

Bills Committee on Companies (Amendment) Bill 2003**Summary of deputations' views and the Administration's response
on Schedule 1 of the Bill****(as at 26 November 2003)**

Clause No. of Schedule 1 / Subject	Name of organization/individual	Major views on the Bill	Administration's response
General comments on Schedule 1	Linklaters	Linklaters welcome the proposals in Schedule 1 which will be beneficial in clarifying the legislative framework in particular in relation to exemptions from the prospectus regime.	Noted.
	The Hong Kong Institute of Company Secretaries (HKICS)	HKICS considers that streamlining the prospectus regime is necessary to enhance the regulatory environment to attract more financial product issuers to Hong Kong.	Noted.
	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	Overall speaking, in respect of the prospectus regime in Hong Kong, the amendments proposed in the Bill are a step in the right direction.	Noted.

Schedule 1

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Clause 1 - <i>Interpretation</i>	HKICS	The issue of when an "offer to the public" arises deserves further examination. For reference, in the case of <i>Australian Central Credit Union v Corporate Affairs Commission (1985)</i> , the Australian High Court ruled that there was no need to issue a prospectus on the grounds that (i) there was a subsisting special relationship between the offeror and members of a group and (ii) there was a rational connection between the common characteristics of members of a group and the offer made to them.	The purpose of the proposed 17th Schedule, read together with the proposed definition of "prospectus" in section 2(1), is to carve out from the definition of "prospectus" offering documentation in relation to specified types of offers that can be made without triggering the prospectus regime. The Australian case law referred to in the submission of HKICS, on the face of it, appears to fall within the scope of an offer to members of a club or association and should be covered by paragraph 10 of the proposed 17 th Schedule.

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Clause 1 - <i>Interpretation</i> (Cont's)	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	<p><u>Submission dated 18 September 2003</u></p> <p>Regarding the proposed new definition of "prospectus", Ms CHAN opines that the word "company" should not be used in the definition. It would be preferable to use the phrase "body corporate or corporation" in lieu of the word "company". If the phrase is adopted, then the sentence "<i>(including a company incorporated outside Hong Kong, and whether or not it has established a place of business in Hong Kong)</i>" can be removed from the definition of "prospectus", while section 2(3) of the Ordinance can be amended by adding "<i>whether or not it has established a place of business in Hong Kong</i>".</p> <p><u>Submission dated 4 November 2003</u></p> <p>The proposed new definition of "prospectus" may not cover debentures issued by non-companies such as sovereigns, governments and governmental authorities. There is no reason why a foreign sovereign bond issue offered to the public in Hong Kong should not comply with the prospectus regime.</p>	<p>The word "company" is capable of meaning an overseas company in the context of the definition of "prospectus". Replacing the word "company" in the proposed definition of "prospectus" with the phrase "body corporate or corporation" may have the effect of applying the relevant prospectus provisions in the Companies Ordinance (CO) to corporations which are currently outside the prospectus regime under CO (e.g. bodies incorporated by statute or charter).</p> <p>Administration to respond</p>

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Clauses 3 and 24 - <i>SFC's powers of exemption and amendment</i>	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	<p><u><i>Submission dated 18 September 2003</i></u></p> <p>Under the Bill, the Securities and Futures Commission (SFC) is given much wider powers of exemption and amendment, including an additional ground for exemption under proposed section 38A: that the exemption will not prejudice the interest of the investing public. <i>(In her submission, Ms CHAN gives an example to illustrate SFC's broadened exemption power and set out in a table the many more requirements that may be exempted by SFC under the Bill.)</i></p> <p>Section 360 of the Ordinance is proposed to be amended to give SFC the power to amend the Third, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first and Twenty-second Schedules (effectively all the substantive provisions relating to the prospectus regime) by order published in the Gazette, again with no limit on the scope of amendment.</p> <p>The question is whether it is worth the time and effort analysing, debating and fine tuning the relevant statutory provisions when they could be waived or amended without the approval of the Legislative Council.</p>	<p>Under the proposed new section 38A(2), SFC may, by order published in the Gazette, and subject to such conditions (if any) as SFC thinks fit and specified in the notice, exempt any class of companies, or prospectuses issued by companies, from any or all of the requirements of the relevant provisions (as specified in the proposed section 38A(4)). Under the proposed section 38A(5), SFC may, by order published in the Gazette, amend subsection (4) which specifies the “relevant provisions”. Under the new section 360(6), SFC may, by order published in the Gazette, amend the Third, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first and Twenty-second Schedules. In all the above cases, an order published in the Gazette will be subsidiary legislation subject to negative vetting by the Legislative Council. In addition, under the new section 360(7), where SFC proposes to make an order under section 360(6), it must publish a draft of the proposed order for public consultation.</p>

