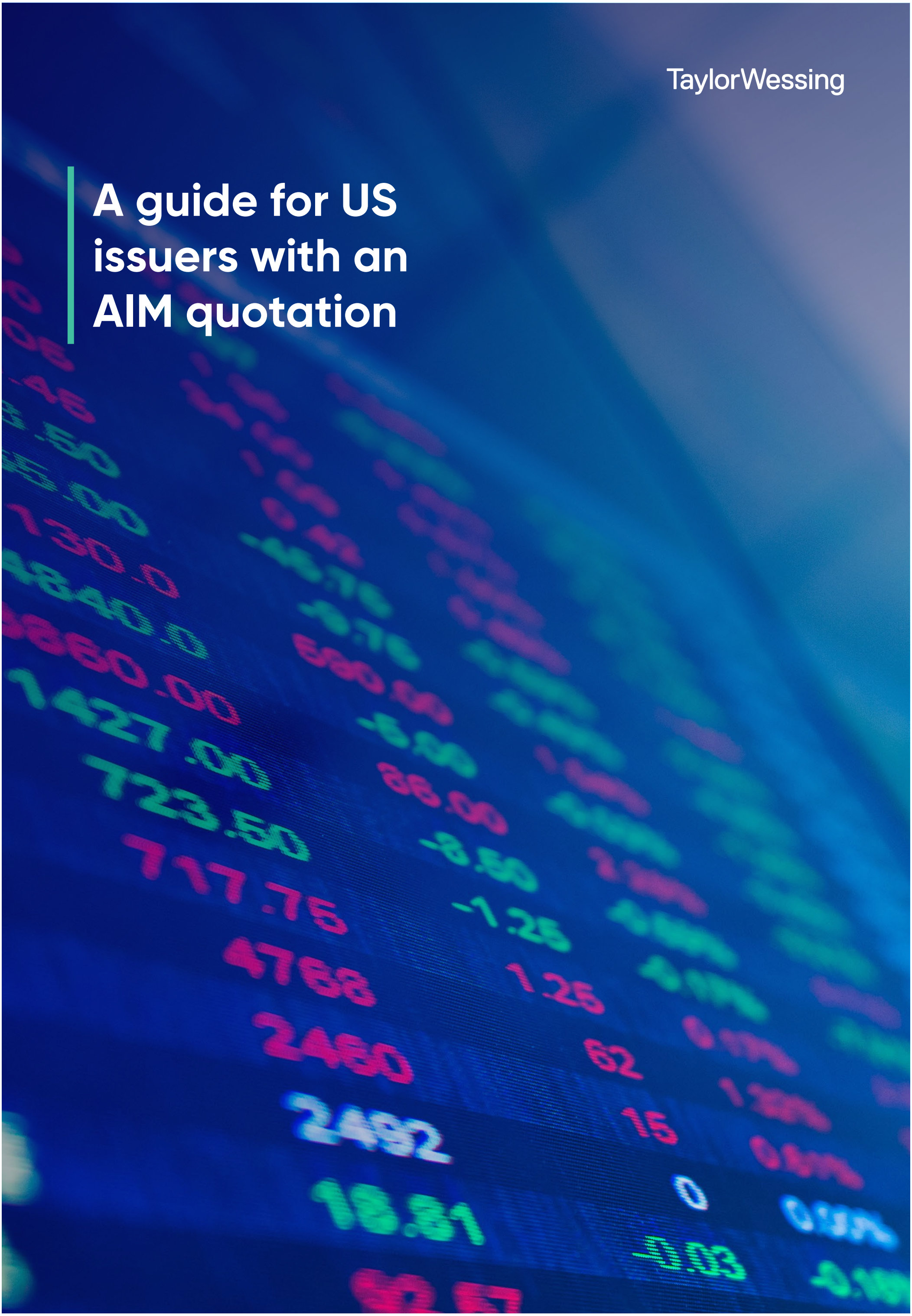
TaylorWessing

A guide for US issuers with an AIM quotation



The Alternative Investment Market (AIM), a specialised exchange–regulated market of the London Stock Exchange (LSE), is the UK's exclusive market aimed at high–growth companies, providing access to capital from a network of premium institutional investors keen to support growing businesses.

