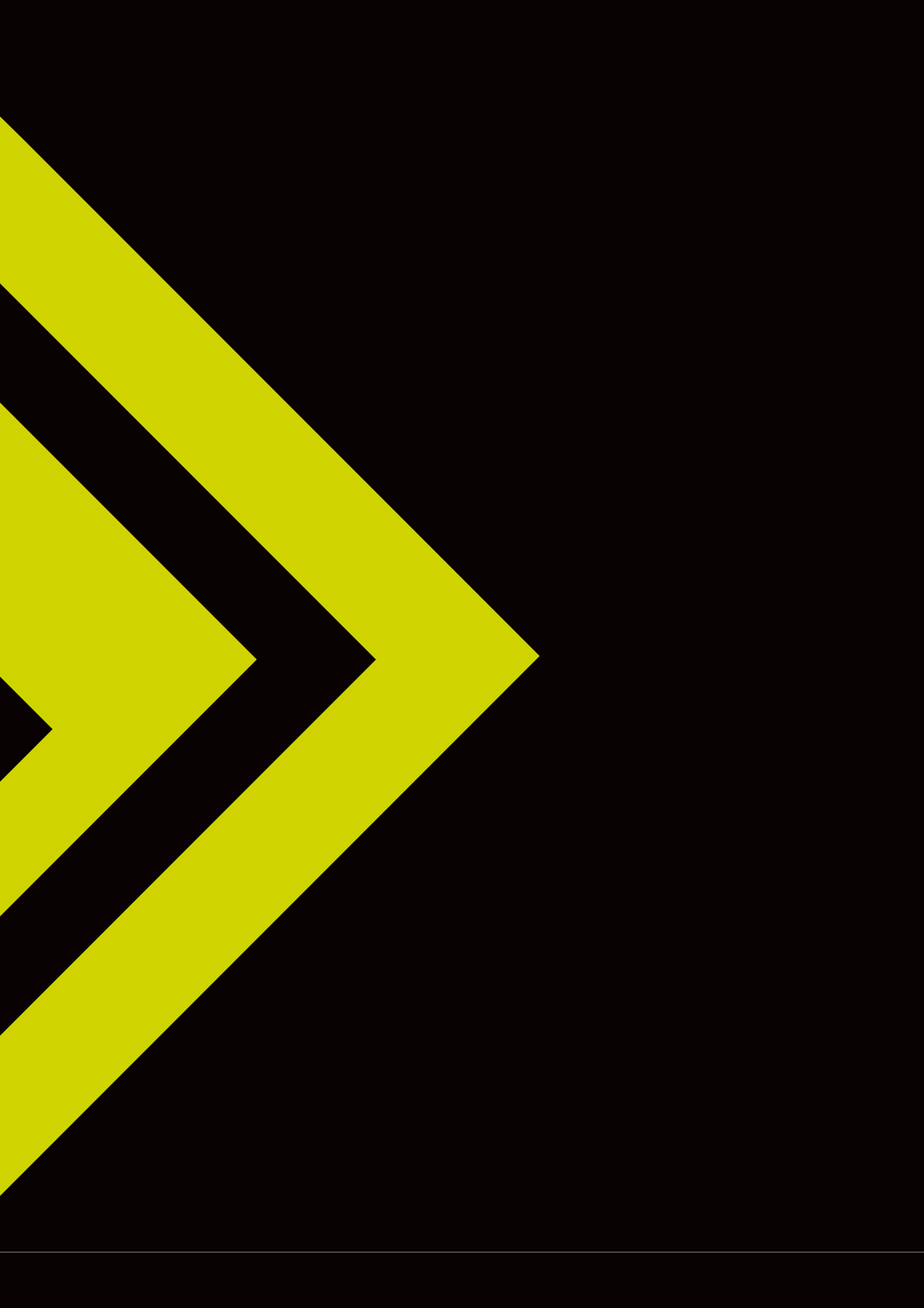
RAISING CAPITAL IN THE UK

MAXIMISING SUCCESS ON AIM:
A TOOLKIT FOR US ISSUERS

www.penningtons.co.uk



MAXIMISING SUCCESS ON AIM: A TOOLKIT FOR US ISSUERS

The Alternative Investment Market (AIM) run by the London Stock Exchange (LSE) is the UK's dedicated market aimed at growth companies. It provides access to a high-quality institutional investor base that is looking for companies to prosper and flourish. The market is very international in nature with the UK being home to more international issuers than any other exchange.

