Protecting Retail Investors in the Malaysian Capital Market

Petrina Tan Tjin Yi*

Abstract

This paper examines the retail investor protection framework in Malaysia. It explains how although consumer protection and investor protection have similar characteristics, they have different developmental trajectories which have implications on the applicable regulatory approaches. This paper then provides a background of the capital market regulatory framework and retail investors in the Malaysian capital market context. It studies the classification of investors in the Malaysian framework, focusing on the distinctions between sophisticated and retail investors and argues for a more nuanced categorisation of investors to take into account modern market realities and international trends. While mandatory disclosure and investor education are critical parts of a functional securities regulation regime, it is argued that they are limited in their effectiveness in protecting retail investors. In view of the limitations of disclosure and investor education, this paper submits that regulatory paternalism is justified within certain parameters and considerations to ensure that retail investors are adequately protected.

Keywords: Retail investor protection, Securities regulation

I. INTRODUCTION

This paper seeks to examine retail investor protection in Malaysia, focusing on the two traditional mechanisms of investor protection - mandatory disclosure and investor education. By way of introduction, this paper will clarify the distinction between consumer and investor protection. It explains how although consumer protection and investor protection have similar characteristics, they have different developmental trajectories which have implications on the applicable regulatory approaches. It will then study the classification of investors in the Malaysian securities law framework, focusing particularly on the metrics by which investors are classified and the implications of this classification. While mandatory disclosure and investor education are critical parts of a functional securities regulation framework, they are arguably limited in their effectiveness in

* LLM (Hons) (Corporate And Financial Services Law), National University of Singapore; LLB (Hons)(With Distinction), University of Malaya, Malaysia. Email address: petrinatan@gmail.com
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protecting retail investors. In view of the limitations of disclosure and investor education, this paper submits that regulatory paternalism is justified within certain parameters and considerations to ensure that retail investors are adequately protected.

The discussion in this paper is structured as follows – Part II sets out the background of investor protection in the regulation of capital markets. This section will explain how securities regulation distinguishes between sophisticated and retail investors. Although investor protection overlaps with consumer protection, it has its own distinctive characteristics and developmental trajectory, which contrasts with the widely-held perception that consumer protection and investor protection are interchangeable. Part III of this paper provides a brief overview of the Malaysian capital market framework, and will give a snapshot of the roles and responsibilities of the various regulators and stakeholders involved. This section will also briefly highlight the Malaysian government and regulatory focus on increasing retail participation in the capital markets. Part IV explains the distinction between retail and sophisticated investors in the context of Malaysian securities law, and the need for greater nuance in the classification system in light of the overall evolution of the capital market ecosystem. Part V of this paper addresses the mandatory disclosure approach and its limitations as a mechanism to protect investors. It will also discuss investor education initiatives and its constraints in protecting investors. Part VI of the paper submits that in view of the weaknesses of mandatory disclosure and investor education, there are instances where regulatory paternalism in securities regulation on the part of the regulator is justified and proposes some instances for consideration.

II. INVESTOR PROTECTION IN REGULATING CAPITAL MARKETS

It is axiomatic that investor protection is one of the cornerstones of securities regulation regimes worldwide. This is reflected in the International Organization of Securities Commissions Objectives and Principles of Securities Regulation (June 2010) (IOSCO Objectives and Principles)[1] which are widely accepted as the international standard for securities regulation. This document sets out 38 principles of securities regulation based on three objectives of securities regulation, namely:

- protecting investors;
- ensuring that markets are fair, efficient and transparent; and
- reducing systemic risk.

The IOSCO Objectives and Principles acknowledges the primacy of investor protection in securities regulation. The priority given to investor protection is reflected in various mission statements of securities regulators[2] and legislative documents governing

[1] International Organization of Securities Commissions, June 2010, *"Objectives and Principles of Securities Regulation"*: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf. Site accessed on 5 June 2017.

[2] Securities and Exchange Commission, United States of America, *"What We Do"*, https://www.sec.gov/about/whatwedo.shtml. Site accessed on 1 June 2017. Financial Conduct Authority, *"About Us"*, https://www.fca.org.uk/about. Site accessed on 1 June 2017.

securities regulation[3] and is often cited as one of the major driving factors of capital market regulatory frameworks worldwide. Investor protection is inextricably linked to the idea that strong capital markets require investor confidence, failing which investors would flee the market.[4]

As a corollary to the above, investor protection seeks to protect investors from the fraud or wrongful actions of issuers and capital market intermediaries, rather than the negative consequences of their investment decisions.[5] This approach is founded on the well-established phenomenon of moral hazard in which investors take on inappropriate investing risks in the belief that they will be protected from the results of their own poor choices via *ex ante* or *ex post* interventions from regulators. Moral hazard stifles the maturity and capacity of investors in learning to deal with increasingly sophisticated investment products and market structures that promotes reckless risk-taking behaviour.

In order to encourage the growth of the capital market alongside ensuring investors are protected, securities regulators have utilised the disclosure-based approach in which issuers are required to disclose material information to investors to enable them to make informed investment decisions. Previously, securities regulators relied on a merit-based approach in which they assessed the relative merits of investment products.[6] Under the disclosure-based approach, the regulator does not interfere in how investors should make investment decisions, but mandates the type and the quality of information which should be disclosed for the purposes of making informed investment decisions. The principle of disclosure is set out in Principle 16 of the IOSCO Objectives and Principles and refers to "full, accurate and timely disclosure of financial results, risk and other information which is material to investors' decisions."

Disclosure requirements form a thread that runs throughout financial law[7] and can be analysed from a variety of perspectives. Such requirements are based on a model that subscribes to the efficient market hypothesis in which the full and accurate disclosure of all material information is emphasised as there is a positive co-relation between the price movements of securities and the availability of information.[8] The principle underlying the disclosure of material information was piquantly described by Professor Louis Loss

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3 See the Preamble to the *Securities and Futures Ordinance* (Hong Kong) Cap. 571 which clearly refers to the protection of investors. This is in contrast with section 5, *Securities and Futures Act* (Singapore) Cap. 289 which states that the objective of the Part Governing Markets is to promote fair, orderly and transparent markets, to facilitate efficient markets for the allocation of capital and the transfer of risks and to reduce systemic risk without any express mention of investor protection.

4 See for example *SEC v Zandford* (2002) 535 U.S. pp. 813, p.819 stating that among the objectives in passing the Securities Exchange Act was to ensure honest markets and thereby promote investor confidence after the 1929 stock exchange crash in the USA.

5 Low Chee Keong, "Revisiting the Regulatory Framework of Capital Markets in Malaysia", *Columbia Journal of Asian Law,* 2001, Vol. 14 No. 2, p. 287.

6 *Ibid.*

7 See Joanna Benjamin, "Narratives of Financial Law", *Oxford Journal of Legal Studies*, 2010, Vol. 30, p. 787. She quotes Lord Watson in *Derry v Peek* (1889) LR 14 App Cas 337 (HL) 345- "[F]or the general public is so at the mercy of company promoters, sometimes dishonest, sometimes over sanguine, that it requires all the protection that the law can give it".

