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Depletion in Investor Confidence Entails Reflection of Regulators: Viewing the Disclosure Regulation for the Primary Securities Market in Bangladesh in Light of the Design and Distribution Obligations in Australia

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Abstract

Disclosure requirements in securities regulation were introduced in the United Kingdom alongside merit regulation in the nineteenth century to prevent corporate fraud. The United States of America (“U.S.”) subsequently adopted the disclosure philosophy at the federal level in the aftermath of the stock market crash of 1929 to supplement, not supplant, the pre-existing merit regulation at the state level. Amid strong criticism of many congressmen, the U.S. federal legislators incorporated the disclosure philosophy into the Securities Act 1933 at the behest of President Roosevelt. Their professed objectives were to establish the “whole truth” in securities regulation in order to enable investing public to make informed decisions, and to exempt the regulator from the responsibility of judging the merits of public offers. Although the philosophy is perceived to be suitable for developed markets enjoying the dominance of institutional investors, this has been adopted by many others as a copycat practice ignoring its usefulness in their domestic markets which are overly dominated by meagre savers turned amateur investors. Bangladesh is one of the latter countries, where the achievement of establishing the “whole truth” and empowering investors with that truth to make investment decisions remain largely elusive to date because of weaknesses on the part of regulators, issuers, and investors alike. Moreover, any example of successfully assisting general investors in particular by disclosure regulation can hardly be found anywhere, mainly because of their behavioural biases towards certain securities worsened by a lack of financial literacy in parallel with a serious lack of truth in the information disclosed. All this eventuates in the failure of the disclosure regulation applied in defiance of merit assessment. Australia has imposed new obligations on both issuers and distributors of securities intending to be issued to retailers and has supplemented the regulatory tools of making “stop orders” and orders under “product intervention powers” by the securities regulator. These reforms have been made based on long term research and recommendations of two financial inquiry reports and that of the Australian Law Reform Commission. This Article analyses the market scenarios in Bangladesh and pertinent regulation, and it concludes with a major recommendation that Bangladesh should follow the Australian reforms with appropriate modifications aiming to bring investors back to the market and to develop its much-needed equity and bond markets. The findings of this Article are also expected to benefit others who are grappling with the disclosure regulation for their primary markets.

I. INTRODUCTION

The securities market is a place where there is only one certainty – that there is no certainty at all – where fortunes are made and lost in a trice. Bangladesh has earned the

reputation of being one of the fastest growing economies¹ and an Asian tiger.² However, it has been grappling with developing its securities market, which has been declining against the rising trend in the national economy,³ mainly because of rampant market manipulation ruining the confidence of investors.⁴ This is nothing new as securities fraud is an old phenomenon,⁵ which grew in the early nineteenth century,⁶ and gradually expanded ever since. Consequently, regulation had emerged to prevent and redress those frauds or deceits, having considered that investor confidence was, is, and will always be, the impetus for market development, requiring the protection of the investing public. Many empirical studies conducted globally consistently argue that ensuring investor protection is imperative for the development of securities markets.⁷ This perspective is strongly defended by a myriad of often-cited research conducted across various markets worldwide. Conversely, the reticence of investors is an impediment to the growth of such a market.⁸ This is so because fund providers generally put the much-needed

¹ *Bangladesh now a Case Study of Economic Uplift in World*, DAILY SUN, (July 22, 2023, 5:59 PM), <https://www.daily-sun.com/post/701598>.

² *Bangladesh: The Tiger of Asia*, THE DAILY STAR, (Sep. 13, 2019, 12:00 AM), <https://www.thedailystar.net/business/news/bangladesh-the-tiger-asia-1799191>.

³ *See generally* Ahsan Habib, *Rising Economy, Falling Stock Markets*, THE DAILY STAR, (Jan. 22, 2022, 12:00 AM), <https://www.thedailystar.net/opinion/economics/news/rising-economy-falling-stock-markets-1857169>.

⁴ Ahsan Habib, *BSEC Frets as Institutions Shy Away from Stocks*, THE DAILY STAR, (Apr. 21, 2022, 12:00 AM), <https://www.thedailystar.net/business/organisation-news/news/bsec-frets-institutions-shy-away-stocks-3009166> [hereinafter “BSEC Frets”]; Ahsan Habib, *Drawing Large Investors to Stocks Still a Tall Order*, THE DAILY STAR, (May 9, 2022, 12:00 AM), <https://www.thedailystar.net/business/organisation-news/news/drawing-large-investors-stocks-still-tall-order-3019361> [hereinafter “Drawing Large Investors to Stocks”]; Ahsan Habib, *Manipulation in Stock Market Lives on Despite Surveillance*, THE DAILY STAR, (Sep. 11, 2022, 1:19 PM), <https://www.thedailystar.net/business/economy/stock/news/manipulation-lives-despite-surveillance-3116241> [hereinafter “Manipulation in Stock Market Lives On”].

⁵ STUART BANNER, *ANGLO-AMERICAN SECURITIES REGULATION*, 89 (1998).

⁶ Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 407 (1995).

⁷ Yanping Shi et. al, *Protection of Small Investors and Firm Value*, 55 J. DEV. AREAS 123 (2021) (articulating that “better investor protection is associated with better development of financial markets”); Rafael La Porta et. al., *What Works in Securities Law*, 61 J. FINANCE 1, 13 (2006) (finding that, “in theory better investor protection is associated with both a higher number of listed firms and a higher valuation of capital”); Rafael La Porta et. al., *Investor Protection and Corporate Valuation*, 57 J. FINANCE 1147 (2002) (presenting a theoretical and empirical analysis of the effect of protection on valuation of legal investor protection for financial development); Andrei Shleifer & Daniel Wolfenzon, *Investor Protection and Equity Markets*, 3 J. FINANC. ECON. 3, 5 (2002) (showing that predictions demonstrate that “entrepreneurs gain more (or lose less) from an improvement in investor protection when the country is open to world capital flows than when it is not”); Florencio Lopez-De-Silanes, *The Politics of Legal Reforms*, 2 ECONOMIA 91 (2002) (showing that pivotal factors driving reform encompass the liberalization of economies and the heightened interconnectivity of financial markets, enabling global investors to exert influence by withdrawing investments when investor safeguards are disregarded); Rafael La Porta et. al., *Investor Protection and Corporate Governance* 58 J. FINANC. ECON 4 (2000) (stating that “investor protection turns out to be crucial because, in many countries, expropriation of minority shareholders and creditors by the controlling shareholders is extensive”); *See generally* Rafael La Porta et. al., *Agency Problems and Dividend Policies Around the World* 55 J. FINANCE 1 (2000); *See also* Rafael La Porta et. al., *Corporate Ownership Around the World*, 54 J. FINANCE 471 (1999); Rafael La Porta et. al., *Law and Finance*, 106 J. POLIT. ECON. 1113 (1998); Rafael La Porta et. al., *Legal Determinants of External Finance*, 52 J. FINANCE 1131 (1997); Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FINANCE 737 (1997).

⁸ Norman S. Poser, *Securities Regulation in Developing Countries: The Brazilian Experience*, 52 VA. LAW REV. 1283, 1301 (1966).

blood and flesh on the bones of capital markets. If investors do not feel that they are protected by the market regulatory mechanisms, they would be reasonably discouraged to put their money in a risky venture.⁹

Securities regulation, in its simplest term, denotes the regulation of information asymmetry that exists between insiders and outsiders of a corporation or company.¹⁰ Professor Louis Loss of Harvard Law School first coined the term “securities regulation” around 1951.¹¹ He asserts that the general problems of fraud, manipulation, and malfeasance in securities markets require regulation.¹² As worded by Professor Razeem Sappideen, “corporate information is costly, all participants may not have equal access to the information” required to make an informed decision, and thus it creates an environment for security fraud.¹³ Professor Loss underpins that “problems at which modern securities regulation is directed are as old as the cupidity of sellers and the gullibility of buyers.”¹⁴ The profound thirst of disclosure is to prevent the corporate cupidity from swindling the gullibility of innocent investors aimed at protecting the latter. The success of disclosure is contingent upon the truth in such publicity being attached to the investors’ ability to utilize it – in the absence of which, corporate disclosure can be little more than window dressing.¹⁵ To prevent that from happening, regulation has a critical role to play. Effective regulation is widely regarded as the most useful vehicle for investor protection.¹⁶

⁹ Caspar Rose, *Director’s Liability and Investor Protection: A Law and Finance Perspective*, 31 EUR. J. LAW ECON. 287, 288-289 (2011).

¹⁰ See Corporations Act 2001, § 57(A)(1) (defining a corporation as “includ[ing]: (a) a company; and (b) any body corporate (whether incorporated in this jurisdiction or elsewhere); and (c) an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose” showing that a company is also a corporation.) [hereinafter “CA2001”]; see also BUTTERWORTHS CONCISE AUSTRALIAN LEGAL DICTIONARY 79, 99 (2d ed. 2002) (indicating that the terms “company” and “corporations” generally share common features as a business organization with separate legal personality).

¹¹ See LOUIS LOSS, TRENDS IN CORPORATE GOVERNANCE AND INVESTOR PROTECTION, 33 (1981) (indicating that “... perhaps the first use of the term, *securities regulation* was when I chose it as the title of my treatise on the subject.”) [hereinafter “Trends in Corporate Governance”]; See also LOUIS LOSS, ANECDOTES OF A SECURITIES LAWYER, 51 (1995) (“Although the two words, “Securities Regulation,” now appear almost routinely in the titles of books and other publications in the field, as well as in general conversation, I am quite certain that it had never been publicly used before, at least to my knowledge.”).

¹² Trends in Corporate Governance, *supra* note 11, at 33.

¹³ Razeem Sappideen, *Securities Market Efficiency Reconsidered*, 2 UNIV. TASMN. L. REV. 132, 139 (1988).

¹⁴ LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATIONS, 1 (2d ed. 1988).

¹⁵ See Jacob Freund, *Investors Take Note: Complexity and Disclosure Efficacy Concerns amid a Structured Notes Renaissance*, 123 COLUM. L. REV. 139, 154 (2023) (internal citations omitted).

¹⁶ See generally, *supra* note 7 (reflecting on how this view is commonly reflected in the works in which investor protection has been emphasised for the development of securities markets); George J. Stigler, *Public Regulation of the Securities Markets*, 37 U. CHI. J. BUS. 117 (1964) (discussing academic scholars who oppose securities market regulation) [hereinafter “Public Regulation of the Securities Markets”]; see also Irwin Friend & Edward S. Herman, *The S.E.C. Through a Glass Darkly*, 37 U. CHI. J. BUS. 384 (1964) (replying to Stigler’s observations); Sidney Robbins & Walter Werner, *Professor Stigler Revisited*, 37 U. CHI. J. BUS. 414 (1964) (replying to Stigler’s observations); *c.f.* George J. Stigler, *Comment*, 37 U. CHI. J. BUS. 414 (1964) (responding to criticism).

However, there have been some scholars who oppose the securities market regulation,¹⁷ arguing that the market itself is able to regulate fraudulent or manipulative activities. They are critical of the public regulation of securities markets from an economic perspective.¹⁸ They argue that government regulation is unnecessary because different market participants will provide the optimal economic benefit to market or community through the pursuits of their self-interests without having any regard to the interests of others.¹⁹ Benefiting each other by promoting their own interests is known as regulation by “invisible hand” as propounded by Adam Smith.²⁰

Indeed, the central purpose of securities regulation is protecting the investing public, which is also recognised by the opponents of regulation.²¹ Professor Stigler, a renowned opponent of public regulation, argued that government regulation of securities markets is unsound.²² The views of Professor Stigler had been strongly countered by other scholars. For example, Professor Friend and Professor Herman found Stigler’s “arguments almost entirely devoid of merit.”²³ They questioned the validity of Stigler’s “theory, his statistics, the inferences he draws from his data, and his neglect of the relevant literature in this field.”²⁴ The idea opposing public regulation is still limited to mere academic debate because securities markets are regulated in every country worldwide with the primary objective of investor protection. This practicality reinforces the need for public regulation of the securities market, and a securities market would be a marginal institution without regulation.²⁵ Delving into the debate of the propriety of government regulation of securities markets falls outside the ambit of the present research.²⁶

The expression “initial public offerings” (“IPOs”) originated in the United States, and simply implies the issuance of shares.²⁷ These shares, or securities, are issued to the public for the first time by a company.²⁸ IPOs constitute the primary market (“IPOs” and “primary market” used interchangeably) where companies issue their securities to the public that are subsequently

¹⁷ Friend & Herman, *supra* note 16 at 403 (commenting that “Stigler has again demonstrated his faith that government regulation is evil.”).

¹⁸ *Id.* at 402-03.

¹⁹ O. Scott Stovall et. al., *Corporate Governance, Internal Decision Making, and the Invisible Hand*, 51, J. OF BUS. ETHICS, 221 (2004).

²⁰ *Id.*; see generally ADAM SMITH, *THE WEALTH OF NATIONS* (1902) (providing Adam Smith’s own analysis of the notion of “Invisible Hand.”).

²¹ Public Regulation of the Securities Markets, *supra* note 16 at 120 (using as an example that Professor Stigler mentioned that “the paramount goal of the regulations in the security markets is to protect the innocent (but avaricious) investor.”).

²² Friend & Herman, *supra* note 16 at 382.

²³ *Id.*

²⁴ *Id.*

²⁵ Amar Bhidé, *Efficient Markets, Deficient Governance*, HARV. BUS. REV. (1994).

²⁶ Public Regulation of the Securities Markets, *supra* note 16 at 117 (providing further details about this debate).

²⁷ Peter Moles & Nicholas Terry, *THE HANDBOOK OF INTERNATIONAL FINANCIAL TERMS*, 228 (1997) (asserting that an initial public offering is “the first offering to the public of any category of a company’s common stock.”); See also, Henry Campbell Black, *BLACK’S LAW DICTIONARY*, (6th ed 1990) (defining “going public”); Jonathan A. Shayne & Larry D. Soderquist, *Inefficiency in the Market for Initial Public Offerings*, 48 VAND. L. REV. 965 (1995).

²⁸ See MARTIN SABINE, *CORPORATE FINANCE: GOING PUBLIC AND ISSUING NEW EQUITY AND TAKEOVERS* 33 (1987); See also Carl W. Schneider et. al., *Going Public: Practice, Procedure, and Consequences*, 27 VILL. L. REV. 1 (1981).

traded on secondary markets through stock exchanges.²⁹ Primary markets broadly include the issuance of both equity and debt securities; the disclosure regulation applies to both types of financial instruments.³⁰

There are two major philosophies to regulate primary markets designed for protecting investors and mothering investments. These are the merit-based regulation (“MBR”)³¹ and the disclosure-based regulation (“DBR”),³² as will be explained in greater detail below. For now, the MBR adopts a paternalistic approach to regulation,³³ whereas the DBR trusts in market freedom, fictionally relying on the investors’ ability to properly understand and rationally utilize the information being disclosed by issuers to raise funds from the public.³⁴

Policymakers need to be cognizant of the reality that regulation must be appropriate to cater for the needs of a given market, which is disregarded in adopting a regulatory philosophy particularly for underdeveloped markets.

This happened to the regulation of IPOs in Bangladesh, which replaced the pre-existing MBR with the DBR in January 1999 under the *Public Issue Rule 1998*,³⁵ without any study being conducted on the country’s readiness to utilize it, even though the market had been precisely in an embryonic form.³⁶ The premature adoption of the DBR was akin to putting the cart before the horse, as evidenced by the waning condition of the market to date.

