibility to implement its new strategy to unlock value for its shareholders.

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COVID-19: Key considerations for private equity funds

Proactivity, communication and transparency is paramount in order to maintain investor relationships and investor confidence during a period of market disruption and uncertainty.

We face an extremely challenging investment environment as markets around the globe feel the effects of the economic slowdown occasioned by the COVID-19 pandemic. Whilst the private equity industry will survive these pressures, it will no doubt be affected by both the immediate impact of COVID-19 and by the ripple effects on industries and markets.

We have outlined some of the key investor expectations and considerations relating to fund terms that both investors and managers of private equity funds should bear in mind in responding to the COVID-19 outbreak. Finally we have briefly summarised the key regulatory considerations that managers should also take into account in the current environment.

Investor expectations

The experience of managers during the Global Financial Crisis of 2008/2009 (GFC) made it very clear that proactivity, communication and transparency is paramount in order to maintain investor relationships and investor confidence during a period of market disruption and uncertainty. This lesson is even more applicable in the context of the current Covid pandemic than it was during the GFC. The preferred frequency and form of such communications should be discussed with the investors, however given that circumstances are changing rapidly, such communication should be frequent enough to keep the investor informed and up to date as to the ongoing impact of COVID-19 on the fund's portfolio. Communication should be detailed and specific to the risks and challenges being encountered. Investors do not want their inboxes flooded with irrelevant data and waffle.

In this regard, managers should assess the impact of the market disruption on their funds' portfolio companies, take pro-active steps to develop and implement contingency plans to ensure the financial stability and business continuity of its portfolio companies, and determine the priority and allocation of its limited time and resources as between such portfolio companies.

Investors are generally willing to engage with managers and to assist managers in implementing plans to ensure value preservation of the portfolio companies, including increasing flexibility around recycling of commitments and creating larger cash reserves (and correspondingly, having reduced, delayed or deferred distributions during this period). Some investors have already developed programmes in terms of which they intend to make a portion of their undrawn commitments available for drawdowns to provide short-term working capital relief to portfolio companies whose business operations have been materially adversely impacted by the COVID-19 pandemic. As an alternative to such cash funding, the programme may also permit an extension of portfolio companies' existing credit lines to the extent required (subject to the programme limit) backed by a guarantee from the fund. In addition to the above options, managers are also encouraged to stay abreast of and ensure that its portfolio companies take advantage of, government bailout policies and initiatives.

Investors expect managers to ensure that robust business continuity plans are in place to maintain continuity of their own critical processes and the services they provide, including reporting obligations.

COVID-19: Key considerations for private equity funds*...continued*

In determining and implementing their response to the COVID-19 outbreak, managers should review the mechanisms available under the terms of the relevant fund documentation.

Managers should also review service provider and counterparty business continuity arrangements to assess any impacts this may have on their own processes (e.g. administrators). To the extent that there will be any issues with meeting any of its obligations, these should be communicated to investors and managers should be proactive in requesting flexibility where this is practical.

In addition to engaging with investors in respect of the needs of the fund and its portfolio companies, managers should also engage with investors in respect of any assistance or flexibility that they may require during this period. For example, certain investors may request that the manager increase the period for drawdown notices to give the investor additional time to address their own liquidity issues and to avoid defaults. Managers can also engage with existing investors to consider additional commitments to pick up any potential defaulting investor allocation, but in doing so should be ever mindful not to treat certain investors more favourably than others.

Fund Terms

In determining and implementing their response to the COVID-19 outbreak, managers should review the mechanisms available under the terms of the relevant fund documentation. The considerations and actions discussed below may require amendments to fund terms and documentation, as such managers should always consult the existing fund documentation to ensure that any such amendments and/or actions are implemented in compliance with the terms of the existing fund documentation, including any consent requirements.

The impact of the COVID-19 pandemic on funds will vary at different stages in the fund life-cycle. Funds which are currently raising capital and those which are at, or nearing, the end of their life-cycles will be most affected. The key impacts are outlined below in respect of each stage.

1.1 Funds currently raising capital

Engaging with and raising commitments from new prospective investors will be more difficult in the current circumstances due to travel restrictions and lockdowns and managers will therefore be more likely to receive commitments from investors who have an existing relationship or who are already familiar with them.

Managers may nevertheless engage with new prospective investors via alternative marketing and business development mechanisms. To accommodate potential delays in this process, managers should consider extending the period during which they seek investor commitments before holding their first close and, to the extent that the fund has already completed its first close, obtain investor consent for an extension of the final closing date (it should however be noted that this may bring complicated equalisation issues into play).

It would also be prudent for managers to review and ensure that risk disclosure statements in their fund documents, including offer documents and private placement memoranda, are accurate in the context of the current situation and updating such statements to the extent necessary.

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COVID-19: Key considerations for private equity funds*...continued*

A manager of a fund nearing the end of its term may wish to extend the life of the fund or raise new capital in order to preserve value of its portfolio and avoid a fire sale in the currently unfavourable market.

