

2011

Reflections on the Securities Law of Jordan

Bashar H. Malkawi

Haitham A. Haloush

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [Banking and Finance Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Malkawi, Bashar H. and Haitham A. Haloush. "Reflections on the Securities Law of Jordan." American University International Law Review 23, no.4 (2007): 763-805.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

REFLECTIONS ON THE SECURITIES LAW OF JORDAN

BASHAR H. MALKAWI^{*} & HAITHAM A. HALOUSH^{**}

INTRODUCTION	763
I. HISTORICAL BACKGROUND ON THE JORDANIAN SECURITIES MARKET	766
II. THE MAIN FEATURES OF THE SECURITIES LAW OF 2002	768
A. SCOPE OF THE SECURITIES LAW	768
B. THE KEY INSTITUTIONS OPERATING IN THE SECURITIES MARKET	771
1. <i>Jordan Securities Commission</i>	772
2. <i>Amman Stock Exchange</i>	774
3. <i>The Securities Depository Center</i>	777
C. DISCLOSURE	779
D. SECURITIES MARKET PROFESSIONALS	786
E. MUTUAL FUNDS AND INVESTMENT COMPANIES	788
F. VIOLATIONS AND SANCTIONS	795
1. <i>Insider Trading and Market Manipulation</i>	798
CONCLUSION	802

INTRODUCTION

Securities markets are a means of raising capital. The better they perform, the more likely savors will be to supply capital, thereby

^{*} Bashar H. Malkawi, Assistant Professor of Law at the Hashemite University, Jordan. The author holds an LL.B, Yarmouk University in 1999; LL.M, University of Arizona College of Law in 2001; S.J.D, American University, Washington D.C in 2005.

^{**} Haitham A. Haloush, Assistant Professor of Commercial Law at the Hashemite University, Jordan. He holds a Ph.D. in Commercial Law from Leeds University, England, College of Law, and an L.L.M. from Aberdeen University, Scotland, College of Law.

reducing the costs of capital to industry, which will also be motivated to seek capital from the public.¹ Securities markets also represent an avenue for investment promotion. Securities could provide higher return to investors than other financial assets, which encourages financial saving, channels it into productive investment, and promotes growth. Securities trading, thus, contributes to the “liquidity” and “efficiency” of the market.² Moreover, securities markets provide business financing without the drawbacks of borrowing.³ These benefits make the introduction of an efficient securities market vital to the success of the economy.⁴

1. Other capital-raising techniques include commercial loans and direct investments. See Dipak Dasgupta & Dilip Ratha, *What Factors Appear to Drive Private Capital Flows to Developing Countries? And How Does Official Lending Respond* 1-2 (The World Bank, Pol’y Research Working Paper No. 2392, 2000). The securities literature often assumes that stock trades are mutually beneficial. From the Jordanian perspective, direct investment may be perceived by the general population as a “Western takeover.”

2. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 112 (R.H. Campbell & A.S. Skinner eds., 1976) (1776). A basic principle of economics is that voluntary exchange is efficient because it helps move resources to those who value them most highly, as measured by willingness to pay. *Id.* The classic statement of this proposition is, of course, Adam Smith’s discussion of the “invisible hand.” *Id.*

3. See generally Jonathan R. Macey & Geoffrey P. Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan, and the United States*, 48 STAN. L. REV. 73, 96 (1995) (“While placing banks in positions of exceptional power over their borrowers may be optimal for banks, but it may not be optimal for the rest of society.”). Direct lending by commercial banks, as the only means of capital raising, gives the banks a dominant position in the corporate governance system. *Id.* at 81. Germany and Japan are examples of such a system. See *id.* at 81-83, 87 (contrasting the Japanese system of bank oversight with the U.S. system of market corporate control). The banks may use their dominant power over corporate governance to prevent companies from undertaking risky projects. See *id.* at 95-96 (explaining that banks avoid risk, in part, due to their highly leveraged capital structure).

4. But see Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation*, 81 VA. L. REV. 611, 615 n.10 (1995) (recollecting that John Maynard Keynes equated stock markets to casinos, and opined that “society might be significantly better off with less stock trading”). Other contemporary scholars agree with Keynes’ proposition, arguing that the social costs of stock markets outweigh the benefits. *Id.* They charge that stock trading leads to a waste of resources because short-term speculation is socially destructive. *Id.* at 620. Despite the criticism directed toward the securities market, there is general enthusiasm for deregulation and unfettered competition, and many scholars admire the efficiency of financial markets. *Id.* at 620-21.

Efficient securities markets are especially instrumental to the sale of state-owned enterprises in the Middle East.⁵ They can facilitate the valuation of these enterprises through objective, comparable valuation measures and generate public support for privatization because they serve as a forum for the transfer of companies into the hands of investors. Based on the perceived benefits of a securities market worldwide and in the Middle East, in particular, Jordan's dilemma is not whether it should have a securities market; rather, the dilemma is how Jordan should regulate securities trading and to what extent regulation will successfully jumpstart a viable securities market.

Numerous issues are involved in the creation of a securities market.⁶ However, this Article will focus specifically on securities law. Accordingly, the Article will give a brief account of the history of securities regulation in Jordan. It will then analyze the statutory provisions of the current securities law and explore the key issues in greater depth. The Article compares Jordanian securities law with U.S. and other foreign laws where appropriate.⁷ Finally, the Article concludes by arguing that Jordanian securities law is far from complete and suggesting ways in which Jordanian can improve its securities market.

5. See John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 427-28, 444-47 (2005) (observing that Jordan is pressing forward with economic reforms, including privatization programs and investment reforms to liberalize trade).

6. See *Committee Presents Report to King Abdullah Proposing Changes Needed to Jordan's Financial Market*, JORDAN TIMES, Oct. 30, 2000. To set up a securities market, King Abdullah's special committee identified several necessary elements including the following: (1) promoting the establishment of savings institutions, such as insurance companies and the Social Security Corporation; (2) clarifying the role of government agencies, such as the Ministry of Industry and Trade and the Jordan Securities Commission; (3) eliminating barriers in banking laws; (4) reforming company law; (5) reforming tax laws; and (6) restructuring the judiciary.