Australia, a developed economy, introduced the DBR in 1987, and has recently modified it following the two consecutive financial system inquiry recommendations, confirming that the disclosure regulation does not work well for retail investors. The wider ineffectiveness of the disclosure philosophy is best evident in the global financial crisis of 2008-2010 (“GFC”).³⁷

This Article intends to critically examine the efficacy of the DBR in Bangladesh by looking through the modifications imposing greater duties on issuers and distributors with effect from October 2021 in Australia departing from the unbridled reliance on corporate disclosures. This is particularly important for Bangladesh, which is struggling with the challenge of generating and retaining investor confidence in the market where investors are losing their

²⁹ See Matt Silverman, *Fraud Created the Market: Presuming Reliance in Rule 10B-5 Primary Securities Market Fraud Litigation*, 79 *FORDHAM L. REV.* 1787, 1789, 1793 (2011).

³⁰ *Id.* at 1793.

³¹ See Conrad G. Goodkind, *Blue Sky Law: Is There Merit in the Merit Requirements?*, 1976 *WIS. L. REV.* 79 (1976).

³² See generally Andrew A. Schwartz, *Mandatory Disclosure in Primary Markets*, 2019 *UTAH L. REV.* 1069 (2019).

³³ *Id.*

³⁴ *Id.*

³⁵ S. M. Solaiman, *Adoption of the Disclosure-Based Regulation for Investor Protection in the Primary Share Market in Bangladesh*, *UNIV. OF WOLLONGONG* 123 (2005).

³⁶ Sheikh M. Solaiman, *Investor Protection in a Disclosure Regime: An International and Comparative Perspective on Initial Public Offerings in the Bangladesh Securities Market* (Sept. 19, 2003) (Ph.D. dissertation, University of Wollongong) (on file with author) (finding that the securities markets in Japan, Singapore, and Hong Kong are developed markets. Japan adopted the DBR in 1997, Singapore adopted a predominantly DBR in 1998 and Hong Kong undertook a four-year plan to shift from the MBR to the DBR.).

³⁷ S. M. Solaiman, *Revisiting Securities Regulation in the Aftermath of the Global Financial Crisis: Disclosure – Panacea or Pandora’s Box?* 14 *J. WORLD INVEST. TRADE* 646 (2013).

meagre savings by investing in equities and mutual funds units.³⁸ When small retail investors lose their small savings, they become hopeless and frustrated about investment in the securities market. About eighty to ninety percent of investors in the Bangladesh market are individual small investors.³⁹ Consequently, they are crying out for protection of themselves, as well as of the market itself, after being ruined by market manipulators.⁴⁰ In such an enfeebled market, the regulator is striving to resonate its recently introduced bond market. Amid this frailty, Bangladesh, in a bid to elevate market fertility, has signed a Memorandum of Understanding with the United Nations Development Program (“UNDP”) in July 2023, seeking assistance to develop its bond market.⁴¹ However, any enduring development is unlikely to occur unless the regulatory philosophy is changed or considerably overhauled favoring investor protection. Although this Article concentrates on the regulation in Bangladesh and Australia, other nations which are encountering difficulties with the disclosure philosophy are also expected to benefit from its analysis and findings.

Discussions in this Article are split into eight parts. Part I introduces the topic foregrounding the significance of undertaking the present research and its expected outcomes. The Bangladesh securities market is presented in Part II and it focuses on initial public offerings, whilst Part III explains the IPO pricing methods in Bangladesh and Australia. Part IV demonstrates the lack of investor confidence in the securities market in Bangladesh caused by serious irregularities committed by different market players. The decline in IPOs and resultant reduction in raising funds by companies are discussed in Part V, whilst Part VI examines the disclosure philosophy and its applicability in primary markets. Part VII highlights the main obligations of issuers and distributors of securities together with the specific regulatory powers to ensure performance of those obligations imposed under the new reforms in Australia. Part VIII concludes this Article with its major recommendations.

II. BANGLADESH SECURITIES MARKET – FOCUSED ON IPOS

The Dhaka Stock Exchange (“DSE”), the oldest and largest bourse in Bangladesh, was initially incorporated as the East Pakistan Stock Exchange Association Limited (“EPSEAL”) on

³⁸ *Stock Selloff Resumes as Investors Fear Capital Erosion*, THE BUSINESS STANDARD, (Aug. 09, 2023, 11:06 PM) <https://www.tbsnews.net/economy/stocks/stocks-volatile-second-day-recovery-679518>; Ahsan Habib, *Economic Crisis Sends 43 Listed Firms, Mutual Funds into Losses*, THE BUSINESS STANDARD, Bangladesh (Feb. 12, 2023) <https://www.thedailystar.net/business/economy/news/economic-crisis-sends-43-listed-firms-mutual-funds-losses-3245376>.

³⁹ *Protecting Small Investors is not Government’s Responsibility*, THE BUSINESS STANDARD, <https://www.tbsnews.net/economy/stocks/its-not-govt-responsibility-protect-small-investors-salman-f-rahman-604078> (last modified Mar. 22, 2023, 10:39 PM) [hereinafter “Protecting Small Investors is not Government’s Responsibility”].

⁴⁰ *Save Us, Save The Capital Market*, PROTHOM ALO, (Feb. 3, 2022, 8:58 AM) (on file with author).

⁴¹ *See generally*, প্রেস বিজ্ঞপ্তি, (July 3, 2023), https://sec.gov.bd/press/Press_Release_03.07.2023.pdf [hereinafter “BSEC Press Release”].

April 28, 1954,⁴² whilst the Chittagong Stock Exchange (“CSE”), the second of the country’s two bourses, started its operation on October 10, 1995.⁴³ The market remains unreasonably small in respect of the gross domestic products (“GDP”) and investment ratios, and significantly smaller compared to other markets in South Asia.⁴⁴ As of June 2020, the GDP and capital market investment ratios were 9.41 in Bangladesh, 62.75 in India, 89.29 in Thailand, and 14.92 in the financially troubled Sri Lanka.⁴⁵ The GDP is noticeably rising from 6.1 percent in 2014 to 7.25 percent in 2022, as per the Bangladesh Bank, the central bank of Bangladesh.⁴⁶ By contrast, private investment has been falling in recent years.⁴⁷

Because recording the second time fall in the ratios in the past three years, the provisional data from the Bangladesh Bureau of Statistics reveals that the private investment to GDP ratio plunged by 0.88 percentage points to 23.64 percent in 2022-2023, compared to 25.25 percent in 2018-2019.⁴⁸ The serious lack of investor confidence prevailing in the market is admitted by all stakeholders from regulators to issuers alike.⁴⁹ Consequently, to prevent a debacle, the market is currently (as of the date of this writing) under a tight “floor price”⁵⁰ by regulation imposed on July 28, 2022,⁵¹ the lifting of which may cause a market crash, as apprehended by the Chairman of the Bangladesh Securities and Exchange Commission (“BSEC”) himself.⁵² On July 11, 2023, the Chairman of the BSEC, while addressing a seminar entitled “Economic Challenges for the Bangladesh’s Capital Market: Possible Remedies,” said that “BSEC would lift the floor price once the capital market came to a firm position” adding that “[w]henver we’ll see that the

⁴² CFA INST., *Bangladesh*, <https://www.cfainstitute.org/-/media/documents/article/rf-brief/rfbr-apac-capital-markets-bangladesh.pdf>.

⁴³ *Background*, CHITTAGONG STOCK EXCHANGE, https://www.cse.com.bd/about/inside_cse (last visited Mar. 26, 2024).

⁴⁴ Mehdi Hassan Rahat, *Dhaka Stock Exchange Could Not Become Mature Even in Six Decades*, BONIK BARTA, (Oct. 27, 2020) (on file with author).

⁴⁵ *Id.*

⁴⁶ Trading Economics, *Bangladesh GDP Annual Growth Rate*, <https://tradingeconomics.com/bangladesh/gdp-growth-annual> (last visited Mar. 26, 2024).

⁴⁷ Rejaul Karim Byron & Mahmudul Hasan, *Private Investment Falls for Second Time in 3 Years*, THE DAILY STAR, (May 21, 2023, 12:03 PM), <https://www.thedailystar.net/business/economy/news/private-investment-falls-second-time-3-years-3325256>.

⁴⁸ *Id.*

⁴⁹ Ahsan Habib, *BSEC Measures to Prop up Stocks Backfiring*, THE DAILY STAR, (Oct. 15, 2023, 1:48 PM), <https://www.thedailystar.net/business/economy/news/bsec-measures-prop-stocks-backfiring-3443446>; *Capital Market Grappling with Poor Confidence, Governance: Stakeholders*, NEW AGE, (Sep. 17, 2022, 10:49 PM), <https://www.newagebd.net/article/181322/capital-market-grappling-with-poor-confidence-governance-stakeholders> [hereinafter “Capital Market Grappling with Poor Confidence”]; Mahfuz Ullah Babu & Jebun Nesa Alo, *Bank IPOs Unsold for the First Time as Investors Not Confident*, THE BUSINESS STANDARD, (Mar. 5, 2023, 11:00 PM), <https://www.tbsnews.net/economy/stocks/bank-ipos-unsold-first-time-investors-not-confident-595002>; Ahsan Habib, *How Bangladesh’s Stock Market Remains an Outlier- Most Global Markets Bounce Back But DSE Still Bleeds*, THE DAILY STAR, (Jan. 10, 2023, 11:05 AM), <https://www.thedailystar.net/business/economy/news/how-bangladeshs-stock-market-remains-outlier-3216941> [hereinafter “DSE Still Bleeds”].

⁵⁰ The concept “floor price” refers to the lowest price at which a product can be sold.

⁵¹ *GP Shares Dip 8.72% as Floor Lifted*, THE BUSINESS POST, (Mar. 3, 2024, 9:49 PM), <https://businesspostbd.com/stocks/gp-shares-dip-872-as-floor-price-lifted>.

⁵² *Eagerly Waiting to Lift Floor Price: BSEC Chair*, BANGLADESH SANGBAD SANGSTHA, (July 11, 2023, 8:02 PM), <https://www.bssnews.net/business/135790>.

capital of the investments is safe, then we'll remove the floor price. We're also eagerly waiting when we'll be able to remove the floor price.”⁵³

The BSEC Chair justifies the imposition and retention of the floor price by saying that, “we came to see that the supply side had started to fall alongside the reserve coupled with the downtrend in market index. That is why the floor price was imposed for the sake of the investors.”⁵⁴ It implicitly means that the imposition of floor price on a falling market can be likened to the injection of Coramine into a dying patient.⁵⁵ The concept “floor price” refers to the lowest price at which a financial product can be sold or traded, and it is imposed by the regulator in the wake of falling demand for the product.⁵⁶ It is a regulatory constraint restricting the behavior of free markets in order to prevent a sudden collapse of a market.⁵⁷ Floor price concerns not only local, but also foreign investors, as evidenced by the latter's withdrawal of portfolio investment amid a regulatory move to set a floor price previously coupled with poor performance of macroeconomic indicators leading to the decline of their investment by 14.26 percent or BDT 5,535.4 crore (approximately USD \$5.15 billion) at the end of the fiscal year 2019-2020.⁵⁸ Foreign investors are leaving the market, perceivably displaying their lack of confidence.⁵⁹ Institutional investors are no different, as they are also staying away from the market.⁶⁰ They have lost their confidence too, alongside such a rampant runaway by other investors, letting the market know that they have no confidence in the financial reports of most of the listed firms as those are changed overnight contriving misrepresentation to hide the truth.⁶¹ This malpractice is not all new.

Many companies perfidiously claim great potential and profits before getting listed to convince investors who are abundantly naïve.⁶² But the firm's profits fall after listing.⁶³ This causes investor losses and diminishes the integrity of the market by their artificially inflated financial health.⁶⁴ Credulously, very often the shares of small, loss-making and even closed-down companies are traded stupendously in the market and their prices tend to increase.⁶⁵ For example, a listed company remained closed for nine months of the 2021-2022 financial year,

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ G. Norman Myers, *An Experimental Investigation on The Action of Coramine*, 40 J. HYG. 474, 499 (2009) (Coramine “acts as a powerful respiratory stimulant and is able to overcome the depressant effects of morphine on the respiratory centre in the medulla” and to help prevent death caused by cardiac failure).

⁵⁶ Floor Price Definition, Cambridge Business English Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/floor-price> (last visited Mar. 26, 2024).

⁵⁷ Cory Mitchell, *Floor: What It Is and What It Means for Traders*, INVESTOPEDIA, (Dec. 27th, 2023), <https://www.investopedia.com/terms/f/floor.asp>.

⁵⁸ HM Murtuza, *Foreign Portfolio Investment Dips to Tk 33,294cr in FY20*, NEW AGE, (Jan. 2, 2021, 12:47 AM), <https://www.newagebd.net/article/125996/foreign-portfolio-investment-dips-to-tk-33294cr-in-fy20#:~:text=The%20latest%20Bangladesh%20Bank%20data,previous%20fiscal%20year%202018%2D2019.>

⁵⁹ *How Bangladesh's Stock Market Remains an Outlier*, *supra* note 49.

⁶⁰ BSEC Frets, *supra* note 4.

⁶¹ Drawing Large Investors to Stocks, *supra* note 4.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

then it abruptly declared 244 percent profit growth, afterwards its share prices surged exponentially.⁶⁶

Making the situation worse, the BSEC “favoured the company owners to sell their shares by giving exemption from lock-in period,” they sold shares at the bullish market, thereafter the price nosedived and innocent investors suffered a big loss.⁶⁷ This demonstrates how uninformed the market is. Such market behavior prompts institutional investors to draw an inference that it is a gambling market, which discourages them from investing in securities in the Bangladesh market.⁶⁸

The implications of lack of confidence have been serious. According to the reduction in the number of total beneficiary owner (“BO”) accounts, which are mandatory for investors to have for the purposes of securities investment in Bangladesh, the market has lost thirty four percent of its investors in four years, dwindling the account from 28,25000 taka in March 2019 to 18,52000 in May 2023.⁶⁹ Even the trading of the government guaranteed treasury bonds, listed for the first time on the exchange on October 11, 2022, remains low, attributed largely to a lack of awareness amongst retail investors.⁷⁰ The government borrows money from the market by issuing treasury bills and bonds⁷¹ through the central bank.⁷² Treasury bonds add diversification to the market, but there is a paucity of enough buyers and sellers in the stock exchange as the investor’s appetite to buy bonds is minimal.⁷³ The managing director of Prime Bank Securities Limited commented that the investor’s willingness to buy bonds is low, and highlighted the lack of investor knowledge by saying that “only a few investors have proper knowledge about bonds and can choose lucrative bonds and know when to buy them.”⁷⁴ A treasury official of a non-bank financial institution replicates the same view.⁷⁵

The bond market scenario is dismal as well. The debt instrument size is only 0.25 times of equity in Bangladesh, whereas the global bond market size stands at USD \$124 trillion as against the global equity market size of USD \$106 trillion as of 2021.⁷⁶ The size of the bond

⁶⁶ Rafiqul Islam & Noman Mahmud, *Shut for 9 Months, Paper Company Posts 244% Profit Growth!*, THE BUSINESS STANDARD, <https://www.tbsnews.net/economy/stocks/shut-9-months-paper-company-posts-244-profit-growth-550142> (Dec. 12, 2022, 6:57 PM).

