Regulating Online Corporations in Malaysia - Issues and Challenges for the Corporate Sector

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Abstract

Paper is still the primary means in which companies as corporate issuers currently communicate with their members and directors. However, electronic communications offer potential benefits in terms of reducing the cost of communication between issuers and investors, and therefore increasing the overall efficiency and competitiveness of the Malaysian securities markets, and enhancing the quality of information available to investors and its timeliness. A number of developments suggest that electronic provision of documents that have traditionally been provided, either personally or by post, will become more of a commonplace. First, there has been a rapid and widespread increase in access to the internet within the general community, and in a number of companies that have internet home pages. In addition, a number of legislative changes have been made to this area of law in recent years to facilitate electronic communications. These legislations include Communication and Multimedia Act 1998, Computer Crimes Act 1997, Digital Signature Act 1997, and Personal Data Protection Act 2010. This article will analyze the impact of advancement technology in specific legal issues relating to corporations, namely, issues in relation to online investments and electronic meetings. Further, the article will examine legal developments and problems in these specific areas and will propose to establish best practice guidelines which will enhance corporate governance of corporations in a technological environment.

Key words: Online Corporation, Technology, Electronic Meetings, Digital Signature

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I. Introduction

The rise of networked computer technology, comprising computing power, software, and telecommunications infrastructure represents the third phase of the computing revolution, following the development of the first phrase, that is, the mainframe computer, and the second phrase, personal computer.[1] One aspect of the impact of computer technology is on trading securities on cyberspace, namely offering securities via the internet.

Internet and e-mail are now considered to be significant conduits of communication for issuers, market intermediaries, and investors. Communication through the internet in the securities industry provides for ease, immediate, and low cost in spreading information. Many public traded companies use the internet to run their routine business operations by setting up their own web sites to furnish company and industry information. On the other hand, internet provides an effective communication medium for shareholders and companies, whereby they can get the latest information and give immediate response to it. Potential investors may obtain market data through the internet which in turn will help them understand a company better before making any decision. The legal aspect regulating online securities offering would, therefore, become necessary to explore. From a company's perspective, electronic communications may reduce the cost of communications. Needless to say, electric communication enhances the value of a company in various ways.[2]

The growth of electronic communication networks has provided an alternative trading platform for investors. The information available on the internet is readily accessible to the public in contrast with information stored in a registration statement or ordinary prospectus. The present laws and regulations, however, are based largely on traditional paper-based system. The securities industry has been facing certain obstacles when dealing with online securities offering. The adequacy of the existing laws and regulations constitute a major factor to overcome this problem. A virtual global capital market is gradually developing as the unprecedented and exponential growth in computing and communication technology continued along with widespread and instantaneous interactive communication.[3] The electronically integrated digital technology has dissolved the link between commercial trading and geographical location

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1. Burton DF Jr., *The Brave New Mired World*, 16 FOREIGN POLICY 106 (1997).
2. AUSTRALIAN SECURITIES COMMISSION, ELECTRONIC COMMUNICATIONS BETWEEN ISSUERS AND INVESTORS UNDER THE CORPORATION LAW (1996) (discussing some of these issues); *see also* Elizabeth Boros, *The Online Corporation: Electronic Corporate Communications*, CTR. FOR CORP. LAW & SEC. REGULATION (Dec. 1999), http://law.unimelb.edu.au/__data/assets/pdf_file/0005/1710257/146-online1.pdf.
3. Dipak K. Rastogi, *Living Without Borders*, 6 BUSINESS QUARTERLY 4 (1997).

with lower cost and more effective means as compared to the conventional securities trading. Rastogi has aptly described the radical transformation brought about by these rapid innovative changes to the financial sector in the following manner:

> From the 1970s' invention of the microchip to the 1990s' explosive Internet growth and deregulation of the developed world's telecom industries, we have seen an unprecedented increase in our ability to communicate and transact globally. From a financial-markets perspective, these inventions have resulted in the development of a large-scale, transaction-processing infrastructure, cost-effective access to timely information, the introduction of personalized automated transaction systems, and the ability to structure and deliver highly complex financial solutions to users and provides of capital.[4]

Therefore, amidst these significant developments is the emergence of a set of new legal issues that ought to be addressed appropriately to ensure that the securities industry can function properly and the participants enjoy optimal benefits.

The way to conduct business by means of paper-based system has been long-established in the commercial world as well as the securities industry. Two specific laws that governed the commercial practice in Malaysia, namely the Companies Act 1965 ("Companies Act") and the Capital Markets & Services Act 2007 ("CMSA") were drafted to take care of such kind of practice by companies. A good example is the Companies Act which requires a prospectus to be "printed in type of a size not less than the type known as eight point Times" unless the Registrar certifies otherwise[5] while the definition of "printed" has not included document in electronic means. Furthermore, circulation or distribution of any form of application for shares or debentures of cooperation is prohibited unless the form is issued, circulated, and distributed together with a prospectus, and a copy has been sent to the Registrar.[6]

The government has signalled its commitment to facilitating the development of electronic towards the securities industry. Towards this end, the Companies Act and the Securities Commission Act 1993 ("Securities Commission Act")

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4. *Id.*
5. Companies Act 1965, Act 125, § 39(1)(a) (Malay.).
6. *Id.* § 37.

have been amended in order to accommodate the usage of technology in securities trading. The CMSA, which was passed by the Parliament in year 2007, incorporate a number of provisions dealing with electronic trading in capital markets. Several new laws have been introduced, which include the Digital Signature Act 1997 ("DSA"), the Communications and Multimedia Act 1998, the Electronic Commerce Act 2006, and the latest Personal Data Protection Act 2010. While the efforts are still closely observed by the regulator, there are areas where the laws are subject to scrutiny through the practice in the industry.

A good example is the offering of prospectus by way of electronic medium. Despite of the requirements stated under the Companies Act, issuance of electronic prospectus are now commonly accepted by the securities industries. Pursuant to the amendment of Companies Act in year 2007, companies may now conduct meetings at different venues with the help of technology. Questions arise as to the procedure of conducting an electronic meeting, such as sending out notice of meeting through electronic medium, quorum of meeting, appointment of proxy by the members, and their rights to vote as well as the postponement of the meeting due to certain circumstances. Apart from this, another problem associate with the online securities trading, which gain less attention of the regulator, is in respect of public offering that regulates under the CMSA. Matters concerning security and authentication of digital signatures are also areas which should be dealt with in pursuant to the new trend.

II. Legal and Regulatory Framework Governing E-Commerce in Malaysia

The legal and regulatory framework of e-laws in Malaysia consists of seven laws. The first batch of these laws was enacted ten years ago as the main legislative framework for the Multimedia Super Corridor ("MSC"). Collectively known as cyberlaws, these laws are the DSA, the Computer Crimes Act 1997, the Telemedicine Act 1997, and the Amendment to the Copyright Act 1997. A year later, the Communication and Multimedia Act 1998 was enacted. The second batch of e-laws is the Electronic Commerce Act 2006 and the Electronic Government Act 2007.

Mindful of the fact that the Electronic Commerce Act 2006 has been enacted specifically to facilitate e-commerce transactions in Malaysia, it is important to highlight that the Act gives legal recognition to electronic messages. According to section 6(1) of the Electronic Commerce Act 2006, "[a]ny information shall not be denied legal effect, validity or enforceability on the ground that it is

wholly or partly in electronic form."[7] The Act, however, does not state explicitly the issue of the formation of electronic contract. Section 7(1) of the Act merely states that "[i]n the formation of a contract, the communication of proposals, acceptance of proposals, and revocation of proposals and acceptance or any related communication may be expressed by an electronic message."[8] Given that the main aim of the Act is to facilitate e-commerce, it is perhaps desirable to clarify issues including the time and place of formation of electronic contract. On this note, given that section 4 of the Electronic Commerce Act 2006 provides that "[t]he application of this Act shall be supplemented and without prejudice to any other laws regulating commercial transactions,"[9] it could be said that all issues relating to the formation of contract must be resorted to the Contracts Act 1957. But then again, the Contract Act was enacted at a time when electronic contract was unknown.

A. Online Investment and Electronic Meetings

In Malaysia, The Company Law Review Steering Group identified the pace of change in information technology as one of the factors that had stimulated the need to review the framework of company law.[10] One of the most important impacts of electronic communications on a facet of company law would be online investment and shareholders' meetings. Online investment and shareholders' meetings focuses on widely-held public companies since these are the companies where the use of technology has the potential effect of the most radical change in the decision-making process. Public companies are also the companies that are likely to have the greatest financial incentive to take advantage of electronic modes of communication with investors.

The internet benefits the securities industry in two ways. Firstly, it allows for an increased, efficient communication and information flow. Furthermore, investors may also use the internet to research and obtain market data, reports,

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7. Electronic Commerce Act 2006, Act 658, § 6(1) (Malay.).
8. *Id.* § 7(1).
9. *Id.* § 4.
10. The Corporate Law Reform Committee Malaysia ("CLRC") is a Committee established by the Companies Commission of Malaysia to undertake the initiative to review the Malaysian Corporate Law under its Corporate Law Reform Programme. *See* Corporate Law Reform Committee, *Review of the Companies Act 1965 - Final Report*, SURUHANJAYA SYARIKAT MALAY. 9 (2008), http://www.maicsa.org.my/download/technical/technical_clr_final_report.pdf. In relation to electronic services, the CLRC recommends that a hybrid process of filing a document be adopted, allowing subscribers of the e-filing service to lodge documents electronically as an alternative to paper filing. In addition, the incorporation process was reviewed from name search and reservation to certificate of incorporation, electronic filing, and liability of the Registrar.

and the latest news. They are also able to communicate quickly with the issuer and other investors using electronic mail and message boards. Issuers may also use the internet to communicate directly with the shareholders, investors, and researchers. The cost of communication is, thus, reduced and the audience may substantially be larger. Furthermore, another significant issue is that companies can also use the internet to publish prospectuses and other financial information. Most jurisdictions, in which securities are issued and traded, will generally have securities laws enacted that protect the investors and creditors.[11]

Securities regulation generally requires a prospectus to be registered in order to ensure full and proper disclosure concerning the investment in question. Malaysia is no exception. Prior to the new law on corporate disclosure, the prospectus requirements came under the provisions of the Companies Act and the listing requirements of the Bursa Malaysia (formerly Kuala Lumpur Stock Exchange), which impose minimum standards of disclosure with respect to pertinent corporate information. These requirements were reinforced by the policies and Guidelines of Issue and Offer of Securities issued by the Securities Commission 1996. However, under the new regime, which came into effect in July 2000, the Securities Commission is vested as the sole regulator for all fund raising activities and has acquired a distinctive new position as the approving and registering authority for prospectus in respect of all securities other than those issued by unlisted recreational clubs which falls under the scope of the Companies Act.