Schedule 1

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Clauses 3 and 24 - <i>SFC's powers of exemption and amendment</i> (Cont'd)	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (Cont'd)		<p>Therefore, any proposals by SFC to increase the coverage of exemptions that can be granted or to amend the prospectus-related Schedules are subject to public consultation and examination by the legislature.</p> <p>One of the regulatory objectives of SFC is to provide protection for members of the public investing in or holding financial products (section 4(c) of the Securities and Futures Ordinance (Cap. 571) (SFO)), and one of its functions is to secure an appropriate degree of such protection (section 5 of SFO). Before proposing any amendment to the list of requirements under the Companies Ordinance that may be exempted by an order published in the Gazette, SFC will have to take into consideration its statutory regulatory objectives and functions.</p>

Schedule 1

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<p>Clauses 3 and 24 - <i>SFC's powers of exemption and amendment</i> (Cont'd)</p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (Cont'd)</p>	<p><u>Submission dated 4 November 2003</u></p> <p>Proposed section 360(9) sets out two conditions that SFC needs not publish a draft of the proposed order for public consultation under section 360(7).</p> <p>The main concern from an investor protection point of view is not as much over the amendment of the schedules or exemption of whole classes of companies or prospectuses, but rather the exemptions which may be granted to individual issuers, which do not have to be made public.</p> <p>Administration's response did not really explain the reasoning for the proposed additional ground for exemption and the expanded list of requirements that may be exempted.</p>	<p>Administration to respond</p>
	<p>Hong Kong Small and Medium Enterprises Association</p>	<p>The exemption and amendment powers conferred on SFC under proposed section 38A are very extensive. To prevent abuse of powers and to avoid public misunderstanding, SFC should publish in the Gazette the reasons when SFC exercises the powers.</p>	<p>Please refer to the Administration's response at LC Paper No. CB(1)309/03-04(01).</p>

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<p>Clauses 4 and 17 - <i>Sale, etc. of shares or debentures acquired pursuant to offer specified in Part I of the Seventeenth Schedule</i></p>	<p>Linklaters</p>	<p>Linklaters has the following concerns in respect of the proposed sections 38AA and 342AB-</p> <ul style="list-style-type: none"> (a) the proposed provisions overlap with the existing section 41(2) of the Companies Ordinance. Linklaters is not aware of any pressing mischief which needs to be addressed by the new provisions, nor any misconduct that is not already caught by the existing section 41(2); (b) Linklaters is not aware of any similar provisions in other common law jurisdictions; (c) Linklaters is concerned that the proposed provisions are somewhat novel imposing restrictions, punishable by a fine, on a purchaser of securities; (d) the intended scope of the proposed provisions is not clear; and (e) it is unclear how the restriction interacts with the Seventeenth Schedule exemptions that are available with respect to a primary offer. 	<p>Section 41(2) only applies to the resale of shares to the effect that the issuer, upon the allotment of shares/debentures, allots shares/debentures with the intention of on-selling such shares/debentures through the allottee to the public. The scope of the proposed new section 38AA is wider as it prevents shares/debentures acquired pursuant to an offer under the proposed 17th Schedule from being sold to the public, regardless of the intention of the issuer upon allotment, unless a prospectus is issued or shares/debentures of the same class are listed. The policy intent of the new section 38AA is to prevent abuse of the exemption provided for in the 17th schedule and getting around the prospectus requirements.</p> <p>The imposition of the resale restriction does not alter our existing regulatory philosophy concerning offers of investments, where issuers, rather than end purchasers, are generally regulated. As far as the resale restriction is concerned, we are regulating the offerors of shares/debentures, regardless of whether or not they are the issuers.</p>

