

**Bills Committee on the Companies (Amendment) Bill 2003**

**Schedule 1 – Amendments updating the prospectus regime**

**Response to Ms Alice Y L Chan,  
Department of Professional Legal Education,  
Faculty of Law, University of Hong Kong**

**Introduction**

This paper addresses the comment of Ms Alice Y L Chan, under paragraph I(d) of her submission, dated 18 September 2003, on section 11 of the proposed 17<sup>th</sup> Schedule. The section excludes “an offer in respect of an exchange of debentures of the same company which does not result in an increase in the aggregate principal amount outstanding under the debentures” (exchange offer) from the prospectus requirement. Other comments of the respondent have been addressed in Paper CB(1)84/03-04(02).

**Summary of the respondent’s comment**

2. The respondent is concerned that, by virtue of section 11 of the proposed 17<sup>th</sup> Schedule, in the case of an exchange offer an issuer does not have to issue a prospectus setting out the detailed information required under the Companies Ordinance (CO), including the updated financial position of the company and the value of any properties offered as security. Thus, an average retail investor holding debentures of the issuer may not be alerted to a possible deterioration in the financial position of the issuer or appreciate the risks involved in accepting the exchange offer.

**Response of the Administration and the Securities and Futures Commission**

3. After considering these views in detail, we believe that section 11 of the proposed 17<sup>th</sup> Schedule strikes an appropriate balance between affording reasonable protection to investors and minimizing the compliance burden on issuers. We set out our views below.

*Effect of section 11 of the proposed 17<sup>th</sup> Schedule*

4. An exchange offer entails an offer to existing debenture holders of the company in question. Under the existing CO, while the requirement to register a prospectus under section 38D applies to an exchange offer, existing sections 38(5) and 342(5) provide that a prospectus issued to existing debenture holders of a company relating to an offer of debentures of the company does not have to comply with the content requirements set out in sections 38(1) and 342(1) (including those in the Third Schedule to the CO). Therefore, section 11 of the proposed 17<sup>th</sup> Schedule does not have any impact on the availability of the type of information referred to in the respondent's submission.

*Investor protection*

5. In practice, since existing debenture holders to whom an exchange offer is made must agree to the terms of the exchange, a document containing such offer and sufficient information to enable them to decide whether to accept the offer will have to be issued. Investor protection is secured through the liability provisions against misrepresentation or untrue statements (namely, sections 40 and 40A of the CO in the existing regime and sections 107 and 108 of the Securities and Futures Ordinance in the proposed regime). Moreover, where there are a lot of debenture holders and it is unrealistic to obtain their consent individually, a scheme of arrangement or other mechanism requiring court oversight will be the only practical method to effect the exchange and their interests will be protected by court procedures and oversight.

*Overseas comparison*

6. Offers of debentures to existing debenture holders do not require disclosure under the Corporations Act in Australia and are not regarded as offers to the public requiring a prospectus under the Securities and Futures Act in Singapore.