Our brochure *Listing on AIM: a toolkit for US issuers* sets out the various factors that US companies need to consider when assessing if the UK markets are right for them in their next stage of financing and the practical steps they would need to take to achieve an AIM quotation.

But once quoted, the company's growth journey does not stop. This toolkit is aimed at supporting existing US businesses quoted on AIM and covers the following aspects:

- Growth through M&A
- Raising further equity finance
- Achieving liquidity for shareholders
- Keeping on track with your continuing obligations
- What to do if a potential acquiror appears.

The information contained in this guide is general in nature and is not intended to constitute legal advice. It has been prepared to reflect the law as at 1 April 2019.

© Penningtons Manches LLP 2019

GROWTH THROUGH M&A

It is common for AIM companies to seek to achieve growth through the acquisition of one or more target companies that offer complementary business lines, depth of offering and/or operational synergies. One of the benefits of AIM is that the quoted company has acquisition currency in the form of its AIM-quoted shares thereby creating the opportunity to acquire target companies for cash, quoted shares or a combination of both.

In addition, the market allows companies to finance the cash portion of the acquisition costs either through existing cash resources, a further equity placing, debt or some combination of the three.

If you are planning an acquisition, one of your first considerations will be how to structure the deal once a target has been found. This will involve negotiating and agreeing the usual M&A terms which include how the consideration will be calculated; how much of that will be paid up front and deferred; identifying key risks in the due diligence process and negotiating protection accordingly.

However, as an AIM-quoted company, you will also need to think about various provisions that are additionally imposed due to your publicly-quoted status. These include:

- your obligations under the Market Abuse Regulation (MAR) and AIM Rules for Companies (AIM Rules) regarding price-sensitive and inside information
- the provisions of the AIM Rules in respect of the disclosure and, in certain cases, approval of corporate transactions
- the interplay between (i) the Sale and Purchase Agreement (SPA) terms, (ii) the corporate steps and requirements to effect the financing, and (iii) your obligations under the AIM Rules.

> One of the benefits of AIM is that the quoted company has acquisition currency in the form of its AIM-quoted shares...

INSIDE INFORMATION

MAR applies to both main market and AIM-quoted companies in London. Under Article 7(1) of MAR, inside information is defined as information that:

- is of a precise nature
- has not been made public
- is directly or indirectly in relation to one or more issuers or to one or more financial instruments
- would likely have a significant effect on the price of the relevant financial instruments (or any related derivative).

As a general rule, issuers are required to inform the public as soon as possible through a Regulatory News Service (RNS) announcement of any inside information that directly concerns it. In addition, under a parallel but similar requirement, under Rule 11 of the AIM Rules, AIM companies need to announce without delay any new developments which are not public knowledge which, if made public, would likely lead to a movement in the price of its AIM securities.

However, the regimes do recognise that, in certain circumstances, it will be necessary for issuers to delay publication of price-sensitive information if it concerns an impending development or matter in the course of negotiation. One of the key conditions required to qualify for these provisions allowing for delayed disclosure is that there are effective confidentiality procedures and controls in place designed to ensure the confidentiality of such information and to minimise the risk of a leak.

As such, one of the first assessments that you would need to undertake as you look at any prospective acquisition is whether or not the transaction would be price-sensitive for the purpose of both MAR and the AIM Rules, and "precise" for the purpose of MAR (in other words, reasonably expected to occur).

If the transaction is likely to be price-sensitive, you would need to ensure that you have careful procedures and controls in place for that information, including an insider list. As well as keeping your own insider list, which will be in the prescribed format, you will also need to ensure that your advisors who are privy to the inside information also keep their own lists, each of which should be kept for a minimum period of five years.

> If the transaction is likely to be price-sensitive, you would need to ensure that you have careful procedures and controls in place for that information, including an insider list.

AIM RULES FOR TRANSACTIONS

In addition, you would need to consider whether or not any of the AIM Rules applicable to the disclosure and/or approval of transactions will apply.

More specifically, AIM issuers will need to ensure that any agreement for a transaction that would constitute a "reverse takeover" is conditional on shareholder approval. A reverse takeover is any acquisition or acquisitions in a 12-month period which for an AIM company would:

- exceed 100% in any of the "class tests" (see below) or
- result in a fundamental change in its business (which, broadly, includes a disposal by an AIM company which exceeds 75% in any of the class tests), board or voting control or
- in the case of an investing company, depart materially from its investing policy.

The class tests are five separate calculations that you and your Nominated Advisor (NOMAD) will need to carry out for both the AIM company and the target business to assess the relative size of the transaction for your existing business. The tests assess gross assets, profits, turnover, consideration, and gross capital.