Schedule 1

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Clauses 4 and 17 - <i>Sale, etc. of shares or debentures acquired pursuant to offer specified in Part I of the Seventeenth Schedule</i> (Cont'd)	Linklaters (Cont'd)		As regards practices in overseas jurisdictions, there are similar provisions in the Securities and Futures Act 2001 (SFA) of Singapore. Under section 276 of SFA, where shares or debentures initially acquired under an exemption in section 274 (i.e. offers made to licensed banks, registered insurance companies, statutory bodies, pension funds/collective investment schemes, etc.) or section 275 (i.e. offers made to sophisticated investors) are first sold to any person falling outside these exemptions, the offer for sale of such shares or debentures shall be regarded as an offer to the public requiring a prospectus unless the shares or debentures to which the offer relates are listed or quoted on a securities exchange and at least six months have elapsed since the date they were initially acquired pursuant to either of the aforesaid exemptions.

Schedule 1

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<i>Clause 5 - Advertisements concerning prospectus</i>	HKICS	<p>It might be worthwhile for the Stock Exchange of Hong Kong (SEHK) to take charge of a forthcoming issue at the outset by SEHK's publicising it in the form of an advertisement, the cost of which can be recovered from the issuer.</p> <p>The details publicised may include such matters as the name of the issuer and its directors and those of the sponsors and underwriters, the proposed size of the offer, and relevant dates.</p>	SFC would refer to SEHK HKICS' suggestion of SEHK publicising a forthcoming public offer by way of advertisement the cost of which is to be recovered from the issuers.

Schedule 1

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Clause 11 - <i>Interpretation of provisions relating to prospectuses</i>	The Hong Kong Chinese Enterprises Association (HKCEA)	<p>Regarding the meaning of "untrue statement" for the purposes determining civil and criminal liabilities for misstatements in prospectuses under sections 40 and 40A of the Ordinance, paragraph 11 of Schedule 1 of the Bill amends the Ordinance such that "untrue statement" in relation to any prospectus will include any "material omission" from the prospectus.</p> <p>HKCEA proposes that, for determining whether an omission is a "material omission", a disclosure standard or guidelines on what constitutes a "material omission" should be set out in the Ordinance.</p> <p>Further elaboration on the current provision in paragraph 3 of the Third Schedule is also required.</p>	<p>The proposed section 41A(2) is to clarify the application of civil and criminal liabilities under sections 40 and 40A to misrepresentation in the form of material omission. Disclosure requirements for prospectuses are clearly set out in Parts II or XII of, and the 3rd Schedule to, the Companies Ordinance and it is the responsibility of the issuer (and its adviser) to ensure that the prospectus satisfies these requirements.</p>

Schedule 1

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Clauses 7 and 19 - <i>Registration of prospectus</i>	Office of the Privacy Commissioner for Personal Data, Hong Kong (PCO)	<p><u>Submission dated 16 September 2003</u></p> <p>Under the existing paragraph 17 of the Third Schedule of the Ordinance, the dates of, parties to and general nature of every material contract shall be specified and included in the prospectus. The proposed sections 38D(3A) and 342C(3A) of the Ordinance further require the companies concerned to make available for public inspection such contract or memorandum for not less than 14 days from the date of publication of the prospectus. PCO considers that:</p> <p>(a) without limiting the contents of such contract or memorandum that may be disclosed, it appears that the amount of information to be made available for public inspection can potentially be more than that covered by the paragraph 17 of the Third Schedule; and</p> <p>(b) the express purpose for disclosing and making them available for public inspection and that the personal data collected as a result are subject to the observance and compliance with the requirements of the Personal Data (Privacy) Ordinance should be clearly stated in the Bill.</p>	<p>The requirement to place material contracts on display and available for inspection by the public (whether on file with a regulator or at another convenient location) is a common practice in offers of securities - this is a requirement of the Listing Rules of the Stock Exchange of Hong Kong. The existing sections 38D(3)(b)(i) and 342C(3)(b)(i) of the Companies Ordinance require material contracts (or a memorandum of the terms of such contracts) to be registered with the prospectus at the Registrar of Companies. The purpose of this arrangement is to enhance information disclosure for better investor protection.</p>

Schedule 1

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Clauses 7 and 19 - <i>Registration of prospectus</i> (Cont'd)	PCO (Cont'd)	<u>Submission dated 14 October 2003</u> PCO acknowledges the existing requirements under sections 38D(3)(b)(i) and 342C(3)(b)(i) of the Ordinance, but considers that the proposed amendments obliging a company to make available for public inspection material contracts or memorandum of the terms of such contracts at its registered office in Hong Kong provide an additional channel for inspection akin to a public register. PCO therefore considers that the provision of a purpose statement specifying the use of the personal data in the proposed legislation would be appropriate and effective to quell uncertainty over their permitted use.	Please refer to the Administration's response at LC Paper No. CB(1)387/03-04(01).