7. See *Jordan Securities Commission Draws on US' SEC Expertise*, JORDAN TIMES, Apr. 5, 2004 (asserting that Jordanian officials have received assistance from the U.S. Securities and Exchange Commission, which is viewed as "the world's renowned leader in securities regulation and oversight"). The SEC's 70 years of experience makes it "uniquely qualified" to assist Jordan in developing its securities regulation regime. *Id.*

I. HISTORICAL BACKGROUND ON THE JORDANIAN SECURITIES MARKET

Despite the absence of a specific legal structure to govern it, Jordan developed a primitive system of trading in securities well before the creation of a formalized securities market. In the 1930s, the Jordanian public already transacted shares of public companies.⁸ The first corporate bonds were issued in the early 1960s. The market of shares and bonds had an enormous impact on the Jordanian capital markets; it created, for the first time, the nucleus of a securities industry.

The unorganized nature of trading in securities prompted the Jordanian government to contemplate the idea of setting up a formal market to regulate the issuance of securities in a manner that would ensure “safe, speedy and easy trading, and protect small savors through a mechanism that would define a fair price based on supply and demand.”⁹ Therefore, the government proposed economic plans establishing an organized securities market and businesses within Jordan commenced preparation of the market.¹⁰ In the 1970s, studies conducted by the Central Bank and the World Bank’s International Finance Corporation (“IFC”) concluded that “the size of the national economy and the share of the private sector in it through public shareholding companies and its broad investor base” made the creation of a formalized securities market necessary. The Jordanian government and businesses believed that such a market would facilitate economic growth and stimulate economic activity.

8. See Official Website of Amman Stock Exchange, Establishment of the Amman Financial Market, http://www.ase.com.jo/pages.php?menu_id=151&local_type=0&local_id=0&local_details=0#1 (noting that the first publicly held companies to be established in Jordan were the Arab Bank in 1930, Jordan Tobacco and Cigarettes in 1931, Jordan Electric Power in 1938, and Jordan Cement Factories in 1951).

9. *Id.* Prior to the creation of a formal securities market, the legal system in Jordan was not well suited for a developing capital market. Primary offerings were under-regulated and the government had not enacted legal provisions covering anti-competitive behavior such as insider trading, market manipulation, or deceptive marketing. Furthermore, there was no regulatory scheme for market intermediaries and no professional or regulatory oversight of meaningful, continuing disclosure to investors.

10. *Id.*

After a tortuous drafting process, the government in 1976 enacted Temporary Law No. 31, which created the Amman Financial Market ("AFM").¹¹ Soon after, in 1977, the Jordanian cabinet established an AFM Administration Committee, which began work almost immediately. From its inception, "AFM was entrusted with a dual task, namely the role of a securities and exchange commission and the role of a traditional stock exchange."¹²

The modernization of the legal rules governing the capital market is key to economic development. Therefore, in 2002, Jordan enacted its Securities Law, ushering in a new era of capital market regulation.¹³ During the past five years, the stock exchange in Jordan has been the site of fervent activity. Shares of 229 companies are actively being traded.¹⁴ The total market capitalization is \$32.9 billion and the market Price/ Earnings Ratio (P/E Ratio) is 19.8. This amount of capitalization qualified Jordan as one of the largest securities market in the Middle East region.¹⁵ The securities market in Jordan is, to some extent, internationalized.¹⁶ This internationalization has increased the availability of funds from foreign investors. The Jordan securities market's journey of unprecedented development merits an examination of the Securities Law.

11. *Id.*

12. *Id.*

13. Securities Law for the Year 2002, art. 1 (Jordan), available at <http://www.jsc.gov.jo/SecuritiesLaw.asp>.

14. This figure was reached by looking to the Amman Stock Exchange provided in the July 2007 edition of the *Banks in Jordan* magazine.

15. See United International Press, Jordan: Foreign Investment Reaches Record Levels, Jan. 20, 2008, http://www.unitedinternationalpress.com/Jordan2/jor_f.html (quoting the CEO of the ASE as stating that "among the regional stock markets, Jordan has the largest market capitalization as percent of GDP").

16. Sales of outstanding issues to non-Jordanians grew to 1.2936 billion Jordanian dinars in 2007, and purchases of outstanding issues from non-Jordanians grew to 787.4 million Jordanian Dinar in 2007. See generally Official Website of Amman Stock Exchange, Foreign Investment: Foreign Investment Activity (January 2006-January 2008), <http://www.ase.com.jo>. Several reasons could explain this trend in the Jordanian market. For instance, advances in communications technology in the processing of transactions facilitated the trading of securities and the settlement of transactions. Deregulation in areas, such as foreign exchange controls and reduced restrictions on participation by investors in the Jordanian securities market, also served to facilitate the internationalization.

II. THE MAIN FEATURES OF THE SECURITIES LAW OF 2002

It should be noted from the outset that securities regulation in Jordan is different from the traditional regulatory model existing in developed countries. While securities regulation in the United States and the United Kingdom primarily responds to changing conditions in existing markets,¹⁷ Jordanian regulation is designed to assist in building and developing the market. Therefore, it should anticipate, rather than respond to, market needs.

The Jordanian Securities Law of 2002 lies in 124 articles divided into twelve chapters. Furthermore, the government has promulgated several regulations to implement the law.¹⁸ The Securities Law and implementing regulations establish an independent market regulator, govern the licensing of brokers, mandate public disclosure from issuers, and regulate other aspects of securities trading. This Section will analyze the main features of the Securities Law.

A. SCOPE OF THE SECURITIES LAW

A complete understanding of any statutory scheme requires attention to definitions of operative terms. The most important terms are “security” and, to a lesser extent, “offer.”

As is clear from its title, the Securities Law regulates transactions in securities. Securities enjoy several characteristics: Securities, unlike goods, are created rather than produced; they have no intrinsic value and are merely chosen in action, namely, legally enforceable

17. See John H. Walsh, *A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry*, 29 HOFSTRA L. REV. 1015, 1019 (2001) (discussing how misconduct on the part of bankers and businesses caused the stock market crash precipitating the Great Depression, and how the U.S. government developed securities laws resulting in the wake of the crash); see also Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WIS. INT'L L.J. 367, 382-85 (2005) (describing the reforms to securities laws that the U.S. government enacted in the wake of the Enron scandal).