In the case of a reverse takeover, you would need to produce an admission document for the proposed enlarged entity, in addition to shareholder approval, which should be sought as soon as possible following announcement of the conditional acquisition.

Following announcement of the proposed transaction, your securities would also be suspended until the admission document has been published and the new enlarged entity would need to make a new application or listing on AIM. This can be made in advance of the general meeting so that the enlarged group's securities are admitted on the day after the general meeting approving the reverse takeover.

Even if the transaction does not constitute a reverse takeover, you may need to publicly disclose the transaction under AIM Rules 12 and 13 respectively if it constitutes a "substantial transaction" (ie one which exceeds 10% in any of the class tests) or is a "related party transaction" which exceeds 5% of any of the class tests. A related party is any current or recent director, any substantial shareholder (holding 10% or greater), or any of their respective associates.

In practice, most AIM companies will want to disclose the transaction as soon as it is agreed for general commercial and marketing reasons and, as noted above, this may also be a requirement if the transaction is considered to be price-sensitive.

INTERPLAY BETWEEN THE SPA, THE AIM RULES AND GENERAL CORPORATE REQUIREMENTS

Each transaction is unique on its terms, although it will generally either be financed by existing cash resources, a further equity offering, debt financing or a combination of one or more of these options.

The position is relatively straightforward if you are financing your acquisition through existing cash resources or private debt financing. The workstreams to ensure the cash and/or debt facilities are in place can run parallel to the SPA negotiations, bearing in mind the requirements to keep any lenders under an obligation of confidentiality if the transaction could be considered price-sensitive, as noted above.

If you are financing your acquisition through a further equity issuance, you may need shareholders' approval to authorise the increase in shares, particularly if the equity raise will be more than 10% of the existing share capital and is not on a pre-emptive basis (see overleaf). As such, you should check your existing headroom for further equity raise early on and, if shareholders' approval is required, ensure that any SPA is conditional on that approval being obtained.

> If you are financing your acquisition through a further equity issuance, you may need shareholders' approval to authorise the increase in shares...

RAISING FURTHER EQUITY FINANCE

AIM is a growth market and the investors on it recognise that issuers may need further financing for either organic and/or inorganic growth. There are numerous examples of issuers successfully using further equity financing rounds to maintain their trajectory.

There are different options available to execute a further equity financing which, in essence, depend on whether or not existing shareholders will be given the opportunity to participate. If not, the new shares will only be issued to one or more select investors.

The route you decide to take will be based on the consideration of several factors, including speed of execution and size of raise, as well as other legal factors such as whether a prospectus would be required.

You will also need to take into account your obligations under MAR and Rule 11 in relation to price-sensitive information and also be careful to ensure that any raise does not cut across the conditions for Enterprise Investment Scheme (EIS) and/or Venture Capital Trust (VCT) qualification.

> The general rule is that a prospectus will be required where transferable securities are to be offered to the public and/or admitted to trading on a regulated market ...

PLACING VS OPEN OFFER OR RIGHTS ISSUE

A "placing" is a non pre-emptive offer by the issuer to one or more third parties to subscribe for new shares for cash. An "open offer" and "rights issue" are pre-emptive offers to a company's shareholders to subscribe for further shares *pro rata* to their existing shareholdings.

If you restructured prior to IPO and have a UK topco, restrictions will be imposed as a matter of law by the UK's Companies Act 2006 on both the board's ability to allot further shares and its ability to do so on a non pre-emptive basis. If you did not restructure and admitted shares in your US topco directly, it is likely that you included replica provisions within your Certificate of Incorporation or bylaws in recognition that those Companies Act provisions would not apply directly to you as a US company.

As it is common for companies to seek to disapply these restrictions on an annual basis, one of the first things to check is what authority your board has to issue shares and to do so on a non pre-emptive basis without having to seek further approval from shareholders.

Any further shareholder approval will require a convening of a general meeting and will need to comply with the relevant notice requirements that should be incorporated into the transaction timetable.

The level of disapplication and annual "headroom" provided to allot further shares, including on a non pre-emptive basis, is generally directed by institutional investor guidelines. As a general guide, it would be common for directors to have annual authority to allot up to 33% of an AIM company's existing share capital, of which 10% could be issued on a non pre-emptive basis (sometimes seen as a 5% disapplication for general cash placings and a further 5% disapplication for cash placings used to finance an acquisition or capital investment).

IS A PROSPECTUS REQUIRED?

You need to check whether an FCA-approved prospectus will be required, as there will be timing and cost implications if so.