The UK's markets contain more international issuers than any other exchange and AIM is currently home to around 850 companies with a combined market capitalisation in excess of US$160 billion. As at February 2022, 63 AIM companies had their main operations in North America.

Our brochure 'A guide for US issuers floating on AIM' sets out the considerations for US companies when assessing the viability of a UK listing, including the practical steps required to achieve an AIM quotation.

This guide focuses on supporting US businesses already quoted on AIM and covers the following topics:

- **raising capital by further equity issuances**
- **achieving liquidity for shareholders**
- **growth through acquisitions**
- **continuing obligations**
- **recieving a takeover bid.**

The information contained in this guide is general in nature and does not constitute legal advice. It has been prepared to reflect the law as at April 2022.

"

… the UK's markets contain more international issuers than any other exchange.

Raising capital by further equity issuances

As AIM is a growth market, investors recognise that issuers may need further financing.

As a result, many issuers rely on further equity financing rounds to continue on their growth journey, and there are numerous examples of issuers raising equity finance following their initial admission to AIM. As at February 2022 over US$100 billion has been raised by AIM–quoted companies through further issues of shares.

There are various options available to companies seeking further equity financing, which may involve an offer to all existing shareholders or an offer to only select investors.

Companies will need to consider their desired speed of execution and size of the fundraising, whether a prospectus will be required, and any obligations under the UK Market Abuse Regulation (UK MAR) and AIM Rule 11 (regarding price–sensitive information). Issuers also need to ensure that any follow-on fundraise will not cut across the conditions for the Venture Capital Trust (VCT) qualification and/or the Enterprise Investment Scheme (EIS), if applicable.

"

As at February 2022, over US$100 billion has been raised by AIM–quoted companies through further issues of shares.

Placing vs open offer vs rights issue

A placing comprises an issue of new shares for cash to selected subscribers. As new shares are placed with selected investors, rather than being offered to all existing shareholders on a pre–emptive basis, a placing is a form of non–pre–emptive offer.

In contrast, an open offer and a rights issue are both forms of pre–emptive offers to a company's existing shareholder base. Open offers are pre–emptive offers to existing shareholders to subscribe for additional shares on a pro rata basis. Unlike in a rights issue, the 'right' to subscribe for new shares is not itself a tradeable security. In practice, open offers are normally accompanied by a separate placing to institutions.

Where a US company has undergone a reorganisation prior to IPO whereby a UK topco is placed on top of the US entity, there will be restrictions on both the board's ability to allot further shares and its ability to do so on a non–pre–emptive basis under the Companies Act 2006.

Where a US company has not restructured in such a manner, and where shares were admitted directly in the US topco, it is likely that such company will have replicated the restrictions contained in the Companies Act 2006 into its constitutional documents.

Listed companies generally seek to disapply restrictions on issuing shares on a non–pre–emptive basis annually at their AGMs in line with investor guidelines. It is therefore important to check what authority the board has to issue shares, and whether it is able to do so on a non–pre–emptive basis, without requiring additional approval from shareholders. If shareholder approval is required, this would require a general meeting and therefore the relevant notice should be incorporated into the transaction timetable.

Issuers tend to follow institutional investor guidelines on the acceptable level of disapplication and headroom for the allotment of further shares, including those carried out on a non–pre–emptive basis. Directors typically obtain annual authority to allot such number of shares up to 33% (or sometimes 66%) of an AIM company's existing share capital, of which up to 10% may be issued on a non–pre–emptive basis.

Where an issuer has appropriate share allotment authorities in place (including disapplication of pre–emption rights), a placing can be completed in a matter of days (or even hours), without the need for a shareholders' meeting and is a common way of raising capital very quickly.

"

It is important to check what authority the board has to issue shares, and whether it is able to do so on a non–pre–emptive basis, without requiring additonal approval from shareholders.

Is a prospectus required on a follow-on issuance of shares?

Companies must check whether a Financial Conduct Authority (FCA) approved prospectus will be required. A requirement for a prospectus would involve timing and cost implications.