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Clause 13 - <i>Construction of references to offering shares or debentures to the public</i>	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	<p><u>Submission dated 18 September 2003</u></p> <p>It is proposed to add to section 48A of the Ordinance a new subsection (3) to declare that <i>"the provisions of the Seventeenth Schedule shall not be construed to prejudice the generality of this section"</i>. The drafting of the subsection defeats the whole purpose of introducing the Seventeenth Schedule, which is to provide certainty that offers falling within that schedule will not be subject to the prospectus regime under the Ordinance.</p> <p>Ms CHAN believes that subsection (3) should only refer to subsection (2) and not the entire section 48A. The effect of such a formulation is that an offer which does not fall within one of the heads in the Seventeenth Schedule may nonetheless be construed as not being an offer to the public, if the offer satisfies the criteria set out in subsection (2), for example, that it is a domestic concern between the persons making and receiving the offer.</p>	<p>Section 48A(1) states that any reference in the Ordinance to offering to the public is construed as including an offering to any section of the public (and therefore subject to certain rules). Subsection (2) says that “domestic” offers are not offers to the public (and therefore are not subject to the prospectus-related provisions). The proposed 17th Schedule introduces 12 new categories of offers that are not subject to the prospectus-related provisions.</p> <p>The purpose of the proposed section 48A(3) is to make it clear that the 17th Schedule does not displace the general rule in section 48A(1), that offers made to any section of the public are subject to certain provisions. But that will only be the case if an offer does not fall within an exemption, such as the 17th Schedule, or sections 48A(2) or 343(2). The 17th Schedule does not limit section 48A(1) in those cases where the 17th Schedule does not apply.</p>

Schedule 1

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<p>Clause 13 - <i>Construction of references to offering shares or debentures to the public</i> (Cont'd)</p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (Cont'd)</p>	<p><u>Submission dated 4 November 2003</u></p> <p>Section 48A(1) and the Seventeenth Schedule should have to be made mutually exclusive to achieve the necessary certainty the market seeks. Ms CHAN suggests that section 48A(3) should be revised as follow-</p> <p><i>"For the avoidance of doubt, subsection (1) shall not apply to the offers specified in Part 1 of the Seventeenth Schedule, and the Seventeenth Schedule shall not prejudice the generality of this section with respect to offers not specified in that schedule."</i></p>	<p>Administration to respond</p>

Schedule 1

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Clause 25 - <i>Matters to be Specified in Prospectus and Reports to be set out therein</i>	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	<p><u><i>Submission dated 18 September 2003</i></u></p> <p>The Bill proposes to add at the end of paragraph 3 of the Third Schedule: <i>"taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them"</i>. It is not clear as to what <i>"the nature of the company"</i> means.</p> <p>In all likelihood the proposed qualifications to the overall standard will be relied on by issuers or their advisors to argue for a lower level of disclosure when faced with allegations that the amount of information in a prospectus is inadequate or insufficiently clear. The more fundamental question is: Are such additional qualifications necessary or in the interests of the public?</p>	<p>The existing prospectus content requirements in the 3rd Schedule do not differentiate between equity and debt issues. All issues, regardless of whether they are equity or debt issues, have to comply with the relevant disclosure requirements set out in the 3rd Schedule. What may be seen as relevant information for an investor in equity (e.g. profitability of a company) may not be viewed as such by a debt investor who may be more concerned about the sufficiency of reserves of the company in determining its repayment ability. The proposed amendment to paragraph 3 is to allow the regulator to tailor disclosure requirements to a particular offer, having regard to the nature of the company and securities being offered, etc.</p> <p>This proposal is part of the efforts to facilitate offers of shares and debentures. Investors would also benefit from this initiative as they will not be overloaded with information irrelevant to the making of informed investment decisions.</p>