8 *Supra*. n 5.

as "every investor has the right to make a fool of himself."[9] Notwithstanding Professor Louis' description, the disclosure paradigm is based on the assumption that investors are rational and are able to make use of the information which has been presented to them to maximize their utility in making investments. This is in turn underpinned by the neo-classical school of economics which is the dominant paradigm underpinning securities regulation. From a neo-classical economics perspective, the disclosure of material investment information is meant to lead to more information impounded into stock market prices (informational efficiency), more trust in the markets (institutional efficiency), more liquidity and better capital allocation (allocation efficiency).[10] In other words, disclosure is designed to solve the informational asymmetries that exist between companies and investors. The logic is that by arming investors with information, mandatory disclosure promotes informed investor decision making, which in turn develops capital market integrity, and capital market efficiency.[11]

At its most fundamental, disclosure regulation is not concerned with fairness or justice – its ambition is not to protect risk-takers from risks they cannot bear, but merely from risks which they have not consented to on an informed basis.[12] As long as the investor is aware and has consented to such risks, then the regulators will not interfere in the consequences of the said investment decision, in the absence of fraud or other malfeasance. Nevertheless, as this paper argues there is still a place for paternalistic intervention with regard to retail investor protection on the part of securities regulators.

A. The Classification of Investors – Assets and Knowledge

Generally, the investor protection framework expressly distinguishes between sophisticated and retail investors. Briefly, sophisticated or professional investors are individuals or entities that meet specified net wealth or asset levels. Such investors are regarded as having more investing knowledge than retail investors and are able to assume greater investment risks relative to their wealth or asset levels.

Conversely, the term 'retail investor' is often used synonymously with 'mom and pop investors', 'unsophisticated investors' or 'individual investors'. Within the default securities regulatory framework, persons who do not fall within the definition of institutional or professional investors are treated as retail investors.[13] In other words, the

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[9] See Louis Loss, "The Protection of Investors: The Role of Government", *South African Law Journal*, 1963, Vol. 80, p. 53 at p. 60. This expression goes back to the 1935 report of the Canadian Royal Commission on Price Spreads, p. 38. See also T.H. Hazen, "Rational Investments, Speculation, or Gambling? Derivative Securities and Financial Futures and their Effect on the Underlying Capital Markets", *Northwestern University Law Review*, 1992, Vol. 86 at p. 987: "There is no need to protect a fool from his or her investment folly so long as no fraud or manipulation is involved."

[10] See generally Lars Klöhn, "Preventing Excessive Retail Investor Trading under MiFID: A Behavioural Law & Economics Perspective", *European Business Organization Law Review*, 2009, Vol. 10 Iss. 03.

[11] Tyro A. Paredes, "Blinded by the Light: Information Overload and Its Consequences for Securities Regulation" *Washington University Law Quarterly*, 2003, Vol. 81, pp. 417-418.

[12] *Supra*. n 7.

[13] See page 53, Appendix E of the IOSCO Questionnaire on the Development and Regulation of Institutional Investors in Emerging Markets: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD384.pdf. Accessed on 5 June 2017.

definition of 'retail investors' is the group of investors which remain after the parameters for institutional or professional investors have been drawn. It follows that this classification of retail investors covers a broad swathe of the population with varying degrees of financial resources and knowledge.

It is submitted that a more nuanced characterisation of retail investors is important because they are not homogenous[14] and display different levels of sophistication, competence and risk appetite.[15] Additionally, behavioural finance has shown that the rationality of investors is limited, and that they are subject to biases in making investment decisions. These insights prompt a more detailed analysis of the existing investor protection framework to ensure that an appropriate balance is struck between overly protective regulatory behaviour which may result in moral hazard and the stymieing of market development and regulation which is too lax and places too much reliance on investors to protect themselves.

B. Retail Investors or Financial Consumers?

The terms 'retail investors' and 'consumers' are often used interchangeably.[16] As such, two questions arise for consideration:

- Are retail investors equivalent to financial consumers?
- If retail investors are equivalent to financial consumers, should the degree of protection for retail investors then be the same as that afforded to financial consumers?

With regard to the first question, reference is made to the early case of *Twycross v Grant.*[17] In this case, Coleridge CJ alluded to the relationship between consumer protection and investor protection, noting that all purchasers equally run the risk of buying comparatively worthless articles and being misled by untrue representations as to its nature and value. Nevertheless, there are additional circumstances which determine the value of a share in a company e.g. the persons by whom and the mode in which the capital of the company is dealt with. Unlike an ordinary purchaser who is uninterested in knowing what the vendor will do with the purchase money when he gets it, the purchaser of shares finds it paramount to know what sort of persons have control of the money he has paid and how the money is to be applied. In a modern context, the reasoning which was applied to shares would also apply to units of collective investment schemes such as unit trusts and real estate investment trusts.

It follows that while retail investors do share similar characteristics with consumers, there are differences between retail investors and consumers which have implications on the structuring of consumer protection and investor protection regulatory regimes. Both

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14 See generally Niamh Moloney, *How to Protect Investors – Lessons from the EC and the UK*, Cambridge University Press, United Kingdom, 2010.

15 *Ibid.*

16 See Nik Ramlah Mahmood, 12 December 2012, "Developing A Platform for Consumer Protection in the Islamic Financial Services Industry": http://www.ifsb.org/docs/IFSF6_Dr%20Nik%20Ramlah%20Mahmood_FINAL.pdf. Site accessed on 6 June 2017.

17 (1887) 2 CPD 469, p. 483.

financial products and consumer products create value by offering benefits to the buyer. However, financial products differ from consumer products in that investors effectively supply capital through purchasing equity ownership, debt or investment contracts that promise a combination of returns and risks, whereas consumers do not directly contribute to the capital of a company from which it has purchased a product. As a corollary, investors, which are the shareholders of a company, are allowed a voice in the management of the company through mechanisms such as annual or extraordinary general meetings, as provided for in companies' legislation[18] and the listing requirements,[19] where applicable.

The distinction between retail investors and financial consumers also rests on how one construes the relationship between investment products and daily life – whether consumption is a consequence of government withdrawal from welfare, and that the protection of the consumer with respect to potential losses and risks is warranted[20] or whether investment is a discretionary activity which relates to the conception of investors as suppliers of capital, subject to the principles of *caveat emptor* and investors bearing the risk of the investments. Thus, investors are associated with speculation and asset accumulation, rather than consumption for core welfare needs,[21] which provides a distinguishing point between retail investors and financial consumers.