18. Legislation is customarily written to provide the general framework. Regulations are enacted to implement statutes and basic law, and to add some detail to many of the matters left outstanding by the legislation. Regulations cannot change, add, or amend the provisions of the legislation. The drafting of implementing regulations is done either pursuant to an entrustment clause in an enacting law or by an issuing department.

rights or interests in something else—they convey upon their holders an interest either as owners or creditors of the issuer.¹⁹

Whether an instrument is a security is often the threshold issue in determining whether or not the Securities Law applies. The law defines the term “security” by first enumerating a list of specific types of instruments that are, *per se*, considered securities.²⁰ For example, securities include stocks, bonds, other debt instruments issued by the government or public institutions, and investment units issued by investment funds. The list ends in a “catchall” phrase, which empowers the regulatory body to expand on the definition as it sees fit.²¹ The statute includes a second step: a short list of exempted instruments that fall outside the category of securities and which are not regulated by the Jordan Securities Commission (“JSC”).²² The list includes commercial papers, documentary credits, money transfers, instruments exclusively traded among banks, and insurance policies.²³

As noted above, the Securities Law of 2002 adopts a traditional approach by defining the term “security” and then broadly empowers the JSC to expand this definition through its rulemaking power. The list approach is flexible as it allows the administrative body to adapt to changes and innovations in the market. For example, the JSC could bring investment contracts within the coverage of the Securities Law. The strength of the laundry list approach adopted in the Jordanian Securities Law is that it removes the question of what a security is from the courts and legislature, and places it in the hands of the administrative body governing the securities market. Thus, the Securities Law of 2002 does not utilize a judicially evolving definition of “security,” as is the case in the United States.²⁴ The

19. See Securities Law for the Year 2002, art. 114 (noting the privileges enjoyed by securities, including the “finality and conclusiveness of securities trades in stock exchanges”).

20. *Id.* art. 3(B).

21. *Id.* art. 3(B)(9) (including, in the definition of securities, any right to acquire any of the other types of securities mentioned in the list, subject to approval by the Board of the Securities Commission).

22. *Id.* art. 4.

23. *Id.* art. 4.

24. See 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 64-69 (5th ed. 2005) (explaining that courts have used various tests for determining whether a security exists because of the very broad definition of security in the

Jordanian judicial system lacks the capacity to deal with complex financial matters.²⁵ Therefore, the JSC's administration of the law through a rulemaking process creates the best shot of creating a functional system. Investors seeking to enter the Jordanian securities market can enjoy certainty as to which instruments and transactions the law regulates.

An offer is defined in the Securities Law as any communication that has the effect of selling a security or offering it for sale.²⁶ This definition excludes preliminary negotiations among underwriters. Rather than attempt to define the exact situations where an offer does or does not occur, the Securities Law uses an effect-based definition that covers all situations where the communication has the effect of offering to sell a security. This expansive definition eschews the intent-based formula of U.S. securities law in favor of an objective standard.²⁷ The JSC will play a vital role in determining whether there has been an offer or not.

Issuers do not have to conduct offerings of securities by themselves. Underwriting professionals, such as investment bankers, can be involved in the issuance process. According to the Securities Law, an underwriter is a person who administers the "issuance and

U.S. securities law). Courts have found a range of items to be "securities," including scotch whiskey, self-improvement courses, cosmetics, pooled litigated funds, and fruit trees. *Id.*

25. See generally ADEL OMAR SHERIF & NATHAN J. BROWN, JUDICIAL INDEPENDENCE IN THE ARAB WORLD, U.N. DEVELOPMENT PROGRAM, PROGRAMME ON GOVERNANCE IN THE ARAB REGION (2003), available at <http://www.pogar.org/publications/judiciary/sherif/jud-independence.pdf> (pointing out that judicial independence is important for the "development of healthy and sound economies" and noting that most Arab countries do not yet have judiciaries that are free from the influence of the executive branch).

26. See Securities Law for the Year 2002, art. 2 (defining a public offer as "any bid for the sale of any security to more than 30 persons of the public").

27. See J. Colin Sullivan, Note, *SEC Offshore Press Conference Safe Harbors: Lack of Objectivity Leads to Uncertainty and Ineffective Rulemaking*, 23 B.U. INT'L L.J. 177, 184-85 (2005) (explaining that, under U.S. securities law, an offer is everything that, even though not couched in terms of an express offer, conditions the public mind or arouses public interest in the particular securities). Further, actions that are calculated—by arousing and stimulating investor and dealer interest in the issuer's securities, and by eliciting indications of interest from customers to dealers and from dealers to underwriters—set in motion the distribution process, and thus are offers. See *id.* at 185-86.

marketing of securities on behalf of the Issuer.”²⁸ The involvement of underwriters in the issuance process makes the process efficient and aids the development of the securities market in Jordan.

B. THE KEY INSTITUTIONS OPERATING IN THE SECURITIES MARKET

The capital market of Jordan comprises, *inter alia*, a primary securities market and a secondary securities market.²⁹ The former describes a market in which new securities are sold, hence its association with initial public offerings (“IPO”), while a secondary market is one in which investors trade outstanding issues of securities.³⁰ The distinction can be drawn through an assessment of their functions. The primary market is used to raise new capital for enterprises, while the secondary market provides required liquidity for investors to arrange their portfolios to best meet their individual needs. The trading of listed securities in Jordan is currently the domain of Amman Stock Exchange.

The central feature of the restructuring effort advanced by the Securities Law of 2002 was the separation of the supervisory and legislative roles from the executive role in the capital market. The law left the latter role to the private sector’s Securities Depository Center, while it entrusted the supervisory and legislative roles to the Jordan Securities Commission and Amman Stock Exchange. Therefore, the capital market in Jordan consists of an intertwined

28. Securities Law for the Year 2002, art. 2.

29. See Directives for Listing Securities on the Amman Stock Exchange for the Year 2004, arts. 17-19 (Jordan), available at http://www.ase.com.jo/pages.php?menu_id=121&local_type=0&local_id=0&local_details=0 [hereinafter Listing Securities Directive] (defining the meaning of market types in Jordan, such as secondary market, first market, bonds market, and funds market). An emerging, but important, component of the capital market in Jordan is the bond market; this market is composed of both government securities and corporate papers. *Id.* It is essential for these debt securities to be listed. There is also trading of financial futures and options which is conducted through the ASE. The availability of these derivative products allows investors to design and implement more effective risk and portfolio management. These products bode well for the development of the Jordanian financial market as they allow market participants to undertake three principal activities: to speculate, to arbitrage, or to hedge against adverse conditions in the cash market.