⁶⁷ *Id.*

⁶⁸ Drawing Large Investors to Stocks, *supra* note 4.

⁶⁹ *Women Investors in the Stock Market Have Decreased by 3 Lakh in Four Years*, PROTHOM ALO, <https://www.prothomalo.com/business/market/30scmb50p> (last updated Mar. 9, 2023, 10:47 PM).

⁷⁰ Ahsan Habib, *Bond Trading in Secondary Market Still Negligible*, THE DAILY STAR, <https://www.thedailystar.net/business/economy/news/bond-trading-secondary-market-still-negligible-3361236> (last updated July 5, 2023, 5:28 PM).

⁷¹ *Id.* (articulating that treasury bills are issued at a discount as short-term instruments with repayment periods ranging from three months to twelve months, whereas bonds are coupon-bearing long-term investment financial instruments carrying repayment periods of two years to twenty years).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Habib, *supra* note 70.

⁷⁶ Aroka Chowdhury, *Bond Market of Bangladesh: Yet to be Vibrant but Promising*, THE BUSINESS STANDARD, <https://www.tbsnews.net/thoughts/bond-market-bangladesh-not-so-vibrant-promising-317965> (last modified Oct. 19, 2021, 6:24 PM).

market of neighboring developing countries like Malaysia, Indonesia, and Pakistan stand respectively at USD \$345 billion, USD \$233 billion and USD \$66 billion, whereas the bond market in Bangladesh has attracted only USD \$18 billion including both treasury and corporate bonds.⁷⁷

Admittedly, the ongoing Ukraine war has affected the market slightly, albeit not immensely, because the market is still far from being globalized. The badly impacted international markets have rebound in two months despite the persistence of the turmoil erupted by the conflict, but the Bangladesh market is wrestling with that mild-shake to date and have failed to restore public confidence.⁷⁸ This happens despite the fact that the country's economic condition is better than what was expected to be at the beginning of the war.⁷⁹ Analysts impute this negativity to the confidence crisis at issue.⁸⁰ An asset manager finds that long-term investors have not yet evolved in the market as “most of the people are investing for short-term profits and they depend on rumours” instead of fundamentals.⁸¹

Alongside the noticeable GDP growth in Bangladesh over the past few years, interest rates of both banks and state guaranteed saving bonds⁸² have been cut aggressively.⁸³ Nevertheless, investors have left the capital market gratingly. Paradoxically, though not incomprehensibly, the mismatch of all these happenings surrounding the core economic factors symbolizes a distressing frustration deeply ingrained in the skeptical minds of investors who are mostly investment-illiterate. Such a somber situation has prompted the BSEC to adopt a somewhat ponderous “wait and see” policy in approving IPOs, which is ascribed to the fund crisis and poor condition prevailing in the market.⁸⁴ Given the passivity surrounding the market, companies appear to be increasingly reluctant to float.⁸⁵ As of July 24, 2022, there are a total of 272,598 companies in Bangladesh, of which 3,631 are public limited companies which are eligible to raise funds from the securities market.⁸⁶ But only 657 companies are currently listed

⁷⁷ *Id.*

⁷⁸ DSE Still Bleeds, *supra* note 49.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Rakib Hasan, *Govt Cuts Interest Rates on Savings Certificates*, NEW AGE, (Sep. 22, 2021, 9:04 PM), <https://www.newagebd.net/print/article/149745> (finding that normally invested by retirees as their sole source of income and that was cut amid strong criticism to indirectly compel lifesavers to put their money at risk in the volatile market in order to inject flesh and blood to the skeleton of the securities market); *see also* Ahsan Habib & Rejaul Karim Byron, *Govt Cuts Interest Rates of Savings Tools*, THE DAILY STAR, (Sep. 22, 2021), <https://www.thedailystar.net/business/economy/news/govt-cuts-interest-rates-savings-tools-2181346>.

⁸³ *Bangladesh Bank Ends Rate Cap, Hikes Policy Rate By 50 Basis Points*, THE BUSINESS STANDARD, (Jun. 18, 2023, 5:11 PM), <https://www.tbsnews.net/economy/bangladesh-bank-replaces-lending-rate-cap-market-driven-reference-rate-loans-651822>.

⁸⁴ Rafiqul Islam, *An IPO Slowdown—Only One Firm from the Manufacturing Sector Go Public in FY23*, THE BUSINESS STANDARD, (Jul. 8, 2023, 10:06 PM), <https://www.tbsnews.net/economy/stocks/ipo-slowdown-662186>.

⁸⁵ *Id.*

⁸⁶ Md Fazlur Rahman, *Registration of New Companies Slows*, THE DAILY STAR, <https://www.thedailystar.net/business/economy/news/registration-new-companies-slows-3077781> (last updated July 24, 2022, 9:36 AM).

on the DSE.⁸⁷ This obviously depicts a depressive scenario meriting a critical analysis of the IPO assessment process. As part of that process, the ensuing section considers the IPO pricing methods permitted to be employed in Bangladesh in order to comprehend more succinctly the reasons for the lack of confidence in question.

III. IPO PRICING METHODS IN BANGLADESH AND AUSTRALIA

Share certificates themselves carry no real value unless their prices are defended by their issuer's assets underpinning them. Three distinguished corporate law gurus in Australia assert in their prophetic treatise that securities differ from physical commodities in that they are choses in action, with their value dictated by the rights they bestow rather than any intrinsic worth.⁸⁸ Unlike tangible goods, securities are generated rather than manufactured, and they are neither utilized nor depleted in the same manner. These commentators further explain that the rights they confer usually pertain to income or capital distributions from a business entity, thus their worth hinges on evaluating the entity's value.⁸⁹ Central to this evaluation is having access to dependable information, hence, proper pricing of securities is essential for investor protection and that of the market integrity. Bangladesh follows both par value and book value methods.

The amended BSEC Public Issue Rules 2015 prescribes two distinct methods for public issues: (a) fixed price method, when offered at par value; or (b) book-building method, when offered above par value.⁹⁰ Only premium seeking companies are required to go through the book-building method in which institutional investors bid to set the reference price for the public.⁹¹ The book building method is stated to have originated in the United States and is widely popularised worldwide.⁹² The book building method requires the issuer to gather indication of investor interest in the underlying shares in advance before issuing to the public.⁹³ It "lets underwriters manage investor access to shares, allowing them to reduce risk for both issuers and investors and [to] control spending on information acquisition, thereby limiting either underpricing or aftermarket volatility."⁹⁴

As defined in the BSEC, the "book-building method" denotes the process by which issuers of securities attempt to determine the price to offer their securities based on demand from

⁸⁷ Dhaka Stock Exchange PLC., https://www.dsebd.org/company_listing.php (last accessed Mar. 26, 2024).

⁸⁸ See generally ROBERT P. AUSTIN & IAN M. RAMSEY, *FORD'S PRINCIPLES OF CORPORATIONS LAW*, 874 (15th ed. 2013).

⁸⁹ *Id.*

⁹⁰ Bangladesh Securities and Exchange Commission (Public Issue) Rules, No. BSEC/CMRRCD/2003-109/182/Admin/65, BSEC § 3(1) (2015).

⁹¹ Mahfuz Ullah Babu, *New IPO Pricing Method Frustrates Entrepreneurs*, THE BUSINESS STANDARD (Apr. 14, 2022, 10:59 AM), <https://www.tbsnews.net/economy/stocks/new-ipo-pricing-method-frustrates-entrepreneurs-403010>.

⁹² See generally Ann E. Sherman, *Global Trends in IPO Methods: Book Building Versus Auctions with Endogenous Entry*, 78 J. FINANC. ECON. 615 (2005); Ravi Jagannathan, et. al., *Share Auctions of Initial Public Offerings: Global Evidence* 24 J. FINANC. INTERMEDIATION 283 (2015) (examining IPO methods in fifty countries and shows that book building has become common across the globe).

⁹³ Sherman, *supra* note 92, at 616.

⁹⁴ *Id.*

the eligible investors.⁹⁵ The reference price determined through book-building is technically called “the cut-off price.”⁹⁶ Even if the cut-off price is determined through a conventional process, the price is not always credible. A director of AAA Finance & Investment Limited, one of the reputed Merchant Bankers in Bangladesh, observes that “many good companies are hesitant to go public due to the fear of not receiving a fair value through the formula used to determine the share price in the book building method.”⁹⁷ Conversely, the fair price is affected by irregularities being committed by potential issuers. For example, the IPO of Asiatic Laboratories was stopped in 2022 in the “middle of the process due to its accounting irregularities.”⁹⁸

Although the method has gained popularity, based on initial evidence, as an efficient way of price discovery in IPOs, an empirical study conducted on the Indonesian market produces mixed results when compared between the fixed and book building methods.⁹⁹ These findings are relevant to the Bangladesh market. Indonesia had applied the fixed price method for IPOs until October 2000 and have been using the book building method ever since.¹⁰⁰ The findings about the inefficacy of the book building method include that underpricing in the book building period is significantly higher than that in the fixed price period.¹⁰¹ This means the method is not working well in Indonesia. The study further finds a positive relationship between under-pricing and volatility with the book building method and an insignificant relationship between these two variables with the fixed price method.¹⁰² Its findings add that IPOs issued through book building underperform fixed price IPOs.¹⁰³ This is the situation in Indonesia, even though retail investors in the market are only ten to twenty percent,¹⁰⁴ showing that institutional investor’s assessment of the value of the IPO shares are not creditworthy.

The Bangladesh market has its own problems. The market is arguably less prepared compared to its Indonesian counterpart to determine an IPO price properly because the market is dominated by mostly individual investors.¹⁰⁵ The book building method has thus failed in

⁹⁵ BSEC, *supra* note 90 at § 2(1)(b).

⁹⁶ Babu, *supra* note 91.

⁹⁷ Islam, *supra* note 84.

⁹⁸ *Id.*

⁹⁹ Mamduh M. Hanafi, *Fixed Price and Book Building Methods in an Exogenous Environment: Evidence from Indonesia Stock Market*, 58 RES. IN INT. BUS. AND FINANCE 101430 (2021).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (finding that “aftermarket volatility in the book building period is significantly higher than in the fixed price period.”).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *The Indonesia Stock Exchange - IPO Overview*, LEGALINK, 11, https://www.legalink.ch/xms/files/CROSS_BORDER_QUESTIONNAIRES/IPO/IPO_Jakarta.pdf (last visited Mar. 27, 2024).

¹⁰⁵ Protecting Small Investors is not Government’s Responsibility, *supra* note 39 (stating that approximately eighty to ninety percent of investors are individual retailers).

Bangladesh with allegations that companies dishonestly inflate material figures of their earnings and assets in a bid to secure a better price for the underlying shares.¹⁰⁶

How can investors put their trust in the market? Some recent examples of this malpractice are as follows: Islam Oxygen Limited submitted manipulated revenue data to trick its IPO as the revenue authorities discovered a huge discrepancy between the revenue calculation provided in its prospectus and the value-added tax (“VAT”) invoice.¹⁰⁷ Perhaps more alarmingly, the BSEC ignored the request of the DSE to stop Apollo Ispat Co, Khulna Printing and Packaging Co, and C&A Textiles Co. from going public, raising allegations of providing false information in their prospectuses. Nevertheless, the regulator approved their public offers.¹⁰⁸ Even general or retail investors went to court against these IPOs issuers.¹⁰⁹

Unlike Bangladesh, Australia has abandoned the provisions of authorised capital, book value, or par value of companies in 1998 by the Company Law Review Act 1998 under § 254C of the CA2001.¹¹⁰ Australia, under its disclosure regime, requires issuers to satisfy both the general disclosure test,¹¹¹ and a specific disclosures test.¹¹² Section 710 of the CA2001 sets forth the general disclosure test imposing responsibility on issuers to determine the contents of a disclosure document which must include all the information that investors and their professional financial advisers would reasonably require to make an informed assessment of the matters set out in the table provided therein. The requirements of § 710 represents the general test that lists matters to be determined by issuers on which investors or their advisers will consider in making an informed assessment of the offer. The extent of the information required to be disclosed has to be determined objectively taking into account of what is reasonable for investors and their professional advisers to expect to find in the prospectus.¹¹³ On the other hand, § 711 prescribes a long list of specific information that an issuer must incorporate in the prospectus.¹¹⁴

In Bangladesh, the BSEC also requires both general and specific disclosures required to enable investors or their advisers to make informed investment decisions.¹¹⁵ Hence, both countries are similar in terms of the requirements of contents of disclosures, leaving no material disparity warranting further elaboration on them. However, the continued applicability of the disclosure philosophy in Bangladesh and the recent reforms made in Australia about the design and distribution obligations (“DDOs”) remain a critical issue to be revisited and compared, given

¹⁰⁶ Jasim Uddin & Ahsan Habib Tuhin, *Firms Manipulate Data to Trick IPO Investors*, THE BUSINESS STANDARD, (Mar. 14, 2022, 8:45 PM), <https://www.tbsnews.net/economy/stocks/firms-manipulate-data-trick-ipo-investors-384850>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See generally Ho Yew Kee & Lan Luh Luh, *The Par Value of Shares: An Irrelevant Concept in Modern Company Law*, 1999 SING. J. LEGAL STUD. 552 (1999) (providing an analysis of both the par value and book building method).

¹¹¹ CA2001, *supra* note 10 at § 710.

¹¹² *Id.* at § 711.

¹¹³ *Id.* at § 710(1).

¹¹⁴ *Id.* at § 711.

¹¹⁵ BSEC, *supra* note 90 at § 5, Annexure E.

the poor performance of the former for a long period of time.¹¹⁶ Australia generally requires lodgement of disclosure documents with the Australian Securities and Investments Commission (“ASIC”) before issuing them to the public.¹¹⁷ The potential issuers in Bangladesh, by contrast, need both filing with and approval of the BSEC, which does not assess the merits but considers only the accuracy of the information provided.¹¹⁸ This scrutiny has proved to be ineffective in protecting investors and integrity of the market, simply because most of the securities issued through IPOs in recent times are traded below the book value or issue price, which tends to establish that those were overpriced at the time of issuance because of lack of full and fair disclosure coupled with the regulator’s failure in scrutinizing them properly and investors inability to assess the merits.¹¹⁹ All these require merit-assessment by the regulator utilizing state sponsored resources in the interest of the vibrancy of the market.

Given the market reality, there is no alternative to generate and restore investor confidence to achieve sustainable development of the market.¹²⁰ The nucleus of investor confidence is that investors feel protected from market malefactors.¹²¹ Market manipulation in Bangladesh often takes place¹²² in the absence of any useful investor protection mechanisms.¹²³ The Bangladesh capital market could not develop itself as a fully functional and dynamic capital market in the long journey of six decades.¹²⁴ Most of the retail investors in the Bangladesh market are amateur small savers who invest their money as speculators, rather than long-term committed investors.¹²⁵ They become helpless and market shy when they lose their meagre savings while in a desperate bid to earn their livelihood.

The tainted market integrity is well-known to the watchdog body, as Shaikh Shamsuddin Ahmed, a Commissioner of the BSEC, publicly admits: “investors were failing to take investment decisions properly due to the lack of credible information about business of a

¹¹⁶ Niaz Mahmud, *Bangladesh’s Bourse Showed Worst Performance Among Peers in 2023*, THE BUSINESS POST, (Jan. 02, 2024, 10:06 PM), https://businesspostbd.com/stocks/bangladeshs-bourse-showed-worst-performance-among-peers-in-2023#google_vignette (finding that the poor performance of the Bangladesh securities market is evident in the comparative index returns in its peer countries).