As it is submitted that retail investors are not the same as financial consumers, retail investor protection can thus be differentiated from consumer protection. Consumer protection goes to process and not outcome, such as, the focus is on protection from unfair odds, rather than unfair harms.[22] Therefore, it is often linked to an *ex ante* and precautionary approach in which consumer products are tested before they reach the market, and less reliance is placed on market mechanisms for the protection of consumers.[23] There is greater reliance on intermediaries, and risks in terms of product manufacture and information asymmetries in consumer protection. By contrast the core regulatory concepts informing retail investor protection, that is, best execution and suitability, focus on the point of sale and not on possible future losses that may materialise many years in the future.[24] It follows that investor protection is more greatly associated with market-based mechanisms, including the tools which intermediation and more complex markets provide, particularly in terms of hedging and diversification.[25]

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[18] See sections 223 and 230 of the *Companies Act 2016* (Malaysia), Act 777 for provisions on the requirement of company approval for disposal of a company's undertaking or property and for directors' fees respectively.

[19] See Chapter 7 of the *Bursa Malaysia Main Market Listing Requirements* and *ACE Market Listing Requirements* which provide specific requirements pertaining to meetings and voting rights which must be incorporated into listed companies' articles of association and adhered to.

[20] See E. Warren, "Product Safety Regulation as a Model for Financial Services Regulation", *Journal of Consumer Affairs*, 2008, p. 452. Also see J. Fisch, "Rethinking the Regulation of Securities Intermediaries", *University of Pennsylvania Law Review*, 2009-2010, Vol. 158, p. 1961.

[21] Niamh Moloney, "The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors?", *European Business Organization Law Review*, 2012, Vol. 13, p. 174.

[22] *Supra* n 7.

[23] *Supra* n 21.

[24] *Supra* n 7.

[25] *Supra* n 21.

The preceding points of differentiation between financial consumers and retail investors, and the protection regime underscoring financial consumers and retail investors are important as they provide the basis for the development of separate streams of consumer protection and investor protection having different developmental trajectories and focus. Consumer protection takes a more interventionist approach while investor protection is aimed at ensuring that investors are given sufficient information about the possible risks and benefits of the investments. Consequently, the distinctions between consumer protection and investor protection provide a basis to challenge the perceived interchangeability of the investor and consumer protection regulatory frameworks, and enables regulators and policymakers to better understand the forces which shape investor protection and the appropriate policy tools to encourage a better calibrated investor protection paradigm.

Examples of this distinction can be seen in both the United States of America (US) and the European Union (EU) as follows: the distinction between the US Securities and Exchange Commission's treatment of retail investment products in contrast with the contested and more interventionist approach taken by the US Consumer Financial Protection Bureau,[26] and within EU policy literature, for example, the 2008 Optem Report for the EU on disclosure in which household investors were classified as either 'prudent savers' who sought 'safe' investments (similar to consumers) or 'gamblers' prepared to take risks.[27]

III. AN OVERVIEW OF THE MALAYSIAN CAPITAL MARKET REGULATORY FRAMEWORK

The primary regulator of the Malaysian capital market is the Securities Commission (SC), a statutory body formed pursuant to the Securities Commission Malaysia Act 1993, Act 498 (SCA). Section 15 of the SCA sets out the wide range of regulatory functions of the SC, including but not limited to the supervision of exchanges, clearing houses and central depositories, approval of corporate bond issues and regulation of securities and derivatives contracts, take-over and mergers of companies and unit trust schemes. While the SC carries out the licensing and supervision of licensed persons and ensures the proper conduct of market institutions and licensed persons, it aims to encourage self-regulation by professional associations or market bodies in the securities and derivative industries.[28]

Underpinning all these functions is the SC's ultimate responsibility of taking all reasonable measures to ensure the confidence of investors in the securities and derivatives markets by ensuring adequate protection for such investors.[29] Apart from discharging

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[26] *Supra* n 21.

[27] *Supra* n 21. See also Optem, "Pre-Contractual Information for Financial Services, Qualitative Study in the 27 Member States", 2008, pp.8, 88 and the French TNS-Sofres Report on regulated disclosures for 'savvy investors' who were able to control risk through diversification and 'small investors' who were unwilling to take risks and concerned with purchasing safe products. TNS-Sofres, "Investigation of Investment Information and Management Processes and Analysis of Disclosure Documents for Retail Investors", Report for the AMF, 2006.

[28] See Part VIII CMSA.

[29] Section 15(1)(g) SCA.

its regulatory functions, the SC is also obliged by statute to encourage and promote the development of the capital market in Malaysia, as set out in section 15(1)(k) SCA.

Further to the above, the Capital Markets and Services Act 2007, Act 671 (CMSA) regulates and provides for matters relating to the activities, markets and intermediaries in the capital markets. The front-line regulation of the capital markets is carried out by Bursa Malaysia Berhad (Bursa Malaysia), a demutualised entity[30] which has been tasked with the duty of maintaining a fair and orderly market in the securities and derivatives that are traded through its facilities.[31] As a demutualised entity, Bursa Malaysia and its subsidiaries[32] are required to act in the public interest, having particular regard to the need for protection of investors in the discharge of its duties and its statutory duties shall prevail over its corporate interests. This approach is embedded throughout the provisions of Part II of the CMSA which pertains to the establishment of securities and derivatives markets and the various market institutions.

The regulation of the Malaysian capital market also rests on self-regulatory organisations such as the Federation of Investment Managers Malaysia[33] (FIMM) which was gazetted as a self-regulatory organisation in January 2011. The FIMM describes itself as playing a dual role as an industry body and public interest body, advocating the growth of Unit Trusts and Private Retirement Schemes (PRS) in Malaysia while ensuring that investor and public interests are protected. FIMM members which comprise Unit Trust Consultants and Private Retirement Scheme Consultants are regulated via FIMM's codes and standards of conduct.

Additionally, the SC and Bursa Malaysia work closely with the industry via industry associations such as the Malaysian Investment Banking Association[34] (MIBA), the Malaysian Institute of Chartered Professional Accountants[35] (MICPA) as well as other stakeholders such as the Minority Shareholder Watchdog Group[36] (MSWG) which was established as a government initiative in the year 2000 as part of a broader capital market framework to protect the interests of minority shareholders through shareholder activism. Such engagements are typically conducted via public and industry consultations.

The capital market space in Malaysia encompasses the conventional and Islamic equities market, bond market and the equity crowdfunding, and peer-to-peer lending segment. There is a specific *Shariah* compliant commodity trading platform which allows

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[30] Bursa Malaysia was converted from a company limited by guarantee to a public company limited by shares pursuant to the Demutualisation (Kuala Lumpur Stock Exchange) Act 2003, Act 632.

[31] Section 11(2) CMSA.

[32] The full list of Bursa Malaysia subsidiaries is available at http://www.bursamalaysia.com/corporate/about-us/our-organisation/regulatory-structure/. Site accessed on 3 June 2017.

[33] Federation of Investment Managers Malaysia, "*Self-Regulatory Organisation*": https://www.fimm.com.my/about-us/self-regulatory-organisation/. Site accessed on 3 June 2017.