A prospectus will normally be required (unless an exemption is available) if either:

- transferable securities will be offered to the public; and/or
- transferable securities will be admitted to trading on a regulated market.

As AIM is not a regulated market for these purposes, companies with an AIM quotation are not required to publish a prospectus, unless shares will be 'offered to the public'. An issuer, with the support of its advisers, must therefore consider whether there is an available exemption for the requirement to publish a prospectus where there is an 'offer to the public'.

A common exemption, particularly relevant in the context of a placing, applies where shares are offered only to qualified investors (ie institutional investors).

In contrast, if a company is considering an open offer or rights issue, then the shareholder base may be broader than just institutional investors, and two other exemptions may be relevant. One available exemption is to cap the raise at a maximum of up to €8 million (or USD or GBP equivalent amounts), as there is an exemption for offerings below that level. There is also an exemption for offerings to fewer than 150 persons in the UK (excluding qualified investors).

EIS/VCT eligibility

The UK has several tax incentives for investment into earlier stage, higher risk companies, including the Enterprise Investment Scheme (EIS) and the Venture Capital Trust (VCT) regime. This can potentially increase the investor pool available to AIM companies seeking to raise capital. There are several eligibility criteria that need to be met in order to ensure access to (or continued) EIS and VCT treatment.

In order for a company to be eligible, a company must have a permanent establishment in the UK. Taylor Wessing can advise further on how this eligibility requirement may be fulfilled. In addition, shares must be issued within seven years of the first commercial sale by the company (or 10 years for 'knowledge–intensive' companies), the group's gross assets must not exceed £15 million before the issue of shares (or £16 million immediately after such issue). The group and/or the company must have fewer than 250 full-time employees. That number is increased to 500 full-time employees for knowledge-intensive companies.

Companies which qualify for EIS/VCT treatment:

- can only raise up to £5 million in every rolling 12–month period (or £10 million if the company is 'knowledge intensive')
- cannot raise more than £12 million (or £20 million if the company is 'knowledge intensive') in total through risk capital schemes (including the EIS and VCT schemes).

Companies with investors who want to retain EIS or VCT treatment for their shareholdings will need to ensure that any secondary fundraise is structured in such a way so as not to breach any of the relevant thresholds.

UK Market Abuse Regulation (UK MAR)

Under Article 7(1) of UK MAR, inside information comprises information that is of a precise nature, has not been made public, relates either directly or indirectly to one or more issuer(s) or to one or more financial instrument(s) and if it were made public, would likely have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

A follow-on fundraise will often constitute price–sensitive information. Therefore an issuer (and any person acting on its behalf) needs to ensure it has in place the right procedures and controls for that information, including an insider list, to ensure that the fact that a secondary fundraise is about to take place is kept confidential, until such time as it is announced.

UK MAR also includes a 'market soundings' regime which comprises a procedural framework to enable an issuer (usually via its appointed broker) to gauge the interest of potential investors ahead of an announcement of a fundraise or other transaction, without breaching the restriction on unlawful disclosures of inside information.

"

A secondary fundraise will often constitute price–sensitive information.

Regulation S

US issuers will often be subject to Category 3 of Regulation S within the US securities law regime.

If more than 12 months has passed since the IPO, it is possible that any transfer restrictions on its shares will have been lifted, and they will therefore be able to trade freely.

If a further issuance of shares takes place pursuant to a secondary fundraise under Category 3 of Regulation S, then the same considerations which were taken into account on placing stock at the time of IPO will apply to the new shares.

This could require such an issuer to have a line of restricted stock in place for one year after the follow-on offering.

This consideration should be discussed with the issuer's advisors, including its counsel, Nomad and also its registrar, early on. Further details of the application of Regulation S and Category 3 are contained in our brochure 'A guide for US issuers floating on AIM'.

"

If a further issuance of shares takes place pursuant to a secondary fundraise under Category 3 of Regulation S, this could require an issuer to have a line of restricted stock in place.

Achieving liquidity for shareholders

The AIM market is not only used for raising capital; it can also be used to create liquidity for existing shareholders. A company which has a shareholder or group of shareholders who wishes to sell their shares will need to consider:

- whether there is any contractual 'lock–up' arrangement in place (that is, an agreement preventing the sale of shares for a period of time which is often put in place at the time of IPO to certain categories of shareholders)
- whether the company is currently in a closed period or holds inside information
- the impact of the sale on the company's securities under Regulation S.