The principal efficiency gained by using electronic or internet prospectuses is transactional efficiency. The assumption is that the use of convergent Information Technology ("IT") to deliver prospectuses will lower cost of issuers vis a vis use of the printed medium. In addition, information efficiency is enhanced. In Malaysia, share offers to the public are traditionally accompanied by a printed prospectus. The printing and mailing of a prospectus is a cost to the issuer and hence a cost in the capital formation. The cost includes accounting fees, brokerage and commission, legal fees, financial advisory fees, prospectus printing and mailing costs, and public relations and marketing.

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11. See THOMAS P. VARTANIAN ET AL., 21ST CENTURY MONEY, BANKING & COMMERCE 3-4 (1998); CHRIS REED ET AL., CROSS BORDER ELECTRONIC BANKING: CHALLENGES AND OPPORTUNITIES 143 (2000); AISHAH BIDIN, ELECTRONIC COMMUNICATIONS AND SHAREHOLDERS MEETING (2008) (proceedings papers from the 3rd Conference on Law and Technology organized by Faculty of Law and Centre of Law and Genetic, University of Tasmania, New Zealand); Aishah Bidin, *Shareholders Meetings in Cyberspace*, UNDANG-UNDANG DALAM ERA TEKNOLOGI, Chapter 9 (2008) [hereinafter *Shareholders Meetings in Cyberspace*]; Karen Furst et al., *Internet Banking: Developments and Prospects* 5 (Off. of the Comptroller of the Currency Econ. and Pol'y Analysis, Working Paper No. 2000-9, 2002), on the use of internet, commercial transaction, and banking system.

Apart from that there is also compliance cost, namely the cost of complying with relevant legislation.

B. Position in the Malaysian Companies Act 1965/ 2016

Information transmission and communication technologies are revolutionizing the management of corporation in the securities industry. These technologies have drastically transformed the ways businesses are conducted. One of the major changes is conducting shareholders' meetings virtually, i.e. by way of technology. Literally, virtual meetings mean "a business discussion that is conducted via Internet broadcast, videoconferencing, email, or a similar mode."[12] It is mainly conducted with the assistance of electronic appliance. Thus, virtual meetings are also known as electronic meetings.

An electronic meeting allows shareholders to communicate quickly, efficiently, and cost-effectively with each other and the management. It enables companies to hold meetings under the sense of urgency. It also resolves problems of communication caused by geographically. This would definitely increase the participation of shareholder in companies, which will result in improved corporate governance that can lead to better financial results. Therefore, by adopting electronic meetings, companies will not only save considerable sums of money, but will also portray a good image for being environmental friendly in its operation. However, in the implementation of this newly-invented method, there are a few legal issues that need to be scrutinized carefully to ensure that it can function properly, even better than the traditional shareholders' meetings.

The first important issue that needs to be clarified is the validity of electronic meetings. It is well-established that the term "meetings" refers to a gathering which involve physical presence of parties in the same place for certain activities.[13] This interpretation clearly contradicts with the principle of electronic meetings, whereby the parties are not required to physically attend meetings or be at the same place. The validity of electronic meetings has been questioned at its early age. Although there is a lack of Malaysian cases that discuss on this issue, we saw judges in other jurisdiction who were quite reluctant to depart from the traditional approach when interpreting the term.

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12. *Virtual meeting*, DICTIONARY.COM, http://www.dictionary.com/browse/virtual-meeting?s=t.
13. *Meeting*, OXFORD ENGLISH DICTIONARY. The Oxford English Dictionary has defined meetings as:
    (1) Coming together of people, especially for discussion.
    (2) Assembly of people for a particular purpose.
    (3) Gathering of people (for a sporting contest).
    (4) A meetings of minds close understanding between people.

The court in the case of *In Residues Treatment Co. v. Southern Resources Ltd.*[14] has seen to be much more hostile to departures from the physical meetings format.[15]

On the other hand, some judges have adopted a more liberal approach as long as the counsel can established that there is some form of meetings of the mind. A good example is shown in the case of *Byng v. London Life Association*[16] where the English Court of Appeal rejected an argument that there must literally be contemporaneous face to face presence to constitute 'meetings' in view of modern technology, making it possible for people to 'meet' without having to be physically present in the same room.[17] Browne-Wilkinson VC has given his opinion:

> Given modern technologies advances the same result can now be archived without all the members coming face to face; without being physically in the same room they can be electronically in each other's presence so as to hear and be heard and to see and be seen . . . .[18]

The question of whether an electronic meeting can be considered a meeting is no longer in dispute now as most of the countries' legislation has given recognition to the usage of technology in meetings. In Malaysia, with the coming into effect of section 145A pursuant to the Companies (Amendment Act) 2007, the validity of meetings conducted by way of technology is not an issue under the law. However, the law does not specify further on the matters related with electronic meeting.

The adoption of electronic meetings involves a fundamental change of a companies' management. Hence, the company's articles of association might need to be reviewed in order to be consistent with the practice of the companies.

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14. In Residues Treatment Co. v. Southern Resources Ltd., 14 ACLR 569 (1988).
15. *Id.* (Perry, J.) ("The words in art 105 'meet together'; the requirements as to a quorum; the provisions of art 106 disentitling a director while out of Australia to notice of a meetings of the directors; the words in art 106 that a director 'may attend and vote by proxy'; the words in art 108 referring to a quorum being 'present' . . . all point inexorably to the conclusion that in the articles the word 'meetings' has its ordinary meaning, namely, that it refers to an assembly of people").
16. Byng v. London Life Association, 1 All ER 560 (1989) (UK).
17. In this case, the venue of the meetings was a cinema and an overflow room which was linked by audio-visual equipment. Unfortunately, the audio-visual link was defective on the day of meetings and while members in the overflow rooms could see and hear the chairman, members speaking from the cinema could not see and hear the chairman, members speaking from the cinema could not be heard as well.
18. Byng, 1 All ER at 564-65.

Nevertheless, the position under the law is not clear as to matters concerning the appointment of proxies, given of notice, and the "deemed service" provisions. The element of consent of shareholders to conduct meetings by way of electronic is not emphasized in the Act. This is relatively important as shareholders cannot be compelled to make use of facilities if they do not wish to. Further, the provision lacks on regulating the issuance of notice of meeting, especially the length of notice and how the relevant notice can be served.

Besides, section 147(1)(a) of the Companies Act provides that two members of the companies who are present personally shall be a quorum.[19] However, it is not clear that the quorum in this section can be equally applicable to electronic meetings as the requirement of "personally present" is of course impossible for electronic meetings. In a traditional meeting, members are allowed, under the law, to appoint proxy to attend and vote on behalf of them.[20] The appointment of proxy in electronic meeting is much more complicated as it might be difficult to verify the identity of the proxy and whether he acted under authorization. Another important feature of corporate governance is the member's entitlement to vote at company meetings. Questions like, under what circumstances do members vote through electronic meetings, how do members vote electronically, and the voting period are yet to be answered by the regulator. The minutes of meetings and its contents are also another area that should not be forgotten.

In short, to conduct a company's meeting by electronic means can be described as the most challenging area in the context of local commercial laws due to the extensive matters that await to be resolved by the regulator. Indeed, the use of telephone, which can be considered as a product of technology, has long been accepted as a method of communication in business even though there are no relevant statutory provisions regarding the use of telephone to hold board meetings. Nevertheless, specific law is needed to enable electronic meetings to be conducted more effectively.

In relation to a company's meeting, the Companies Act provides that a member of a company holding not less than one-tenth of the company's paid-up capital may require the company to hold an extraordinary general meeting by signing a requisition, which shall be deposited at the registered office of the company.[21] Even if the signature may be digital, it is not clear whether the same should be applied to "requisition" and "deposit." At present, this issue is still left unsettled. One of the solutions is to recommend that the provision

19. Companies Act 1965, Act 125, § 147(1)(a) (Malay.).
20. *Id.* § 149.
21. *Id.* § 144(1).

should be clarified as to specify and to allow notice to be given by electronic means.

Upon delivery of notice to the members, the issue that will arise is whether the company can assume that the members have actually received notice. Is there a need for a provision deeming the receipt of documents that are electrically sent? For an example, the day after electronically sending the documents, is there an assumption that the member will be deemed to receive notification. In relation to notice, pursuant to an Annual General Meeting ("AGM"), notice must be given to all persons who are entitled to receive notice. This implies that there should be individual delivery.

It can be argued that with regards to delivery of notice to members, there is a presumption that a company can assume members have actually received delivery of notice if it is made by a way of electronic, as opposed to individual delivery. The question lies to whether there is sufficient justification for allowing a company to post the notices on the company website or homepage. Individual delivery of notice through electronic means can only be done if the members have nominated electronic mail addresses for delivery. Members may not be willing to nominate their electronic and mail addresses in the absence of a specific provision in the Companies Act to require companies to keep these addresses confidential. This is a privacy issue. There should, therefore, be specific provisions in the Companies Act requiring companies to keep electronic addresses of its members confidential.

Similarly, the Companies Act does not regulate directors meeting. The Fourth Schedule in the Companies Act emanates that a director meeting will be held on the requisition by the director.[22] There is no definition for the term "requisition." Article 1 of the Fourth Schedule provides that expression referring to writing includes printing, lithograph, photograph, and other modes of representing or reproducing words in a visible form.[23]

Notwithstanding this article in the Fourth Schedule, it is common for companies to provide in its article that notice for directors meeting must be in writing and served individually to its directors. It should be considered, therefore, whether there is a need to provide a provision in the Companies Act that requires notices be made in any form to directors, including electronic mails nominated by the directors. It may also be necessary to include the manner of conducting such meeting as directors will be allowed to utilize the latest technologies for their meetings.