[34] Malaysian Investment Banking Association, *"MIBA at a Glance",* http://www.miba.com.my/miba-at-a-glance/items/88/267. Site accessed on 3 June 2017.

[35] The Malaysian Institute of Certified Public Accountants, *"About Us",* http://www.micpa.com.my/the-institute/about-us/. Site accessed on 3 June 2017.

[36] Minority Shareholder Watchdog Group, *"Who We Are"*, https://www.mswg.org.my/who-we-are. Site accessed on 3 June 2017.

commodities approved by the Shariah Advisory Council (SAC) of the SC to be traded.[37] The SAC screens and classifies equities, exchange traded funds, real investment trusts and fixed income securities which comply with *Shariah* principles based on a screening methodology and releases an updated list of *Shariah* compliant securities from time to time.

A. The Malaysian Economic Transformation Plan and Malaysian Capital Market Masterplan 2

The strategic direction of the growth of the Malaysian economy is set out in the Malaysian Economic Transformation Plan (ETP) which was prepared and launched in 2010 by the Performance Management & Delivery Unit (PEMANDU),[38] a unit in the Prime Minister's Department. In the ETP, PEMANDU identified the challenges which the Financial Services sector faced, which include limitations in the types of investors, products, and currencies available in the capital market and the need to improve personal financial literacy and the local industry to operate in a competitive environment regionally.[39]

As part of the SC's aspirations in helping Malaysia achieve developed nation status, the Malaysian Capital Market Masterplan 2 (CMP2) was released in 2011 in the wake of the global financial crisis of 2009-2010. The CMP2 is a key document setting out the broad strategic direction of the Malaysian capital market over the course of the next decade. The opening section of the CMP2 explains the macro-level and regulatory challenges for the Malaysian capital market to expand its role in invigorating national economic growth while addressing concerns about the efficacy of the market. The CMP2 takes a two-pronged approach, focusing on growth strategies to expand the role of the capital market and governance strategies for investor protection and stability.

B. Specific Focus on Retail Investor Participation

Since the inception of the ETP and CMP2, the SC and its stakeholders have embarked on various initiatives to increase retail investor participation in the capital markets. In 2011, the bond and *sukuk*[40] markets were opened to retail participation i.e. issuers would now be able to issue bonds through the stock exchange or over-the-counter (OTC) via appointed banks. Previously, access for retail investors to bonds and *sukuk* was mostly available through bond and *sukuk* unit trust funds and exchange traded funds.

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[37] Bursa Malaysia Berhad, *"Bursa Suq Al-Sila (BSAS)"*: http://www.bursamalaysia.com/market/islamic-markets/products/bursa-suq-al-sila-bsas/. Site accessed on 3 June 2017.

[38] Pemandu, *"About Pemandu"*: http://www.pemandu.gov.my/about.aspx. Site accessed on 3 June 2017.

[39] Pemandu, "*Financial Services"*:http://etp.pemandu.gov.my/Financial_Services-@-Financial_Services.aspx Site accessed on 4 June 2017.

[40] Sukuk means certificates of equal value which evidence undivided ownership or investment in the assets using Shariah principles and concepts endorsed by the Shariah Advisory Council, as defined in paragraph 2.01 of the Guidelines on Issuance of Private Debt Securities and Sukuk to Retail Investors. Please see https://www.sc.com.my/wp-content/uploads/eng/html/resources/guidelines/bondmkt/guidelines_retailsPDS_sukuk_150615.pdf . Site accessed on 26 October 2017.

Such initiatives are timely in view of a study in 2012 which shows that 80.1% of Generation Y respondents believe that investing in the stock market is risky and 62.8% of Generation Y respondents do not prefer to invest in Bursa Malaysia.[41] The results of the analysis show that the top three factors Generation Y respondents consider before investing are the security of investments (68.7%) followed by the interest rate (61.2%), and low risk (53.5%).[42] Based on these results, it is apparent that Generation Y respondents place great importance on safe and risk free investments. Also, this study indicates that recommendations by remisiers and stockbroking firms are the factors least considered by the Generation Y respondents in this study, with the percentage for both standing at a mere 7%.[43]

In January 2015, retail participation in Malaysian shares was described as weak and lacking vibrancy among its Asian peers. In an article by The Edge Malaysia, statistics cited that institutional investors accounted for 74% of stock trades while retail investors carried out the remaining 26% of local share trades[44] consistent with the findings in the study referred to above. Bursa Malaysia's vibrancy in terms of the velocity of trading stood at 26.8% as compared to 51.5% for the Hong Kong Stock Exchange and 38.9% for the Singapore Stock Exchange.[45] As the CMP2 highlights, retail investor participation is critical to the success of the Malaysian capital market, especially in terms of market liquidity and smaller cap Main Market companies and listed corporations on the Access, Certainty and Efficiency (ACE) Market. Institutional investors are often confined to making investments in large cap corporations by virtue of their investing mandate. It is also noted that most small cap stocks have thin floats so the purchase of a significant number of shares in a small cap company could have a significant impact on the price of the shares, thus reducing the attractiveness of the investment.[46] Retail participation is therefore critical in ensuring the success of such smaller cap Main Market listed issuers and ACE Market listed corporations in seeking financing via the stock exchange, as well as in encouraging the growth of the overall capital market.

IV. CLASSIFICATION OF RETAIL INVESTORS IN THE MALAYSIAN CONTEXT

At present, the investor protection framework in Malaysia is prescribed in the CMSA which sets out the distinction between retail investors, sophisticated investors and institutional investors. The current framework was established pursuant to the SC's public consultation paper on the review of sophisticated investors and sales practices for capital market products issued in 2010. The SC recognised that a greater diversity of capital

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[41] Sangeetha Amirtha Ganesan, "*Consumption, Spending And Investment Behaviour Of Malaysia Generation Y*", May 2012, Master of Business Administration thesis, Universiti Tunku Abdul Rahman Faculty of Accountancy and Management, p. 47.

[42] *Ibid.*

[43] *Ibid.*

[44] Chong Jin Hun, 31 January 2015, "Bursa retail participation weak, lacks vibrancy". The Edge Weekly: http://www.theedgemarkets.com/article/bursa-retail-participation-weak-lacks-vibrancy. Site accessed on 5 June 2017.