Normally, larger shareholders and directors will have lock–up arrangements with the broker and Nomad which take effect on IPO, and which typically last up to 24 months from the IPO date. Within this lock–up arrangement, there is typically a 'hard lock–in' of 12 months from the IPO date, during which time no locked–in shareholder can sell any shares without the prior written consent of the company's Nomad and broker. Following this time, an 'orderly market' period of six to 12 months follows, where such locked–in shareholders may only trade their shares through the company's appointed broker.

If a company is in a closed period (normally the period that runs from 30 days prior to the announcement of interim or final results, up to their actual publication) then directors and senior managers are not permitted to trade in the company's shares. A similar restriction is imposed on persons who hold inside information.

It will also be important to consider any impact the trade will have under US securities laws. This is especially significant if the IPO was carried out under Category 3 of Regulation S, as restricted stock would have been issued as part of the IPO. This line of restricted stock would be subject to US transfer restrictions that often remain in place until lifted, normally one year following the IPO.

Growth through acquisitions

AIM companies' growth strategies commonly involve acquiring one or more target companies that provide complementary operational potential and new business opportunities.

A significant benefit of AIM is that quoted companies are able to issue publicly tradeable shares as consideration (which unlisted companies do not have the benefit of doing).

AIM also allows companies to finance (or part finance) the cash portion of acquisition costs (in whole or in part) through an equity raise if it does not have or wish to deploy all of its existing cash resources.

Companies planning an acquisition will need to consider the structure of the transaction once the target has been identified. In particular, the parties will need to consider and agree the mechanisms relating to the calculation of deal consideration, the interaction between the acquisition payment and equity raise; the amount and timing(s) of the payment(s); risks associated with the due diligence process; and ensuring the issuer's (as acquirer) interests are protected along the way.

An AIM company will also need to be mindful of other considerations and rules by virtue of its publicly–quoted status, including:

- the operation of the AIM Rules, and in particular, the disclosure obligations in connection with significant transactions (and in some cases, the requirement to obtain approval of the corporate transaction)
- the fact that (prior to announcement) the transaction may constitute inside information under UK MAR
- the corporate authorities required to issue shares (as discussed above), as well as its overall obligations under the AIM rules generally.

Disclosure of corporate transactions under the AIM rules

AIM Rule 12 requires AIM companies to issue an announcement without delay as soon as the terms of any substantial transaction exceeding 10% in any of the five 'class tests' are agreed. The class tests assess the size of the transation relative to the issuer by reference to (i) gross assets, (ii) profits, (iii) turnover, (iv) consideration, and (v) gross capital.

In addition, where an acquisition (or any other transaction) is entered into by an AIM company and a 'related party' exceeds 5% in any of the class tests, then the company must announce without delay. In practice, AIM companies would also need to disclose details of any acquisition or corporate transaction without delay if such a transaction is considered to be price sensitive in order to comply with UK MAR in any event (see below).

In addition, AIM issuers must ensure any acquisition which would be considered a 'reverse takeover' is conditional on shareholder approval. A reverse takeover is any acquisition(s) by an AIM company within a 12–month period, which would:

- exceed 100% in any of the class tests
- result in a fundamental change to the AIM company's business (including a disposal by an AIM company exceeding 75% in any of the class tests), board or voting control, or in the case of an investing company, materially departing from its investing policy.

Where an acquisition by an AIM company constitutes a reverse takeover, an admission document will need to be produced for the proposed enlarged entity, and shareholder approval obtained (which should be sought immediately after the announcement of the proposed acquisition). The AIM company's securities will also need to be suspended until the admission document has been published. The enlarged entity will also need to make a new application for listing on AIM, which can be made in advance of the general meeting, ensuring the enlarged group's securities are admitted on the day following the general meeting approving the reverse takeover.