Statutory provisions provide shareholders the right to attend and vote at company meetings. However, dispersed corporate ownership and geographical

22. *Id.* Fourth sched. art. 79.
23. *Id.* Fourth sched. art. 1.

distance have acts as a barrier for shareholder to attend meetings physically. Electronic meetings and electronic voting has, thus, became a more viable approach for corporate governance. The present laws allow meetings to be convened at more than one venue by using technology that gives all members a reasonable opportunity to participate.[24] Apart from this, there is no provision concerning the procedure to conduct an electronic meeting, requirements that need to be fulfilled, and limitation imposed on meetings that are held electronically.

C. Position in the United Kingdom and Australia

The Companies Act 1985 (Electronic Communications) Order 2000 in United Kingdom ("U.K.") is a piece of legislation that was enacted to enable the government to use delegated legislation to allow companies to communicate with their shareholders electronically.[25] Table A to the Companies Act 1985 is amended to include the use of electronic communications in certain areas, such as the appointment of proxies, given of notice, and the "deemed service" provisions.[26] Companies do not have to amend their articles before using electronic communications.

Reference may be made to the Electronic Communication Order 2000 in U.K. Following amendments made to section 369 of the U.K. Companies Act 1985 by the 2000 Order, notice may be given by electronic communication, notwithstanding any provision contrary to the articles.[27] A notice is to be treated as given to a member where the companies and the member have agreed that such notices may be accessed by the member on a website, provided that the member is notified, in the manner agreed with the companies, of the publication of the notice on a website, and the notice continues to be published on that website throughout the period from the giving of that notification (which is deemed to be the time of notification) until the conclusion of the meetings.[28] The notification must state the particulars of the meetings, such as whether it is to be an annual or extraordinary meetings, and must specify the date, place, and time of the meetings.[29] In Australia, a number of provisions have been enacted

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24. *Id.* § 145A.
25. The Companies Act 1985 (Electronic Communications) Order 2000 (Eng.), www.legislation.gov.uk/ukdsi/2000/0110186745/contents; *see also* THE COMPANY LAW REVIEW STEERING GROUP, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY: COMPANY GENERAL MEETINGS AND SHAREHOLDER COMMUNICATION (1999).
26. *See* The Companies Act 1985 (Electronic Communications) Order 2000, sch. 1.
27. *Id.* art. 18(2)(4E).
28. *Id.* art. 18(2)(4B).
29. *Id.* art. 18(2)(4C).

to provide for the calling of meetings using electronic communication. Before starting virtual meetings, companies should first invite shareholders to use it and have it entirely voluntary.[30] Shareholders cannot be compelled to make use of the facility. The practice in Australia is that if shareholders consent to or wishes the receipt of the relevant communications by electronic means, they are requested to return a registration slip which states their e-mail address.[31]

There are few principles that need to comply strictly, such as the offer to use electronic communication should not discriminate between shareholders of the same class or between classes.[32] The facility should be available to all shareholders on equal terms.[33] The option to receive relevant materials in hard copy should be retained.[34] Where certain shareholders object to the facility, companies will have to follow the traditional meetings and send out the material in the form of hard copy.[35] The rationale is that shareholders are entitled to choose the manner of meetings which they feel comfortable, especially for them to vote for the meetings. This is their fundamental rights and it cannot be overtaken by the excuse of technology advancement. However, this requirement does not exist in the present laws in Malaysia.

Even though some corporations in Australia have carried out online real time audio-visual transmission of annual general meeting,[36] electronic voting has not been offered by any corporations at the present moment.[37] In order to participate in electronic voting, voting members will be required to have a valid email address. Companies should state clearly in the notice matters that need to be voted, the relevant website to vote, the starting and ending date which they will be able to cast their vote ("Voting Period"), the voting procedure, and contact information for any questions or issues that may arise during the electronic voting process. Certain password or identification code, which is unique to each member, should be given to ensure voting members are only able to cast a single vote. This can also resolve the worries of authentication, especially in the case of electronic proxy voting.

It is advisable that the voting period should be at least 14 days to ensure every member have ample time to exercise their rights. During the voting period, members may log into the given secure website and cast their vote. Reminders

30. *Shareholders Meetings in Cyberspace*, *supra* note 12.
31. Boros, *supra* note 2.
32. *Id.* at 18-26
33. *Id.*
34. *Shareholders Meetings in Cyberspace*, *supra* note 12.
35. *Id.*
36. Boros, *supra* note 2.
37. John Roth, *The Network is the Business*, *in* BLUEPRINT TO THE DIGITAL ECONOMY: CREATING WEALTH IN THE ERA OF E-BUSINESS 283 (1998).

during the Voting Period may be sent to the voting members who have not cast their electronic votes. In the event that the electronic system fails to operate properly or the technology provider is unable to deliver the services required and the failure is not rectifiable, during the voting period the companies may decide to terminate electronic voting during the applicable voting period and institute another form of voting to decide the matter. Companies must ensure that the whole voting process is confidential and the results of voting can be displayed on the website upon agreement or be distributed to every member in hard copy.

Compared to the position of U.K. and Australia, the present laws that regulate electronic meeting in Malaysia is very much simple and insufficient if it is compared with other jurisdiction. The primary purpose of having a meeting is to provide a chance for the members to express their view and opinion to the company's management and, in the same time, to allow decisions made by the members to exercise their right to vote under the law. Therefore, the form of meetings must not be too burdensome to the members. Companies who decide to adopt electronic meeting must ensure that there is a "meetings of the minds" at the end of the day.

III. Specific Issues on Prospectus

In relation to the usage of electronic prospectuses, it is pertinent to evaluate whether the present laws on a company's prospectus provides any reference to this matter. A general overview of the Companies Act suggests that Malaysian law does not expressly provide such provision. Section 39(1) of the Companies Act relates on the contents of the prospectus. Section 39(1)(a) states that in order to comply with the requirements of the Act, a prospectus "shall be printed in type of a size not less than the type known as eight point Times" unless the Registrar certifies otherwise.[38] Two problems existed for electronic prospectuses, namely it is not in printed form and secondly, the font size and type may not appear as prescribed on the investor's monitor. The term "printed" is defined in section 4(1) of the Act to include documents, "typewritten or lithographed or reproduced by any mechanical means."[39] Clearly, this definition does not encompass printing by electronic means. Hence, it can be said that electronic prospectuses are prohibited unless an exemption can be obtained under section 47A of the Companies Act.[40]

38. Companies Act 1965, Act 125, § 39(1)(a) (Malay.).
39. *Id.* § 4(1).
40. *See id.* § 47A. Pursuant to section 47A the Minister of Domestic Trade and Consumer Affairs

The Companies Act also prohibits the circulation or distribution of any form of application for shares in or debentures of corporation unless the form is issued, circulated, or distributed together with a prospectus, a copy of which has been registered by the registrar.[41] An electronic prospectus is not a "copy" of the prospectus lodged with the Registrar. The Securities Commission has also recognized the possibility of electronic prospectuses being made available by issuers, but requires that such prospectus may only appear on the web-page of the relevant regulatory authority.[42]

Another vital issue is related to multimedia prospectus. A multimedia prospectus contains text, graphics, pictures, video clips, audio clips, and hyper-links that will link any part of the prospectus to another part, or to different documents and other multimedia applications. However, because of the limitation in law that recognizes paper prospectuses, prospectuses with multimedia advantage will not yet be introduced in Malaysia.

One of the advantages of prospectuses is that it prevents better-informed investors from reaping unfair profit from trading on their superior information. Matters disclosed in the prospectus help to ensure that all investors have equal access to information. Information without access will be at a disadvantage if prospectuses were available only in electronic form. Therefore, even when the law has caught up with the intricacies of electronic and multimedia prospectuses, it should provide that paper prospectuses still be made in addition to electronic prospectuses.

A. Electronic Prospectus

The rapid development of information and communication technology is changing the way financial information is disseminated. Nowadays, companies tend to publish and circulate their prospectus through the internet, which is less costly than the statutory requirements. An "electronic prospectus" is any

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may on the application of any interested party or person and subjected to the recommendation of the Registrar, the companies may exempt persons from the provisions of part IV, Division I. *Id.* An application under section 47A must be supported by a recommendation from the Registrar. *Id.* The Registrar's recommendatory powers are constrained by section 47A(2)(a) and (b). *Id.* A recommendation shall not be made by the Registrar to the Minister unless the Registrar is of the opinion that circumstances exist whereby either "(a) the cost of providing a prospectus outweighs the resulting protection to investors, or (b) it would not be prejudicial to the public interest if a prospectus is to be dispensed with." *Id.*

41. *Id.* § 37.

42. *See* SECURITIES COMMISSION, FRAMEWORK FOR THE IMPLEMENTATION OF ELECTRONIC COMMERCE IN THE CAPITAL MARKET (2000).

prospectus which is distributed in electronic rather than paper form.[43] There is no interpretation on "electronic prospectus" in the Companies Act or the CMSA. The word is only defined in a guideline issued by the Securities Commission which says: an "electronic prospectus" means a copy of a prospectus that is issued, circulated or distributed via:

(i) the Internet; and/or
(ii) an electronic storage medium, including but not limited to CD ROMs or floppy disks. [44]

The above definition creates doubt as to whether a prospectus in electronic form can be said to be a "copy" to a paper form prospectus. A "copy" refers to a "thing made to look like another, especially a reproduction of a letter, picture etc."[45] By applying this interpretation, an electronic prospectus, though not created in the same form of paper-based prospectus, is safe to be regarded as a copy of the later. Indeed, the spirit behind it is to make sure investors are provided with the document that contains the same information in the same sequence as in the registered prospectus.