[45] *Ibid.*

[46] Alicia J. Davis, "A Requiem for The Retail Investor?" *Virginia Law Review*, 2009, Vol. 95, pp.1105-29.

market products may be offered in Malaysia as a result of connectivity and integration of markets, some of which are complex investment products that should only be offered to sophisticated investors who have the financial means or knowledge to invest in such products.[47]

In doing so, the SC proposed certain qualifying criteria and classification of 'sophisticated investors' which culminated in the introduction of 'sophisticated investors' as fully set out in Part 1 of Schedules 6 and 7 of the CMSA. The term 'sophisticated investors' encompasses accredited investors, high net worth entities and high net worth individuals. The term 'accredited investors' covers a wide range of institutions and includes unit trust and retirement schemes, Bank Negara, Capital Markets Services License holders, Licensed banks, Islamic banks and insurance companies. 'High net worth entities' are defined as registered trust companies under the Trust Companies Act 1949 (Malaysia) Act 100, or public companies approved by the SC as trustees and which have assets under management exceeding RM10 million or its equivalent in foreign currencies as well as corporation or partnerships with total net assets exceeding RM10 million. 'High Net Worth Individuals' (HNWI) are those:

a) whose total net personal assets, or total net joint assets with his or her spouse, exceed RM 3 million or its equivalent in foreign currencies, excluding the value of the individual's primary residence;
b) who has a gross annual income exceeding RM300,000.00 or its equivalent in foreign currencies per annum in the preceding 12 months; or
c) who, jointly with his or her spouse, has a gross annual income exceeding RM400,000.00 or its equivalent in foreign currencies per annum in the preceding 12 months.

The SC has maintained these foundational definitions of investors in a public consultation paper issued in 2014 seeking feedback on the proposed regulatory framework for equity crowdfunding.[48] Section 5 of the consultation paper sets out the proposed threshold of investment amounts in relation to sophisticated investors and retail investors. Sophisticated investors are defined as comprising accredited investors, high-net worth entities and high-net worth individuals provided under Part 1 of Schedules 6 and 7 of the CMSA, indicating that the underlying principles in relation to investor classification have remained the same.

The classification of investors also takes effect in the context of sections 229 and 230 of the CMSA which provides for excluded offers or excluded invitations[49] of securities for

[47] Securities Commission Malaysia, "Review of Sophisticated Investors and Sales Practices for Capital Market Products", Public Consultation Paper No. 1/2010.

[48] Securities Commission Malaysia, "Proposed Regulatory Framework For Equity Crowdfunding", Public Consultation Paper No. 2/2014.

[49] Excluded offers and invitations are defined in section 229(1) of the CMSA as an offer for subscription or purchase of, or an invitation to subscribe for or purchase securities specified in Schedule 6 or the offer or invitation is made to a class of persons prescribed by order published in the Gazette. In this regard, the term 'securities' is defined in section 2(1) of the CMSA as – (a) debentures, stocks or bonds issued or proposed to be issued by any government; (b) shares in or debentures of, a body corporate or an unincorporated body; or (c) units in a unit trust scheme or prescribed investments, and includes any right, option or interest in respect thereof.

accredited investors, high net worth entities and high net worth individuals. An excluded offer or excluded invitation is one which does not require the issuance of a prospectus, but only requires an information memorandum to be issued and deposited with the SC seven days after it is issued. While an information memorandum is not subject to the same disclosure requirements as those set out in the SC Prospectus Guidelines, it is noted that an information memorandum is deemed to be a prospectus in respect of the liability of the person or his agent for any information that is false, misleading or which contains a material omission as per section 230(3) of the CMSA.

The classification of investors is also relevant in the context of unlisted capital market products in which a Product Highlights Sheet and Suitability Assessment are applicable to both retail investors and high net worth individuals. Paragraph 1.11 of the SC Guidelines on Sales Practices of Unlisted Capital Market Products defines 'retail investors' as excluding high net-worth individuals, high net-worth entities or accredited investors set out in Schedule 1 of the said Guidelines. The threshold for high-net worth individuals is the same as set out in the CMSA.

Further to the above, the SC has carved out a specific regime for the sale of unlisted capital market products comprising wholesale funds, corporate bonds, *sukuk* and structured products to sophisticated investors via the Lodge and Launch framework,[50] as set out in the SC Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework. This framework is targeted at reducing time to market by enabling such products to be launched once the required information is lodged with the SC via its online submission system which should result in a shortened time frame from the previous 14-21 days' approval time frame. The SC has also introduced Guidelines on Issuance of Private Debt Securities and *Sukuk* to Retail Investors which sets out specific requirements pertaining to the issuance of such products to retail investors, and which are to be read together with the SC Guidelines on Sales Practices of Unlisted Capital Market Products. This initiative reflects a liberalisation of the regulation of unlisted capital market products, and clarifies the distinction in regulatory treatment between sophisticated and retail investors with regard to unlisted capital market products, allowing for better access to suitable investment products for the relevant categories of investors.

Be that as it may, a question which arises is whether the current system of classification of investors is appropriate, and how it may be refined further to reflect modern securities regulation practice. At present, the complexity and nuance in characterising investors can be seen in the realm of equity crowdfunding. In the SC Guidelines on Recognised Markets which governs the equity crowdfunding sector, angel investors recognised by the Malaysian Business Angels Network (MBAN)[51] are allowed to invest on the equity crowdfunding platform up to a limit of RM5,000 per issuer and up to RM500,000 within a 12-month period.[52]

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[50] Securities Commission Malaysia, *"Lodge and Launch Framework"*: https://www.sc.com.my/legislation-guidelines/lodge-and-launch-framework/. Site accessed on 10 June 2017.

[51] The MBAN describes itself as the 'Official Trade Association And Governing Body for Angel Investors and Angel Clubs in Malaysia'. MBAN strives and aims to put forward the agenda of angel Investing in an all-inclusive manner for the benefit of members, the angel ecosystem and start-ups. See http://mban.com.my. Site accessed on 20 October 2017.

[52] Paragraph 12.26(b), *SC Guidelines on Recognised Markets,* SC-GL/6-2015 (R1-2016).

The MBAN defines angel investors as HNWI or High Income Earners (HIE) who invest their personal disposable income in start-ups or early stage businesses, usually in exchange for equity.[53] While HNWI are defined as those who have total wealth or net personal assets of RM3 million and above or its equivalent in foreign currencies and is similar to the definition set out in the CMSA, HIE are defined as those with a gross annual income of not less than RM180,000 in the preceding period of 12 months; or jointly with his or her spouse, with gross annual income of RM250,000 in the preceding period of 12 months,[54] which is lower than the RM400,000 threshold prescribed in the CMSA for a similar group of investors. As such, the HIE forms a category of investors which does not fall within the threshold of sophisticated investors as stipulated in the CMSA, but are deemed able to tolerate higher risks compared to retail investors who are only allowed to invest up to a maximum of RM5,000 per issuer with a total amount of not more than RM50,000 within a 12-month period.[55]

Based on the foregoing, the SC has decided that on the basis of the recognition provided by MBAN, the risk profiles of angel investors allow them to invest larger amounts than retail investors. This approach suggests that the decision-making authority with regard to investment limits does not need to be confined to securities regulators but may draw upon input from relevant industry bodies. Such recognition paves the way for further collaboration between the SC and industry in the creation and implementation of a well-calibrated retail investor protection framework which facilitates participation in new investment markets and is founded on practical realities.