Inside information

UK MAR requires issuers to notify the public as soon as possible, using a Regulatory News Service (RNS) announcement of any inside information (described further earlier) that concerns it directly. Additionally, Rule 11 of the AIM Rules requires AIM companies to issue notification without delay of any new developments which are not public knowledge which, if made public, would be likely to lead to a significant movement in the price of its AIM securities.

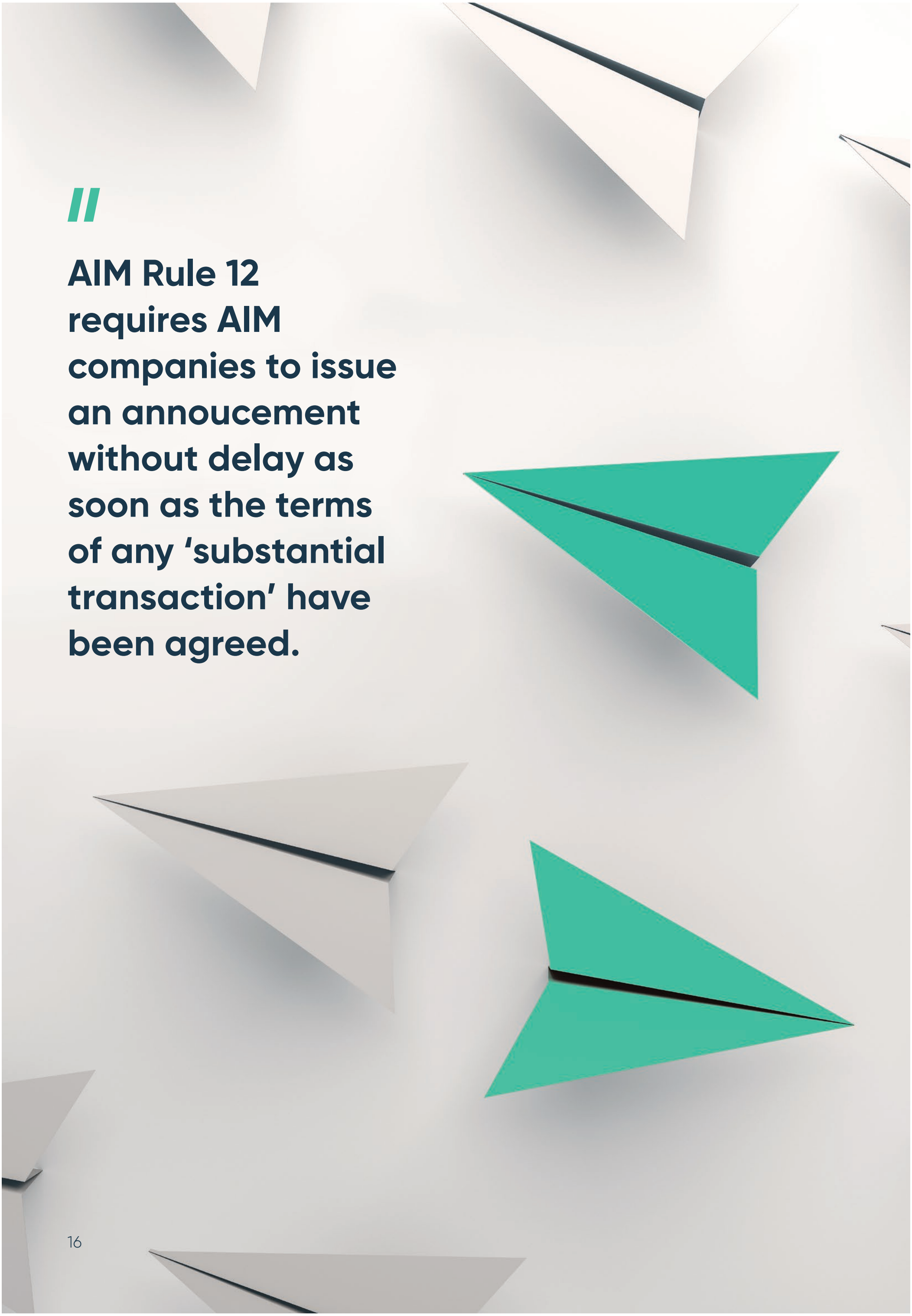
These regimes do acknowledge that, in certain circumstances, AIM companies may need to delay publication of price–sensitive information if a matter or transaction is still under negotiation or if it concerns an impending development.