Another term which has been used interchangeably with "electronic prospectus" is "multimedia prospectus," which contains text, graphics, pictures, video clips, audio clips, and hyperlinks that links any part of the prospectus to another part or to different documents. Up to date, only the Australia Securities & Investments Commission has made an attempt to distinguish between these two terminologies.[46]

The Companies Act has laid out a number of statutory requirements in respect of the contents of a prospectus. Among others, it shall be "printed in type of a size not less than the type known as eight point Times" unless the Registrar certifies otherwise.[47] The Act specifies further that "printed" includes typewritten or lithographed or reproduced by any mechanical means.[48] In other words, an electronic prospectus is not complying with the statutory requirement under the Act. Non-compliance to the requirement under the Companies Act constitutes an offence whereby each director of the corporation and other

43. REGULATORY GUIDE 107 FUNDRAISING: FACILITATING ELEC. OFFERS OF SEC. (AUSTRALIAN SEC. & INV. COMM'N 2000).
44. GUIDELINES ON ELEC. PROSPECTUS AND INTERNET SEC. APPLICATION (MALAYSIA SEC. COMM'N 2003).
45. *Copy*, THE OXFORD ENGLISH DICTIONARY.
46. REGULATORY GUIDE 107 FUNDRAISING: FACILITATING ELEC. OFFERS OF SEC., *supra* note 43; AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION, CONSULTATION PAPER 7 MULTIMEDIA PROSPECTUSES AND OTHER OFFER DOCUMENTS (1999).
47. Companies Act 1965, Act 125, § 39(1)(a) (Malay.).
48. *Id.* § 4.

person responsible for the prospectus shall be liable for imprisonment for five years or thirty thousand ringgit.[49]

Director or person liable for the offence may invoke defences under the Act if he is able to prove that he was not cognizant as regard to the matter not disclosed,[50] that the non-compliance or contravention arose from an honest mistake on his part concerning the facts,[51] or such non-compliance was in the opinion of the court, immaterial or was otherwise reasonably to be excused.[52] Nevertheless, the defences available seem not applicable to the exiting scenario as offering prospectus through the internet involves a totally different mechanism than paper-form offering.

Apart from the contents of a prospectus, the issuance of form of application for shares or debentures of a corporation is subject to further requirements under the Companies Act. The Act prohibits any issuance, circulation, or distribution of any form of application for shares or debentures of the corporation unless such form is issued, circulated, or distributed together with a prospectus and a copy was registered with the registrar.[53] This means that the copy of a prospectus must bear the cop or signature from the Registrar. Strictly, an electronic prospectus is not a copy of a prospectus that has been endorsed by the Registrar. Under such circumstances, the Act provides that any issuance of form of application without the attachment of a prospectus constitute an offence which shall be liable for imprisonment for five years or one hundred thousand ringgit, or both.[54]

Albeit the above provisions, there are two exceptions under the Companies Act that is applicable to the statutory requirements imposed on a prospectus. Firstly, a company or issuers may apply relief from the requirements as to the form and content of a prospectus.[55] The application must be in writing.[56] The Registrar may grant an order of relief if, after having considered the nature and objectives of the corporation, satisfies that by granting relief to the applicant will not cause non-disclosure to the public of information necessary for them to make their assessment,[57] and the compliance to the statutory requirements

49. *Id.* § 39(4).
50. *Id.* § 39(5)(a).
51. *Id.* § 39(5)(b).
52. *Id.* § 39(5)(c).
53. *Id.* § 37(1); Capital Markets & Services Act 2007, Act 671, § 232(2) (Malay.) (a similar provision).
54. Companies Act 1965, § 37(1).
55. *Id.* § 39B.
56. *Id.*
57. *Id.* § 39B(3)(a).

would impose unreasonable burden to the applicant.[58] By granting such relief, the Registrar may impose any other terms and conditions that the Registrar thinks fit.[59] A prospectus issued in compliance with the order made under this section will be deemed to have complied with all the requirements of the Act.[60]

Besides, section 47A of the Act provides a general exemption to the provisions under Division 1 and 4 in Part IV of the Act. The exemption is subject to the recommendation of the Registrar.[61] It imposed an obligation on the Registrar that the Registrar shall not make such recommendation to the Minister unless the Registrar is satisfied that the cost of providing a prospectus outweighs the resulting protection to investors,[62] or it would not be prejudicial to the public interest if a prospectus were dispensed with.[63]

As a whole, exceptions provided under section 39B is not suitable for an electronic prospectus as an electronic prospectus still carry the same purpose with a paper-form prospectus, namely, to give investors and their financial advisers information about a company or mutual fund, including information on products, management, financial and strategic planning, and risk in order to assist them in making sound investment decisions. Thus, any non-disclosure of such information will prejudice the investors by making a wrong decision. Similarly, to fulfill the requirements imposed under section 47A is not an easy task as the public interest of the investors would definitely be affected if exemption is given either to the contents of an electronic prospectus or its issuance for the purpose of section 37 as mentioned above.

As mentioned earlier, there is no interpretation on "electronic prospectus" in the Companies Act or the CMSA. The words only defined in a guideline issued by the Securities Commission includes a copy of a prospectus that is issued, circulated, or distributed via the internet and/or an electronic storage medium.[64] Meanwhile, the Australia Corporations Act 2001, which merely gives a broad interpretation on "prospectus," states that "prospectus" means a prospectus that is lodged with Australian Securities and Investments Commission ("ASIC").[65] Since ASIC has allowed prospectus to be issued

58. *Id.* § 39B(3)(b).
59. *Id.* § 39B(2).
60. *Id.* § 39B(4).
61. *Id.* § 47A(1).
62. *Id.* § 47A(2)(a).
63. *Id.* § 47A(2)(b).
64. GUIDELINES ON ELEC. PROSPECTUS AND INTERNET SEC. APPLICATION, *supra* note 44.
65. *See Corporations Act 2001* (Cth) (Austl.).

electronically subject to the terms and conditions imposed,[66] the definition covers electronic prospectus as well. Comparatively, the interpretation in Malaysian law is clearer than the Australia jurisdiction.

Apart from the statute, matters regulating electronic prospectus are mainly provided under the "Guidelines on Electronic Prospectus and Internet Securities Application" that is issued by the Securities Commission on December 2003.[67] Some important features of the guidelines include the inclusion of hyperlink in the electronic prospectus. A prospectus that contains embedded hyperlinks to other information that contain in other part of the website is prohibited and the presence of such hyperlink will be considered as an indication of the adoption of the hyperlinked information.[68] The inclusion of hyperlink will only be allowed provided that the hyperlinks direct the applicant either to the beginning or the first page of the electronic prospectus, or a page which displays the contents of the electronic prospectus in its entity.[69]

On the other hand, the Securities and Exchange Commission ("SEC") has issued a guideline on the use of electronic media, which includes the issuer responsibility for hyperlinked information. Similarly, the SEC believes that an issuer may have some responsibility for sites to which the investor has chosen to link, depending on the circumstances. Unlike the Securities Commission, the SEC applies essentially a subjective standard to hyperlink. From the SEC's perspective, whether the issuer has involved itself in the preparation of the information, or explicitly or implicitly endorsed or approved the information (with the former commonly referred to as the "entanglement" theory and the latter as the "adoption" theory).[70] The SEC has identified three factors that help determine whether an issuer has adopted information hyperlink from a third party side, namely:

(i) Context of the hyperlink – what the issuer says about the hyperlink or what is implied by the context in which the issuer places the hyperlink.
(ii) Risk of confusion – the presence or absence of precautions against investor confusion about the source of the information.

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66. REGULATORY GUIDE 107 FUNDRAISING: FACILITATING ELEC. OFFERS OF SEC., *supra* note 43.
67. GUIDELINES ON ELEC. PROSPECTUS AND INTERNET SEC. APPLICATION, *supra* note 44.
68. *Id.*
69. *Id.*
70. SEC. & EXCH. COMM'N No. 33-7233 (1995); SEC. & EXCH. COMM'N No. 33-7856 (2000); SEC. & EXCH. COMM'N No. 33-7288 (1996).

(iii) Presentation of hyperlink information – how hyperlinked information is presented is relevant in determining whether the issuer has adopted the information.[71]

By comparing both legislations on the said matters, Malaysian law is not comprehensive enough as to the determination on liability of issuer for hyperlink information. Conversely, the standard set by the SEC is too subjective. For instance, the ability to perceive information presented from a hyperlink is different from one and another, and the level of precautions about the source of information is different. To this respect, improvement to the current law can be made by referring to the SEC guidelines.

Under the present laws, there are certain requirements that need to be fulfilled on a paper-form prospectus. Firstly, a prospectus must not be issued, circulated, or distributed unless a copy of it has first been registered by the Registrar.[72] Secondly, no person can issue, circulate, or distribute any form of application for securities unless the form is accompanied by a copy of a prospectus, which has been registered with the Securities Commission.[73] Both requirements exist under the Australia Corporation Act 2001 as well.[74] However, ASIC has given class order relief to the issuer and any other person who passes on an application form if they take reasonable steps to ensure that the investors receives an application form attached to, or accompanied by, an electronic prospectus or a print out of it.[75] Alternatively, Malaysian laws are silent in this matter and the Companies Act only provides a general exemption, which is not suitable to be applied to electronic prospectus.[76] Such limitations impose strict liability to the issuers to register a prospectus and ensure that investors are supplied with proper prospectus before they complete the application form. Nevertheless, the lack of further guidance on electronic prospectus might also discourage the issuers from adopting this new practice.

A prospectus is an important disclosure document in securities trading. Hence, issuers who wish to issue prospectus electronically must obtain the

71. SEC. & EXCH. COMM'N No. 33-7233 (1995); SEC. & EXCH. COMM'N No. 33-7856 (2000), SEC. & EXCH. COMM'N No. 33-7288 (1996).
72. Companies Act 1965, Act 125, § 42 (Malay.); Capital Markets & Services Act 2007, Act 671, § 233 (Malay.).
73. Companies Act 1965, § 37(1); Capital Markets & Services Act 2007, § 232(3).
74. *Corporations Act 2001* (Cth) § 1020 (Austl.) (for the requirement to register); *Id.* § 1025 (for the requirement to attach application form together with prospectus).
75. Australian Securities and Investments Commission Class Order, [CO 00/43] (2000).
76. Companies Act 1965, § 47A. Which has also been discussed in Chapter II.

consent of investors and provide direct notice to them regarding the availability of disclosure documents that has been delivered through electronic means.[77] The element for consent, however, is not stated in the current laws. The Securities Commission requires several notices to be provided for the issuance of an electronic prospectus. For example, the electronic prospectus and electronic application form must be accompanied by a statement that is a paper/printed prospectus, and application forms must also be available and provide where it can be obtained from.[78] The electronic prospectus and electronic application form must also carry a notice containing jurisdictional disclaimer to the effect that securities offer is intended only to be made available in Malaysia or to any person in Malaysia.[79] There must be a notice that provides the closing date of the application period and that no securities are allowed to trade electronically after the closing date.[80] In this respect, the efforts done by the Securities Commission, in order to protect investors from uncertainties when dealing securities through the internet, are quite sufficient, if, compared to other jurisdictions.