It is noted that the current classification of investors in Malaysia is based on a household-wealth based model which applies bright line criteria to distinguish between categories of investors, allowing for clear identification. Nevertheless, it is submitted that investment appetite, patterns and understanding should be incorporated as they are essential in developing effective regulatory models.[56] Such information would entail a more detailed analysis of the profiles of investors to create a more refined and targeted classification system. In this regard, the time is ripe for a review of the investor classification system to consider factors such as the exclusion retirement assets so as to ensure that investors do not jeopardise their savings for the future as well as alternative criteria such as the educational level and business experience of investors in investor classification.[57] The classification of investors may also help to shed light on suitable investor education programmes for these investors, a point which is developed in this paper.

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53 Malaysian Business Angels Network, *"Investors"*: http://mban.com.my/investors/. Site accessed on 15 August 2017.

54 Malaysian Business Angels Network, *"Angel Application Explanatory Notes"*:http://mban.com.my/wp-content/uploads/2017/04/Angel-Application_Explanatory-Notes.pdf. Site accessed on 15 August 2017.

55 Paragraph 12.26(c), *SC Guidelines on Recognised Markets,* SC-GL/6-2015 (R1-2016).

56 *Supra* n 21 at pp 169-193. See also R. Deaves, C. Dine and W. Horton, How Are Investment Decisions Made, Research Report Prepared for the Task Force to Modernize Securities Legislation in Canada. Evolving Investor Protection (2006).

57 United States Securities and Exchange Commission, 18 December 2015, "*Report on the Review of the Definition of "Accredited Investor*": https://www.sec.gov/files/review-definition-of-accredited-investor-12-18-2015.pdf. Site accessed on 20 August 2017.

V. DISCLOSURE BASED REGULATION AND INVESTOR EDUCATION IN MALAYSIAN SECURITIES MARKET REGULATION

A. *Disclosure Based Regulation –A Panacea for all Ills?*

Since 1996, the SC has shifted from merit-based regulation to disclosure-based regulation in order for the Malaysian capital market to become more efficient and to develop into a sound and credible market of international standing.[58] The SC expressed its role in terms of ensuring that the incentives and structures of the market are consistent with efficiency, fairness and stability, and that the shift to disclosure-based regulation would increase the efficiency of the market overall, inculcate higher standards of disclosure, due diligence and corporate governance and accountability among promoters, directors of public companies, advisers and company investors as well as facilitate market discipline on the pricing and valuation of securities.[59]

The SC has built on these earlier statements by emphasising 'investor empowerment' which results from the fair treatment of investors, investors being proactive, and investor literacy.[60] While product issuers and distributors are required to consider investors' interests throughout the lifecycle of the product, this does not relieve investors of the responsibility for their own investment decisions and informed assumption of risk.[61] Empowerment of investors requires investors to be proactive and understand their rights, obligations and risks of their investments during the tenure of such investments. They are also required to seek professional advice where needed.

Undoubtedly, disclosure-based regulation has many attractions in that it allows policymakers to avoid heavy-handed regulation while still giving the appearance of doing something to protect investors.[62] The growth in disclosure runs parallel to a trend wherein regulatory agencies seldom subtract from disclosure requirements, but tend to add on more information to be disclosed to investors in the belief that more disclosure assists investors in making better investment decisions.[63] Disclosure-based regulation is above all an expression of trust in market-based regulatory mechanisms to ensure that investors are protected.

Nevertheless, a key shortcoming of disclosure-based regulation relates to the issue of information overload on the part of investors as disclosures become more complex[64] and voluminous, thus prompting the question as to whether investors are able to appreciate

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58 Securities Commission Malaysia, 1996, *"Disclosure-based Regulation - What Directors Need to Know"*: https://www.sc.com.my/wp-content/uploads/eng/html/resources/inhouse/dbrbi.pdf. Site accessed on 12 June 2017.

59 *Ibid.*

60 Securities Commission Malaysia, 2015, *"Securities Commission Malaysia Regulatory Philosophy*: https://www.sc.com.my/about-us/sc-regulatory-philosophy/. Site accessed on 12 June 2017.

61 *Ibid.*

62 Susanna Kim Ripken, "Paternalism and Securities Regulation", *Stanford Journal of Law, Business & Finance*, 2015, Vol. 21, p. 45.

63 *Ibid.*

64 Steven L. Schwarcz, "Disclosure's Failure in the Subprime Mortgage Crisis", *Utah Law Review*, 2008, p.1109; Steven L. Schwarcz, Rethinking the Disclosure Paradigm in a World of Complexity, *University of Illinois Law*

and apply the information which has been disclosed to them effectively. As securities laws require disclosure of more information, documents such as prospectuses become packed with mind-bogglingly complicated details, which may lead to investors ignoring the data or choosing to read only parts of it, thereby defeating the very purpose of disclosure documents.[65] Investors may also regard disclosure as fine print or disclaimers by lawyers to protect issuers from liability,[66] and this again results in important information being overlooked.

Arguably, even if disclosures were able to be simplified, the issue of cognitive and behavioural biases that prevent the accurate processing of disclosed information and risk would still arise.[67] Both retail and institutional investors are subject to cognitive biases, and behavioural finance studies have established that these biases do affect their ability to make rational decisions in respect of investing.[68] Disclosure encounters its greatest hurdle in the form of the bounded rationality of humans, as the deeply ingrained irrational tendencies prevent investors from utilising the disclosures by issuers and intermediaries to make sound investment decisions.[69] Unless there is a drastic shift in the rationality of human beings, such ingrained limitations will affect the overall effectiveness of disclosure-based regulation.

B. Whither Investor Education?

Investor education is part of the SC's CMP2 growth strategies. To this end, the SC has incorporated a separate learning and development arm, the Securities Industry Development Corporation which spearheads the learning and development of training programmes for the participants of the capital market ecosystem in Malaysia.[70] With regard to investor education initiatives, the SC reached out to the Malaysian public via its 'SC in the Community' roadshows, seminars and training programmes. In 2014, the SC and industry collaborated on a comprehensive investment literacy outreach campaign 'InvestSmart' under the SC's Investor Empowerment initiative to enable more confident and informed retail participation in the capital market. As a means of increasing financial literacy and investor education, Bursa Malaysia set up the Bursa Marketplace, a virtual marketplace providing investor education, real time pricing information and market insights targeted at the younger generation. Bursa Malaysia has also launched Bursa

Review, 2004, p.1 and Henry T.C. Hu, "Too Complex To Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm", *Texas Law Review*, 2012, Vol. 90, p. 1601.

65 Susanna Kim Ripken, "The Dangers and Drawbacks of the Disclosure Antidote: Toward A More Substantive Approach to Securities Regulation", *Baylor Law Review*, Vol. 58, pp.139, pp.149-56.

66 *Supra* n 61, at pp. 186-187.

67 Elaine. A. Welle, "Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement", *Washington & Lee Law Review*, 1999, Vol. 56, pp. 519, 583.