¹¹⁷ Australian Securities and Investments Commission (ASIC), *Regulatory Guide 254: Offering Securities under a Disclosure Document*, Aug. 2020, RG 254.126; CA2001, *supra* note 10, at § 718, § 727(1) (“Issuers intending to make an offer of securities or distribute an application form for an offer of securities, must first lodge a disclosure document for the offer with ASIC.”).

¹¹⁸ Schwartz, *supra* note 32 (stating that, unlike in merit regulation, a regulator does not assess the merits of a public offer under a disclosure regime, because the goal of the disclosure philosophy is “simply to give investors the relevant information about a company and let them make their own decision whether to invest.”).

¹¹⁹ Capital Market Grappling with Poor Confidence, *supra* note 49.

¹²⁰ See generally Masahiro Enomoto, et. al., *Accrual-Based and Real Earnings Management: An International Comparison for Investor Protection*, 11 J. CONTEMP. ACCOUNT. ECON. 183 (2015).

¹²¹ See Thomas W. Joo, *Who Watches the Watchers - The Securities Investor Protection Act, Investor Confidence, and the Subsidization of Failure*, 72 S. CAL. L. REV. 1071, 1075, 1080, 1103 (1999); Vietnam: *Capital Market Development Helps Raise Confidence in Investor Protection*, VOV, (Feb. 23, 2022, 6:34 PM).

¹²² JENNIFER ROMERO-TORES, ET. AL., DEVELOPMENT OF CAPITAL MARKETS IN MEMBER COUNTRIES OF THE SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION, 16 (2013).

¹²³ *Id.* at 17.

¹²⁴ Rahat, *supra* note 44.

¹²⁵ See Nazreen Tabassum Chowdhury, et. al., *Investors in the Bangladeshi Stock Market: Issues, Behavioural Biases and Circumvention Strategies*, QUALITATIVE RESEARCH IN FINANCIAL MARKETS (2024).

company... many companies did not provide trustable information about their business on their websites as well as their annual financial reports.”¹²⁶ Where the central purpose of the DBR is to enable investors to make “informed decisions” as mentioned repeatedly in the BSEC,¹²⁷ a question begs to be answered as to what is the point of the regulatory reliance on that philosophy if the information disclosed itself is not reliable? Adding to the honest admission of the reality by the watchdog, the DSE board incredibly disclosed in September 2022 that ninety-one companies went public and got listed on the stock exchanges under the previous commission (the BSEC currently in place has been reconstituted with new members) and fifty percent of those listed companies are now trading below their issue price.¹²⁸

A more dismal rundown of the market is provided by a top securities analyst and Professor of Economics, Abu Ahmed, in his narration that the market is infected with “junk and sick” companies, where only a few of them could be found to be performing well out of the 350 listed entities.¹²⁹ Professor Ahmed adds that more junk companies are listed than good ones.¹³⁰ The BSEC has slowed down the approval process owing to the fund crisis and the prevailing poor condition in the market.¹³¹ Lack of investor confidence has kept the market stagnated. To address the issue, consideration should be given to the cause of this lack.

Apart from frauds being committed by the supply side, irrational behavior of investors become evident from the fact that the trading interest of investors in good shares is relatively less, and paradoxically, they have an “irresistible attraction” towards bad shares.¹³² It can be said that this mentality of investors is attributable to the lack of market integrity caused by frequent market manipulations giving a signal to speculators that investing in the rising shares would be an opportunity to make a quick profit. They are making millions of takas by attracting investors towards bad shares through spreading rumours in the market.¹³³ Experts warn the public of rumour-based investment when they see junk stocks gain value without any valid ground whenever the market takes a bullish turn.¹³⁴ These junk stocks are those whose issuers were making a loss in their business and have failed to pay dividends preceding or at the time of trading in their shares on the exchanges.¹³⁵ This trend evidences that investors are either investment-illiterate or careless about the companies’ fundamentals, which are overshadowed by rumours spread out by malefactors. Such behaviors of both unscrupulous *mala fide* actors and

¹²⁶ *Lack of Credible Info Impedes Stocks Investment: BSEC Commissioner*, NEW AGE (June 5, 2022, 10:27 PM), <https://www.newagebd.net/article/172486/>.

¹²⁷ BSEC, *supra* note 90 at Annexures A, B, E.

¹²⁸ Capital Market Grappling with Poor Confidence, *supra* note 49.

¹²⁹ *Id.*

¹³⁰ Abu Ahmed, *More Junk Companies Are Listed in the Capital Markets Than Good Ones*, BONIK BARTA (Sep. 20, 2021), https://bonikbarta.net/magazine_details/3645.

¹³¹ Islam & Mahmud, *supra* note 66.

¹³² Mehedi Hassan Rahat, *Bad Shares More Demanding Averting Good Shares*, BONIK BARTA (Aug. 01, 2021), https://epaper-bonikbarta-net.translate.google.com/newspaper/2021-08-01/1?_x_tr_sl=bn&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc&_x_tr_hist=true.

¹³³ *Id.*

¹³⁴ *Junk Stocks Infect Market Once Again*, THE DAILY STAR, (May 29, 2023, 12:00 AM), <https://www.thedailystar.net/business/economy/news/junk-stocks-infect-market-once-again-3332051>.

¹³⁵ *Id.*

naïve *bona fide* investors contribute to diminishing investor confidence in the end, as discussed below.

IV. LACK OF INVESTOR CONFIDENCE CAUSED BY MARKET MALPRACTICES

The securities market of Bangladesh has been struggling with a chronic lack of investor confidence owing to diverse factors that embrace “the absence of governance and good quality companies, manipulation and poor diversification.”¹³⁶ The Chairman of the DSE effectively admits the helplessness of the market. The chairman identifies two major problems. First, the market is wrestling with a lack of governance and confidence. Second, no initiatives will work until and unless the governance is improved, and investor protection is assured.¹³⁷ The absence of good governance is proven by the investor’s lack of confidence. The lack of investor confidence is so intense that for the first time in the history of the Bangladesh primary market, an IPO of a “bank company” remained unsubscribed in the wake of a series of loan scams, rising default loans, and weak performance of the listed stocks.¹³⁸ Approximately twenty-six percent of IPO shares of that bank, called Midland Bank, remained unsubscribed in March 2023.¹³⁹ This under subscription also makes a record of failure amongst IPOs of all industrial sectors since 2006.¹⁴⁰ This downturn comes as no surprise to anyone, as not only the new IPOs, but also the prices of the half of the listed bank’s shares have been dancing around their issue price or book value since 2010.¹⁴¹

As alluded to earlier, institutional, as well as foreign investors alongside retailers have also lost confidence in the market because of financial irregularities committed by issuers taking advantage of lack of good governance of the market.¹⁴² Apart from the issuer’s malpractices, investors also behave unreasonably.¹⁴³ Most of the time the shares of small companies, loss making companies, and companies with closed factories are also sold heavily in the market and the prices tend to increase.¹⁴⁴ It even comes up in the list of top price hikes.¹⁴⁵ As a result, institutional investors consider this market as a gambling market and they stay away.¹⁴⁶ Institutional investors represent only five to ten percent of total investors, whilst eighty-five to ninety percent are individuals in the Bangladesh market.¹⁴⁷ The lack of confidence of institutional investors becomes obvious when compared with their counterparts in the Indian

¹³⁶ Capital Market Grappling with Poor Confidence, *supra* note 49.

¹³⁷ *Id.*

¹³⁸ Babu & Alo, *supra* note 49.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² BSEC Frets, *supra* note 4; Drawing Large Investors to Stocks, *supra* note 4; Manipulation in Stock Market Lives On, *supra* note 4.

¹⁴³ Drawing Large Investors to Stocks, *supra* note 4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Protecting Small Investors is not Government’s Responsibility, *supra* note 39.

market, which has fifty-five percent of the turnover at the National Stock Exchange, whilst the institutional investors make up thirty-five percent of the turnover at the Karachi Stock Exchange in Pakistan.¹⁴⁸

Mutual funds should typically be popular to retail investors simply because they are professionally managed.¹⁴⁹ Even those funds are not credible in Bangladesh because of their poor performance and they have failed to earn investor confidence although such funds have come to the market four decades ago.¹⁵⁰ Despite this old age, mutual funds contribute only 0.73 percent to the total market capitalisation of the DSE.¹⁵¹ At the end of 2019, the BSEC suddenly and arbitrarily increased the terms of the mutual funds from ten to twenty years, without having to have consulted their investors.¹⁵² This was done at a time when investors were preparing to receive payments on the maturity of those funds within a few months and yield a lump sum profit.¹⁵³ On this unwelcome regulatory interference, a foreign investor lodged a lawsuit against BSEC, asking for an explanation as to how the regulator can make such decisions on investors' money regarding the maturity of mutual funds.¹⁵⁴ When the investors understood that anything could be possible under the poor governance in Bangladesh, they started to sell off their shares.¹⁵⁵ The regulator made the decision about the funds' maturity resting upon the "extremely fragile logic - it was claimed that selling shares in order to liquidate the mutual funds will have a negative impact on the market."¹⁵⁶ It seems to be an attempt to protect the market against the "preference" of investors inhibiting the liquidity of the market. Investors are gradually losing interest in mutual funds due to questionable investments and disappointing returns.

There have also been serious allegations of misappropriation of fund money and transferring the money overseas through laundering.¹⁵⁷ Those who are concerned state that although the country's mutual fund sector falls behind reasonable expectations in terms of performance, it is ahead with respect to irregularities.¹⁵⁸ They fear that the investor confidence crisis in mutual funds will intensify in the days ahead.¹⁵⁹ A total of thirty-four of the tenured mutual funds, except two, are now trading below the face value. Besides, the net asset value ("NAV") of fourteen funds is now below BDT10 (USD \$0.093).¹⁶⁰ The situation prompted the BSEC to file money laundering cases against the managing director of Universal Financial Solutions ("UFS"), an asset management company, and his associates, for embezzlement of BDT

¹⁴⁸ BSEC Frets, *supra* note 4.

¹⁴⁹ Rahat, *supra* note 132.

¹⁵⁰ *Id.*

¹⁵¹ BSEC Frets, *supra* note 4.

¹⁵² Habib, *supra* note 3.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Rahat, *supra* note 132.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

2.35 billion (approximately USD \$21.86 million) from four open-end mutual funds.¹⁶¹ In another move, the BSEC has decided to lodge a prosecution against issue managers, auditors, and sponsor-directors of an issuer named Nurani Dyeing and Sweater Limited for allegedly aiding and abetting forgery and fraudulent activities in relation to the company's IPO and subsequent to the public issue.¹⁶²

In response to a query about the irregularities associated with the mutual funds, the Chairman of the BSEC replied that the regulator is taking major legal actions against such illegal conduct, and efforts have been made to bring the withdrawn money back with an exception of releasing good news about such funds in the future.¹⁶³ The market participants will have to wait to see when that exception comes true. However, no remedy is forthcoming and the case backlog is another serious concern for justice seekers in Bangladesh.¹⁶⁴ The Chairman of the BSEC comments that "the crime in the capital market has increased because of such delay in the trial."¹⁶⁵ Many ordinary investors have lost their capital in the stock market manipulation at various times, but there has been no cure.¹⁶⁶ In most cases, the perpetrators of frauds were not even prosecuted.

For example, one and a half crore BDT (approximately USD \$139,523) were withdrawn by manipulating shares in a company called JH Chemical Industries in 1998-1999. and twenty-two years have passed in the investigation of that case.¹⁶⁷ Even if a trial is held, rewards of the crimes outweigh penalties.¹⁶⁸ In one instance of manipulation, criminals made profits of BDT 140 million (approximately USD \$1.3 million) whereas the penalty was BDT 30 million (USD \$279,046).¹⁶⁹ Since such a small penalty can be taken as business cost, it raises the question of where the deterrent effect will come from. In such a situation, persons concerned can reasonably ponder whether this accurately reflects the true value of an individual company's shares.

The current Prime Minister's Private Industry and Investment Adviser publicly admits that there are problems with the basic structure of the country's stock market, and no initiative has been taken to address them.¹⁷⁰ Whilst acknowledging that eighty-ninety percent investors are retailers, the Adviser unrealistically advises that small investors should invest through

¹⁶¹ *Regulator to Sue UFS MD, Associates for Money Laundering*, THE FINANCIAL EXPRESS (Mar. 24, 2023, 11:49 PM), <https://thefinancialexpress.com.bd/stock/bangladesh/regulator-to-sue-ufs-md-associates-for-money-laundering> [hereinafter "Regulator to Sue UFS MD"].

¹⁶² *Nurani Dyeing IPO Forgery—BSEC to Sue 3 Issue Managers, Auditors*, NEW AGE, (Sep. 28, 2022, 10:40 PM), <https://www.newagebd.net/article/182316/bsec-to-sue-3-issue-managers-auditors>.

¹⁶³ Rahat, *supra* note 132.

¹⁶⁴ M. Moneruzzaman, *Lower Court Pending Cases Surge to 35 Lakh - Poor People's Cases Left Unresolved for Long*, NEW AGE (Jul. 3, 2023, 11:37 PM), <https://www.newagebd.net/article/205696/lower-court-pending-cases-surge-to-35-lakh#:~:text=Of%20the%20pending%2035%20lakh,for%20more%20than%20five%20years>.

¹⁶⁵ *22 Years in the Investigation of a Single Case of Share Scam*, PROTHOM ALO, (Feb. 17, 2023, 4:54 PM), <https://en.prothomalo.com/bangladesh/crime-and-law/ne2vwuo3hm>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Hirus' Profit in Manipulation 14 Crores, Penalty 3 Crores*, PROTHOM ALO, (Sep. 13, 2022, 12:20 AM), <https://www.prothomalo.com/business/market/2mpvpuurw>.

¹⁶⁹ *Id.*

¹⁷⁰ Protecting Small Investors is not Government's Responsibility, *supra* note 39.

institutions (i.e., financial advisers); when investors make their own investment decisions and suffer loss then they blame the regulation.¹⁷¹ His advice includes a suggestion to change this practice and mentality of investors to make their own investment decisions.¹⁷² He unfortunately ignores the reality that such investors cannot afford to pay fees for the professional advice, and it is the responsibility of the government to maintain market integrity, as the second of the three objectives of securities regulation is “[e]nsuring that markets are fair, efficient and transparent” with the ultimate objective of protecting investors, as determined by the International Organization of Securities Commissions (“IOSCO”).¹⁷³ Even if we accept that it is not the responsibility of the government regulator to protect investors, it is certainly their responsibility to prevent malfeasances and irregularities which are eating away investors.

Surrounding market irregularities, a burning question arises as to who will watch the watchers. This is because company auditors are appointed to check the irregularities of issuers, many of these watchers themselves have indulged in corrupt practices,¹⁷⁴ as will be discussed shortly below. All these irregularities have contributed to an obvious outcome of lack of investor confidence in the IPO market in Bangladesh.