Schedule 1

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<p>Clause 25 - <i>Matters to be Specified in Prospectus and Reports to be set out therein</i> (Cont'd)</p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (Cont'd)</p>	<p><u>Submission dated 4 November 2003</u></p> <p>Ms CHAN does not agree that the proposed amendment to paragraph 3 of the Third Schedule is necessary or appropriate to achieve the purpose of having different levels of disclosure for debt issues and equity issues. The proposed paragraph 3 is only a statement of the general or overall standard and it is difficult to see how the regulator can "tailor" disclosure requirements to particular offer through that paragraph. Under the current legislation, SFC already has the power to tailor disclosure requirements and exempt irrelevant information.</p> <p>Ms CHAN also points out paragraph 3 will likely be relied on by an aggrieved investor to seek redress from the issuer. There is a serious possibility that an issuer may rely on the proposed amendment and successfully argue for a lower overall standard of disclosure.</p>	<p>Administration to respond</p>

Schedule 1

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<p>Clause 25 - <i>Matters to be Specified in Prospectus and Reports to be set out therein</i> (Cont'd)</p>	<p>HKICS</p>	<p>HKICS advocates the use of plain language in both English and Chinese to render the document "user friendly", thereby achieving the objective of providing simple and clear information to allow the investing public to make informed investment decision.</p>	<p>We agree that the use of plain language in a prospectus would render the document more user-friendly. On the other hand, we note that since personal liability often attaches to directors for contents of prospectuses, these documents are often drafted by lawyers in such a way that may result in them being too technical and complex for the laymen. The policy of SFC is that so long as the documents comply with the relevant prospectus-related provisions and investor protection is not compromised, the issuer of the prospectus should have discretion to determine how the documents are drafted. SFC and SEHK have been promoting the use of simpler language in prospectuses to facilitate understanding by investors. For example, the Working Group on Plain Language under SFC published a booklet "How to Create a Clear Prospectus" earlier to demonstrate how the presentation of prospectus can be improved. SFC is supportive of the use of plain language in prospectuses and will continue its efforts with SEHK in this regard.</p>

Schedule 1

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Proposed Seventeenth and Eighteenth Schedules <i>Legending requirements in Prospectus</i>	Linklaters	<p>Linklaters has the following concerns relating to the requirement that any exemption (except for one exemption) in the Seventeenth Schedule can be relied on only if the legending requirements are met -</p> <p>(a) the extent to which the legends really provide any degree of investor protection is questionable, in particular in the context of the exempted offers;</p> <p>(b) the requirement may result in certain offers losing the right to rely on one of the exemptions as a result of the omission of the legend, in particular in the context of international offerings; and</p> <p>(c) Linklaters is not aware of any other common law jurisdiction that specifically requires a legend to be used in order to benefit from such exemptions.</p>	<p>Offers falling within the scope of paragraphs 1, 5, 6 and 12 of the proposed 17th Schedule (i.e. offers to professional investors, offers in connection with an underwriting agreement, takeover/repurchase offers in compliance with the Codes on Takeovers and Mergers and Share Repurchases, and offers in connection with collective investment schemes authorised by the Securities and Futures Commission) are not required to satisfy the legending requirement.</p> <p>The legending requirement is to alert potential offerees of the need to exercise caution in relation to the offer. This is of particular importance as the relevant offer document has not been reviewed by any regulator. We believe that the legending requirement for certain exempted offers under the proposed 17th Schedule would not impose a significant administrative burden on issuers in global offerings. If an issuer proposes to offer shares/debentures in Hong Kong, it and/or its advisers should be responsible for ensuring compliance with all local legal and regulatory requirements.</p>

Schedule 1

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Proposed Seventeenth and Eighteenth Schedules <i>Legending requirements in Prospectus</i> (Cont'd)	Linklaters (Cont'd)		If a decision to offer to a limited group of Hong Kong investors is taken only after printing of the relevant documents, we believe that it would not be too onerous for the issuer to simply add a cover sheet or sticker, etc. to satisfy this legending requirement.