30. *Id.* art. 2.

body of related institutions, entrusted with the responsibility of promoting and developing the market.

1. Jordan Securities Commission

The first key institution operating in the securities market is the JSC, the primary regulatory body. The JSC has the capacity to take all the actions necessary to carry out its prescribed responsibilities and it reports directly to the Prime Minister.³¹ The Securities Law provides a straightforward statement of the financial and administrative independence of the JSC.³² This statement was intended to prevent undue influence in the JSC affairs and to help the JSC accomplish its mission.

As a feature of professionalism, the Securities Law prohibits JSC from engaging in any commercial activity, having a special interest in any project intended for profit, "lending any funds, and owning or issuing any securities."³³ The sole job of the JSC is market regulation.³⁴ Thus, regulators must separate themselves from what they regulate. The Securities Law of 2002 contains several provisions that serve to minimize conflicts of interest. Article 11 requires all members of the JSC to make a full disclosure of the securities they own or control and the securities their relatives—defined in Article 2 as spouses and minor children—own or control, as well as all changes in their portfolios going forward. Article 11 also prohibits JSC members from engaging in any other profession or job in any company, in the government, or in public or private institutions. It further prohibits JSC members from providing advice to these entities. However, this prohibition applies only to JSC members and does not extend to JSC employees. Article 24 ensures that all unpublished information obtained by the JSC or its employees is treated as confidential, only to be disclosed by the JSC if necessary for the protection of investors.³⁵

31. Securities Law for the Year 2002, art. 7.

32. *See id.* art. 7(A).

33. *Id.* art. 9(A).

34. *See id.* art. 8 (setting forth the aims of the JSC which include protecting investors, protecting the capital market, and regulating the market).

35. *Id.* art. 24.

The Securities Law of 2002 also describes the structure of the JSC. The JSC is run by a board consisting of five full-time members, all natural Jordanians and qualified market professionals.³⁶ These members will be appointed for a five-year term, renewable only once by a Royal Decree. The board is headed by a single chairman and a deputy chairman, appointed by the Council of Ministers. There are several provisions that describe actions and meetings of the board and outline the duties of the chairman.³⁷ The board is charged with the oversight of the Jordanian securities market.

The JSC is financially independent, as the government is not the JSC's only source of revenue. The financial independence of the JSC avoids any budgetary drawbacks by the government. The U.S. Securities and Exchange Commission ("SEC"), in contrast, sets fees for a variety of activities and retains these funds.³⁸

However, the JSC's retention of fees could leave it susceptible to pressure to generate revenue through undue enforcement actions if there is any kind of budgetary shortfall. Therefore, the JSC maintains a reserve equal to double its expenditures as reported in its annual budget.³⁹ The JSC can use this reserve to cover any shortages in revenue. Although the JSC is financially independent, the Council of Ministers still reviews the JSC's finances when the Council receives the JSC's annual report and budget, which outlines the JSC activities for the previous year.⁴⁰ Additionally, the JSC must deposit all excess receipts with the treasury.

The Securities Law grants the JSC the powers necessary to accomplish its mission. Specifically, the Securities Law gives the JSC a non-exclusive list of twenty powers that provide for

36. *Id.* art. 10.

37. *See id.* arts. 13-14.

38. Securities Act of 1933 § 19, 15 U.S.C. § 77ee (2008). The financial resources of the SEC include the fees for registration, listing, trading, and licensing, charges against using its facilities, fines, any funds provided by the government, and any other sources determined by the SEC. *Id.*

39. Securities Law for the Year 2002, art. 29. Article 29 further notes that the reserve will be built using fees, charges, and fines imposed by the JSC. *Id.* art. 29(A).

40. *Id.* art. 26 (requiring that the JSC present an annual report to the Council of Ministers within the first three months of the new fiscal year that is certified by an auditor).

administrative needs of the market.⁴¹ For example, the JSC has the power to set policies and plans. In addition, the Securities Law grants the JSC full rulemaking authority, including the power to issue rules, directives, and instructions related to the Securities Law.⁴² This language intends to give the JSC the necessary flexibility to develop and adapt rules as the Jordanian capital market evolves. The JSC is further charged to conduct investigations or inspections in order to perfect its oversight of the market and determine if a person has violated or is about to violate the Securities Law or any of its rules and regulations.⁴³ This language is similar to the language found in U.S. securities law.⁴⁴ To carry out its investigatory function, the JSC has the power to issue subpoenas, take evidence, and inspect any record as needed.

According to the text of the Securities Law, the JSC makes most, if not all, the vital decisions concerning the operation of the Jordanian securities market. By drafting flexible language and choosing a system that can adapt through new rules, rather than new legislation, the JSC should be able to meet unforeseen demands and quickly adjust to a growing and developing Jordanian economy. However, such flexibility places a burden on the JSC to draft, implement, and update a comprehensive set of rules. Moreover, the JSC needs to carefully consider how it should best exercise its authority given that there are few checks on the JSC's powers.

2. Amman Stock Exchange

The second key institution central to the Securities Law of 2002 is the Amman Stock Exchange ("ASE"), which took over the functions of the AFM. The Securities Law established the ASE as the single entity authorized to carry on trading in securities.⁴⁵ The existence of

41. *Id.* art. 12 (enumerating the broad range of activities over which the JSC has authority).

42. Securities Law for the Year 2002, art. 12(Q).

43. *Id.* art. 17(A)-(B).

44. *See* Securities Act of 1933 § 19, 15 U.S.C. § 77s(c) (2008) [hereinafter Securities Act] (granting the Commission the authority to subpoena witnesses, take evidence, and require production of any material deemed relevant to an inquiry necessary for enforcement of Securities Act).