1.2 Funds in the investment and holding periods

Managers of funds in the investment period should consider whether an extension of the investment period (i.e. the period during which investor commitments can be drawn down) is required, and if so, the effect of such extension on management fees (this may need to be agreed upfront with investors).

Managers would also do well to review their fund terms as to whether:

1.2.1 it allows for deals that are in progress to be completed after the end of the investment period;

1.2.2 it contains follow-on investment provisions which permits the manager to make capital calls after the end of the investment period to preserve and enhance the value of the existing portfolio;

1.2.3 the investment guidelines and strategies can accommodate opportunistic investments which may arise as a result of the current financial market displacement and equity valuations;

1.2.4 the business plan reflects the current and probable future market disruption;

1.2.5 the risk strategy is sufficiently robust to address any new or increased risks; and

1.2.6 short term illness such as COVID-19 triggers a key person event, although this is unlikely as it is typically provided that only an extended period of absence would trigger a key person event.

As discussed above, following engagement with investors, managers may also wish to increase the notice period for drawdowns in order to give investors additional time address their own liquidity issues and to avoid defaults.

1.3 Funds nearing the end of life

A manager of a fund nearing the end of its term may wish to extend the life of the fund or raise new capital in order to preserve value of its portfolio and avoid a fire sale in the currently unfavourable market. Bridging the valuation gap is discussed in more detail at page 11 below. In addition to recycling and increasing cash reserves (discussed above), some options available to managers of funds nearing the end of its term are:

1.3.1 Fund extension in terms of the fund documentation (which typically allows for one to two-year extensions) or by unanimous investor consent, depending on the fund terms;

COVID-19: Key considerations for private equity funds*...continued*

In implementing their response to the COVID-19 outbreak, managers will need to ensure they follow the correct procedures as set out in the fund documentation, including seeking investor consents to the extent required.

1.3.2 Secondary transactions whereby the portfolio companies are transferred into a continuation fund to be established by the manager, and the investors will have the option to roll over into the continuation fund or cash out of the existing fund at prevailing NAV (or even a discount to NAV);

1.3.3 Cross trades in terms of which the portfolio companies are transferred from a prior fund to a successor fund, or between a fund nearing the end of its life and a newly launched fund. Cross-trades are distinct from secondary transactions in that it does not necessarily require the establishment of new fund specifically for the purpose of acquiring the portfolio companies, it may involve an existing fund managed by the manager, and it does not necessarily require that the existing investors be given the option to roll-over into the acquiring fund. Managers should be particularly careful to consider any conflicts of interest provisions and related party rules applicable and should rely on independent valuation of the fair value of the assets being sold and purchased;

1.3.4 Offering co-investment opportunities to investors or establishing an annex fund in which interests are offered to investors on a pro-rata basis, for the purpose of providing follow-on funding to portfolio companies. This may not necessarily provide any additional time for realisation of investments, but it will allow for additional drawdown capacity for follow-on investment in portfolio companies; and

1.3.5 Strip sales in terms of which a fixed percentage of the fund's portfolio is transferred to a new acquisition vehicle to which commitments for follow-on funding is made by an entirely new investor (secondary buyer). A strip sale is treated as a disposal by the fund, and the fund's remaining interest in existing portfolio companies which have been stripped will be progressively diluted to the extent that the new acquisition vehicle is further funded by the secondary buyer.

In implementing any of the above options, managers will need to ensure they follow the correct procedures as set out in the fund documentation, including seeking investor consents to the extent required.

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COVID-19: Key considerations for private equity funds*...continued*

Whichever options are considered, communication and transparency between the manager and the investors will be the key to maintaining investor relationships and investor confidence during this crisis.

1.4 General

Managers of funds at all stages in their life cycle should ensure they have robust business continuity plans in place and should review the fund documentation to ensure that it allows for board meetings, investment committee meetings, advisory board meetings, investor meetings, annual partnership meetings, and any other relevant meetings to take place virtually or by telephone. Where relevant, managers will also need to consider whether there are a sufficient number of directors or key persons remaining in the jurisdictions where funds or fund managers are established to maintain tax residency, as well as the legal effectiveness of electronic execution of documents in respect of the relevant jurisdiction.

Regulatory

Notwithstanding the disruption the COVID-19 outbreak has caused, managers are still required to comply with their regulatory obligations, save where regulators have stated otherwise. It is therefore important for managers to ensure that they keep up to date with and be alert to variations to existing regulatory requirements or the introduction of new regulatory requirements.

In this regard, it is worth noting the recent FAIS Notice 17 of 2020, issued by the Financial Sector Conduct Authority on 31 March 2020, which provides an exemption from and extension of the period to comply with certain fit and proper requirements, including continuous professional development requirements and regulatory examination requirements. A summary of this notice is available here.

Conclusion

Although the COVID-19 outbreak has caused a massive disruption in the public markets and is doing the same to private markets, there are options available to managers which seek to mitigate the negative effects of this crisis on the funds they manage. Whichever options are considered, communication and transparency between the manager and the investors will be the key to maintaining investor relationships and investor confidence during this crisis.