V. DECLINE IN IPOS AND RESULTANT REDUCTION IN RAISING FUNDS

Recurrent incentives have been provided to investors to stabilize the stock market over the past ten years. Some of these are short-term, some are medium-term, and some are long-term, but nothing works.¹⁷⁵ The DSE data reveals that the fundraising from the primary market has dropped in 2022-2023 to BDT 6.21 billion (approximately USD \$57.77 million) from BDT 699.36 billion (approximately USD \$6.51 billion) raised in the previous year.¹⁷⁶ Those who are concerned impute this decline to two “crises” in the market.¹⁷⁷

On the demand side is the crisis of investor confidence in this market, whilst the supply side has effectively lost its potency by the abundance of poorly performing companies (there are fewer good companies).¹⁷⁸ The regulator is captive to syndicates and the web of incentives offered by the government fails to bring investors back to the market. Analysts comment that good governance is an urgent need and reform in the overall financial sector is necessary.¹⁷⁹ Experts suggest that instead of incentives, law reform is necessary to generate investor confidence. Regarding the paucity of good companies, experts comment that the securities

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (“IOSCO”), OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION, 3 (2017) [hereinafter “IOSCO Objectives and Principles”].

¹⁷⁴ Mostafizur Rahman, *45 CAs Signed Financial Reports Without Proper Auditing*, NEW AGE, (May 31, 2022, 10:14 PM), <https://www.newagebd.net/article/172045/45-cas-signed-financial-reports-without-proper-auditing>.

¹⁷⁵ Monir Hossen, *Regulatory Body Hostage to Syndicates – Distrust in the Stock Market Despite the Tide of Incentives*, DAILY JUGANTOR (Oct. 20, 2022, 12:00 AM) (on file with author).

¹⁷⁶ Islam, *supra* note 84.

¹⁷⁷ Hossen, *supra* note 175.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

“market won’t see significant development unless fundamentally good companies are listed.”¹⁸⁰ Echoing this view, Professor Faruq Ahmad Siddiqi, a former BSEC chairman, asserted the “main problem is that good companies are not coming to the market. I think no significant development of the capital market will be ensured until the good companies get listed.”¹⁸¹ Professor Siddiqi added that only some ten good companies came to the market over the last ten years.¹⁸² Overall, the whole securities market keeps on being moribund and its primary market remains stagnated as evident from the declining number of IPOs issued which was only eight in 2006 and it witnessed the same number in 2022.¹⁸³

VI. DISCLOSURE PHILOSOPHY AND ITS APPLICABILITY IN PRIMARY MARKETS

The genesis of the modern disclosure requirements in a prospectus goes back to the Companies Act 1844 (UK).¹⁸⁴ However, the contents of a prospectus were first detailed in the Companies Act 1862 (UK), the corporation law in Australia with its fundraising provisions adopted originally from that British legislation.¹⁸⁵ That disclosure was a requirement of going public, but the merits assessment remained in place. The disclosure philosophy as used in practice today gained greater familiarity with its introduction by the United States of America in 1933 in the aftermath of the unprecedented depression caused by lack of truth in securities. The regulatory philosophy, which is opposed to the merit regulation has been “adopted with a surprising absence of discussion,”¹⁸⁶ even it was not so smooth to pass through the U.S. Congress. This is so because the Congress, at the time of passing the Securities Act 1933 (“SA1933”), had engaged in an intense debate raising concerns about the adequacy and effectiveness of the corporate disclosure as a method of investor protection.¹⁸⁷

It is now a historic truth that such disclosures are not often adequate, let alone being accurate.¹⁸⁸ Opponents at the U.S. Congress were critical of the philosophy by arguing that “those needing investment guidance would either lack the intelligence or training to understand the financial reports and other disclosures,”¹⁸⁹ or would be “so concerned with a speculative profit as to consider them irrelevant.”¹⁹⁰ One of the reasons for the approval of the disclosure philosophy may have been the explicit preservation of the effect of state-based blue sky law,¹⁹¹

¹⁸⁰ *Good Cos’ Listing to Ensure Capital Market’s Development*, THE FINANCIAL EXPRESS, (Sep. 18, 2022, 12:00 AM), <https://today.thefinancialexpress.com.bd/stock-corporate/good-cos-listing-to-ensure-capital-markets-dev-1663430884>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Bangladesh Securities and Exchange Commission, *Annual Report 2021-2022*, Dhaka at 32.

¹⁸⁴ See Companies Act 1948, 11 & 12 Geo. 6 c. 38 10, §§ 417-23 (Eng.).

¹⁸⁵ FADY AOUN, ET. AL., REDMOND’S CORPORATIONS AND FINANCIAL SERVICES LAW 866 (8th ed 2022).

¹⁸⁶ Poser, *supra* note 8, at 1298.

¹⁸⁷ *Id.*

¹⁸⁸ Susanna Kim Ripken, *The Danger and Drawback of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation* 58 BAYL. LAW REV. 139, 186 (2006); see also, Solaiman, *supra* note 37.

¹⁸⁹ Poser, *supra* note 8, at 1299.

¹⁹⁰ LOUIS LOSS, SECURITIES REGULATION, 451 (2d ed 1961).

¹⁹¹ Poser, *supra* note 8, at 1299.

which generally allowed state securities administrators to apply merit regulation.¹⁹² Notably, in the U.S., the first “state securities law” which is commonly referred to as the “blue sky law”¹⁹³ was enacted in Kansas in 1911.¹⁹⁴ The U.S. Supreme Court in *Hall v. Gieger-Jones Co.* pronounced that the blue-sky laws were enacted to protect investors from promoters who would partake in selling shares in the blue sky itself.¹⁹⁵ The U.S. Supreme Court observed that Blue Sky Laws aimed to regulate “speculative schemes which have no more basis than so many feet of blue sky.”¹⁹⁶

Alongside the merit regulation at the state level, President Franklin D. Roosevelt introduced the DBR by embracing the often-quoted philosophy of Justice Louis D. Brandeis, the “spiritual father” of the SA1933.¹⁹⁷ Justice Brandeis first expressed the philosophy in 1913 that “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁹⁸ However, he recognized that “excessive sunlight can cause skin cancer.”¹⁹⁹ Proponents of the DBR believe that it has “prophylactic effects” on securities markets.²⁰⁰ However, they probably ignore the opposite side of the coin, as discussed in this Article.

As noted above, the adoption of the DBR was a subject of strong criticism. The detrimental impacts of the DBR were voiced strongly by the congressmen at the time of the enactment of the SA1933, but all were ignored relying on an illusory belief that investors are all rational humans and capable of understanding financial disclosures and that issuers will tell the whole truth to the public.²⁰¹ The original draft of the SA1933 contained the MBR.²⁰² Eventually President Roosevelt dictated the adoption of the DBR and removal of the merit regulation from the draft SA1933.²⁰³ President Roosevelt asserted that “[o]f course, the Federal Government cannot and should not take any action which might be construed as approving or guaranteeing that newly issued securities are sound in the sense that their value will be maintained or that the

¹⁹² *Id.*

¹⁹³ *Hall v. Gieger-Jones Co.*, 242 U.S. 539, 550, 37 S. Ct. 217, 61 L. Ed. 480 (1917).

¹⁹⁴ Loss, *supra* note 14 at 8.

¹⁹⁵ *Hall*, *supra* note 193.

¹⁹⁶ *Id.*

¹⁹⁷ Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. OF CORP. L. 1, 27, 51, (1983); Troy A. Paredees, Commissioner, U.S. Sec. Exch. Comm’n, Remarks at The SEC Speaks (Feb. 22, 2013).

¹⁹⁸ LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 91 (1914).

¹⁹⁹ Louis Loss, *Disclosure as Preventive Enforcement*, in 1 CORPORATE GOVERNANCE AND DIRECTORS’ LIABILITIES 327, 331 (Klaus J. Hopt & Gunther Teubner eds, 1985).

²⁰⁰ Poser, *supra* note 8 at 1283.

²⁰¹ See AD HOC SUBCOMMITTEE ON MERIT REGULATIONS OF THE STATE REGULATION OF SECURITIES COMMITTEE, *Report on State Merit Regulation of Securities Offerings*, 41 BUS. LAW. 785 (1986) (providing details of the debate); see also Hugh H. Makens, *Who Speaks for the Investors? An Evaluation of the Assault on Merit Regulation*, 13 U. BALT. L. REV. 435 (1984); Alison Grey Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 HASTINGS L. J. 311 (1974); Homer Kripke, *The Myth of the Informed Layman*, 28 BUS. LAWYER 631 (1973).

²⁰² P.L. No. 22, 73d Cong., 1st Sess. (1933).; Daniel J. Morrissey, *The Road Not Taken: Rethinking Securities Regulation and the Case for Federal Merit Review*, 44 U. RICH. L. REV. 647, 679 (2010).

²⁰³ Morrissey, *supra* note 202 at 679; See President’s Message (Mar. 29, 1933), in HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL SUPERVISION OF TRAFFIC IN INVESTMENT SECURITIES IN INTERSTATE COMMERCE, H.R. REP. No. 85, 73d Cong., 1st Sess. 1 (1933).

properties they represent will earn profit.”²⁰⁴ President Roosevelt’s message to the Congress includes that the DBR “adds to the ancient rule of *caveat emptor*, the further doctrine ‘let the seller also beware.’ It puts the burden of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence.”²⁰⁵ This is how the U.S. Congress enacted the SA1933 to regulate securities offerings through mandatory disclosure by issuers to the public without any merit review being conducted by the federal government regulatory agencies.²⁰⁶

Justice William O. Douglas, an eminent jurist who later became a Justice of the U.S. Supreme Court,²⁰⁷ and one of the many who were critical of the DBR, commented that “[t]his is no more and no less than an indication of the futility of placing hope for substantial progress merely on the truth about securities. Real protection must rest on broader bases.”²⁰⁸ Justice Douglas, who was also the Chairman of the U.S. Securities and Exchange Commission (“US-SEC”), further commented on the disclosure philosophy entrenched in the SA1933 that the DBR would not be of much help for those who need guidance for investment decisions.²⁰⁹ That is the reality in Bangladesh.

A burning question is: where is “the whole truth” which was the driving force for the DBR as envisioned by President Roosevelt? If the truth existed, how did the GFC come about, and why do most of the IPOs in Bangladesh have very poor performers pushing the investors away from the market? It should be noted about the proposition that securities regulation under the DBR is a departure from the general principle of *caveat emptor* and a recognition of the underlying complexities in assessing the value of securities because of its intangible nature²¹⁰ is inaccurate.²¹¹

Despite the controversy at its influential origins, the philosophy has impregnated the modern notions of securities regulation largely across the world.²¹² The regulators of securities markets are advocates of investor protection worldwide where the BSEC is no exception as highlighted in its avowed mission,²¹³ and as specified by the IOSCO, protecting investors is the

²⁰⁴ President’s Message, *supra* note 203.

²⁰⁵ Daniel M. Gallagher, Commissioner, U.S. Sec. Exch. Comm’n., Remarks at Society of Corporate Securities & Governance Professionals 67th National Conference (July 11, 2013).

²⁰⁶ Manning Gilbert Warren III, *Reflections on Dual Regulation of Securities: A Case Against Preemption*, 25 B.C. L. REV. 495, 528 (1984).

²⁰⁷ See Dorothy Glancy, *Getting Government off the Backs of People: The Right of Privacy and Freedom of Expression in the Opinions of Justice William O. Douglas*, 21 SANTA CLARA L. REV. 1047 (1981); see also More Just, *The Environmental Activism of William O. Douglas*, BERKELEY L. (Nov. 8, 2022).

²⁰⁸ William O. Douglas, *Protecting the Investor*, 23 YALE L. REV. 522, 528 (1934).

²⁰⁹ *Id.*

²¹⁰ DONNA CROKER, PROSPECTUS LIABILITY UNDER THE CORPORATIONS LAW 5 (1998).

²¹¹ Solaiman, *supra* note 37 at 662-669.

²¹² Wendy Gerwick Couture, *A Glass-Half-Empty Approach to Securities Regulation*, 76 MD. LAW REV. 360 371-72 (2017).

²¹³ *Mission of BSEC*, BANGLADESH SEC. AND EXCH. COMM’N., <https://sec.gov.bd/home/mission> (last visited Mar. 30, 2024) (“The [BSEC] was established with the aims of protecting the interest of investors in securities, developing the securities market and promulgating rules on these issues or on related matters thereunder.” Thus, its functions (mission) include “protecting the interest of investors in securities; developing the securities market; formulating rules on securities related matters or on related topics thereunder.”).

first of the three objectives of this securities regulation,²¹⁴ whilst the other two are ensuring that markets are fair, efficient, and transparent; and the reduction of systemic risk.²¹⁵

Adding to the arguments for merit regulation for underdeveloped markets, an assessment by the IOSCO notes that the MBR, rather than the DBR, is a preferable regulatory philosophy for developing markets especially those markets which lack professional analysts and advisers.²¹⁶ This squarely mirrors the features of the market in Bangladesh which is overly dominated by retail investors in the absence of professional financial advisory services as alluded to earlier.

The situation preceding the adoption of the DBR in Bangladesh can be somewhat likened to that of the U.S. in that the Bangladesh securities market witnessed an unprecedented debacle in 1996 when a big bubble ended in a catastrophic burst.²¹⁷ The index-point of the DSE unusually boomed from about eight hundred points in June 1996 to around 3,600 points in November 1996,²¹⁸ and then gradually plummeted to 486.62 points on April 21, 1999.²¹⁹ Thousands of novices and small investors lost their life savings, and numerous small businessmen lost their entire capital.²²⁰ The market-crash was perhaps best stated by foreign analysts who termed it the “slaughter of the innocent.”²²¹ However, “the flute was played by really mature and skilled players who ... made their real fortune out of the innocence of [the] new generation of investors.”²²² In such a scenario, Bangladesh adopted the DBR in 1998²²³ with effect from January 1999, without having to conduct any research on its eligibility and usefulness on the plea that the regulator or the BSEC is unable to assess the merits of IPOs.²²⁴ What a silly ground to make such a serious regulatory change. Disclosure has very little or no value without the truth and the user’s intellectual ability to utilize the disclosed information.

²¹⁴ See IOSCO Objectives and Principles, *supra* note 173 (providing details of the objectives).

²¹⁵ *Id.*

²¹⁶ INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (“IOSCO”), OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION, 25 (1998) [hereinafter “IOSCO 1998”].

²¹⁷ K. M. Zahidul Islam & Sayed Farrukh Ahmed, *Stock Market Crash and Stock Return Volatility*, 38 BANGLADESH DEV. STUD. 25, 26 (2015).

²¹⁸ *Id.*

²¹⁹ S. M. Solaiman, *Recent Reforms and the Development of the Securities Market in Bangladesh: A Critique*, 41 J. ASIAN AFR. STUD. 195, 202 (2006).

²²⁰ Habib, *supra* note 3; Mahfuz Ullah Babu & Ahsan Habib Tuhin, *Chained-Up Stock Market Keeps Bleeding*, THE BUSINESS STANDARD, <https://www.tbsnews.net/economy/stocks/chained-stock-market-keeps-bleeding-591234> (last modified Feb. 27, 2023, 3:54 PM); *2023: A Remarkable Year for Junk Stocks*, THE BUSINESS STANDARD, <https://www.tbsnews.net/economy/stocks/2023-remarkable-year-junk-stocks-766862#> (last modified Dec. 31, 2023, 4:42 PM); *Production Closed For 2yrs, Apollo Ispat Reveals It Now*, NEW AGE, https://www.newagebd.net/article/209671/production-closed-for-2yrs-apollo-ispat-reveals-it-now#google_vignette (Aug. 17, 2023, 11:10 PM); *Manipulation in Stock Market Lives On*, *supra* note 4; Uddin & Tuhin, *supra* note 106; Mahfuz Ullah Babu & Salah Uddin Mahmud, *Move to Stop Private Placement Trickery*, THE BUSINESS STANDARD, <https://www.tbsnews.net/economy/stock/move-stop-placement-trickery-184792> (last modified Jan. 13, 2021, 12:25 PM); See also S.M. Solaiman, *Protection of Foreign Portfolio Investment in Bangladesh: A Critical Appreciation*, 19 *Sri Lanka J. of Int’l L.* 223 (2007).