The general rule is that a prospectus will be required where transferable securities are to be offered to the public and/or admitted to trading on a regulated market, unless a relevant exemption(s) apply. As AIM is not a regulated market, the question is whether there is a relevant exemption to the "offer to the public" requirement on which the issuer can rely.

One such exemption is that a prospectus is not required if the offer is only to qualified (ie institutional) investors. Usually, if there is a placing, it will be to an institution that falls within the definition of a "qualified investor" and a prospectus is not normally required.

However, if you are contemplating an open offer or rights issue, then it is quite possible that your shareholder base is broader than just institutional investors. In this case, there are two other exemptions that might be useful. The first is that the raise is limited to up to €8 million (or GBP or USD equivalent), being the UK's *de minimis* amount for offerings that could be subject to the prospectus regime. The other is that offerings directed at fewer than 150 persons (excluding qualified investors) per EEA state will also not require a prospectus. Whether this applies would depend on the composition of your existing shareholder register - which will therefore need to be assessed at an early stage.

EIS/VCT

AIM companies, including those incorporated in the US, can be eligible for EIS and VCT treatment, thereby widening the pool of potential investors. It may be that your IPO - and possibly even one or more funding rounds before your IPO - was carried out with EIS and/or VCT eligibility in mind.

However, there are several conditions that need to be met in order to ensure continued EIS and VCT treatment. In particular, qualifying companies:

- can only raise up to £5 million in every rolling 12-month period (or £10 million if the company is knowledge intensive), and
- cannot raise more than £12 million (or £20 million if the company is "knowledge intensive") in total through risk capital schemes (including EIS, VCT, R&D tax credits under the SME scheme and any other amount that counts as State Aid).

If any of your investors have or wish to retain EIS or VCT treatment for their shareholdings in your company, it will be important to ensure that any placing and/or open offer (or rights issue) is structured so as to not breach these thresholds. For example, if your secondary raise is likely to be for more than £5 million (or £10 million if "knowledge intensive"), then it will be important to be able to retain the right to scale back any applications from shareholders seeking VCT or EIS eligibility to take their total shareholding down to less than £5 or £10 million (as applicable). It may also be possible for some EIS/VCT subscribers to invest under advance subscription agreements in order that funds come into the company, but the shares are not issued until there is sufficient headroom in the annual investment limits. Sometimes issuers will also include a *de minimis* level for subscriptions below which they will not claim EIS relief.

> **There are numerous examples of issuers successfully using further equity financing rounds to maintain their trajectory.**

> **AIM companies, including those incorporated in the US, can be eligible for EIS and VCT treatment, thereby widening the pool of potential investors.**

REGULATION S

As explained in our brochure *Listing on AIM: a toolkit for US issuers*, which covered the AIM admission process, as a US issuer it is likely that your company will be subject to Category 3 of Regulation S within the US securities law regime. If more than 12 months have passed since the IPO, it is possible that you have already lifted the transfer restrictions applicable to your AIM-quoted shares, which therefore can currently trade freely.

On the assumption that the further placing and/or open offer (or rights issue) is also carried out under Category 3 of Regulation S, then the same considerations would apply as at IPO. This means that you would very likely need to have a line of restricted stock in place to ensure there are no sales back into the US for up to one year after the follow-on offering. This is something you should discuss with your NOMAD and broker at an early stage.

MAR

It is likely that the company's plans for a secondary fundraise will constitute price-sensitive information. As such, and in the same way as described above in the context of any M&A activity, the issuer will need to ensure that it has careful procedures and controls in place for that information, including an insider list for both itself and its advisors.

> YOU WILL NEED TO CONSIDER WHETHER THERE ARE ANY CONTRACTUAL LOCK-UP ARRANGEMENTS IN PLACE. IT WILL ALSO BE IMPORTANT TO DETERMINE WHETHER THE COMPANY IS IN A CLOSED PERIOD.

ACHIEVING LIQUIDITY FOR SHAREHOLDERS

Just as the AIM market is one on which further offerings by the issuer are commonplace, it is also used as an avenue to create liquidity for existing shareholders. If one or more of your shareholders wishes to sell, you will need to consider:

- whether there are any contractual lock-up arrangements in place
- if the company is in the middle of a closed period or in possession of inside information
- what effect a sale will have on the company's securities under Regulation S of the US securities regime.