Schedule 1

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Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance</i>	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	<p><u>Paragraphs 3 and 4 of Part 1</u></p> <p><i><u>Submission dated 18 September 2003</u></i></p> <p>Paragraph 3 of Part 1 of the Seventeenth Schedule provides that an offer is exempt if the total consideration payable for the securities offered does not exceed HK\$5 million. This seems to be a relatively high threshold given that the net proceeds raised by some companies listed in Hong Kong on their IPOs were in the region of HK\$20 million. The corresponding threshold in the UK Financial Services and Markets Act 2000 ("FSMA") is 40,000 Euros.</p> <p>Paragraph 4 of Part 1 provides that an offer is exempt if the minimum denomination of, or the minimum consideration payable by any person for, the securities being offered is not less than HK\$500,000. It is interesting to note that the equivalent to this minimum threshold under FSMA is also 40,000 Euros.</p>	<p>The monetary threshold prescribed for the maximum size of an offer has been proposed on the basis of comments received during the public consultation on the proposed amendments to the Companies Ordinance to facilitate offers of shares and debentures in March 2003. In response to market's concerns about the legal, accounting and other costs associated with making an offer, we have proposed to pitch the threshold at HK\$5 million.¹</p> <p>We will consider proposing drafting amendments to the Bill to the effect that the monetary thresholds referred to in paragraphs 3 and 4 of the proposed 17th Schedule would include their equivalent in other currencies.</p>

¹ The threshold suggested by the market ranges from HK\$5 to 10 million. The market also notes that in Australia, the similar threshold is AUD 2 million (approximately HK\$10 million) (see section 708 of Australia's Corporations Act).

Schedule 1

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Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance</i> (Cont'd)	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (Cont'd)	As a matter of drafting, it is better to specify that the threshold is HK\$xxx "or its equivalent in another currency", as it is possible that foreign currencies may be raised in a securities offering in Hong Kong. Alternatively, a new subsection may be added to section 2 of the Ordinance to the effect that, unless the context requires otherwise, all references in the Ordinance to amounts in HK dollars include its equivalent in another currency.	

Schedule 1

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<p>Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance</i> (Cont'd)</p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (Cont'd)</p>	<p><u>Submission dated 4 November 2003</u></p> <p>Investors' (particularly retail investors') interests are seldom represented in the responses to the public consultation conducted by the Administration, and hence it is dangerous for the Administration to rely solely or predominantly on the ranges suggested by the "market" in such consultation when determining policies, limits and thresholds.</p> <p>The AUD2 million threshold under the Australia's Corporations Act (ACA) is not a fair or appropriate comparison to make as that threshold only applies to "personal offers", while the exemption under the Bill will apply to any offer to the public at large.</p> <p>Comparing with the United Kingdom and Australia, Ms CHAN is of the view that the \$500,000 threshold for the large consideration exemption (under <u>paragraph 4</u>) is reasonable, but the \$5 million threshold for small offering exemption (under <u>paragraph 3</u>) is too high.</p>	<p>Administration to respond</p>

Schedule 1

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<p>Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance</i> (Cont'd)</p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (Cont'd)</p>	<p><u>Paragraph 7 of Part 1</u> <i>Submission dated 18 September 2003</i> Rather complicated wording is used for paragraph 7 of Part 1 and it is not clear whether the paragraph is intended to cover other situations apart from an offer of free shares to shareholders of a company. The equivalent exemption in FSMA simply refers to an offer where "the securities are shares and are offered free of charge to all or any of the holders of shares in the issuer". <i>Submission dated 4 November 2003</i> As a matter of general company law, any dividend, whether in cash or in kind, should be free of charge to the shareholders as no fresh consideration is provided by the shareholders for the dividend itself. If a company only declares a scrip dividend then the shareholders are never entitled to a cash dividend and therefore could not "forego" that "in return for shares". It is highly unlikely that the wording of FSMA was not intended to cover scrip dividends To address the Administration's concern, it may add in the phrase ", including scrip dividends" after "issuer".</p>	<p>We consider that the wording in the UK Financial Services and Markets Act 2000 (FSMA) referred to by Ms Alice Chan does not entirely meet our objective. The phrase "the securities are shares and are offered free of charge to all or any of the holders of shares in the issuer" under FSMA would not extend to an offer of shares pursuant to a scrip dividend scheme which is covered by paragraph 7 of the proposed 17th Schedule. This is because such an offer is arguably not free of charge to shareholders – they forego a cash dividend in return for shares. Administration to respond</p>