45. Securities Law for the Year 2002, art. 65(A) (establishing the Amman Stock Exchange and providing it with "financial and administrative autonomy").

a single exchange achieves economy of scale, leads to most efficient pricing and liquidity, and simplifies the task of regulatory oversight. An over-the-counter market ("OTC") is not available. The Securities Law correctly chose not to overburden the Jordanian securities business with an OTC.⁴⁶

The ASE is not a governmental organization, but rather a private, non-profit organization with administrative and financial independence.⁴⁷ As a private organization composed of members who are brokers or dealers, the ASE can craft rules for listed companies in areas where lawmakers lack the proper jurisdiction, provided that the rules comply with the applicable securities laws. Making the ASE a non-profit entity could restrict the incentive to become a member of the Exchange. However, the structure of the Jordanian market, with only one stock exchange, makes it impossible for a broker-dealer to conduct business without being a member of the ASE. The problem may arise with the development of an OTC market where broker-dealers are able to transact business outside the stock exchange and therefore do not need its membership. However, the development of the OTC market in Jordan is not likely to happen at this stage.

Although the ASE can hardly be compared to the New York or London stock exchanges, it follows some of their traits. The ASE enjoys an independent, self-regulatory nature, which is attractive for

46. The term "over-the-counter market" describes stocks not traded on an exchange. See Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System*, 39 U. RICH. L. REV. 1069, 1076 n.35 (2005). It is much easier to control an auction market (such as a stock exchange), which is physically concentrated in one place, than to regulate an OTC market, with its amorphous structure and lack of centralized trading. Even though the OTC market can be made more organized through the introduction of the automated trading system (like NASDAQ—a computer screen-based market with no central exchange or trading floor which functions by collecting figures for both purchase and sale prices entered by brokers around the United States), only few countries—such as the United States and the United Kingdom—have such a system, and it would be too ambitious to project the same for Jordan. See *id.* at 1085.

47. See Securities Law for the Year 2002, art. 65(A) (noting that, given the ASE's independence, it may acquire property, enter into contracts, and be liable for legal violations); see also *id.* art. 65(F) (permitting the JSC to pursue profit-making activities so long as they do not adversely affect trading).

several reasons.⁴⁸ With the stock exchange as independent as possible from the central government, it helps ease the burden and workload on the regulators while making the market more responsive to the needs of issuers, brokers, and investors. Unlike a legislator, a quasi-self-regulatory ASE can adopt innovative approaches to problems and modify solutions quickly by its own rule-making process. Although the ASE designs and administers its own rules, it has a quasi-self-regulatory structure because it is subject to the JSC's oversight. JSC can monitor and supervise the work of ASE.⁴⁹ This framework diminishes some of the potentially negative aspects of a "pure" self-regulatory regime, which include bias and inadequate enforcement of rules.⁵⁰

ASE is governed by the ASE Board of Directors comprised of seven members—two representing banks licensed as brokers and brokers that are owned by or associated with banks, two representing brokers not associated with banks, and three representing the private sector.⁵¹ Notably, the ASE Board of Directors does not have representatives from government agencies.

The ASE regulations provide for direct election of directors.⁵² The rules of the ASE govern all remaining details concerning the structure, operation, and procedures of the board. The board can also propose bylaws, which govern most policy issues concerning operation of the ASE. Moreover, it may issue any other rule or directive deemed necessary to protect investors through ensuring fairness, efficiency, and transparency in the Exchange's affairs.

48. See Jarad D. Hunter, Comment, "No Crying in Baseball"—And No More Crying on the Stock Markets: An Alternate-Hybrid Approach to Self-Regulation, 74 U. CIN. L. REV. 639, 642-45 (2005) (discussing the progression of SEC self-regulation from the Great Crash through collusion on NASDAQ concerning an implicit agreement by brokers to omit odd-eight quotes in order to ensure larger spreads, while including the advantages and disadvantages of self-regulation).

49. See Securities Law for the Year 2002, art. 65(G).

50. See Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 LAW & POL'Y 363, 366, 370 (1997) (noting that pure or voluntary self-regulation is characterized by no direct governmental oversight).

51. See By-Law of the Amman Stock Exchange of 2004, art. 17(b) (Apr. 1, 2004).

52. *Id.* art. 19.

3. *The Securities Depository Center*

While the trading activity takes place in the Exchange, the Securities Depository Center (“SDC”) has control over everything that happens after the buy and sell orders are matched.⁵³ The SDC is an independent public entity with the mission of creating and maintaining property rights.⁵⁴ The presence of an independent registry does not allow the management of Jordanian companies to over-issue securities by simply running printing presses. However, although providing deference because of the SDC’s status as an independent entity, the JSC retains the power to approve, veto, or amend any rule of the SDC.⁵⁵ The power given to the JSC is an important check, especially because the SDC has the authority to set its own charges.⁵⁶

The SDC acts like a databank of securities. After buy and sell orders are matched, the SDC will clear the transaction by confirming its details, such as price and quantity. The SDC computer system will settle the transaction by transferring consideration from the buyer’s account to the seller’s account and by transferring title in the securities to the buyer. After the transaction settles, the SDC will register the new ownership by amending the list of equity holders for the company in question. The SDC enjoys a monopoly on all deposit, transfer, clearance, settlement, and registration business.⁵⁷ Therefore, the SDC records are the only evidence of securities ownership in Jordan.

The SDC must register all transactions effectuated, reported to, and received by the SDC. To provide guarantees to investors, the SDC could issue ishaars of ownership (advices) upon the request of

53. See Securities Law for the Year 2002, art. 77 (granting the SDC the responsibility to conduct clearance, settlement, and registration). The ASE calls for final settlement by T + 2: date of trade plus two days. It remains unclear what percentage of securities transactions in Jordan fail to settle.

54. *Id.* art. 76 (giving the SDC the power to “acquire and dispose of . . . property, and to perform all legal acts to realize its objectives”).

55. *Id.* art. 83(A) (requiring the SDC to submit its by-laws and instructions to the JSC for approval before they are implemented).

56. *Id.* art. 84 (delegating to the SDC the power to establish commissions, fees, and fines regulated by their by-laws).

57. *Id.* art. 77(B).

an investor.⁵⁸ However, the use of ishaars could raise a problem: The Jordanian securities market has a tradition of using certificates of registration as a proxy for the property rights of investors. Brokers could continue to use secondary trading of certificates of registration unless the SDC's ishaars come to replace them in the eyes of investors. In addition, ishaars and certificates of registration may create an opportunity for traders to defraud unsophisticated investors who are not aware of the fact that certificates of registration have no value and do not represent any recognized rights. The JSC and SDC will have to address the role that ishaars and certificates of registration will play in the future of the Jordanian securities market, and ascertain how they can be integrated into the computerized system at the Exchange.