In short, the legislation regulating traditional paper form prospectus is complete and well-established. This is not the case of offering securities via electronic prospectus. As a comparison, the present laws are considered sufficient but not excellent. Certain aspects need to be improved, including the determination of liability for the inclusion of hyperlink and the element of consent of the investors towards the usage of electronic prospectus. Further guidance on the requirement to be fulfilled by the issuer is needed to clear the doubted area in practice.

IV. Offering Securities Through the Internet

Since the internet is an open network, it is not limited to a specific audience. Instead, anyone from any jurisdiction may have access to information. Thus, any regulator from any jurisdiction, who has internet access, may technically claim jurisdiction over the content of the internet. In Malaysia, offers or invitation relating to securities published in the internet, regardless of its

77. Securities and Exchange Commission October 1995 Release § II B; *id.* May 1996 Release § IIA.
78. GUIDELINES ON ELEC. PROSPECTUS AND INTERNET SEC. APPLICATION, *supra* note 44.
79. *Id.*
80. *Id.*

geographical location, is governed by section 212 of the CMSA.[81] Contravention of section 212 of the CMSA is an offence against the Act and renders the person liable to a maximum fine of 1 million ringgit and/or a term imprisonment not exceeding ten years conviction.[82] In line with the shift towards a full disclosure regulatory environment, the act does not specify or prescribe the documentation that must be submitted with the application, but instead provides the Commission with the flexibility to exercise its discretion as required under the circumstances.[83] In addition, the Companies Act prohibits a person from issuing circulars or distributing any form of application "for shares in or debentures of a corporation unless the form is issued circulated or distributed together with a prospectus, a copy which has been registered by the Registrar.[84]

In this event, if all regulators seek to claim jurisdiction over the information on the internet and seek to regulate offers of securities appearing on the internet, the development of the securities industry will be severely hampered. Therefore, there is a great need for the harmonization of regulation relating to offer of securities on the internet.[85]

Within the regulatory framework, the Securities Commission has issued a Consultative Paper entitled "The Framework for the Implementation of Electronic Commerce in the Capital Market" in 1997.[86] Since the 1997 paper, the Securities Commission has also issued a policy statement entitled "Primary Offers of Securities via the Internet" that clarified the Securities Commission

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81. Capital Markets & Services Act 2007, Act 671, § 212 (Malay.) (Formerly section 32 of the Securities Commission Act 1993. It stipulates that all proposal for the listing of securities on Bursa must be approved by the Securities Commission. An overview of this section seems to indicate that these provisions are not limited to equity securities but also extends to encompassing debts securities including redeemable preference shares and the issue of share warrants, convertibles, and call warrants by the issuer.).
82. *Id.* (Formerly Section 32(13) Securities Commission (Amendment) Act 1995 (Act A926)).
83. This is based on section 32(3), which states that an "applicant shall submit to the Commission such documents and such other information in relation to the proposal in such form and manner and at such times as the Commission may require." Securities Commission Act 1993, Act 498, § 32(3) (Malay.).
84. Companies Act 1965, Act 125, § 37(1) (Malay.). *See also Id.* § 4(1) (for the definition of a "prospectus"); *Id.* § 4(6) (for the definition of "offering shares or debentures to the public."). See Corporate Affairs Commission (SA) v. Australian Central Credit Union, 10 ACLR 59 (1985); Nicholas v. Gan Realty Sdn Bhd, 2 MLJ 98 (1970); Public Prosecutor v. Huang Sheng Chang & Ors, 2 MLJ (1983), for issues in relation to what amounts to a "public offer."
85. *See* INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, SECURITIES ACTIVITY ON THE INTERNET (1998), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD83.pdf.
86. SECURITIES COMMISSION, *supra* note 42.

position on offers of securities via the internet in relation to the Securities Commission Act.[87]

The Consultative Paper defines electronic commerce as: to be broadly defined as the use of IT to affect linkages among functions provided by participants in commerce.[88] The term describes technology platforms that allow:

a. the transfer and dissemination of information to a wider number of users within and between network;
b. the execution of trade and other transactions without the need for parties to the transaction to be physically present at the same location; and
c. the distribution or delivery of services and products in electronic form such as software products offered by software vendors on the internet.[89]

The Securities Commission in its discussion paper[90] has taken the view that an offering over the internet that is accessible within Malaysia is an offer that is within the ambit of section 212 of the CMSA. However, the Commission may take into consideration a number of factors to access whether that offering should fall within the section. Some of the factors that will be taken into consideration are:

i) the intention of the parties making the offer namely whether the offer is in fact targeted to Malaysian residents or otherwise.
ii) the penetration of the offer in Malaysia namely whether any Malaysian resident actually accepts the offer and
iii) the involvement of Malaysian resident in making the offer.

With this regards, the Securities Commission has yet to decide whether to subject internet offering to the rigors of section 212 or to exempt such offerings. Any decision taken would clearly have to take into account the rationale, cost, and effectiveness of any attempt to regulate such offerings.[91]

In addition, the Securities Commission has also further issued a policy statement to address the issue in August 1999. The press release commences by outlining the policy consideration, namely, a desire to develop e-commerce against the duty to protect Malaysian investors, and then reiterates that an internet offering of securities accessible in Malaysia is caught by section 212.

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87. Companies Act 1965, § 32.
88. SECURITIES COMMISSION, FRAMEWORK FOR THE IMPLEMENTATION OF ELECTRONIC COMMERCE IN THE CAPITAL MARKET (1997).
89. *Id.*
90. SECURITIES COMMISSION, ELECTRONIC COMMERCE AND THE MALAYSIAN CAPITAL MARKET - REGULATORY AND DEVELOPMENT CHANGES (1999).
91. *Id.*

Hence, the approval of the Securities Commission is required "if the offer is accessible within Malaysia."[92]

The Securities Commission goes on to state that in the absence of an express jurisdictional disclaimer, the Securities Commission will take into account several factors to determine whether an offer of securities on the internet would be subjected to the former section 32 of the Securities Commission Act. These factors include:

i) The intention of the person making the offer namely whether the offer is in fact targeted to a person in Malaysia. In discerning the intention of the offeror, the Securities Commission will consider whether the offerors' use of disclaimer, the establishment of local distribution networks, concurrent advertising or publicity of other forms of media in Malaysia or denomination of prices in Malaysian currency;
ii) The penetration of the offering of securities in Malaysia namely whether any person in Malaysia accepts the offer. This includes consideration of the issuer's precautions to screen address and residency information and the amount of unauthorized sales; and
iii) The involvement of a person from Malaysia in making the offer.[93]

V. Digital Signature Act 1997

With the onset of the electronic age, electronic signature (e-signature) made its appearance. E-signatures play an important role in creating internet contracts by providing safety and reliability in electronic transactions. There are several forms of e-signature, which include digital signature, digitized fingerprint, retinal scan, pin number, and digitized image of a handwritten signature that is attached to an electronic message or merely a name typed at the end of an e-mail message.[94]

The requirement of electronic signature in authenticating transactions in the internet is very much related to the issue of electronic security. Security in the internet refers to the security of information or data in electronic or digital form, and covers policies, practices, and technologies that must be in place for an organization to carry out transactions electronically, via networks with a

92. Press Release, Securities Commission, Primary Offers of Securities via the Internet (Aug. 18, 1999).
93. *Id.*
94. *See also* David K. Y. Tang & Christopher G. Weinstein, *Electronic Commerce: American and International Proposals for Legal Structures*, *in* REGULATIONS AND DEREGULATIONS: POLICY AND PRACTICE IN THE UTILITIES AND FIN. SERVICES INDUS. (1999).

reasonable assurance of safety. The ultimate aim of electronic security is to ensure information confidentiality, integrity, and availability. Therefore, the parties involved in electronic businesses are able, with a reasonable degree of confidence, to identify and authenticate a particular person as the source of the message. In addition to that, electronic signature is also important to guarantee that the content of the message is transmitted with the approval of the sender.

In response to the above issue, the Malaysian government appreciates the concerns of businesses and individuals with respect to the authentication of messages to verify the identity of the contracting parties. With the aim to facilitate the growth of internet contracts, the government made a commitment in providing a secure and effective environment to contracting in cyberspace by enacting the DSA.

The United Nations Commission on International Trade Law Model law on Electronic Signature 2001 defines e-signature as "data in an electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of information contained in the data message."[95] The core concern of electronic signature by the legislation has been electronic documents, sometimes referred to as "records" or "electronic records," and "signatures" that are created, communicated, and stored in electronic form.[96] Generally, these signatures are referred to as either "electronic signatures" or "digital signatures." Unfortunately, these terms themselves have created considerable confusion.