²²¹ *Revenge of the Innocents*, THE ECONOMIST, (April 10, 1997), <https://www.economist.com/finance-and-economics/1997/04/10/revenge-of-the-innocents>.

²²² Solaiman, *supra* note 220 (providing details as to how the debacle played out).

²²³ Solaiman, *supra* note 35.

²²⁴ *Id.*

Now the question is where the truth is and how are investors able to use the disclosed information.

A company willing to go public generally forms an “IPO coalition”²²⁵ comprised of, amongst others, directors, auditors, lawyers, issue managers, and underwriters.²²⁶ Auditors have a sacred role to play in purifying disclosures for IPOs. They are reputational gatekeepers.²²⁷ Their role is critical because no company can make a public offer without showing their audited accounts.²²⁸ Auditors thus have the power and a sacred responsibility to prevent public offers purported to be made with untrue and misleading or deceptive information. Auditors are called to be servants of two masters in that they are hired and paid by the company to serve potential investors as gatekeepers.²²⁹ Investors or subscribers are expected to trust the professional service of auditors as a basis for the trustworthiness of corporate disclosures. But honesty in their service is questionable.

Reportedly, a group of auditors holding the certificate of the Institute of Chartered Accountants of Bangladesh (“ICAB”) are submitting reports without conducting audits, and the Financial Reporting Council (“FRC”) under the Ministry of Finance in Bangladesh has termed this act as illegal, unethical, and worrisome.²³⁰ The FRC has made such allegations in a recent letter given to the President of ICAB.²³¹ The FRC has lodged complaints against forty-three audit firms in the country²³² and adds that as a result of such illegal conduct of the audit firm, the quality of audit work of various audit institutions is being questioned and the reputation of professional accountants is being tarnished with adverse effects on the government revenue collection, bank loan management and capital market.²³³

A number of these audit firms which are very influential belong to policymakers close to the government.²³⁴ A class of auditors certified by the ICAB are submitting audit reports affirming the accuracy (“True and Fair”) of the financial statements prepared by themselves without any type of audit of the relevant accounts.²³⁵ From November 21, 2021 to May 12, 2022, the FRC has sent a total of thirty-five letters to ICAB to investigate the quality of work of fifty

²²⁵ See Kevin Boeh & Colette Southam, *Impact of Initial Public Offering Coalition on Deal Completion*, 13 VENTUR. CAP. 313 (2011) (discussing IPO coalition).

²²⁶ Randolph P. Beatty & Ivo Welch, *Issuer Expenses and Legal Liability in Initial Public Offerings*, 39 J. L. AND ECON. 545, 548 (1996).

²²⁷ See JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE, 26 (2006) (providing a detailed analysis of gatekeepers); S. M. Solaiman, *Statutory Civil Liabilities of Corporate Gatekeepers for Defective Prospectuses in Australia, the United States, the United Kingdom and Canada: A Comparison*, 35 COMPANY LAWYER 100 (2014).

²²⁸ Beatty & Welch, *supra* note 226; Donghui Wu, et. al., *IPO-Audit Expertise, Audit Quality, and Capital Allocation Efficiency: Evidence from China*, 6 (June 1, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3876506.

²²⁹ Thomas Ehrmann & Aloys Prinz, *The Auditing Game: The Dark Side of the Private Provision of a Public Good*, EUR. J. LAW ECON. 1, 11 (2023).

²³⁰ Rahman, *supra* note 174.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Rahman, *supra* note 174.

auditors of forty-three audit institutions, asking ICAB to take legal action and send a copy of the investigation report to them (FRC).²³⁶

In another action, the BSEC in March 2023 banned two audit firms from conducting any audit of any listed companies or mutual funds when the regulator found evidence that those firms had collaborated with the UFS in the fund misappropriation.²³⁷ These are some examples of audit frauds certifying untrue and unfair information as true and fair. This single type of irregularity is sufficient to wipe out the investor confidence as well as their investment and argue that the disclosure philosophy which essentially aims to establish truth in securities is basically breeding the untruth.²³⁸

The primary purpose of the disclosure philosophy is enabling investors to make an informed investment decision by utilizing the whole truth about a particular offer. The purpose includes some precious words or concepts which are the central pillars of the DBR, but the attainment of all or any of them is disputable in practice. The GFC was arguably a product of the failure of the disclosure philosophy.²³⁹ Even commentators argue that the U.S. “SEC contributed to the financial crisis because it permitted the issuance of more than \$2 trillion in ... mortgage-backed securities (“MBS”) and close to \$700 billion of collateralized debt obligations (“CDO”) with lax or no oversight.”²⁴⁰ More directly, they claim that the “SEC failed to review the supplemental prospectus... because the SEC permitted the issuance of MBO and CDO investments, which violated or sidestepped disclosure requirements that could have alerted investors of the risks the MBO and CDO, the SEC acted unethically. Had the SEC complied with its oversight responsibilities, the financial crisis might have been averted.”²⁴¹

In 2007, a submission to a Parliamentary Committee of the Australian Commonwealth Parliament criticized disclosures as being “too long, too complex and difficult to understand,”²⁴² that remained the fact²⁴³ despite the requirement of disclosing in a “clear, concise and effective manner.”²⁴⁴ Presenting financial information in a manner that should be readily graspable by anyone could be an unrealistic expectation. This is because it cannot be gainsaid that like other disciplines, the financial literature has its own taxonomy which cannot be easily understood by any person by all means. No one should reasonably expect that an ordinary person unfamiliar with financial literacy will properly understand them in any useful manner, even though they

²³⁶ *Id.*

²³⁷ Regulator to Sue UFS MD, *supra* note 161.

²³⁸ See Solaiman, *supra* note 37.

²³⁹ See generally Emiliios Avgouleas, *The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform*, 6 EUR. CO. FINANC. L. REV. 440 (2009); Edward J. Schoen, *The 2007–2009 Financial Crisis: An Erosion of Ethics: A Case Study*, 146 J. BUS. ETHICS 805 (2017).

²⁴⁰ Schoen, *supra* note 239 at 823.

²⁴¹ *Id.*

²⁴² Gerry Gallery & Natalie Gallery, *Rethinking Financial Literacy in the Aftermath of the Global Financial Crisis*, 19 GRIFFITH L. REV. 30, 40 (2010).

²⁴³ Phoebe Tapley & Andrew Godwin, *Disclosure (Dis)content: Regulating Disclosure in Prospectuses and Product Disclosure Statements*, 38 COMPANY & SEC. L. J. 315 (2021).

²⁴⁴ Australian Securities and Investments Commission (ASIC), *Regulatory Guide 228: Prospectuses: Effective Disclosure for Retail Investors*, Aug. 2019.

genuinely try to do so. The argument against this proposition ignores the fact that investment knowledge is not something to be achieved with “divine inspiration” and without sincere efforts. Rather, securities analysis requires prophetic knowledge without divine blessings. As worded by Professor Burton G. Malkiel “the security analyst must be a prophet without the benefit of divine inspiration.”²⁴⁵

When an understanding of corporate disclosure requires special skills and penetrating efforts, research suggests that “most investors do not read, let alone thoroughly analyse, financial statements, prospectuses, or other corporate disclosures ...”²⁴⁶ Supporting this view firmly and going one step further, Professor Robert Prentice adds that investors usually do not have a look at issuers’ disclosures in making their investment decision.²⁴⁷ The two major challenges of a successful disclosure regime are ensuring truth in the publicity and investor’s ability fastened with adequate efforts to understand them. Both are effectively non-existent in Bangladesh. Hence, an expectation of a useful disclosure regulation in Bangladesh seems to be pretentiously overambitious.

Like many others, Australia also adopted the disclosure philosophy as a tool to provide investor protection.²⁴⁸ The 1997 Wallis Financial Inquiry Report in Australia underscored the fact that “consumers lack (and cannot efficiently obtain) the knowledge, experience or judgment required to make informed decisions” about some financial products, hence “further disclosure, no matter how high quality or comprehensive, cannot overcome market failure.”²⁴⁹ The subsequent and the latest Financial Inquiry Report about disclosure notes that consumer’s “[b]ehavioural biases undermine the assumption that individuals are ‘rational’. They limit the efficacy of disclosure as a regulatory tool and can lead to sub-optimal outcomes for consumers.”²⁵⁰ It recommends enhancing consumer confidence and trust by creating an environment entailing financial firms to treat customers fairly.²⁵¹ The Report adds that a “more proactive approach to improving retail consumer outcomes underscores the importance of financial firms treating consumers fairly.”²⁵² Recommendation twenty-one of the Financial System Inquiry Report 2014 (“FSIR2014”) was to “introduce a targeted and principles-based product design and distribution obligation,”²⁵³ followed by recommendation twenty-two, which

²⁴⁵ BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET* 89 (9th ed. 1990).

²⁴⁶ Baruch Lex & Meiring De Villiers, *Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis*, 47 STANF. LAW REV. 7, 19 (1994).

²⁴⁷ Robert Prentice, *Wither Securities Regulation? Some Behavioral Observations Regarding Proposals for its Future*, 51 DUKE L. J. 1397, 1456 (2002).

²⁴⁸ Croker, *supra* note 210, at 6.

²⁴⁹ GAIL PEARSON, *FINANCIAL SERVICES LAW AND COMPLIANCE IN AUSTRALIA* 20 (2009); *See also* Austl. Dep’t of the Treasury, *Financial System Inquiry: Discussion Paper* (1996), <https://treasury.gov.au/publication/c2014-fsi-final-report> (last visited Mar. 30, 2024) [hereinafter “Discussion Paper (1996)”].

²⁵⁰ Aust’l Dep’t. of the Treasury, *Financial System Inquiry: Final Report* (2014), <https://treasury.gov.au/publication/c2014-fsi-final-report> (last visited Mar. 30, 2024) [hereinafter “Final Report (2014)”]; *See also*, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

²⁵¹ Final Report (2014), *supra* note 250, at 13.

²⁵² *Id.* at 242.

²⁵³ *Id.* at 25.

suggested to “introduce a proactive product intervention power that would enhance the regulatory toolkit available where there is risk of significant consumer detriment.”²⁵⁴

It is to be noted that the Australian market is in a better position in terms of development and investor’s demography, as it currently has 7.7 million on-exchange investors with a median portfolio size of USD \$170,000 in 2023.²⁵⁵ Australian market capital demonstrates that thirty-three percent is owned by retail and thirty-five percent by local or domestic institutional investors, whilst foreign ownerships comprise six percent (UK), five percent (Asia), sixteen percent (North America), and five percent (rest of the world).²⁵⁶

Nevertheless, two consecutive financial system inquiry reports in Australia have found that the DBR is not beneficial for retail investors.²⁵⁷ The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (“DDOs Act 2019”) is a product of the FSIR2014, which was built on the previous report, the Financial System Inquiry Final Report (“FSIR1997”). However, ASIC itself realized in 2013 that the existing DBR “may not ensure that retail investors in debentures are confident and informed.”²⁵⁸ The DDOs concept is not all new, similar obligations are currently in place in the United Kingdom, the Netherlands, and the European Union.²⁵⁹ It is to be borne in mind that disclosure may facilitate knowledge, “but they cannot guarantee knowledge itself,”²⁶⁰ and investor protection does require something more than disclosure.²⁶¹ Professor Marina Nehme observes that considering the limitations of disclosure, regulators need to employ other means for investor protection.²⁶²

The effectiveness of heavy or complete reliance on the DBR necessitates the presence of the “whole truth” and the investor’s ability to utilize that truth, both of which are absent from the market in Bangladesh, and their existence cannot be attained overnight. Companies typically have cupidity,²⁶³ which is nourished by dishonest auditors,²⁶⁴ and retail investor’s gullibility is evidenced by their behaviour as aforementioned.²⁶⁵ If all these practicalities are taken holistically, there can be no reason to argue that the DBR is an appropriate means of regulation to protect investors and preserve the market’s integrity. Hence, the BSEC should revisit the

²⁵⁴ *Id.* at 25.

²⁵⁵ AUST’L SEC. EXCH., AUSTRALIAN INVESTOR STUDY 2023, 13-14 (2023).

²⁵⁶ JUSTIN ELLIS, UNDERSTANDING OWNERSHIP TRENDS IN AUSTRALIA - 2018 KEY INSIGHTS, 2 ORIENT CAPITAL (2018).

²⁵⁷ Discussion Paper (1996), *supra* note 249; Final Report (2014), *supra* note 250.

²⁵⁸ AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC), DEBENTURE: REFORM TO STRENGTHEN REGULATION, 8 (2013).

²⁵⁹ ASIC Releases Regulatory Guide on Product Design and Distribution Obligations, AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION, (Dec. 11, 2020), <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-320mr-asic-releases-regulatory-guide-on-product-design-and-distribution-obligations/> [hereinafter “ASIC Releases Regulatory Guide”].

²⁶⁰ Marina Nehme, *Product Intervention Power: An Extra Layer of Protection to Consumers*, 31 J. OF BANKING AND FINANCE L. AND PRACTICE 88, 93 (2020).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Loss, *supra* note 14, at 1.

²⁶⁴ Rahman, *supra* note 174.

²⁶⁵ Drawing Large Investors to Stocks, *supra* note 4.

existing regulation of IPOs in Bangladesh, and the recently introduced DDOs requirements may usher the path of modifying the regulation in Bangladesh.

VII. DESIGN AND DISTRIBUTION OBLIGATIONS IN AUSTRALIA

Australia no longer follows the original theme of the disclosure philosophy which has been considerably modified by the newly introduced DDOs requirements for the protection retail investors. DDOs represent “a significant shift in the regulation of financial products in Australia” as observed by the Australian Law Reform Commission (“ALRC”).²⁶⁶ The DDOs are a relatively new approach to investor protection, which moves away from the usual heavy or to some extent, absolute reliance on corporate disclosure, by imposing the mandatory requirement that financial products are designed and distributed to the target market of retail investors or consumers.²⁶⁷ The new regime was enacted by the DDOs Act 2019 and came into effect on October 5, 2021.²⁶⁸

The new philosophy may be termed as a hybrid of both disclosure and merit regulation when the regulatory powers are attached to them. Whilst the disclosure regime imposes a burden exclusively on buyers to judge the merits of a public offer, DDOs resemble a regulatory philosophy that imposes the responsibility on both the issuers of securities and their distributors to ensure that the products are suitable for their end-users.²⁶⁹ To this end, DDOs intensify the accountability of product issuer and distributor.²⁷⁰ “Issuers” are simply those who issue their products to the primary market, whilst “distributors” refer to financial advisers and others associated with them as will be defined later in this Article in relation to their obligations.²⁷¹

The DDOs introduce a consumer-centric approach to designing and distributing products.²⁷² DDOs apply to both issuers and distributors of financial products when they target retail investors as their buyers.²⁷³ As stated in the ASIC Regulatory Guide, the overarching objective of the DDOs regime is to help investors obtain the financial products that are appropriate for them.²⁷⁴ The DDOs regime applies to almost all financial products, a notable

²⁶⁶ AUSTRALIAN LAW REFORM COMMISSION (ALRC), LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION, ¶ 61 (2022) [hereinafter “ALRC (2022)”].