The SDC is considered the most efficient way to operate a securities market. The system of the SDC is cheaper and more efficient than the traditional methods of clearance, settlement, and registration.⁵⁹ By choosing this system, Jordan availed itself of the conveniences and efficiency of modern information technology.⁶⁰ However, the system does have drawbacks. For example, the SDC system is more vulnerable to security risks than a paper-based system. Therefore, the SDC needs to invest in strong computer security measures to ensure public confidence in the system. Moreover, using the computerized SDC system could raise concerns for some investors in Jordan who are used to dealing in paper representations of their ownership rights. There should be a high

58. See The Instructions of Registration, Deposit, and Settlement of Securities for the Year 2004, art. 4(C) (Jordan), available at <http://209.61.192.188/english/instruction-1-1.shtm> (requiring the SDC to provide services to investors, including the "issuance of an ownership notice for deposited securities").

59. See generally Mark Gillen & Pittman Potter, *Convergence of Securities Laws and Implications for Developing Securities Markets*, 24 N.C. J. INT'L L. & COM. REG. 83, 86 (1998) (discussing the effect of the convergence of securities laws around the world on the strategies used in formulating laws by developing securities markets, like that in Jordan). The settlement, clearance, and registration system designed in Jordan was a departure from the time-honored ways of most developed securities markets.

60. See Thaer Qadoumi, *The Effect of Conversion to Electronic Dealing System on the Operating Efficiency and Performance of Amman Stock Exchange*, 11 AL-BALQA J. RES. & STUD. 73, 87-92 (2006) (the use of technology in the Amman Stock Exchange, which is very recent, has led to reduction in costs, improvement in transparency, and increase in the volume of trade on the Exchange).

standard of accountability for the SDC to ensure security of stock ownership.

C. DISCLOSURE

Used as a shield against fraud, deception, and manipulation, and as a building block of an efficient market, the practice of public disclosure has taken root in many countries.⁶¹ Like most securities-related laws in other countries, the Securities Law of 2002 makes public disclosure one of its fundamental tenets. The Jordanian Securities Law follows the philosophy that the government does not guarantee the quality of investments, but rather assures that all the information is disclosed to the investing public.⁶² Absent disclosure of information regarding the issuers of securities, average retail investors have no mechanism for distinguishing between high and low quality enterprises, which could hamper efficient allocation of capital.

An issuer must make an initial public disclosure prior to the sale of a security and must make continuing disclosures for as long as the shares are listed. The Securities Law requires issuers of securities to notify the JSC. Furthermore, a prospectus must be filed with the JSC, approved by the JSC, and published to the public prior to an offer to sell any security.⁶³ However, in certain cases, the issuer is exempt from filing a prospectus. Exemptions are left to the rulemaking power of the JSC and may be based on the limited number of purchasers or the amount of an offering.⁶⁴ For example, the JSC may

61. See Samuel Wolff, *Implementation of International Disclosure Standards*, 22 U. PA. J. INT'L ECON. L. 91, 96-104 (2001) (reviewing disclosure standards in several states, including Australia, Israel, Luxembourg, Mexico, the United States, and the United Kingdom); see also Merritt B. Fox, *Optimal Regulatory Areas for Securities Disclosure*, 81 WASH. U. L.Q. 1017, 1022-23 (2003) (discussing the public benefits derived from disclosure for issuers).

62. See Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 359-61 (1991) (noting the use of an approach in Kansas that requires the disclosure of certain information to a private or public administrative body that will assess the merits of investment in the securities and will only allow the distribution if investment in the securities met some minimum quality standard). This was known as the "blue sky" legislation. *Id.* This legislation was later adopted in several states and in foreign jurisdictions. *Id.*

63. See Securities Law for the Year 2002, arts. 34(A), 41(A).

64. *Id.* art. 36.

grant an exemption from submitting a prospectus if the number of investors is limited and those investors are capable of assessing and bearing the investment risks. These offering exemptions may come in handy in Jordan, where many potential issuers could be unable to afford the costs of filing a prospectus. As such, the introduction of exemptions to filing a prospectus will help expand the Jordanian securities market.

Compared with the U.S. securities laws,⁶⁵ the Jordanian Securities Law of 2002 makes no distinction between a prospectus and a registration statement. The absence of such a distinction is appropriate given the size of the Jordanian capital market and it also simplifies the registration process by eliminating many of the complexities of the pre-registration period. The content of the prospectus is set forth in the rules decreed by the JSC rather than in a schedule or annex attached to the law.⁶⁶ Thus, the Securities Law of 2002 lays down the general categories of necessary information—issuer data, securities data, audited financial data—but leaves it to the JSC to decide how much and what nature of each is sufficient. For example, the JSC could require a prospectus to contain information regarding the issuer's financial history and its use of profits.

The JSC must approve all prospectuses before they become valid, but the Securities Law restricts the JSC powers by allowing them to reject a prospectus for only three reasons.⁶⁷ Moreover, the JSC has

65. See Michael G. Byers, Comment, *Eschew Obfuscation—The Merits of the SEC's Plain English Doctrine*, 31 U. MEM. L. REV. 135, 165-68 (2000) (noting that a public offering under U.S. securities laws requires the filing of a registration statement, which includes the prospectus). A prospectus is Part I of the registration statement and is the portion of the registration statement that is delivered to the investor, to the offeree, or purchaser. The registration statement is not delivered to the investor, but is filed with the SEC. The registration statement has to be reviewed, cleared, and declared effective by the SEC before sales can be confirmed. U.S. law contemplates a two-step registration process comprised of a waiting period and a post-registration period. The law does not prohibit oral offers during the waiting period. Also, in recognition of the fact that the prices of securities change rapidly and cannot be known in advance, U.S. regulations allow issuers to deliver a so-called preliminary prospectus. This complex scheme of the U.S. securities laws is not contemplated by the Jordanian Securities Law.

66. See Securities Law for the Year 2002, art. 34(A)(2).

67. The reasons are as follows: (1) if the prospectus does not conform to the requirements of the Securities Law, regulations, or instructions issued pursuant

thirty days to either approve or deny the prospectus.⁶⁸ The thirty-day limit protects the issuer against bureaucratic inefficiency. The JSC also decides how long each individual prospectus will remain valid.⁶⁹ The JSC must be informed, in writing or electronically, of any change in the information contained in the prospectus that “may affect the value of the security.”⁷⁰ Thus, the Securities Law contains an objective standard that requires notification of any material event that “may” have an impact.