In a more general sense, "electronic signature" is a generic, technology-neutral term that refers to the universe of all of the various methods by which one can "sign" an electronic record. Although all electronic signatures are represented digitally, they can take many forms and can be created by many different technologies. "Digital signature" is simply a term for one technology-specific type of electronic signature. It involves the use of public key cryptography to "sign" a message, and is perhaps the one type of electronic signature that has generated the most business and technical efforts, as well as legislative responses. Because the implementation of a digital signature is based largely on public key cryptography, there has been a legislative tendency to define digital signature based on technological background.[97] This definition views

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95. *See* United Nations Commission on International Law Trade Law Model Law on Electronic Signature, art 2(a) (2001).
96. Thomas J. Smedinghoff & Ruth Hill Bro, *Moving with Change: Electronic Signature Legislation as a Vehicle for Advancing E- Commerce*, 17 JOHN MARSHALL JOURNAL OF COMPUT. AND INFO. LAW 723 (1999).
97. John Chong, *A Primer on Digital Signatures and Malaysia's Digital Signatures Act 1997*, 14 COMPUT. LAW AND SEC. REPORT 322, 323-33 (1998).

digital signature as a specific process (a transformation) achieved by a specific method (an asymmetric cryptosystem) to achieve specific objectives (message authentication and integrity). According to the DSA, a digital signature means:

> [A] transformation of a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine; (a) whether the transformation was created using the private key that corresponds to the signer's public key; and (b) whether the message has been altered since the transformation was made.[98]

A signature, whether electronic or on paper, signifies the intention to authenticate. However, the nature of that intent will vary with the transaction and in most cases, can be determined only by looking at the context in which the signature was made. In addition to evidencing a person's intent, a signature can also serve two secondary purposes. First, a signature may be used to identify the person signing. Second, a signature may serve as some evidence of the integrity of a document, such as when parties sign a lengthy contract on the final page and also initialling all preceding pages to guard against alterations in the integrity of the document through a substitution of pages.

Thus, the requirement of an authenticated electronic message serves not only the function of showing that an already identified person made a particular promise, but the more fundamental function of identifying the person making the promise contained in the message in the first place. In the e-commerce world, issues arise in the need of concern in trust and security. Parties to electronic contract must be satisfied that the sender and receiver in the electronic transactions are who they are purported to be. The sender and the receiver must also be convinced that their electronic record can be authenticated and not forged while in transit.[99] Henceforth, while handwritten signatures in most cases serve merely to indicate the signer's intent, signatures in an electronic environment typically serve three critical purposes for the parties engaged in an e-commerce transaction - i.e., to identify the sender, to indicate the sender's intent (e.g., to be bound by the terms of a contract) and to ensure the integrity of the document signed.

The establishment of the MSC in 1996 has brought a new development to the legal fraternity in Malaysia. With the paramount aim of enabling Malaysia

98. Digital Signature Act 1997, Act 562, § 2 (Malay.).

99. Tay Eng Siang & Goh Choon Yih, Legal Issues and Technical Aspects on Mechanism of Digital Signature in Malaysia, Presentation at the International Conference of E-Commerce 2006 (Sept. 19-20, 2006).

to leapfrog into the information age, the MSC has brought into a tremendous growth of a plethora of new cyber legislations in Malaysia.[100] Various legislations have been passed internationally to facilitate commerce by the use of electronic records and signatures with the intention to ensure the validity and legal effect of contracts entered into electronically. The government of Malaysia has also initiated a legal and regulatory framework of cyber laws and intellectual property laws to create a predictable environment for the implementation of e-commerce.[101]

In 1997, the DSA was enacted to propel Malaysia as a regional leader in intellectual property protection and cyber laws.[102] This Act clearly demonstrates the government's commitment to gear Malaysia at becoming trusted international e-commerce hub. Its objective is to enhance electronic commerce and electronic contract in Malaysia by legalising the use of digital signature. The DSA is modelled after the Utah Digital Signature Act ("Utah Act"), which was enacted in 1996. The Utah Act was the first of its kind and was described as cutting-edge legislation at the time. The DSA, which was based substantially on the Utah Act, has mandated Public Key-Infrastructure ("PKI") or private key-public key technology to electronically authenticate the electronic transactions. The Act provides for the recognition of digital signatures, and a framework for the licensing and regulation of certification authorities.

A. Issues Relating to E -Signature

As been noted in the above discussions, the DSA was introduced to regulate digital signatures in Malaysia following the electronic signature legislation of the Utah Digital Signature, which was stimulated by the development of the American Bar Association Digital Signature Guidelines. The DSA facilitates the development of, among others, e-commerce by providing an avenue for secure online transactions through the use of digital signatures. Thus, it establishes the legal validity, enforceability, and admissibility and recognition of digital signatures.

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100. *Id.*; *see also* ZINATUL A. ZAINOL, ELECTRONIC COMMERCE: A COMPARATIVE ANALYSIS OF THE MALAYSIA DIGITAL SIGNATURE ACT 1997 AND THE SINGAPORE ELECTRONIC TRANSACTION ACT 1998 (2000).
101. Digital signature created in accordance with the Digital Signature Act is deemed to be a legally binding signature. However, it must be verified by reference to the public key listed in a valid certificate issued by a licensed certification authority by the Malaysian Government.
102. The other cyber laws are the Computer Crimes Act 1997, The Telemedicine Act 1997, The Communication and Multimedia Act 1998, the Optical Disc Act 2000, The Layout Designs of integrated Circuits Act 2000, and the 1997 amendments to the Copyright Act 1987.

Digital signature is defined by the Act as "a transformation of a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine whether the transformation was created using the private key that corresponds to the signer's public key, and whether the message has been altered since the transformation was made."[103] Essentially, digital signature is an electronic version of a conventional signature using pair of keys created, made up of a private key to create a digital signature as well as a public key used to verify the digital signature. The Act provides that the holder of a private key is not disclosed to anyone else except the subscriber while the public key is known to the public, and noted in the certificate issued by the certification authority and may be retrieved from the repository.

The Act also looks into the effect of a digital signature as in contrast to a traditional holographic signature. Where a law requires a signature or provides for certain consequences in the absence of a signature, that law is satisfied by a digital signature if the digital signature is verified by reference to the public key listed in a valid certificate issued by a licensed certification authority and the "digital signature was affixed by the signer with the intention of signing the message."[104] The recipient must also have no knowledge or notice that the signer breached a duty as a subscriber (such as by improperly disclosing the private key) or does not rightfully hold the private key used to affix the digital signature (e.g. if the person signing the message stole the private key).[105]

The recipient of a digital signature assumes the risk that the digital signature is forged, if reliance on the digital signature is not reasonable under the circumstances.[106] If the recipient decides not to rely on a digital signature, the recipient shall promptly notify the signer of that decision.[107] A message is valid, enforceable, and effective as if it had been written on paper if it bears a digital signature and the digital signature is verified by the public key listed in a certificate, which was issued by a licensed certification authority and was valid at the time the digital signature was created.[108]

The crucial issue to determine is the viability of the existing legal framework on electronic signature in providing a better security to international e-commerce. It is arguably submitted that as a main feature of the DSA is prescriptive, the Act may not be adequate to cater for the aggressive growth of cutting-edge technology. It is a

103. Digital Signature Act 1997, § 2.
104. *Id.* §§ 64(1)(b)(i), 62(b).
105. *Id.* §§ 67(c)(iii), 62(c)(ii).
106. *Id.* § 63(1).
107. *Id.* § 63(2).
108. *Id.* § 64(1)(b).

great concern that if the DSA is not reviewed, the Act would be lagging behind the technology and always be out-dated.

VI. Advancement of Technology

Technology advancement is already having a profound impact on the commercial world. Revolutionary changes are taking place in the operation of, and access to, wholesale markets as well as in the provision of cross-border service. Computer and communication technology has reshaped the securities industry in Malaysia in terms of corporate disclosure, shareholder's activism, and investors' function in contemporary society. The report by Internet Usage Stats shows that in year 2010 approximately 64.6 percent of total population in Malaysia are internet users.[109] The potential spread of the latest internet into commercial world has constituted a new era in the securities industry.

The internet provides an extraordinary amount of information to individual investors. Investors use the internet for obtaining research, market data, and the latest news report as well as to communicate information quickly using email and message boards. Meanwhile, many issuers use internet to communicate directly with their shareholder, potential investors, and analysts. Internet can also help issuers to publish their corporate information on the companies' website, which is less costly than current practice. Securities intermediaries, such as brokers and broker-dealers, are able to send a variety of information to a large number of individuals over the internet without having to rely on traditional mass media such as newspaper or mailings. On the other hand, internet can function as an effective tool for the regulator, such as the Securities Commission, to provide educational information on trading strategies in order to educate the investor and give warning on dangerous investment. Regulators can also use the internet as a source of information to look for suspicious offers and price manipulation in the market.

In short, the development of computer technology, especially the influence of the internet in the securities industry, has allowed individuals easy access to information regardless of pace and time. This chapter seeks to evaluate the legal issues concerning offering securities through the internet with contrast to the present laws. The issues include electronic prospectus, online investment contract, electronic meeting, authentication of digital signature, and matter of security.

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109. *Malaysia Internet Usage Stats and Marketing Report*, INTERNET WORLD STATS, http://www.internetworldstats.com/asia/my.htm.

VII. Security Issues

Rapid developments in online securities offering pose a growing need to improve the online security system, especially the aspect of digital signature and authentication. Many emerging technologies are being developed to provide online authentication. The major concern in online securities offering transactions is the need for a replacement of the hand-written signature with a 'digital' signature. The traditional e-mail system, which has problems of message integrity and non-repudiation, does not fulfill the basic requirements for a digital signature. Furthermore, since the internet communication system is prone to various types of security breaches, the discussion of robust and authenticated online securities offering is incomplete without consideration of 'security' as a prominent aspect of 'digital signatures.'

Briefly, a digital signature authenticates electronic documents in a similar manner and a handwritten signature authenticates printed documents. This signature cannot be forged and it asserts that a named person wrote or otherwise agreed to the document to which the signature is attached. The recipient of a digitally signed message can verify that the message originated from the person whose signature is attached to the document and that the message has not been altered either intentionally or accidentally since it was signed. Also, the signer of a document cannot later disown it by claiming that the signature was forged. In other words, digital signatures enable the "authentication" and "non-repudiation" of digital messages, assuring the recipient of a digital message of both the identity of the sender and the integrity of the message.