68 See Lai Ming Ming, Tan Siow-Hooi, Chong Lee Lee, "The Behavior of Institutional and Retail Investors in Bursa Malaysia during the Bulls and Bears", *Journal of Behavioral Finance*, 2013, Vol. 14, Iss. 2.

69 *Supra* n 61, at p. 48.

70 Securities Industry Development Corporation, *"Company Profile"*, http://www.sidc.com.my/about-sidc/company-profile. Site accessed on 15 June 2017.

'Celeb.Tradr', a portal designed to attract retail investors, especially millennials, to invest in the equities market.[71]

The SC conducted a Retail Investors Profile Survey in 2014 among the general public aged 18 years and above to gauge investor understanding and sentiment towards the Malaysian capital market, and the SC has stated its intention to use the information gathered therein to develop and implement investor education strategies and programmes as well as the overall development of the capital market. This bodes well for the possible incorporation of behavioural finance insights into the data gathered from the survey to further refine and develop the regulatory framework and educational programmes pertaining to retail investor protection.

Nevertheless, the effectiveness of investor education is constrained by its focus on the long-term and arguably, can play only a supporting role in protecting investors[72] as compared to disclosure-based regulation. In the short and medium terms, the key protection given to investors rests on disclosure-based regulation and without the necessary knowledge, retail investors are ill-placed to be able to utilise and make sense of the disclosures made by issuers and intermediaries. Compounding the effectiveness of relying on investor education is the sheer width and breadth of the type of information which investors are required to master to be proficient in financial matters. Some of these topics include the evaluation of investment return and risks, the principle of diversification, investing techniques such as technical and fundamental analysis, financial fraud and how to invest in *Shariah* compliant securities. It may not be realistic to expect investors to be able to completely master such topics to make optimal investment decisions in the short or medium term, which would then mean that in the interim between achieving a reasonable level of investor education, retail investors would need to rely on disclosure-based regulation.

VI. REGULATORY PATERNALISM

In view of the limits and constraints on market-based mechanisms i.e. mandatory disclosure and investor education as regulatory tools for protecting retail investors, it is submitted that in certain conditions and circumstances, regulatory paternalism is a justifiable response, despite its association with protectionist policies, substantive rules and merit regulation.

Paternalism as a concept is difficult to define. At its core, paternalism is the idea that a paternalistic act interferes with a person's freedom in order to further his or her own good.[73] Such interference is premised on promoting the person's interests and welfare and to prevent the person from suffering harm – the paternalistic act is intended to make

71 Bursa Malaysia, *"Bursa Mktplc"*, http://www.bursamarketplace.com/index.php. Site accessed on 15 June 2017.

72 ECON Committee, Workshop on Consumer Protection, (February 2009, PE 416.213), Briefing Notes.

73 Simon Clarke, "Prinicples of Paternalism", *Journal of Applied Ethics & Philosophy*, 2009, Vol 30, p.30 ("Paternalism is the restriction of an individual's freedom for his or her own good"); Katie Grill, "The Normative Core of Paternalism", Res Publica, 2007, Vol. 13, p. 441; Douglas Husak, *Penal Paternalism" in "Paternalism: Theory and Practice*, Eds. Christian Coons & Michael Weber, 2nd Ed., Cambridge University Press, 2013, pp.39-41.

individuals 'better off' than if they were left to make their decisions themselves.[74] Certain scholarly views hold that where the motive for the infringement is to prevent harm to other third parties, or to benefit the one imposing the restriction, then it is not truly paternalistic.

Beyond the motivation, a paternalistic act is manifested through a deliberate interference with a person's liberty to choose or act as the person wishes.[75] The restriction of an individual's freedom to do what he or she wants to do forms the pith and substance of the objection against paternalism; there is a violation of the person's autonomy due to usurpation of his or her decision-making authority.[76] Nevertheless, there are divergent opinions on whether an act is paternalistic if it does not restrain an individual's freedom or coerce him or her in some way, or whether paternalism occurs in the absence of an interference with a person's liberty of action and absence of coercion.[77]

There is value in ensuring that investors retain autonomy and independence over their investments and the consequences of such investments, and the principle of private autonomy is recognised as a fundamental principle of any liberal civil society.[78] However, there is equal value in having some measure of paternalistic protection in light of the vulnerability of investors to financial harm and the damaging effects on the market and society when numerous investors err in the aggregate.[79] The impact of poor investment decisions made collectively takes on a greater scale when one considers that the capital market is increasingly becoming a more significant part of the life and welfare of Malaysians.[80] In view of the duty of the securities regulator to maintain trust and confidence in the capital markets, paternalism also plays a role in maintaining investor confidence.[81]

A factor which may be considered by policymakers is the potential complexity and risk of securities transactions, in which investment products which are unduly complex or risky may be prohibited for sale to retail investors. Essentially, reliance is placed on regulating the conduct of issuers directly, rather than leaving it to disclosure requirements or education strategies to help investors protect themselves.[82]

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74 Bill New, "Paternalism and Public Policy", *Economics & Philosophy*, 1999, Vol. 15, pp. 63-66.

75 Paul Burrows, "Analyzing Legal Paternalism", *International Review of Law & Economics,* 1995, Vol. 15, pp. 489, 491; Daniel M. Hausman & Brynn Welch, "Debate: To Nudge or Not to Nudge", *Journal of Political Philosophy*, 2010, Vol. 18, pp. 123-127.

76 David Crossley, "Paternalism and Corporate Responsibility", *Journal of Business Ethics*, 1999, Vol. 21, pp. 291-297.

77 *Supra* n 61.

78 Recital 30 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145/1.

79 *Supra* n 61.

80 Securities Commission Malaysia, *"Malaysian Capital Malaysian Capital Market Grew to RM 2.84 trillion in 2016 amidst Global Uncertainties"*, https://www.sc.com.my/post_archive/malaysian-capital-market-grew-to-rm-2-84-trillion-in-2016-amidst-global-uncertainties/. Site accessed on 16 June 2017.

81 Peter H. Huang, "How Do Securities Laws Influence Affect, Happiness & Trust?", *Journal of Business & Technology Laws* 2008, Vol. 3, p.297.

82 *Supra* n 61.