The Securities Law of 2002 allows an issuer to sell only after the prospectus has been approved by the JSC and it forbids the sale of a security without the buyer first receiving the prospectus.⁷¹ Thus, the Securities Law requires not only that the prospectus be “sent” to the buyer, but also requires that it actually be “received” by the buyer as well. More specifically, the Securities Law requires the issuer to send the prospectus to the buyer prior to the sale date, rather than allowing it to accompany the delivery of the security. In the future, the JSC could permit delivery of the prospectus to accompany confirmation of the transaction.⁷²

After the prospectus has been approved and published, and all the required fees have been paid, offers may be made through a prospectus, an advertisement, or other written materials.⁷³ The Securities Law does not require the issuer to clear the writing or

thereto; (2) the prospectus or any accompanying information contains false, inaccurate, or misleading data, it omits material facts that enable the investor to make an investment decision, or it presents information in a way that renders the information set forth false, misleading, or inaccurate; (3) if the required fees for the effectiveness of the prospectus are not paid. *Id.* art. 41(B).

68. *Id.* art. 39.

69. *Id.*

70. *Id.* art. 40.

71. *Id.* art. 34(C) (stating that this is the requirement for public offerings only).

72. Compare Directives on Issuance and Registration of Securities, Annex 2, Requirements for the Registration of Securities Shares Prospectus, Existing Companies, available at <http://www.ase.com.jo/> (describing the purpose of a prospectus at this time as informing the investor about a company’s finances), with 69 AM. JUR. 2D *Securities Regulation—Federal* § 288 (2008) (discussing the situation in the United States and the notion that prospectuses may be issued generally to the public and do not have to be delivered to each individual investor).

73. Securities Law for the Year 2002, art. 34(B) (noting that the JSC will issue instructions detailing the content and use of advertisements, but the Securities Law requires that, at a minimum, such advertisements must contain a summary of the prospectus).

other advertising materials with any regulator prior to its use. As stated, it requires prior approval of the prospectus, as well as delivery to the buyer before the actual sales date. This system could provide sufficient protection against fraud and deception with minimal burden on the issuer.

Issuers of securities should not view a prospectus in Jordan only as a selling document; it can also serve as insurance. It is important for a prospectus to fully disclose all material facts to avoid being challenged subsequently by investors on the grounds that it failed to fully disclose the company, its prospects, and its business. Therefore, in some respects, it could be more important to view the prospectus as an insurance document than as a selling document. At the very least, a comfortable balance has to be struck so that issuers do not have liabilities under the Securities Law after the sale.

Along with the requirement of initial public disclosure, the Securities Law of 2002 gives great attention to the requirements of periodic disclosure. The need for periodic disclosure is arguably even greater than the need for initial disclosure, as companies only go public once but continue to be traded afterwards. The rationale behind the periodic disclosure system is to increase the quality, quantity, and timeliness of information flowing from issuers to investors.

The Securities Law requires annual and semi-annual reports containing financial statements.⁷⁴ Financial statements could include balance sheets, income statements, statements of equity, and cash flow statements. Annual reports, which contain the financial statements, must be filed no later than ninety calendar days after the end of the fiscal year and should be audited as required by the law.⁷⁵ The auditing requirement applies only to annual reports. Issuers are also required to file and publish a report describing the board of directors and any change in its composition.⁷⁶

In addition to annual and semi-annual reports, issuers must keep the JSC abreast of any material events that occur between the

74. *Id.* art. 43(A) (providing that the annual report must be submitted ninety days after the end of a company's fiscal year, and the semi-annual report must be submitted thirty days after the midpoint of its fiscal year).

75. *Id.* art. 43(A)(1).

76. *Id.* art. 43(A)(4).

reporting periods.⁷⁷ Material events include, for instance, events that may affect the price of stock. Furthermore, the ASE has the power to compel disclosure of any issuer-specific data and to publish this information.⁷⁸ The exercise of this power requires no preliminary publication of the reasons or grounds, nor is it subject to any prior application for an order from the courts. The disclosure rules allow the public to review and make copies of any prospectus, report, or data that have been publicized and filed with the JSC.⁷⁹ Public access to reports and data should maximize investor confidence in the capital market.

The JSC defines the exact form and amount of information required in the periodic reports.⁸⁰ For example, the JSC could require submission of a management statement forecast of current and future developments expected to have significant effect on the company's financial position. Since the Securities Law does not contain an annex outlining the forms and instructions for disclosure submissions, the JSC has the power to develop these forms and instructions by directives.⁸¹ The directives will, therefore, specify all the important details required in each submission, including required supplementary documents, methods of public disclosure, and information regarding which company officers should sign each submission to certify its authenticity and accuracy.

77. *Id.* art. 43(D). The disclosure requirements under the Jordanian Securities Law resemble those requirements under U.S. securities laws. However, the reporting obligation relating to material events does not exist in U.S. law. *See* Steven E. Bochner & Samir Bukhari, *The Duty to Update and Disclosure Reform: The Impact of Regulation FD and Current Disclosure Initiatives*, 7 STAN. J.L. BUS. & FIN. 225, 231 (2002) (explaining that while good business practices that have developed over seventy years require disclosure of material changes, neither the Securities Act of 1933 nor the SEC prescribe a specific duty to file changes in material facts).

78. Amman Stock Exchange Disclosure Directives for the Year 2004, art. 3(B) (Jordan), available at http://www.ase.com.jo/pages.php?menu_id=29&local_type=0&local_id=0&local_details=0 [hereinafter Disclosure Directives] (requiring the ASE to disclose daily, weekly, and yearly trading information, including immediate disclosure of information that would affect the price of the security).

79. *Id.* art. 3(C).

80. Securities Law for the Year 2002, art. 43(B).

81. *Cf.* Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 488 n.59 (2007) (explaining that, consistent with requirements of U.S. law, the SEC utilizes disclosure forms such as the Form 20-F).

The Jordan Securities Law's approach seems logical because it grants the JSC the authority to determine the content and form for disclosure submission via directives. This approach is better than one that fills the Securities Law with pages of complex instructions and forms. An added benefit of this approach is that directives are much easier to change than laws. In other words, the disclosure forms and instructions are far more flexible and adaptive as directives than as parts of the law. The directives will continue to require new information as the Jordanian capital market demands.