Malaysia is one of the select bands of nations that have the Digital Signature Legislation in place. The DSA that was enacted in year 1997 grants digital signatures that have been issued by a licensed Certifying Authority in Malaysia the same status as a physical signature. For instance, section 36 of the Act provides that by issuing a certification, the certification authority represents that the information in the certificate is accurate, all foreseeably relevant information is stated in the certificate, and the subscriber has accepted the certificate.[110]

On the other hand, by accepting the certificate, the subscriber certifies that the subscriber rightfully holds the relevant private key and the information in the certificate is true.[111] Where a signature is necessary in law, the law provides

110. Digital Signature Act 1997, § 36.
111. *Id.* § 38.

that a digital signature is sufficient.[112] A digitally signed message is as valid, enforceable, and effective as any traditional signature.[113] In settling dispute involving a digital signature, the Act specifies that the court shall presume that the digital signature is valid provided that all the requirements are met.[114] In particular, there is a presumption that the signatory intended to sign the document and adopt its content if a digital signature is verified by the public key listed in a valid certificate issued by a licensed certification authority.[115] The effect of these provisions is to make digital signature as legally valid and enforceable as traditional signatures.

There are challenges in relying on digital signatures. Not only are the IT systems on which they rely are complex, but their use gives rise to a number of legal issues. For example, many provisions under the Companies Act, especially those regarding calling for meeting and keeping company records, require the said document to be signed by the relevant person. For instance, the Companies Act requires the notice of meeting issue to members shall be in writing.[116] Similarly, where an extraordinary general meeting is to be convened upon requisition, such requisition shall be signed by the requisitionists.[117] Further, section 156(2) of the Companies Act provides that a meetings minute that has been duly signed by the chairman is evidence which is admissible in court.[118]

With the coming into force of the DSA, a digital signature is now as good as traditional signature and enforceable under the law. However, it is not clear as to whether the DSA should apply to all cases under the Companies Act, as well as the CMSA. If the answer is affirmative, is there any provision in the existing laws that provide a cautioning function to the signatory? The matter of security is also shown in the case of electronic filing of documents. Electronic filing of documents is now permitted under the Companies Act. Such service is subject to the approval of the Registrar and any person who intends to use the service will have to subscribe the service by paying a prescribed fee and comply

112. *Id.* § 62.
113. *Id.* § 64.
114. *Id.* § 67.
115. *Id.* § 67(c)(ii).
116. Companies Act 1965, Act 125, § 145(2) (Malay.).
117. *Id.* § 144(2).
118. *Id.* §§ 156(1)(b), (2).

with the terms and conditions[119] imposed by the Registrar.[120] While the Act empower the Registrar to determine the manner which requires an electronically filed or lodged document to have the same effect as a paper form document is been stamped, signed, or sealed,[121] so far there is no guideline concerning this aspect.

In short, a signature carries two main functions, namely to identify the signatory and indicate the signatory's assent to the contents of communication. These substances shall apply equally on paper form or electronic document. Up to date, no case has been decided under the DSA in Malaysia. While the effectiveness of that piece of legislation is still under observation, the impact carried by digital signature and authentication of document in dealing with online securities offering is not to be denied.

VIII. Online Investment

Section 212 of the CMSA stipulates that any issuance of securities, including the issuance of shares by a public company (listed or otherwise) or any unit trust products or bonds, requires the Securities Commission's approval.[122] In addition, any distribution or sales of such securities would require a prospectus that is registered with the Securities Commission.[123] The requirement to register a prospectus with the Securities Commission and the issuance to investors ensures that investors are provided with all the information needed on the company, its investment scheme, and the investment risks involved to enable investors to make an informed decision on their investments.

Despite the fact that these statutory provisions form a crucial part of the protection required by law for investors, it certainly imposed barriers that prevent companies (especially small and medium-sized business enterprises) from successfully raising funds on the public seeds. Before being permitted to distribute securities to the public, a prospective issuer must satisfy all the regulatory requirements, including compulsory registration and prospectus requirements, which can be expensive and time-consuming.

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119. The Companies (Electronic Filing) Order 2007, which came into force on Nov. 15, 2007, has determined the prescribed fee to be RM120.00 payable on an annual basis and other conditions related thereto.
120. Companies Act 1965, §§ 11A(1)-(2).
121. *Id.* § 11A(6).
122. Capital Markets & Services Act 2007, Act 671, § 212(3) (Malay.).
123. *Id.* § 232(2).

Consequently, significant attention has recently been directed to the possibility that the internet can operate as an effective vehicle for fund raising through the concept of Internet Public Offerings. It is arguable that the Internet Public Offerings has reconstituted the functional roles performed by intermediaries, such as investment bank and brokers within the contemporary capital markets. Indeed, in the last several years, companies worldwide have attempted to distribute securities directly over the internet without the intermediation of a traditional investment bank. It is clear that internet technology can have a significant impact on redressing the informational asymmetries in the market by reducing the cost of gathering, analysing, and disseminating information.[124]

In the context of securities offering in Malaysia, the CMSA requires that all proposals of securities must be approved by the Securities Commission. The crucial question in relating this provision is whether an offer made through the internet can be considered as "public offer." Under the existing legislation, there is no definition on "public offer." Subsection 4(6) of the Companies Act provides that any reference under the Act to offer shares or debentures to the public shall, except the contrary intention is proven, be interpreted as including a reference to offering them to public, whether selected as clients of the person issuing the prospectus or in any other manner.[125] Besides, second limb of the said section also list out several circumstances whereby a bona fide offer or invitation of shares and debentures shall not be treated as public offer.[126] In other words, the Companies Act only describes what not a public offer is, rather than to provide a precise interpretation on "public offer."

Under such circumstances, it is not clear as to an offer made through the internet can be deemed as "public offer," whereby approval of Securities Commission is needed before it can be offered to the investors. Failure to obtain the necessary approval is considered as an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term

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124. Jason Trainor, *The Internet Direct Public Offering: Establishing Trust in a Disintermediated Capital Market*, 2 CANADIAN JOURNAL OF LAW & TECH. 47 (2003).

125. Companies Act 1965, § 4(6).

126. *Id.* § 4(6) provides:

"but a *bona fide* offer or invitation with respect to shares or debentures shall not be deemed to be an offer to the public if it is—

(a) an offer or invitation to enter into an underwriting agreement;

(b) made to a person whose ordinary business it is to buy or sell shares or debentures whether as principal or agent;

(c) made to existing members or debenture holders of a corporation and relates to shares in or debentures of that corporation and is not an offer to which section 46 of the Securities Commission Act 1993 applies; or

(d) made to existing members of a company within the meaning of section 270 and relates to shares in the corporation within the meaning of that section."

not exceeding ten years or to both.[127] Basically, public offering is "an offering of corporate securities to the general public or to potential purchasers whose level of knowledge or access to information about the securities is dependent upon the disclosures of the corporation."[128] Therefore, in order to determine whether an offer constitutes a "public offer," one can look at several factors, such as the intention of the issuer, i.e. whether the offer is intended to open for purchase by general public or to certain groups of identified targets only. If an offer is only open for the internal member only, such as employee of a company, it cannot be consider as "public offer." Besides, acceptance by a foreign investor on a proposal made through the internet might be evidence that constitute a "public offerings" if there is no disclaimer on the jurisdiction display on the relevant website. This may further expose the issuer to the risk of offering securities to certain groups of person which they are not targeted.

In brief, the laws require all proposals of securities to be approved by the Securities Commission. Meanwhile, the interpretation of "public offering" is not provided. Lack of guidance to determine what constitute "public offering" for securities offering, via internet, also creates a risk to issuer for not being registered with the securities before offering. This uncertainty would definitely discourage the issuer and investors by adopting this new technology. A reform of law in this area is necessary for better practice in the future.

As discussed earlier, the internet provides a quick, inexpensive, and effective mechanism for securities offering. Nevertheless, the uncertainty existing in the laws has become an obstacle for those who wish to issue, distribute, or circulate securities by using this mechanism. This uncertainty creates further doubts on which jurisdiction applies whenever dispute happens for online securities trading across the border. Up to date, the present laws are silent on this matter.

The intention of all these efforts are to assist issuers avoid the potential regulatory action in jurisdiction's where their offers are not targeted. It can also enhance international coordination of consumer protection. Therefore, the lack of such safeguard provisions in our laws would expose issuers to unnecessary regulatory action, especially if they could not even ascertain the basic requirement that need to be obeyed for online securities offering.

The significance of digital signature in electronic commercial transaction can no longer be denied. However, we also discussed on the lack of relevant provision to be incorporated into specific laws regulating commercial trading in this country, especially to the CMSA. While the suitability and effectiveness of adopting the DSA on online securities offering is still under observation, the Government has introduced several pieces of legislations in order to facilitate

127. Capital Markets & Services Act 2007, § 212 (13).
128. *Public offering*, FINDLAW, http://dictionary.findlaw.com/definition/public-offering.html.

the growth of electronic commercial trading in Malaysia. A good example is the Electronic Commerce Act 2006, which provides legal recognition of electronic messages in commercial transactions, the use of the electronic messages to fulfill legal requirements, and to enable and facilitate commercial transactions through the use of electronic means and other related matters. The Act applies to any commercial transaction conducted through electronic means, including commercial transactions by the Federal and State Governments. Nevertheless, the use of such means is not made mandatory.

Another aspect, which is equally important, is the protection to personal data provided by the investors or shareholders. As the investor's personal data is only granted for the purpose of online securities transaction, it cannot be used for any unauthorized purposes without their prior consent. To this respect, the Personal Data Protection Act 2010 ("PDP") has been passed by the Parliament in November 2013.[129] Generally, the enactment of the PDP is laudable. Prior to this, Malaysia adopted a sectoral approach in protecting personal data but this approach proved inadequate. It is time to have a comprehensive legislation to cover all aspects of personal data protection. The PDP will apply to anyone who processes, or who has control over or authorises the processing of any personal data in respect of commercial transactions.[130]

The PDP imposes many obligations on data users. It requires a data user to not process personal data unless with consent from the data subject and it must be processed for a lawful purpose directly related to an activity of the data user.[131] Failure to comply with the Act constitutes an offence which can be fined not exceeding 300,000 ringgit or be jailed for a term not exceeding two years, or both.[132] It also states that a data user has the duty to inform a data subject about the processing of his personal data by way of written notice, and such notice must be given as soon as practicable by the data user.[133] The data user must also take practical steps to implement security measures to protect and safeguard personal data.[134] In addition, personal data shall not be kept longer than it is necessary, and the data must be destroyed or permanently deleted if it is no longer required for the purpose for which it was to be processed.[135] Although the PDP has been criticized for being not applicable to the Federal and State governments, whereby massive amounts of personal data are stored with government departments, the enactment of the PDP is still a step

129. Personal Data Protection Act 2010, Act 709 (Malay.).
130. *Id.* § 2(1)(b).
131. *Id.* § 6(3)(a).
132. *Id.* § 5(2).
133. *Id.* § 7(1).
134. *Id.* § 9(1).
135. *Id.* § 10(2).

in the right direction as the investors will now have legal protection in safeguarding their personal data when dealing with securities online trading.