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<p>Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance</i> (cont'd)</p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (cont'd)</p>	<p><u>Paragraph 8 of Part 1</u> <i>Submission dated 18 September 2003</i> Paragraph 8 of Part 1 effectively provides that an offer made to employees and former employees of a company is exempt. However, the exemption is expressed (<i>see paragraph 6 of Part 4</i>) to cover "consultants" and "former consultants" who provide services to the issuer (or another group company) pursuant to a contract for services. This is potentially a very wide extension and may lead to difficulties in interpretation. First, what services are "commonly" rendered by an employee is a subject matter for debate. Secondly, it is likely that the legal entity which the issuer instructs and contracts with is a company or a partnership, and it is not clear whether the term "consultant" used in the Bill would cover all the directors and officers of the company or, as the case may be, all the partners and associates of the firm or only those individuals personally involved in providing the services.</p>	<p>The proposed "qualifying persons" exemption is intended to benefit offeror companies which reward persons who could safely be assumed to have a high level of knowledge about the offeror and its group of companies. Consultants contracting with the issuer should be grouped under the exemption directed at employees because it is not uncommon for services to be provided by a consultant instead of an employee, and it would be arbitrary to provide an exemption in respect of one and not the other. For example, in the insurance industry, it is common that an insurance company does not maintain a so-called "employer-employee" relation with its insurance agents. These agents instead work as "consultants" to the insurance company.</p> <p>As regards the identity of the "consultant", the normal rules about legal persons will apply. If the contract for services is with a company or a firm, the legal person would be the company or the firm - not all the directors and officers of the company/partners or associates of the firm; if with an individual, the legal person would be the individual - not all his/her partners or associates.</p>

Schedule 1

Clause No. of Schedule 1 / Subject	Name of organization/individual	Major views on the Bill	Administration's response
<p>Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance</i> (cont'd)</p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (cont'd)</p>	<p>There are valid reasons for drawing a distinction between employees and independent contractors, and the distinction is incorporated in different laws and regulations. Furthermore, most of the commercial arguments for including "consultants" would be equally applicable to, say, major suppliers and customers of the issuer.</p> <p><u>Submission dated 4 November 2003</u></p> <p>Because of the inclusion of "consultants", the exemption under <u>paragraph 8</u> is most open to abuse, exemption under paragraph 8 for offers to "consultants" should be done on a case-by-case basis. It would indeed be arbitrary, and undesirable, to introduce a vague concept of "consultant" to cater for a particular industry, when it can be easily taken advantage of by companies that simply want to avoid complying with the law.</p> <p>The corresponding exemption in UK is limited to "genuine employees", and that in Australia is limited to "executive officers" only.</p>	<p>Administration to respond</p>

Schedule 1

Clause No. of Schedule 1 / Subject	Name of organization/individual	Major views on the Bill	Administration's response
<p>Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance</i> (cont'd)</p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong (cont'd)</p>	<p><u>Paragraph 11(a)(ii) of Part 1</u> <i>Submission dated 18 September 2003</i> Paragraph 11(a)(ii) of Part 1 provides that an offer to exchange debentures in the same company which does not result in an increase in the aggregate principal amount outstanding is exempt. There is no exemption in relation to debentures in the equivalent head in FSMA. <i>(In her submission, Ms Alice CHAN gives two examples to illustrate the dangers of the exemption to the investing public.)</i> The equivalent exemption in FSMA to the exemption in paragraph 11 of Part 1 applies to shares and "investments of a specified kind relating to shares", and "specified" in this context means specified in an order made by the Treasury.</p>	<p>Please refer to the Administration's response at LC Paper No.CB(1)292/03-04 (01).</p>

Schedule 1

Clause No. of Schedule 1 / Subject	Name of organization/individual	Major views on the Bill	Administration's response
Proposed Twenty-first Schedule - <i>Provisions in accordance with which a prospectus may consist of more than one document</i>	Linklaters	The requirement under Part 1 paragraph 8 that the programme prospectus be updated every 12 months is desirable, but this requirement should be sufficiently flexible to cater for the fact that there may be 13 or 14 months between the dates on which a company's annual reports are published.	It is up to the issuers to decide when they update their programme prospectuses. The policy intent is that once a new annual report is published or the first anniversary of the date of publication of the programme prospectus occurs (whichever is the earlier), no further offers of shares or debentures shall be made on the basis of the previous financial statements contained in the programme prospectus. In fact, issuers will only have to update the programme prospectus in time for an offer made after the new financial statements are issued. If no offer is contemplated after an annual report is published, there is no need for the issuer to update its programme prospectus.