²⁶⁷ Andrew C. Worthington, *Consumer Outcomes of the 2014 Financial System Inquiry*, 57 J. OF THE SECURITIES INST. OF AUSTL. 60-61 (2015).

²⁶⁸ Australian Securities and Investments Commission (ASIC), *Regulatory Guide 274: Product Design and Distribution Obligations*, Dec. 2020, RG 274.1 (The DDOs Act 2019 established the DDOs regime by incorporating Part 7.8A into the Corporations Act 2001, with the changes taking effect on October 5, 2021. Originally slated for enforcement on April 5, 2021, the implementation was postponed in response to the COVID-19 pandemic) [hereinafter “ASIC 274”].

²⁶⁹ Final Report (2014), *supra* note 250, at 198.

²⁷⁰ *Id.*

²⁷¹ *FAQs: Design and Distribution Obligations for Advice Licensees and Financial Advisers*, AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (Sep. 16, 2021), <https://asic.gov.au/regulatory-resources/financial-services/giving-financial-product-advice/faqs-design-and-distribution-obligations-for-advice-licensees-and-financial-advisers/> [hereinafter “FAQs”].

²⁷² ASIC 274, *supra* note 268 at RG274.5.

²⁷³ FAQs, *supra* note 271.

²⁷⁴ *See generally* ASIC 274, *supra* note 268.

exception is fully paid shares.²⁷⁵ However, this exception should not be applicable in Bangladesh because the market is exceedingly dominated by ordinary shares and retailers, whilst bonds and mutual funds make up only an insignificant part.²⁷⁶ If this exception is accepted, the DDOs in Bangladesh can play no useful role in generating investor confidence.

A. Modus Operandi of the DDOs Regime

These DDOs require securities issuers to determine an appropriate target market for their financial products, and the obligations also instruct both issuers and distributors to take reasonable steps to ensure that products are distributed to the target market only.²⁷⁷ Importantly, unlike the original disclosure requirements, the obligations of issuers and distributors do not end with the issuance of the products, rather both of them are also required to build and maintain effective governance arrangements for the whole life cycle of the issued financial products.²⁷⁸ The new regime further imposes an obligation to notify ASIC if issuers become aware of a significant dealing in an issued product that is not consistent with the target market determination (“TMD”) for the product.²⁷⁹ Distributors are also required to notify the issuers if they find a similar anomaly or distribution of the product that is inconsistent with the TMD.²⁸⁰ This report or notification will enable the issuer to monitor the appropriateness of the TMD and their product governance arrangements.²⁸¹

These features stipulate four core ideas to implement the DDOs regime. These are: (i) the TMD for a particular public issue; (ii) designing the products suitable for that market; (iii) taking reasonable steps to distribute them to the target market only; and (iv) arranging and maintaining effective governance of the products across their life cycle.

B. Key Obligations of Issuers under the DDOs Regime

The major obligations of an issuer of relevant products include to: (i) make a target market determination (“TMD”); (ii) design its products in a manner suitable for the target market (“TM”); (iii) take reasonable steps that will, or are reasonably likely to, result in distribution of the products being consistent with the most recent TMD; (iv) notify ASIC as soon as possible but within ten days when they become aware of any significant dealing in their products that is not consistent with the TMD for that particular products; (v) maintain complete and accurate records of their decisions concerning their TMDs that embrace decisions with reasons about the applicable content and appropriateness requirements and reviews for those decisions; and (vi)

²⁷⁵ CA2001, *supra* note 10 at § 994B(3)(d); ASIC 274, *supra* note 274, at RG 274.20–RG 274.24 (briefly discussing the “financial products that are subject to the obligations.”)

²⁷⁶ See Chowdhury, *supra* note 76.

²⁷⁷ *Updated Amendments to the Design and Distribution Obligation*, AUST’L GOV’T., <https://treasury.gov.au/sites/default/files/2021-09/c2019-t408904-206688.pdf> (last visited Mar. 30, 2024) [hereinafter “Updated Amendments”]; See also FAQs, *supra* note 271.

²⁷⁸ Updated Amendments, *supra* note 277.

²⁷⁹ ASIC 274, *supra* note 268, at RG 274.157–RG 274.162.

²⁸⁰ FAQs, *supra* note 271.

²⁸¹ *Id.*

keep information regarding distribution of their products.²⁸²

a. Determination of the Target Market

The target market for a product refers to the class of investors or consumers for which the product is likely to be appropriate, having to take into consideration their (investors) likely objectives, financial situation, and needs.²⁸³ Setting out a TMD is a binding obligation of the issuer embracing the information relating to the product distribution and monitoring investor outcomes.²⁸⁴ The TMD will be a public document containing matters pertaining to the product's distribution and review with a clear identification of the class of consumers appropriately targeted for the product.²⁸⁵ As defined in § 994A of the CA2001, the TMD means a determination that is made as required by § 994B that must also satisfy the requirements stated in subsections five and eight of § 994B.

To simplify, the TMD is a binding obligation of issuers, which lies at the heart of DDOs. Issuers (also called sellers) in the present context are persons who are required to prepare a disclosure document to issue or sell their financial products or securities.²⁸⁶ A central concern of issuers in making the TMD must be the “risk/return profile” of a financial product.²⁸⁷ The TMD has to be carried out in writing setting out the details with respect to the target market. The TMD shall outline the market, such as describing the class of customers who are targeted for a given product, stipulate the conditions of distribution of the product such as restrictions or conditions for the sale of the underlying financial products, specify the information which is required to be reported by distributors to the issuer including the frequency of the reports, particularizing the review process that warrants revaluation of the TMD.²⁸⁸

Section 994B(9) of the CA2001 requires issuers to make the TMD publicly available free of charge before it distributes a financial product.²⁸⁹ It is to be noted that TMDs are not disclosure documents required for fundraising by corporations, rather these documentations are intended to guide distributors, although these are publicly available.²⁹⁰ The defining TDM has

²⁸² CA2001, *supra* note 10 at §§ 994A-994J; *Design and Distribution Obligations Frequently Asked Questions* MLC LTD., <https://www.mlc.com.au/content/dam/mlc/documents/pdf/ddo-adviser-faqs.pdf> (last visited Mar. 30, 2024); *See also*, ASIC 274, *supra* note 268 at RG 274.139–RG 274.147; *Design and Distribution Obligations: Significant Dealing Notification Requirements*, AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION, <https://asic.gov.au/regulatory-resources/financial-services/design-and-distribution-obligations-significant-dealing-notification-requirements/> (last visited Mar. 30, 2024) (providing the meaning of “significant dealings.”) [hereinafter “Design and Distribution Obligations”].

²⁸³ FAQs, *supra* note 271.

²⁸⁴ *Id.*

²⁸⁵ *Interim Stop Order Placed on the Pivotal Diversified Fund*, AUSTRALIAN SECURITIES AND INVESTMENTS EXCHANGE, (Jan. 9, 2023), <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-002mr-interim-stop-order-placed-on-the-pivotal-diversified-fund/>.

²⁸⁶ FAQs, *supra* note 271.

²⁸⁷ Final Report (2014), *supra* note 250, at 198.

²⁸⁸ *See* CA2001, *supra* note 10 at § 994B(5); *See also* ASIC 274, *supra* note 268 at RG 274.10–RG 274.11.

²⁸⁹ ASIC 274, *supra* note 268, at RG 274.136–RG 274.138.

²⁹⁰ Design and Distribution Obligations, *supra* note 282.

been a serious issue as fifteen of the twenty-six stop orders²⁹¹ issued by ASIC from October 2021 to early July 2023 are related to this definition.²⁹² All details of a TMD have been succinctly described by ASIC in its RG 274.²⁹³

b. Designing the Products Suitable for the Target Market

Design and distribution requirements relating to financial products for retail clients are stated in §§ 994A-994Q of the CA2001. Once the TMD has been completed. It is the obligation of issuers to design the products to be issued to the public in a manner suitable to the situation and needs of the TM. The designing tasks include “an initial assessment of whether a financial product has been designed in a way that is likely to be consistent with the likely objectives, financial situation and needs of the class of consumers for whom the product is intended.”²⁹⁴ Sections 994B and 994F of the CA2001 stipulate design obligations.

c. Taking Reasonable Steps in Relation to Distribution

Although distribution is the responsibility of distributors, issuers have a binding obligation under § 994E(1) of the CA2001 to take reasonable steps that will, or are reasonably likely to, result in a distribution being consistent with the TMD determined for the given product.²⁹⁵

d. Reviewing the TMD to Ensure That It Remains Appropriate

Section 994C of the CA2001 obligates issuers to review a TMD within 10 business days if it knows, or ought reasonably to know, that a review trigger, or an event or circumstance that reasonably suggests that the TMD is no longer appropriate, has occurred. In addition, issuers have the obligation to conduct review of the TMD to ensure that it remains appropriate for a particular product.²⁹⁶

e. Notifying ASIC of “Significant Dealings”

Issuers are obliged under § 994G and § 1311(1) of the CA2001 to notify ASIC of any “significant dealings” in the securities issued to the TM but the dealings are not consistent with the TMD. This obligation must be performed as soon as practicable, within ten business days after coming to know of such dealings.²⁹⁷ However, this notification is not required if the dealings are excluded ones.²⁹⁸ The excluded dealing is defined in § 994A(1) of the CA2001

²⁹¹ CA2001, *supra* note 10 at § 994J (stating that ASIC has the power to issue stop orders).

²⁹² Michael Bracken, *ASIC Calls for Improvements to the Design and Distribution of Investment Products*, COLLIN, BIGGERS & PAISLEY LAWYERS, (Jul. 10, 2023), <https://www.cbp.com.au/insights/insights/2023/july/asic-calls-for-improvements-to-the-design-and-dist>.

²⁹³ ASIC 274, *supra* note 268, at 8-9.

²⁹⁴ *Id.* at RG 274.39.

²⁹⁵ *Id.* at RG 274.139-RG 274.147.

²⁹⁶ *Id.* at RG 274.148-RG274-156.

²⁹⁷ CA2001, *supra* note 10 at § 294G.

²⁹⁸ *Id.*

referring to “a dealing in a financial product that consists of arranging for a retail client to apply for or acquire the product, where the arranging is undertaken: (a) by a person, or by an associate of a person; and (b) for the purpose of implementing personal advice that the person has given to the retail client.”²⁹⁹ Hence, this notification obligation is not absolute.

f. Keeping Records of the Decisions Made in Relation to Its TMDs

As evidence of proper performance of the obligations, an issuer shall have to maintain complete and accurate records of all decisions made surrounding its TMDs including reviews of those decisions with reasons to substantiate them, as prescribed by § 994F(2) of the CA2001.³⁰⁰ The records must also include information on distribution so far as the issuer was involved in that act.³⁰¹

C. Key Obligations of Distributors

The distributor is the second person having obligations under the DDOs regime.³⁰² They are those who engage in the distribution of retail financial products. Distributors are regulated persons that include Australian Financial Service (“AFS”) licensees; their authorised representatives; credit licensees; and credit representatives.³⁰³ However, the AFS licensees remain liable for the conduct of their authorised representatives.³⁰⁴

Distributors assume the contractual responsibility to distribute the financial products of issuers who have designed the products for the target market (the market of retail investors). In doing so, the distributors must meet the distribution obligations under the DDOs regime, when they engage in such distribution called “retail product distribution conduct.”³⁰⁵ Distributions do include financial advisers.³⁰⁶ They can provide financial product advice (both general and personal) in relation to the product to a retail client.³⁰⁷ For distributors who provide financial advice, their “retail product distribution conduct” typically occurs at the time when they provide advice to their retail clients.³⁰⁸ Their obligations specifically pertaining to the DDOs regime are shown below.

a. Obligation Not to Distribute a Product Unless a TMD Has Been Made

As prescribed in § 994D of the CA2001, a distributor is prohibited from engaging in the conduct of retail product distribution unless a TMD has been made. However, such an

²⁹⁹ ASIC 274, *supra* note 268, at RG 274.157-RG 274.162.

³⁰⁰ CA2001, *supra* note 10 at § 994F(1), (3).

³⁰¹ ASIC 274, *supra* note 268 at RG 274.164-RG 274.165.

³⁰² *Id.* at 9.

³⁰³ *Id.* at RG 274.25-RG 274.31 (detailing the meaning of “issuer”, and “distribution” for the purposes of the obligations).

³⁰⁴ *Id.* at RG 274.27.

³⁰⁵ *Id.* at 9.

³⁰⁶ ASIC 274, *supra* note 268 at RG 274.27-RG 274.28 (defining “distributors” as the “Australian financial services (AFS) licensees,” and financial advisers are obviously one of those licensees as a requirement for them).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at RG 274.25–RG 274.31.

engagement can be excused if the relevant product is an excluded one as defined earlier³⁰⁹ or the distributor believes on a reasonable ground after making all reasonable inquiries that a TMD is not required for that particular distribution.³¹⁰ Failure to comply with this subsection is an offence.³¹¹

b. Taking Reasonable Steps to Ensure Consistency in Distribution

The distributor must take reasonable steps to distribute the product to the target market only. Section 994E mandatorily required distributors to take reasonable steps to ensure consistency with the target market determination.³¹² Such steps refer to those that will, or are reasonably likely to, result in distribution, which is consistent with the most recent TMD, an excluded distribution is excepted.³¹³

c. Notifying the Issuer of “Significant Dealings” Not Consistent with the TMD

Similar to the reporting obligation of an issuer, a distributor has also a binding obligation to notify the issuer (whilst the issuer is required to notify ASIC) if a distributor becomes aware of a significant dealing in the relevant securities that is not consistent with the TMD.³¹⁴ This notification is required to occur as soon as practicable within ten days after being aware of such a dealing.³¹⁵

d. Collecting and Keeping Records of Certain Information Regarding Distribution

Distributors must collect and keep complete and accurate records of certain information concerning distribution of the product designed to be distributed to the TM. The recordable pieces of information include the number of complaints received about a product, the distributor’s reasonable steps taken (where relevant) to ensure distribution being consistent with the TMD, other information reported to the product issuer, and information specified by the issuer in the TMD.³¹⁶

D. Common Obligations of Issuers and Distributors - Effective Governance of the Distributed Products Across Their Life Cycle

This is an obligation of arranging and maintaining good governance of the securities issued to retailers or the TM. Both issuers and distributors are required to implement an effective product governance arrangement to make sure that they comply with their respective DDOs.³¹⁷ Their obligations do not end with the distribution, rather continues throughout the life cycle of

³⁰⁹ CA2001, *supra* note 10 at § 994A.

³¹⁰ ASIC 274, *supra* note 268, at RG 274.168.

³¹¹ CA2001, *supra* note 10 at §§ 994D, 1311(1).

³¹² *Id.* at § 994E(3).

³¹³ ASIC 274, *supra* note 268 at RG 274.166-RG 274.210.

³¹⁴ *Id.* at RG 274.211-RG 274.215; *See also* CA2001, *supra* note 10 at § 994F(6).

³¹⁵ *Id.*

³¹⁶ ASIC 274, *supra* note 268 at RG 274.216-RG 274.223; *See also* CA2001, *supra* note 10 at § 994F(3).