Comparatively, in Australia, the Electronic Transactions Act 1999 that commenced by proclamation on March 15, 2000 allows e-commerce to fit into the same legal framework as traditional paper-based transactions. The goal is to ensure that the technological developments brought about by e-commerce can be dealt with within the existing legal system, while allowing businesses and consumers to determine the most effective technological choice for their purposes. Other equally important legislation governing online transaction in Australia includes the Commonwealth's *Privacy Act 1988* which regulates the collection and handling of personal information by Commonwealth government agencies, large private sector organizations as well as health care services providers, and organizations that trade in personal information. The Privacy Act is technology neutral and applies to personal information comprised in electronic records as well as other mediums. Besides, the *Cybercrime Act 2001* created a number of investigation powers and criminal offences designed to protect the security, reliability, and, integrity of computer data and electronic communications in the *Criminal Code Act 1995*. This outlaws activities such as unauthorized access to restricted data and spreading computer viruses.

Among the legislations governing online commercial trading in Australia, none of it regulates the technology of digital signature (although the usage of electronic signature may be recognized under the Electronic Transaction Act 1999). As discussed earlier, the digital signature is based on PKI which cannot be copied, tampered, or altered, and can only be validated by others using the same applications. On the other hand, an electronic signature is a proprietary format that is an electronic data, such as a digitized image of a handwritten signature, a symbol, voiceprint, which identifies the author of an electronic message. An electronic signature is vulnerable to copying, tampering, and making forgery easy. Therefore, in many cases, they are not legally binding and will require proprietary software to validate the e-signature. Comparatively, the Malaysian law seems more advance and secure in this respective area.

IX. Conclusion

The internet offers many advantages to a connected company, such as online banking activities, e-commerce, which generally refers to conducting business transactions over the internet, as well as communication by means of e-mail and web conferencing. However, the internet also poses numerous risks to a

connected company. The following guidelines on how these risks may be reduced may be helpful to directors of connected companies. Each and every company should have an e-mail policy stipulating that employees are not allowed to send confidential information by means of e-mail to other internet users. This prevents both the interception of sensitive information as well as employee espionage. If employees are allowed to send business information to other users by means of e-mail, such communications must be encrypted. Employees should not be allowed to use the company's e-mail facilities for personal use, such as discussing non-work-related issues or sending personal files to other users. Should an employee fail to adhere to these provisions, the company (as an employer) must be able to enforce effective disciplinary measures (including dismissal) against the employee.

All companies should also have an internet usage policy stipulating that its internet facilities are not to be used for personal purposes, such as downloading music files, viewing pornographic content, etc. Such e-mail and internet policies should be included in the employees' contracts of service. Furthermore, companies should bear in mind that they cannot simply monitor their employees' electronic communications in that such conduct infringes the employees' (constitutional) right to privacy and many countries have legislation prohibiting the interception of "communications" without the dispatcher's consent. Therefore, it is advised that companies should provide in their e-mail policies that they reserve the right to randomly monitor their employees' e-mail communications in order to ensure that the latter adhere to such policies.

With regard to malicious computer programs and hackers, all companies must ensure that their anti-virus software is up to date and that no one can access the corporate network without knowing and using a password. All employees should be furnished with their own unique password. A password policy should stipulate, for instance, that employees are compelled to keep their passwords secret; passwords should not be obvious words and should also be longer than eight letters (if possible, a combination of letters and numbers); and new passwords should be furnished or chosen at least once a month. Companies should also ensure that back-up copies are made daily (at least) of all important business information and that a system (IT) administrator is appointed, whose responsibilities include updating the anti-virus software and making the above-mentioned back-up copies. The system administrator should report to each and every board meeting whether any computer security violations occurred since the last board meeting, and should also report on other computer-related issues.

At common law, company directors must exercise their powers and duties for the benefit of the company with reasonable care and skill. Case law have illustrated that the criterion for the exercise of reasonable care and skill is to which a reasonable businessman, with the same knowledge, expertise, and

qualifications as the defendant director, in the same factual situations would have done. Therefore, where the system administrator informs the directors that the company's computer security system is vulnerable to hacking and viruses, the directors fail to arrange funds for the upgrading of the computer security system in a timely manner, and subsequently a hacker or malicious computer program causes financial loss to the company, the directors would be in violation of their duty of reasonable care and skill in that (surely) a reasonable businessman would have facilitated the upgrading of the computer security facilities in a timely manner.

The internet is multi-jurisdictional. Users can access the internet from almost any place on earth. Because of the complex weave of digital networks and telecommunications infrastructure, information may travel through various countries and jurisdictions, each with its own legal system, in order to reach its destination. Hence, one of the paramount legal risks which the internet poses is the possibility that a single unlawful act may involve multiple jurisdictions, for instance where a hacker or a malicious computer program writer is located in one jurisdiction and the victims in various other jurisdiction. Furthermore, the open nature of this network, along with its multifunctional character and increasingly low-cost access, provides access to a digital medium in which multiple perfect copies of text, images, and sounds can be easily made and transmitted, and trademarks easily misused, posing new challenges for intellectual property owners.

Recent review of the law has changed the definitions of terms, such as "document," "writing," and "record" in the Companies Act, and widened to encompass many types of electronic communication. More recently, the Malaysian Corporate Law Reform Committee has proposed reforms in order to facilitate electronic service of notice of members' and directors' meetings. These legislative developments and proposals made by the Corporate Law Reform Committee are intended to further facilitate e-commerce. There are also some terms that are not specifically defined to encompass electronic communications, but that arguably are sufficiently wide to accommodate them. These include the terms: "issue," "report," "notify," "send," "distribute," and "give" (and their derivatives).

The recent reforms (and the decision not to define terms that are regarded as capable of being construed to extend to electronic communications) reflect a philosophy that the fast pace of change in this area requires a legislative response that is facultative rather than prescribing permissible means to translate existing concepts to an electronic context. As such, the provisions offer issuers a considerable degree of flexibility to take advantage of the new opportunities offered by electronic communications as they arise. Conversely, the provisions offer limited guidance to issuers as to the means they might adopt

to ensure that the delivery will perform all the functions of paper delivery. This may be one reason why, although many issuers now post their annual reports on their internet home pages, issuers have not yet sought to substitute electronic delivery for paper delivery. Another factor may be the cost of setting up new systems of delivery, particularly at a time when electronic communications are not universally available, and are not embraced by all of those who have access to them.

The impact of modern computer and information technology pervades company law. Inevitably, it will serve as an important medium that helps to facilitate an optimal business environment. In order to enhance the practice of offering securities through the internet, possible obstacles must first be addressed and settled. To this respect, a prospectus is an important tool to attract potential investor in making their investment decision. A precise interpretation on "electronic prospectus" and thorough explanation on registration of electronic prospectus, as well as its issuance, circulation, and distribution are able to boost up the confidence of issuers and investors to adopt this new feature in securities trading. One possible way to resolve this problem is to re-examine the exiting legislations and identify the possible provisions which contradicts with or obstruct the practice of internet securities offering, such as Section 4 and 39 of the Companies Act.[136] New provisions regarding offering securities by way of internet can also be incorporated into the legislations to allow the issuers and investors to choose which option they would prefer to pursue.

Besides, massive reforms need to be made on laws regulating electronic meetings as the exiting legislations are too simple and unable to cope with the current practice. A good example to follow is the U.K. Companies Act 1985 (Electronic Communications) Order 2000 whereby Table A to the Companies Act can be amended by including the use of electronic communications in certain areas, such as the appointment of proxies, given of notice, and the "deemed service" provisions. In case where the companies do not have the specific provisions in its articles providing this, the amended provisions of Table A will apply. Thus, no alteration is required where the companies have adopted Table A and specific articles need not be changed. However, for companies who intend to change its articles, the amendments in Table A may provide a useful guideline for the said purpose. Provision regarding the consent of shareholder (or investor) need to be addressed as forcing the shareholder to accept something which they are not familiar or no excess with would tantamount to abuse of rights.

Further, issuers might be reluctant to offer securities through the internet with the worries that such offering might tantamount to "public offering," which

136. Companies Act 1965, Act 125, §§ 4, 39 (Malay.).

requires securities be registered before issuance or distribution. This ambiguity will also expose them to the risk of being prosecuted for offering securities to someone that they are not targeted. To overcome this problem, reform of laws must be made, especially to define clearly what amounts to "public offering" and whether registration is required before it can be issued. Reference to the amendment of Australia CLERP Act is recommended by placing a jurisdictional disclaimer in the prospectus if the securities are not meant to offer to a person outside the jurisdiction of Malaysia. This step will help the issuer, investors, as well as regulator to identify the offers that are available in their own jurisdiction.

Last but not least, the security concerning internet securities offering is the crucial aspect that regulators in every country would not tolerate for. Although a numbers of legislations have been enacted to protect online commercial transaction, there is no specific law dealing with internet securities offerings in Malaysia so far. While too many laws will impose unnecessary burden to the industry, the law must be able to cope with the latest technology development. Perhaps the public needs to be educated of the risk for conducting internet securities offering, especially regarding the usage of digital or electronic signature. Some form of acknowledgement should be given by an electronic signatory to indicate that he or she understands the legal significance of their communications and ready to bind by it.

In a nut shell, unlike the traditional securities trading market, whereby the legal system is well-established, legislation regulating securities offering, via internet, are still at its minor age in Malaysia. The present laws might look sufficient in this moment, but it is unlikely to cope with the needs and development in this area for the next ten years. Consequently, the industry as well as the regulator is expected to face a daunting task in the road ahead.

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