The directors and larger shareholders are likely to have entered into lock-in arrangements with the NOMAD and broker at the time of the IPO. These would typically last between 18 to 24 months from the time of the IPO and constitute a "hard lock-in" of 12 months from the IPO date. During this period no locked-in shareholders can sell any shares without the prior written consent of the NOMAD. This would be followed by a "soft lock-in" of a further six to 12 months during which the locked-in shareholders would not trade any shares except through the NOMAD or broker.

AIM is also used as an avenue to create liquidity for existing shareholders.

It will be important to determine whether the company is in a closed period. This is usually the period that runs from 30 days prior to the announcement of interim or final results up until their publication, during which time directors and senior managers cannot trade. Similar restrictions also apply when there are persons in possession of inside information.

The impact of the trade under the US securities law regime will need to be considered, particularly if the IPO was carried out under Category 3 of Regulation S. If so, then you would have issued a line of restricted stock as part of the IPO subject to US transfer restrictions that generally remain in place until the company seeks to lift those restrictions after one year following the offering.

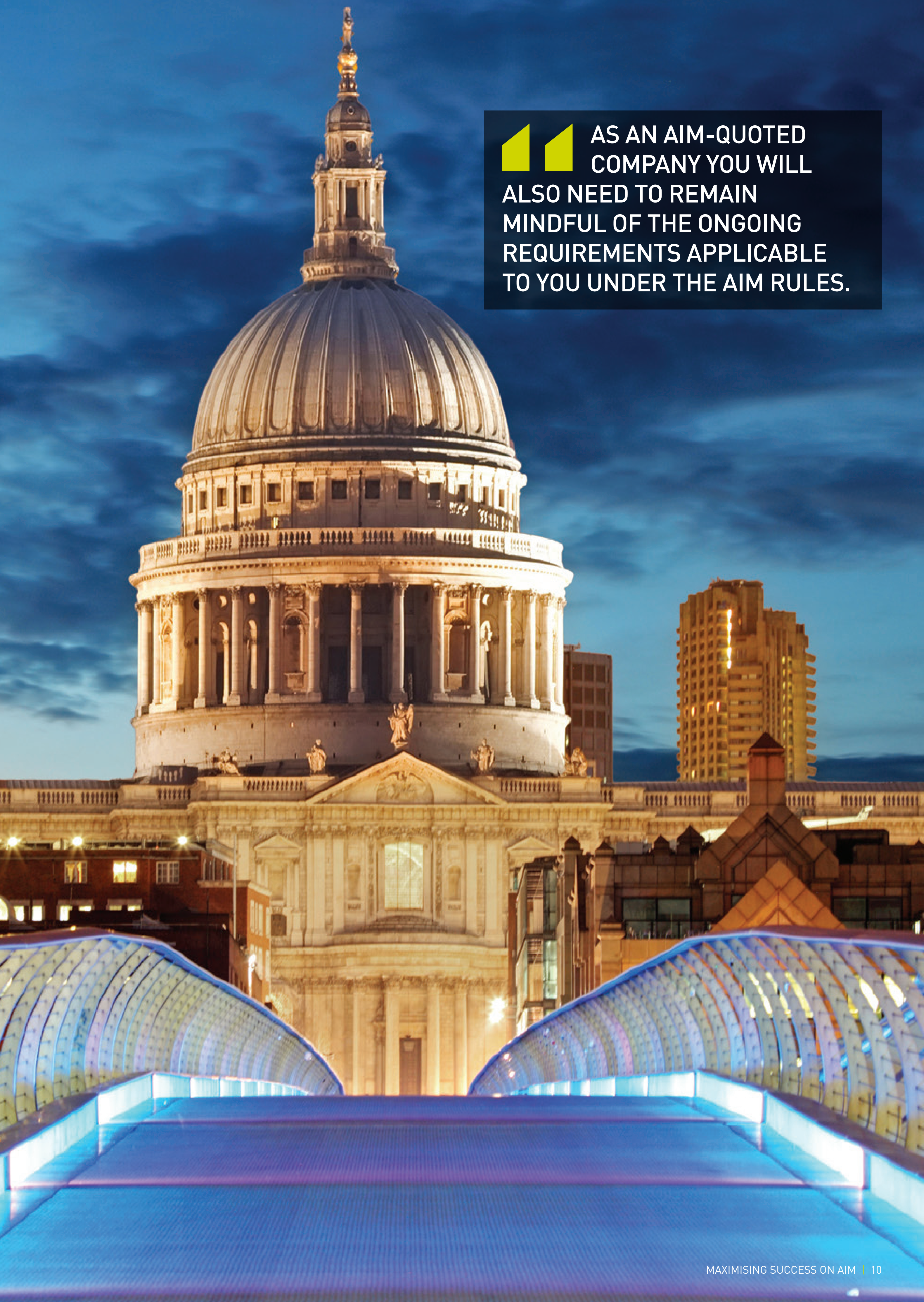
If the shareholder looking to trade is an affiliate (for example, has a holding of 10% or more or has a seat on the board), then a further sale under Regulation S would most likely require you to put in place a line of restricted stock to enable their trade to be effected (to the extent one does not still exist). However, if the shareholder is an institutional shareholder, such as a venture capital investor or another holder of the company's shares (such as, for example, a non-executive employee), then it could be possible for them to trade without you needing to impose additional restrictions on trading of the company's shares.