Nevertheless, paternalism should not be used as a blunt tool across the board in the regulation of capital markets. A cost benefit analysis weighing the cost of paternalistic intervention against the potential benefits from the intervention should be carried out. The principle of proportionality set out on page 8 of the SC Regulatory Philosophy states that the degree to which the SC regulates markets, products, services and activities should commensurate with the risks they pose, standards of conduct practiced and the outcomes sought to be achieved. In this regard, such an approach is consistent with the cost-benefit analysis to be undertaken in the context of paternalistic interventions: the costs to individuals and their families if they make poor financial choices, the costs to society and the wider economy in the wake of aggregated poor investment decisions and the costs of trying to teach people how to make prudent choices on their own versus the countervailing costs of paternalistically infringing on individuals' immediate freedom to make their own choices, the costs to people who do not need and will not benefit from paternalistic intervention, and the costs of administering and enforcing paternalistic laws.[83]

Apart from the mathematical calculation and comparison of costs and benefits, Ripken makes an argument for considering the larger moral and philosophical implications of shaping laws that direct the choices of other people which cannot be addressed by cost-benefit analysis alone, and which requires sound moral judgment, genuine concern, and a good measure of humility.[84] "The truth of the matter is that what we need when we make [paternalistic] decisions affecting the well-being of other people is intuition about their needs and an attitude of respect for their autonomy."[85]

An alternative conception of paternalism is that of 'libertarian paternalism' which was introduced by Thaler and Sunstein, and seeks to find a middle ground between the reaches of the traditional conception of paternalism and market-driven mechanisms whereby investors are protected while still preserving individual freedom of choice.[86] The key concept underscoring libertarian paternalism is that of 'choice architecture' i.e. the structuring of choices which individuals face. This concept is founded on the belief that a regulator can never be fully objective as regardless of how a choice is structured, it would nudge decision-making in some way.[87] Thaler and Sunstein then go on to describe a nudge as 'any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates.[88]

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83 *Ibid.* at p. 54. Ripken highlights the difficulty in quantifying some of these variables and the risk in incorrectly assessing the costs or benefits and the possibility of undue influence from certain groups to measure the costs and benefits in distorted ways. Nevertheless, she states that risk exists in all forms of proposed regulation, whether paternalistic or not, and 'we must do our best to promote an honest analysis in spite of the constraints of our system of law-making.'

84 *Ibid at* p.55.

85 Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power", *Maryland Law Review*, 1982, Vol. 41, p.64.

86 Richard H. Thaler & Cass R. Sunstein, *Nudge*, Yale University Press, New Haven & London, 2008.

87 Chye Shu Yi, "Should Beta Consumers Have Alpha Protection?", Working Paper, Centre for Banking & Finance Law, Faculty of Law, National University of Singapore, 2014, p. 17.

88 *Ibid* at p.6.

The distinct advantage that libertarian paternalism has over traditional views of paternalism is that it allows for the element of freedom of choice and autonomy on the part of investors, as the ultimate decision-making power still remains with the investor. But the overzealous implementation of libertarian paternalism that nudges the regulatory design of the securities market may ultimately chip away at the freedom of choice and autonomy given to investors, which brings regulators back to square one in addressing the concerns arising from adopting a paternalistic approach.

It must be stated that adopting a paternalistic approach does not mean the rejection of disclosure and investor education, but an acknowledgement of the weaknesses of both in which paternalism may provide protection to investors. The considerations for paternalism are not a call to return to merit based regulation in its previous incarnation. Indeed, the Malaysian securities regulators currently practise a form of paternalism in the Malaysian securities market by excluding retail investors from the newly launched LEAP Market, a qualified market for small and medium-sized enterprises to raise funds, in view of the higher investment risk associated with such investments.[89] Other potential areas in which regulatory paternalism may feature is in setting investment limits for certain capital market products and recognised markets as well as substantive conduct rules for issuers and intermediaries, which would help mitigate the shortcomings in disclosure-based regulation.

VII. CONCLUSION

It is undeniable that the role of the securities regulator is challenging, a constant walk on the taut tightrope between unrestrained innovation and over-regulation,[90] dealing with the inherent human limitations of greed, ignorance and bounded rationality. This is particularly true in the context of the creating of a coherent retail investor protection policy and framework given the divergences in the types of investors, and broader philosophical questions about whether securities regulators should employ paternalistic approaches and how they should be utilised. To this end, it is critical that more research and consideration be given to the categorisation of investors to ensure that the definition, thresholds and calculations take into account market realities and international trends as well as allow investors who are able and prepared to enjoy more diverse investment opportunities while those who are vulnerable are protected from risks they can ill-afford. It is also important that the limitations of disclosure and investor education be acknowledged so as to develop strategies to overcome these limitations. Regulatory paternalism may not be the first option of choice, but it is strongly submitted that this option should not be rejected out of hand either.

In view of the current trend of disruptive fintech advancements alongside the rise of the empowered investor and the espoused priority of attracting more retail participation

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[89] Paragraph 2.24 of the *LEAP Market Listing Requirements*. Also see Tee Lin Say, 19 June 2017, *"Bursa's new platform for small firms to seek listing"*: http://www.thestar.com.my/business/business-news/2017/06/19/a-leap-for-smes/. Site accessed on 20 June 2017.

[90] IOSCO, 2011, *Mitigating Systemic Risk – A Role for Securities Regulators* (2011): http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf. Site accessed on 4 June 2017.

in the capital markets, it is crucial that the local securities regulators consider carefully the policymaking tools at their disposal, the relative pros and cons of each approach and the philosophy underscoring these approaches in seeking to protect the most vulnerable of their stakeholders - the retail investor.

Limitations of Social Security Laws and Policies *Vis-A-Vis* Migrant Workers in Malaysia

Noor Shuhadawati Mohamad Amin,* Norjihan Abdul Aziz,**
and Zuraini Ab Hamid***

Abstract

On the basis of the standards established by the international legal regimes and the principle of equality of treatment which is enshrined in the Federal Constitution, it is argued that the social security laws enforced in Malaysia are discriminatory vis-a-vis migrant workers. This is because the country has two different laws governing national workers and migrant workers in the case of employment injury. Under these laws, the benefits provided to migrant workers are inadequate and inequitable because they are inferior to the benefits offered to national workers. Furthermore, the invalidity benefit which is received by national workers is not made available to migrant workers. The old-age benefit introduced by the national provident fund is unfair to migrant workers because their contribution is not made compulsory and their employer's contribution is very low as compared to the benefit enjoyed by national workers. Additionally, the portability of the social security rights from Malaysia to migrant workers' home country fail to be enforced due to lack of coordination through bilateral and multilateral agreements between countries. Hence, this research seeks to analyse the employment injury schemes under the Employees' Social Security Act 1969 (ESSA) available to national workers and workmen compensation scheme under the Workmen's Compensation Act 1952 (WCA) available to migrant workers. Further, this research also attempts to investigate the savings for retirement age provisions under the Employees' Provident Fund Act 1991 (EPFA) specifically for migrant workers and other policy issues such as portability of social security rights and overlapping of ministerial responsibilities. These shortcomings make a strong case for extending social security rights to migrant workers in Malaysia on the basis of equality.

Keywords: Social security, limitations, migrant workers

* Corresponding Author, Civil Law Department, Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia, Malaysia, shuhadaamin@iium.edu.my. This research was financially supported by the Research Initiative Grant Scheme of Malaysia (Grant No. RIGS16-020-0184).

** Legal Practice Department, Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia, Malaysia, norjihanabaziz@iium.edu.my.

*** Legal Practice Department, Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia, Malaysia, zurainihamid@iium.edu.my.