JSE listed miners turn to the equity markets

Mining Bulletin

Recently, certain Johannesburg Stock Exchange (JSE) listed miners have turned to rights issues and private placements to raise cash in market conditions that can hardly be described as stable. In October 2015, JSE listed Implats raised R4 billion through a private placement offering whilst LSE and JSE listed Lonmin announced its intention to raise US$400 million by way of a rights issue before the end of 2015.

Whether or not this evidences a new financing trend for SA miners remains to be seen. But how quickly can cash be raised on the JSE and how does a substantial US shareholding/ ADR's impact on timing?

In contrast to jurisdictions such as Canada where an issuer could raise equity on an overnight basis through a bought deal process with underwriters, there is no equivalent expedited process on the JSE.

The three principal routes are private placement offers (specific issues for cash), general issues for cash and rights offers. Ultimately, the question as to which offering method is favoured depends on the size of the issuer relative to the amount it wishes to raise.

If the US shareholder base is insignificant, US shareholders and ADR holders could simply be excluded from the offer. But this is counterproductive for companies relying on their US shareholder base to raise sufficient capital.

The US considerations outlined below assume that the JSE listed issuer is a "foreign private issuer" (i.e. not US based unless more than 50% of its shares are held by US residents). If the company wishes to list its securities/ ADRs on a US securities exchange, or to make a public offering to US retail investors, the transaction requires registration in the US. Compliance with the financial information requirements of the Securities Exchange Commission ("SEC") is usually the most difficult challenge for foreign private issuers accessing the US public markets given that the requirements are technical. SEC-experienced members of the issuers' audit team should be involved at the earliest possible stage.

In all offerings, the company's MOI would need to be reviewed to ensure there are no restrictions to raise capital in the manner envisaged.

The most efficient route is a private placement offering ("specific issue for cash"). This offer is usually limited to key institutions and requires shareholder approval. The offering

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could be underwritten to eliminate market risk. There is no maximum discount for the share issuance. If shares are issued to related parties, a fairness opinion is usually required. Related parties would be excluded from the shareholder vote.

The circular disclosure requirements for a specific issue for cash are not onerous. In fact, the bulk of the circular content describes strategy and use of proceeds. For both private placements and rights issues, irrevocable undertakings could be obtained from key shareholders/ investors to minimize market risk.

Assuming an undocumented offer in the US, a specific issue for cash could potentially be completed within two to three months.

From a US perspective, the offer would be structured to take advantage of exemptions avoiding registration with the SEC. The offering outside the US would be designed to comply with the safe harbor for offshore transactions provided by Securities Act Regulation S ("Reg S"). Provided that placements into the U.S. are limited to "accredited investors" (essentially large, sophisticated investors), there is no specific information requirement such as a prospectus or offering memorandum.

Technically, an even quicker method of raising cash on the JSE is a "general issue for cash" if an existing shareholder authority is in place and US shareholders can be excluded from the offer. No circular is required and the transaction can be implemented in little more than a week. But no more than 15% of existing share capital can be issued and a maximum discount of 10% on the trading price 30 business days before pricing is applicable.

If a relatively small financing is required, this route could be explored. All that is required is a board resolution, a listing application and an announcement if over 5% of the company's shares are issued.

A third potential route is a rights offer which could be underwritten and usually avoids the shareholder approval requirement unless 30% or more of the company's securities are issued under the rights offer. A JSE approved circular is still required. Although the offering would be extended all shareholders, certain shareholders (such as US shareholders) could be excluded from the offering through a SA Companies Act procedure.

The narrow JSE disclosure requirements for a rights issue circular are similar to those of a private placement offering. However, if the offer is extended to US shareholders, the content requirements are driven by US disclosure standards and not by the minimum JSE content requirements.

If US shareholders are excluded from the offer, the rights offer could be completed within two to three months.

From a US perspective, the rights offer would be structured so as not to be registered in the US with the SEC as a result of a combination of exemptions. The portion of the transaction sold to investors outside the US would be designed to comply with the safe harbor for offshore transactions provided by Reg S whilst the portion sold to US investors would be structured to comply with the safe harbor of Securities Act Rule 144A for resales to Qualified Institutional Buyers.

Depending on the size of the issuer and the offer, unless US shareholders can be excluded from the offering or the offering can fit within the offer size and permitted discount constraints in a “General Issue for Cash”, a private placement offer undocumented in the US but extended to only key US institutions is probably the most efficient route to raise equity capital on the JSE.

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