There will also be practical considerations. For example, the existing shareholder will likely still be holding their shares in certificated form so their holding would need to be converted into dematerialised stock. If this is being considered, it will be important to talk to your NOMAD and broker about these issues at an early stage.

KEEPING ON TRACK WITH YOUR CONTINUING OBLIGATIONS

As an AIM-quoted company you will need to remain mindful of the ongoing requirements applicable to you under the AIM Rules even when no transaction or further fundraising is being considered. These include the requirements set out below.

- A notification must be issued without delay of any price-sensitive information, unless it is possible to delay disclosure. There are also similar obligations for inside information under MAR (see above).
- Any transaction that could constitute the following must be disclosed:
  - 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 business, board or voting control of the company)
  - any disposal which, when aggregated with any other disposals over the previous 12 months, exceeds 75% in any of the class tests.
- Specific corporate matters as required under AIM Rule 17 must be disclosed. These include:
  - relevant changes to any significant shareholders
  - the resignation, dismissal, or appointment of any director
  - changes in your accounting reference date, registered office address or legal name
  - any material change between your actual trading performance or financial condition and any profit forecast, estimate or projection
  - decisions to make any payment in respect of your AIM securities
  - the reason for the application for admission or cancellation of any AIM securities and consequent number of AIM securities in issue
  - the occurrence and number of shares taken into and out of treasury
  - resignation, dismissal or appointment of your NOMAD or broker
  - changes in the address of the website the AIM company maintains pursuant to the AIM Rule 26
  - any subsequent change to the details disclosed regarding the AIM company's directors (eg bankruptcies, criminal convictions, etc)
  - the admission to trading (or cancellation from trading) of the AIM securities (or any other securities issued by the AIM company) on any other exchange or trading platform, where such admission or cancellation is at the application or agreement of the AIM company. The AIM company must also separately submit this information to the LSE.
- Any notifications made to you by shareholders who pass through the relevant disclosure thresholds in Chapter 5 of the Disclosure Guidance and Transparency Rules (DTR) must be disclosed. This is assuming that, if your topco is a US company rather than a UK company, your Certificate of Incorporation was amended at the time of the IPO to reflect those DTR provisions in line with current best practice for companies incorporated outside the UK whose shares are admitted to trading on AIM.
- The maintenance of a schedule of persons discharging managerial responsibilities and their closely associated persons for the purposes of MAR.
- The preparation and publication of audited annual results within six months of the end of the financial year, and half yearly reports (which may be unaudited) within three months of the end of the relevant financial period.
- Ensuring there is an effective share dealing policy in place and having sufficient procedures and policies in place to ensure compliance with MAR's obligations for insider dealing.
- Engaging a NOMAD who is on the LSE's register and a broker that is a member of the LSE at all times.
- Complying or explaining against the relevant corporate governance code. This is typically the Quoted Companies Alliance's corporate governance code for AIM-quoted companies



AS AN AIM-QUOTED COMPANY YOU WILL ALSO NEED TO REMAIN MINDFUL OF THE ONGOING REQUIREMENTS APPLICABLE TO YOU UNDER THE AIM RULES.

A TAKEOVER BY A STRATEGIC OR FINANCIAL BUYER CONSTITUTES THE ULTIMATE EXIT FOR COMPANIES THAT START OUT ON THE MARKET...

WHAT TO DO IF A SUITOR ARRIVES

Although AIM is a market dedicated to growth companies, it is still very much the case that a takeover by a strategic or financial buyer constitutes the ultimate exit for companies that start out on the market.

If, as an AIM-quoted company, you are approached by a potential bidder, the first thing you will need to do from a regulatory perspective is to determine the extent to which the Takeover Code (the Code) will apply to you.

As a general rule, the Code does not apply to US businesses that have shares in a US topco admitted to AIM where its place of central management and control are outside the UK, the Channel Islands and the Isle of Man. But the Code will apply if the US business restructured at IPO to have a topco with a registered office in the UK, Channel Islands or Isle of Man.