³¹⁷ *Id.* at RG 274.32-RG 274.34.

the products.³¹⁸ This is the obligation of arranging and maintaining effective governance of the products distributed to the TM. The scope of such arrangements extends to the governance at the product design stage, at the distribution, monitoring and review stages of the life cycle of relevant products.³¹⁹ Justice Beach of the Federal Court of Australia in *Australian Securities and Investments Commission v. Commonwealth Bank of Australia* underscored the need for a robust and effective arrangement to put in place aiming to deliver products to investors and comply with legal obligations.³²⁰ This means that investors should not be expected to make their investment decision to choose their suitable products based only on the fundraising disclosure, but also on the governance arrangement of the products.³²¹

E. ASIC's Power to Make Stop Orders

ASIC administers the DDOs to promote the protection of financial product consumers including the promotion of the provisions concerning suitable financial products to consumers.³²² To this effect, ASIC has two special powers known as “stop orders powers”³²³ and “product intervention powers” (“PIPs”). The power to make a stop order applies to the protection of consumers from breaches of the design and distribution obligations.³²⁴ The breaches to which the stop order power applies include: failure to make, review, make public or otherwise satisfy the requirements for a TMD; distribution of a particular financial product when a TMD has not been made for the product or the TMD is no longer appropriate; or failure to take reasonable steps that will, or are reasonably likely to, result in distribution of the product being consistent with the TMD.³²⁵ A set of specific rules regarding stop orders are contained in § 994J of the CA2001 which provides for stop orders that:

- (1) This section applies if ASIC is satisfied that a provision of Division 2, or section 994E, has been contravened in relation to a financial product.
- (2) ASIC may order, in writing, that specified conduct in relation to retail clients in respect of the financial product (except excluded conduct) must not be engaged in while the order is in force. The order is not a legislative instrument.
- (3) Before making an order under subsection (2), ASIC must: (a) hold a hearing; and (b) give a reasonable opportunity to any interested person to make oral or written submissions to ASIC on whether an order should be made.
- (4) If ASIC considers that any delay in making an order under subsection (2) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order under that subsection. The interim order may be made without holding a

³¹⁸ *Id.* at 4.

³¹⁹ *Id.* at RG 274.35-RG 274.51.

³²⁰ *Australian Securities and Investments Commission v. Commonwealth Bank of Australia* [2020] FCA 790.

³²¹ ALRC (2022), *supra* note 266.

³²² ASIC 274, *supra* note 268 at RG 274.224.

³²³ *Id.* at RG 274.225; *See also* CA2001, *supra* note 10 at §§ 994J, 739.

³²⁴ *Id.* at RG 274.227-RG 274.236.

³²⁵ *Id.*; *See also* CA2001, *supra* note 10 at § 994E.

hearing and lasts for 21 days after the day on which it is made unless revoked before then.

(5) At any time during the hearing, ASIC may make an interim order under subsection (2). The interim order lasts until: (a) ASIC makes an order under subsection (2) after the conclusion of the hearing; or (b) the interim order is revoked; whichever happens first.

ASIC already had stop order powers previously under § 739 of the CA2001.³²⁶ Section 994J is complementary to the regulator's DDOs powers. ASIC uses this power to stop the issue or distribution of a financial product, for example, the regulator will apply this administrative mechanism when it is satisfied that the TMD has not met the appropriateness requirements.³²⁷ Meanwhile, ASIC has issued twenty-six stop orders until early July 2023 as mentioned previously.³²⁸

F. ASIC's Power to Make Product Intervention Orders

The Commonwealth Government of Australia has introduced a product intervention powers ("PIPs") enabling ASIC to make a product intervention order.³²⁹ As articulated by the ALRC, particularly PIPs "are a departure from a regulatory philosophy of 'buyer beware'... PIPs allow ASIC to make product intervention orders that ban the sale of a financial product to retail clients or impose conditions on the sale of such products."³³⁰

PIPs extend to products that include, amongst other things, securities, interests in managed investment schemes, derivatives which are regulated under the CA2001.³³¹ PIP empowers the securities regulator "to take a more proactive approach to regulating the market and reducing the risk of significant consumer detriment."³³² ASIC can make a product intervention order when it is convinced that a product (or class of products) has resulted, will result, or is likely to result in significant consumer detriment.³³³ ASIC's PIPs are likened to a powerful weapon in its enforcement armoury.³³⁴ This power complements the DDOs.³³⁵ ASIC is expected to typically apply PIPs if an issuer or its distributor acts in breach of their respective

³²⁶ CA2001, *supra* note 10 at § 739.

³²⁷ ASIC 274, *supra* note 268 at RG 274.229.

³²⁸ Bracken, *supra* note 292.

³²⁹ Australian Securities and Investments Commission (ASIC), *Regulatory Guide 272: Product Intervention Power*, June 2020, at RG 272.1 [hereinafter "ASIC 272"].

³³⁰ ALRC (2022), *supra* note 266, at ¶ 65.

³³¹ Mark Standen, et. al., *ASIC Maintains a High Level, Flexible Approach to the Product Intervention Power*, MINTERELLISON, (June 22, 2020), <https://www.minterellison.com/articles/overview-of-regulatory-guide-272-product-intervention-power>.

³³² ASIC 272, *supra* note 329, at RG 272.2.

³³³ *Id.* at RG 272.38; *See also* CA2001, *supra* note 10 at § 1023D(1)(b); ASIC 274, *supra* note 268, at RG 274.226; RG 274.241.

³³⁴ Harry New & Vince Battaglia, *Reflection of the Design and Distribution Obligations and ASIC Product Intervention Powers*, ETHICS & GOVERNANCE, (June, 2019), https://media.fssuper.com.au/prod/media/library/FS_Super/FS_Super_Reflections_on_the_design_and_distribution_obligations_and ASIC_product_intervention_powers.pdf.

³³⁵ ASIC 274, *supra* note 268 at RG 274.242.

obligations.³³⁶ The watchdog can exercise PIPs to prevent significant consumer detriment even if no contravention of DDOs is found.³³⁷ PIPs are not only power but also grounds for holding the regulator accountable if it fails to prevent a product that causes investor's harm.³³⁸

To make an overall comment about the DDOs regime, it can be said that it represents a departure from the strict reliance on the disclosure philosophy. It is designed in a manner to impose obligations and accountability on both the regulator and the regulatees. This is so because both issuers and distributors (regulatees) have certain obligations to perform, e.g., keeping records of their performance and reporting any incidents that may take place in breach of the new DDOs regime.³³⁹

On the other hand, ASIC has received significant regulatory powers for certain products and their distribution to the TM; however, it has the obligation to exercise those powers properly, and it can be held accountable for its failure to do so, particularly in relation to PIPs and the powers to make stop orders. All these obligations and accountability provisions ultimately aim to protect retail financial investors or consumers alongside promoting and preserving the market integrity. As commented by the ALRC, "DDOs reflected a shift towards a regulatory philosophy in which disclosure was important but no longer understood as necessary to achieving fairer outcomes for consumers."³⁴⁰ This regulatory system has been introduced in Australia, which has a developed and well-regulated capital market.³⁴¹ This reform is an outcome of the recommendations of consecutive two financial inquiry systems reports and the recommendations of the ALRC, as alluded to earlier.

Although it has been put in place in October 2021, it can be logically perceived that the new regime will provide better protection to retailers, the main target of the reform. Admittedly, there is a paucity of research on the Bangladesh market; however, abundant credible information about the lack of investor protection, particularly of retailers who are the single dominating fund providers is available, as explained previously. Given the lack of investor protection mechanisms and its damaging impact on the market, it is evidently plausible for Bangladesh to embrace the DDOs reform made in Australia in order to address their chronic problem of market-shyness of investing public. With this end in view this Article draws the following conclusions.

³³⁶ *Id.*

³³⁷ *Id.* at RG 274.243; *See also* ASIC 272, *supra* note 329, at RG 272.2.

³³⁸ New & Battaglia, *supra* note 335.

³³⁹ *See* CA2001, *supra* note 10 at § 994G; *See also* ASIC 274, *supra* note 268 at RG 274.257-RG 242.162 (stating that issuers are required to inform ASIC of any significant transactions involving the product that deviate from the TMD); *See* CA2001, *supra* note 10 at § 994F(1), (3); *See also* ASIC 274, *supra* note 268 at RG 274.164-165 (finding that they are also obligated to maintain records of decisions pertaining to their TMDs and related matters); *See* CA2001, *supra* note 10 at § 994F(6); *See also* ASIC 274, *supra* note 268 at RG 274.211-274.215 (similarly, distributors are subject to comparable duties, including notifying the issuer of any significant transactions involving the product that do not align with the TMD); *See* CA2001, *supra* note 10 at § 994F(3); *See also* ASIC 274, *supra* note 268 at RG 274.216-274.223 (additionally, distributors must maintain comprehensive and accurate records of distribution activities).

³⁴⁰ ALRC (2022), *supra* note 266 at ¶ 64.

³⁴¹ Ian Paterson, *A General Introduction to International Capital Markets in Australia*, LEXOLOGY (Dec. 12, 2023), <https://www.lexology.com/library/detail.aspx?g=3f2ef5dc-8043-4572-9d6e-7d2b72ce9dff>.

VIII. CONCLUSIONS

The Securities market is a dynamic place which typically responds to an ever-changing environment that potentially offers investors both risks and opportunities; hence, investors need to be careful in judging the market movements and making their investment decisions.³⁴² The capital market in Bangladesh is not informationally that efficient to properly react to every bit of disclosure;³⁴³ it is therefore sometimes illogically moved by new information towards an irrational direction. To stay safe in such a market, investors “must resist the temptation to swim blindly with the tide and instead pause, think, and evaluate before making investment decisions.”³⁴⁴ Such a resistance may not be expected to occur because of the specific problems that persist in Bangladesh. These include a serious lack of true and timely information, investors’ lack of investment knowledge and professionalism, the absence of professional financial advisory services, investor’s inability to afford to pay for such advisory services, and so on. All this collectively makes the prevailing disclosure philosophy effectively redundant for the Bangladesh market. Consequently, investors remain market-shy in the presence of the DBR, and regulators are tempted to inject “floor price regulation” to keep the moribund market clinically alive.

Similar reforms have also been made in the United Kingdom, the Netherlands, and the European Union.³⁴⁵ Under the recently introduced DDOs alongside the pre-existing disclosure regulation in Australia, an IPO targeting retailers should only be approved if it passes two tests, being the disclosure test and the merit test. The disclosure test requires satisfaction of the accuracy and timeliness of the information contained in the prescribed disclosure document, whilst the merit test warrants the offer to be viable and beneficial from the perspective of general or retail investors.

By contrast, Bangladesh does not have any special provisions for retailers who are the sole dominating investors in its securities market. Hence general investors are forced to carry out their own assessments of merits of a public offer, whilst the BSEC retains the responsibility to check the accuracy of the information contained in a prospectus, though their safety net often fails to prevent the release of inaccurate, untrue and misleading information to the public as discussed earlier.

Moreover, it sounds unwise and unrealistic to ask investment-illiterate small savers to properly assess the merits of public offers. Of course, if our recommendation to adopt a hybrid method of regulation is adopted, the BSEC will assess the merits of all IPOs (as investors are mostly retailers) and must add a disclaimer that the watchdog will not be responsible for any

³⁴² Tanzina Ahmed Choudhury, *Reacting to Stock Market Movements*, THE FINANCIAL EXPRESS, (Jul. 15, 2023, 11:33 AM), <https://thefinancialexpress.com.bd/views/reviews/reacting-to-stock-market-movements>.

³⁴³ Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FINANCE 383 (1970); Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. FINANCE 1575 (1991).

³⁴⁴ Choudhury, *supra* note 343.

³⁴⁵ ASIC Releases Regulatory Guide, *supra* note 259.

investment loss, despite the exercise of utmost care and diligence in assessing the merits of the offers. It is to be recognized that one size does not fit all in securities regulation.³⁴⁶

In any event, investors themselves will have to bear the responsibility for both losses in, and gains from, their investments. This recommendation is premised on the facts of non-existence of the feasibility requirements for an effective disclosure regime in Bangladesh and the surroundings of the DDOs reforms which came into effect in October 2021 in Australia.

Australia, despite being a developed nation, has modified the DBR for the public offers which target the retail investors. The reforms have kept the disclosure requirements unaffected for all offers but have introduced DDOs for issuers and distributors in addition to disclosures to protect retailers. This effectively makes the regulation of public offers targeting retailers hybrid and represents a deviation from the exclusive reliance on disclosure documents.³⁴⁷ Under the new regime, ASIC will keep on checking the truth in disclosures for all public offers, and additionally will assess the merits of the offers which will be made to retailers.

Notably, Australia excludes some specific public offers from the DDOs, most important one of them, which is extremely relevant to the Bangladesh market, is the offer of “fully paid shares.”³⁴⁸ Fully paid shares and units of managed funds are overly dominating products in Bangladesh. The market scenario depicted in this Article demonstrates that the excessive reliance on the corporate disclosures does not work for retailers irrespective of the type of securities. Hence this exception which is permitted in Australia should not be followed by Bangladesh.

Bringing about the proposed reform is imperative to restore and maintain public confidence in the Bangladesh market, and to vitalize its embryonic bond market. Otherwise, no effort to establish a vibrant capital market in Bangladesh is likely to work, and the dream of having a robust market will remain a dream for even longer, if not for ever. Apart from the equity securities market, Bangladesh definitely falls short of most of the developing economies situated in its neighbourhood with respect to the growth of the bond or debt market.³⁴⁹ Bangladesh seriously wants to develop a jubilant bond market for which it has recently signed an MOU with the UNDP seeking financial assistance.³⁵⁰

However, when Bangladesh brings about the DDOs like reforms, it must apply them to the public issues of bonds and equity offers going beyond Australian exclusions of fully paid shares.³⁵¹ We also recommend that the BSEC be empowered with the powers of making “stop orders” and “PIPs” (product intervention powers) in line with ASIC as discussed in this Article. If Australia needs the issuers and distributors to have special DDOs to protect retailers, there can be no plausible reason to negate the introduction of similar obligations in Bangladesh.

³⁴⁶ Sridhar R. Arcot & Valentina G. Bruno, *One Size Does Not Fit All, After All: Evidence From Corporate Governance*, 1ST ANNUAL CONFERENCE ON EMPIRICAL LEGAL STUDIES, https://www.cerge-ei.cz/pdf/events/papers/071126_t.pdf (last visited Mar. 30, 2024).

³⁴⁷ ALRC (2022), *supra* note 266 at ¶ 65.

³⁴⁸ CA2001, *supra* note 10 at § 994B(3)(d).

³⁴⁹ Chowdhury, *supra* note 76.

³⁵⁰ BSEC Press Release, *supra* note 41.

³⁵¹ *Id.*

The Bangladesh securities market is a place where stocks prices rise at times mostly abruptly for a short period of time, and then suddenly fall without any visible reasons – keeping investors persistently worried; hence the regulator needs to fix the fish in order to protect the aquarium. Otherwise, scams will continue to happen taking advantage of regulatory slips, as failure to ensure adequate disclosure and enhance the ability of investing public to utilize the disclosed information will foster the deception of investors,³⁵² which must be stopped without further ado.

³⁵² Schoen, *supra* note 239, at 823; Ripken, *supra* note 188, at 186.