In order to qualify for this delayed disclosure, it must be demonstrated that there are effective confidentiality procedures in place which will minimise risk of a leak.

As a result, a priority for any company considering an acquisition is to assess whether the transaction will be price senstive, in accordance with UK MAR and the AIM Rules, as well as whether the information relating to this transaction will be considered 'precise' as defined under Article 7(1) of UK MAR (that is, it is reasonably expected to occur).

Careful procedures and controls will also need to be in place if the transaction is likely to be price sensitive, including collating an insider list in a prescribed format.

Additionally, any advisors who are involved in the transaction and are privy to the inside information, must also keep their own insider list. Both lists should be kept for a minimum of five years.



AIM Rule 12 requires AIM companies to issue an annoucement without delay as soon as the terms of any ‘substantial transaction’ have been agreed.

Interaction between transaction documents and acquisition timetable

Although transactions often vary on their terms, they will normally be financed using existing cash resources, debt financing, or the proceeds of a secondary equity fundraise, or a combination of one or more of these options. This position can be straightforward if a company is financing its acquisition through existing cash sources or private debt financing.

It is important that providers of debt finance (and their advisers and agents) remain under a strict obligation of confidentiality if the transaction is considered price sensitive.

If an AIM company intends to fund or partially fund an acquisition through a further equity issuance, it may require shareholder approval to allot the new shares (and where applicable, to disapply pre–emption rights).

See further above in relation to secondary fundraises. If shareholders' approval is required, the sale and purchase agreement will need to be conditional on that approval being obtained.

"

It is important that providers of debt finance (and their advisers and agents) remain under a strict obligation of confidentiality if the transaction is considered price sensitive.

Continuing obligations

It is important that AIM companies are aware of their ongoing responsibilities and obligations under the AIM Rules, UK MAR and other laws and regulations once an AIM IPO has been achieved (even if there is no planned transaction or further share issuance being contemplated).

These ongoing obligations include:

- a requirement to immediately announce any price–sensitive information, unless disclosure can be delayed (similar to the MAR obligations for notification of inside information as discussed above)
- disclosure of any transaction constituting:
  - a 'substantial transaction' (over 10% of any class test)
  - a 'related party transaction' (exceeding 5% of any of the class tests)
  - a 'reverse takeover' (100% of any class test or a fundamental change in board, business or voting control of the company)
  - any disposal exceeding 75% in any class test (when aggregated with all other disposals over the last 12 months).
- disclosure of corporate matters, as necessitated by AIM Rule 17, including:
  - relevant changes to any significant shareholders
  - the appointment, resignation or dismissal of any director
  - changes to the accounting reference date, registered address of the company and/or legal name of the company
  - any material change between the actual trading performance or financial condition and any profit estimates, forecasts or projection of the company
  - decisions to make payment in respect of its AIM securities
  - reasons for an application for admission or cancellation of AIM securities
  - any shares placed and taken out of treasury

    - the appointment, resignation or dismissal of a broker or Nomad
    - changes of the website address of the company, in accordance with AIM Rule 26
    - changes to the details of the company's directors
    - the admission to trading of its AIM securities on any other trading platform, and /or cancellation of such trading.
- notifications made to the company by shareholders, which meet the relevant disclosure thresholds (as set out in Chapter 5 of the Disclosure Guidance and Transparency Rules (DTR)). For companies that have a US topco, its constitutional documents would typically have been amended at IPO to include provisions which mirror the DTR disclosure requirements in respect of voting rights held by shareholders
- maintaining a schedule of persons discharging managerial responsibilities (PDMRs) and their closely associated persons for the purposes of MAR
- preparing and publishing audited annual results within six months of the end of the financial year, and half yearly reports (which can be unaudited) within three months of the end of the relevant financial period
- maintaining a share dealing policy and ensuring sufficient procedures and policies are in place to allow for compliance with MAR's provisions on insider dealing
- maintaining its Nomad and broker appointments
- complying with relevant corporate governance code (often AIM–quoted companies tend to follow the Quoted Companies Alliance Corporate Governance Code).