That said, it is common for US businesses that are not subject to the Code to incorporate provisions mirroring Rule 9 of the Code into its Certificate of Incorporation. These provisions are designed to prevent the acquisition or consolidation of control of a company subject to the Code without a general offer being made to all shareholders.

Where a person or group of persons acting in concert acquires interests in shares which carry 30% or more of the voting rights, they must normally make a general offer for the balance of the issued share capital of the company.

Similarly, 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 in which they or any person acting in concert with them are interested, then an offer for the balance of the issued share capital of the company is similarly usually required.

If the Code does apply, then the following general principles will need to be taken into account at all times:

- all shareholders of the same class must be treated equally, including receiving the same price per share and also being provided with the same information
- shareholders must be given sufficient information and advice at an early enough time to enable them to reach a properly informed decision
- the board of the target company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid
- all parties must endeavour to prevent the creation of a false market
- documents and statements containing relevant information or advice and addressed to or aimed at shareholders must be prepared with the highest standards of care
- absolute secrecy must be preserved before the public announcement of an offer.

In practice, and whether or not the Code applies, it is not common for takeovers on AIM to proceed unless the board of the AIM-quoted company is in agreement with the acquisition and recommends it to shareholders. However, as soon as you receive an approach, it is important to notify the rest of your board quickly and to obtain early advice from the company's NOMAD, broker and legal advisers.

> "... it is not common for takeovers on AIM to proceed unless the board of the AIM-quoted company is in agreement with the acquisition and recommends it to shareholders ...

ABOUT PENNINGTONS MANCHES

Penningtons Manches LLP is one of the UK's leading law firms, with seven offices including a City of London headquarters and a presence in San Francisco. With 110 partners and some 650 members of staff, we are acknowledged as a dynamic and forward-thinking practice which combines comprehensive legal services with a responsive and flexible approach.

We have a broad international focus supported by well-established links with law firms throughout the world. As a member of Multilaw and the European Law Group, we work with lawyers in over 100 countries, and many of our experts play leading roles in various international bodies. We have a strong corporate team focused on IPOs, mergers and acquisitions and venture capital financings, who acted on over 200 transactions in 2018.

Our specialist, multidisciplinary teams concentrate on a range of industry sectors, including technology, life sciences, education, banking, finance and financial services regulation, retail and international wealth.

As well as equity capital markets, through our active involvement with the Department for International Trade (DIT) and its UK Advisory Network (UKAN), we are well placed to advise on all aspects of UK inward investment, from technology start-ups to large international relocations. We have particular expertise in supporting US clients seeking to do business in the UK and Europe. Where problems occur, in any jurisdiction, our international litigation lawyers are able to recommend effective strategies at an early stage.

We represent a growing list of international clients – ranging from private individuals, founder-owned businesses and start-ups to multinational corporations, public companies, professional partnerships, banks and financial institutions.