The humanitarian crisis caused by COVID-19 also presents an opportunity for managers to enhance their commitment to environmental, social and governance related investing and to evaluate their response through a lens of social citizenship.

We recently discussed the topic of this note in a webinar hosted by the Southern Africa Venture Capital and Private Equity Association (SAVCA), a recording of which is available here.

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Private equity funds – Mitigation strategies for valuations during crisis

Private equity fund investments are generally made for a longer term and so funds can ride out down-turns, depending on where they are in their life-cycles. But this does not mean that private equity funds are shielded from market volatility.

The spread of the COVID-19 disease has had a very rapid and deeply disruptive effect on the global economy. It is highly uncertain what the full effect of the spread of the disease will be in the medium-term and in the long-term, especially given that the immediate effects are still rippling through markets. However, everyone can reasonably expect that those effects will be significant and long-lasting.

The private equity industry is well-placed to deal with this volatility. Private equity fund investments are generally made for a longer term and so funds can ride out down-turns, depending on where they are in their life-cycles. But this does not mean that private equity funds are shielded from market volatility. It has become challenging for fund managers and investors to manage existing portfolio investments. For those funds which are being established or in their investment periods, it is even more difficult for fund managers and investors to determine the values of proposed investments in this economic environment.

Fortunately, there were many lessons learned in the global financial crisis of 2007/2008 which the private equity fund industry can apply to mitigate the uncertainty of valuing proposed investments in this kind of economic environment. A few options are set out below.

Convertible Instruments and Minority Acquisitions

A major impact of the spread of COVID-19 disease is constrained liquidity in the market for new acquisitions. Depending on the medium- and long-term effect of the spread of the virus, fund managers may have to reduce the capital they otherwise would have deployed into investments they are interested in. Fund managers may be able to acquire options or instruments apart from equity which may be converted into equity on the achievement of certain triggers. If funds acquire minority interests in portfolio companies (especially if valuations are depressed), this also allows those funds the opportunity to increase their stakes in those portfolio companies at a later stage. In addition, fund managers may be able to negotiate minority protection provisions into their shareholding agreements in respect of those portfolio companies so that they are not prejudiced by taking minority stakes. Sellers of minority interests in companies can expect investors to try to negotiate for negative controls in those companies at the very least. Fund managers could also negotiate protections for the funds they manage against underperformance, e.g. extensive financial reporting provisions to make sure the investors know about underperformance, and the ability to sell their interests back to the sellers in the event that those companies do not meet performance targets post-acquisition.

Conversely, parties may agree to negotiate for "*material adverse change*" clauses which deal specifically with materially adverse changes in market conditions (with very specific triggers) due to COVID-19. Given that this deals with market conditions rather than company-specific conditions, sellers may not be likely to accept this, but it does give buyers the potential for an exit mechanism if market conditions worsen and business performance of the acquired company cannot improve.

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Private equity funds – Mitigation strategies for valuations during crisis

...continued

Given that market conditions will be uncertain at least in the medium-term, fund managers, investors and sellers will need to be innovative about structuring deals in the months, and possibly years, to follow.

Earn-out provisions

When market conditions are uncertain, sellers will have to accept that prices for their assets may be depressed in the short- and medium-term. This may make them unwilling to sell to buyers they see as opportunistic. Buyers, on the other hand, will be unwilling to accept prices for assets they are not sure will increase in value. A way to get around this tension is for sellers to accept a low initial purchase price for their interests in companies and then receive an additional amount (or amounts) later, often with the buyer using the proceeds of the business of the same companies to pay the seller if the company has performed well after the sale. Given that sellers are often familiar with the functioning of the companies they are selling, they are usually confident that those companies will perform well after the sale, even in depressed markets. However, given that they are often giving up control of those companies and at the same time relying on its performance, those sellers often negotiate sale terms which mean that those companies must continue to be run as they had been before the sale transaction. For buyers the benefit is that they can secure agreement when they otherwise may not have, they pay less for the companies in question and often can rely on the companies acquired for paying the earn-out. There are many variations on how to structure the earn-out. However, earn-out provisions often invite dispute and litigation – buyers and sellers disagree regarding whether the company was appropriately run following the sale transaction (particularly when the buyers have negotiated to run the acquired company in previously agreed ways), as a consequence, disagree on the performance of the companies acquired and on payment of the earn-out amount.

Conclusion

Given that market conditions will be uncertain at least in the medium-term, fund managers, investors and sellers will need to be innovative about structuring deals in the months, and possibly years, to follow. The global financial crisis has provided several lessons on deal-structuring in uncertain market conditions and those lessons should be followed. As set out above, there are a number of ways to structure deals when buyers and sellers are uncertain of the value of the assets involved in transactions, including minority acquisitions and earn-out provisions. In addition, there are many other innovative solutions for deal-structuring involving minority acquisitions, earn-out provisions, and other means for parties to structure their transactions. We have experience advising on portfolio company acquisitions by private equity funds and on advising private equity funds more broadly in this climate (further information on that is contained here.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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