Receiving a takeover bid

If an AIM–quoted company is approached by a potential bidder, the company must determine whether the City Code on Takeovers and Mergers (the 'Takeover Code') is applicable, and if so, to what extent.

As a general rule, the Takeover Code does not apply where the issuer is itself a US company. However, if a US business has a UK incorporated topco then the Takeover Code will apply.

However, US issuers that are not subject to the Takeover Code tend to incorporate provisions that mirror Rule 9 of the Takeover Code into their constitutional documents to prevent the acquisition or obtaining of control of that company, without a general offer being made to all shareholders on certain specified terms.

If a person or group of persons acting in concert (together, a **'bidder'**) acquires interests in shares which result in it holding 30% or more of the voting rights, they must announce and make a general offer for the remaining issued shared capital of the company at the highest price paid by the bidder within the previous 12 months.

If a person or group of persons acting in concert already own between 30% and 50% of the voting rights in a company, and there is any increase in the percentage of the shares carrying voting rights where they or a group of persons acting in concert with them are interested, an offer for the remaining issued share capital of the company is normally required.

Note, if the Takeover Code does apply, the following will need to be considered:

- All shareholders of the same share class must be treated equally, including being offered the same price per share and being provided with the same information.
- Shareholders must be given information and advice early on to ensure they reach a properly informed decision.

- The board of the target company must act in the interest of the entire company, and should not deny the holders of securities the opportunity to decide on the bid.
- All those involved should ensure they do not create a false market.
- Documents containing relevant information must be prepared with the highest standards of care.
- Confidentiality is of utmost importance, as secrecy must be preserved before the public announcement.
- The circumstances in which an AIM company is required to issue an announcement.

Generally, takeovers on AIM tend to only proceed where the board of the AIM–quoted company agrees with the acquisition and recommends it to shareholders. However, it is possible for an AIM company to become subject to a hostile takeover. Importantly, following any approach by a prospective bidder, notification to the company's board is critical, as is obtaining advice from the company's Nomad, broker and/or legal advisers.

"

Importantly, following any approach by a prospective bidder, notification to the company's board is critical, as is obtaining advice from the company's Nomad, broker and/or legal advisers.

Taylor Wessing is a global law firm that serves the world's most innovative people and businesses.

Deeply embedded within our sectors, we work closely together with our clients to crack complex problems, enabling ideas and aspirations to thrive.

Together we challenge expectation and create extraordinary results.

By shaping the conversation in our sectors, we enable our clients to unlock growth, protect innovation and accelerate ambition.

Technology, Media & Communications

Private Wealth

Real Estate, Infrastructure & Energy

Life Sciences & Healthcare

- Aerospace & Defence
- Business & Professional Services
- Consumer & Retail
- Hotels, Hospitality & Leisure
- Manufacturing & Industrials
- Automotive & Mobility
- Chemicals
- Financial Institutions & Insurance
- Logistics & Transport
- Public Services & Education

2000+ people
1100+ lawyers
300+ partners
29 offices
17 jurisdictions

Challenge expectation, together

With our team based across Europe, the Middle East, US and Asia, we work with clients wherever they want to do business. We blend the best of local commercial, industry and cultural knowledge with international experience to provide proactive, integrated solutions across the full range of service areas.

2000+ people 1100+ lawyers 300+ partners 29 offices 17 jurisdictions

Austria	Klagenfurt | Vienna
Belgium	Brussels
China	Beijing | Hong Kong | Shanghai
Czech Republic	Brno | Prague
France	Paris
Germany	Berlin | Düsseldorf | Frankfurt | Hamburg | Munich
Hungary	Budapest
Netherlands	Amsterdam | Eindhoven
Poland	Warsaw
Republic of Ireland	Dublin
Slovakia	Bratislava
South Korea	Seoul*
UAE	Dubai
Ukraine	Kyiv
United Kingdom	Cambridge | Liverpool | London | London TechFocus
USA	New York | Silicon Valley

* In association with DR & AJU LLC

Taylor Wessing statistics published are correct as of 1 September 2021.

TaylorWessing