FIND OUT MORE

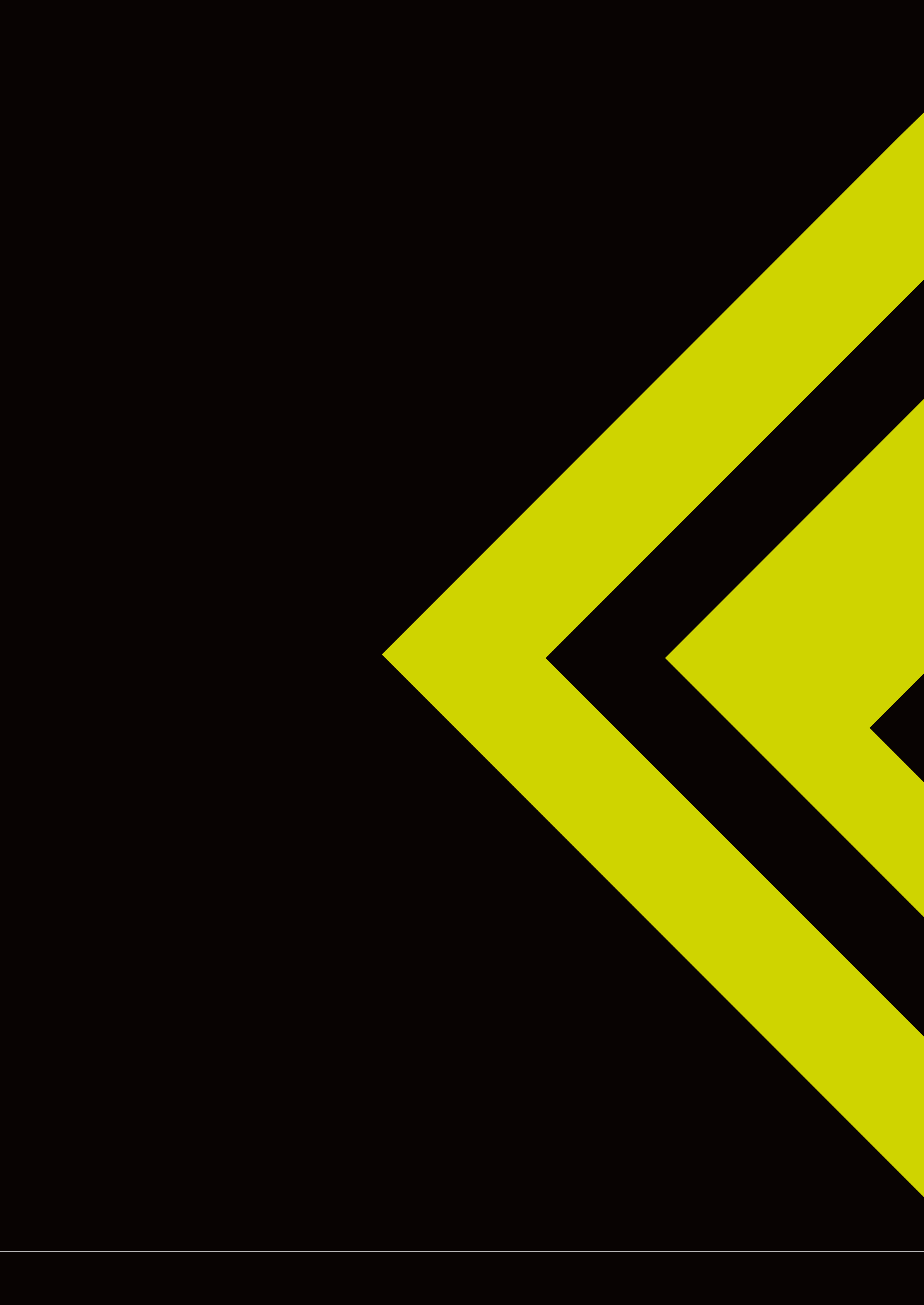
For further information, visit us at **www.penningtons.co.uk** where you will find comprehensive contact details for all our lawyers as well as our latest news, insights and publications. Alternatively, e-mail us at **info@penningtons.co.uk**.

What I like is that they're technically strong on the legal aspects, as you would expect, but what you also get is insight, recommendation and problem-solving. They give you commercial answers to legal questions and look at alternative solutions.

Chambers UK – 2019 edition

The 'excellent and commercial' team at Penningtons Manches LLP is recommended as being 'unfailingly prompt and thorough in their responses, giving clear and actionable advice' and 'good at understanding business context'.

The Legal 500 - 2019 edition



LONDON
125 Wood Street
London EC2V 7AW
T: +44 (0)20 7457 3000
F: +44 (0)20 7457 3240
DX: 42605 Cheapside

BASINGSTOKE
da Vinci House
Basing View
Basingstoke
Hampshire RG21 4EQ
T: +44 (0)1256 407100
F: +44 (0)1256 479425
DX: 148600 Basingstoke 21

CAMBRIDGE
Clarendon House
Clarendon Road
Cambridge
Cambridgeshire CB2 8FH
T: +44 (0)1223 465465
F: +44 (0)1223 465400
DX: 131971 Cambridge 6

GUILDFORD
31 Chertsey Street
Guildford
Surrey GU1 4HD
T: +44 (0)1483 791800
F: +44 (0)1483 424177
DX: 2405 Guildford

OXFORD
9400 Garsington Road
Oxford Business Park
Oxford
Oxfordshire OX4 2HN
T: +44 (0)1865 722106
F: +44 (0)1865 201012
DX: 155710 Oxford 13

READING
Apex Plaza
Forbury Road
Reading
Berkshire RG1 1AX
T: +44 (0)118 982 2640
F: +44 (0)118 982 2641
DX: 117883 Reading

USA

SAN FRANCISCO
149 New Montgomery Street
4th Floor
San Francisco
CA 94105
T: +1 415 712 2869

www.penningtons.co.uk

Penningtons Manches LLP is a limited liability partnership registered in England and Wales with registered number OC311575. San Francisco is an office of Penningtons Manches (California) LLP, a California registered limited liability partnership with number 202016025001.