Disclosures to investors, however, are now required only annually or semi-annually, and even then they are issued long after the year has ended.⁸² Thus, the information investors receive can be stale on arrival. Moreover, the overall voluntary disclosure is poor.⁸³ The Internet makes it easier for issuers to disseminate timely information for the sake of shareholders and investors. The JSC has recognized the importance of the Internet as a communication tool for the investment community. Therefore, the Jordanian Securities Law gave issuers guidance concerning the electronic delivery of prospectuses, annual reports and semi-annual reports, and other materials.⁸⁴ For example, issuers can provide periodic reports to the investing public via corporate Web sites.

As a practical matter, an electronic disclosure regime may not be readily implemented in Jordan, given the status of issuers' information technology infrastructures. It could be argued that additional costs imposed on issuers as a result of a move to an electronic disclosure system could hinder the adoption of such a system. Furthermore, the same features of the Internet that have

82. See *Disclosure of Information by Listed Companies*, AL RAI, May 25, 2007 (stating that forty-two companies did not submit preliminary reports of their activities for the year 2006 within the specified deadline). In addition, twenty-six companies did not provide the JSC with annual reports for the year 2006 within the specified term.

83. See Ayman E. Haddad, *Voluntary Disclosure and Stock Market Liquidity: Evidence from the Jordanian Capital Market 10-12* (2007) (unpublished manuscript) (on file with author) (stating that voluntary disclosure is defined as those items of information which are not stipulated by the Jordanian statutory regulations). These items include background information, future and projected information, employee information, and acquisition and disposal information.

84. See Securities Law for the Year 2002, arts. 35(B), 37(A), 40, 43(B), 43(C) (providing information about how companies should organize securities-related documents and what content may be presented in such documents).

made it an expedient vehicle for gathering and disseminating information—broad coverage, speed, and low costs—could make it an easy vehicle for the perpetration of securities fraud.

On a final note, one mechanism that can be relied upon for compelling disclosure is the ASE. It can impose disclosure requirements on issuers through its ability to condition the right to trade on compliance with certain requirements commonly referred to as listing standards.⁸⁵ Listing standards typically are split into two categories: quantitative standards and qualitative standards. Quantitative standards pertain to the trading environment and market process sought by the ASE.⁸⁶ Qualitative standards address matters that do not pertain directly to liquidity or to the underlying market mechanism of an exchange, but to the conduct of the listed companies. For example, qualitative standards typically require Jordanian companies who trade securities on the ASE to agree to make public disclosure of financial data and business information.⁸⁷ All companies must adhere to minimum disclosure requirements or they lose the privilege of the floor. Thus, trading on the ASE is regarded as a privilege, not a right. Subjecting issuers to these minimum disclosure requirements serves also as a signal of

85. See Disclosure Directives, *supra* note 79, art. 3(A) (providing these standards). Listing standards are the requirements of the ASE and are applicable to the securities traded on the exchange and to the issuer of such securities. The primary purpose of these standards is generally understood to be the facilitation of the efficient functioning of the exchange by ensuring that there is some baseline method of comparison among companies.

86. See *id.* Typical quantitative requirements include that a company maintain a minimum net income and aggregate market value of shares (also required by most Western exchanges), that the stock be widely held prior to listing, that some minimum percentage of the shares outstanding be owned by outside (that is, non-management) shareholders, and that it maintain a certain monthly trading volume.

87. See Listing Securities Directive, *supra* note 28, art. 5(B) (specifying the requirements of this report). To be considered for listing on the market, an issuer must submit a written application accompanied by documents calling for significant disclosure. In addition, the ASE may request additional information from an issuer if needed to enable it to decide whether to admit any security for trading. There is no express limitation on what type of information may be sought. *Id.* In the future, Jordan could open an additional trading floor for companies that do not qualify for listing on the main exchange. The new exchange would make more shares accessible to the public, but will involve higher risks due to easier listing requirements. To date there has been no action on this type of trading floor.

investment quality and therefore can add to the protection of investors.

D. SECURITIES MARKET PROFESSIONALS

Articles 47 and 64 of the Securities Law establish the rules governing the activities and oversight of market professionals. The starting point for understanding the JSC's jurisdiction over market professionals is defining these professionals. The Securities Law lists the following as market professionals: brokers, dealers, investment trustees, investment managers, financial advisors, financial services companies, and custodians.⁸⁸ The basic test for deciding whether a company or an individual is a market professional is whether they are undertaking one of the activities of the listed professionals. These activities include acting as an intermediary in a securities trade, offering securities accounts to others, or placing securities for an issuer.

The Securities Law uses an operational definition of market professionals. In other words, one becomes a broker in Jordan by seeking broker status, not acting as a broker. Furthermore, the law distinguishes between the different types of market professionals. For example, the law distinguishes between brokers and dealers.⁸⁹ The definitions provided for market professionals impose a balancing act upon them. If a financial advisor undertakes the activities of a broker, he automatically becomes an unlicensed broker and could face sanctions. The activities of a broker or dealer must take place in one's commercial capacity.⁹⁰ Therefore, an individual who is acting for himself, and not seeking financial profit through the act of buying and selling securities, will not fall within the jurisdictional reach of the Securities Law.

88. See Securities Law for the Year 2002, art. 47. The text of the Jordanian Securities Law borrowed the list of market professionals from a provision in the U.K. law covering those individuals who hold themselves out as being engaged in the business of buying and selling securities.

89. Securities Law for the Year 2002, art. 2(A). A financial broker is any person engaged in the business of buying and selling securities for the account of others, while a dealer is any person engaged in the business of buying and selling securities for his own account. *Id.*

90. Commercial law defines the commercial nature of broker activities.

Although the Securities Law made a careful distinction between the different categories of market professionals, the mechanics for licensing and ultimate outcome are the same. All market professionals need licenses from the JSC in order to carry out business. The law forbids any individual or company from undertaking brokerage activities without first acquiring a license, unless it is exempted by the JSC's instructions.⁹¹ The JSC will determine the basic requirements and competencies of market professionals.⁹² The burden to apply to the JSC for a license is on any company or individual that wishes to undertake securities activities.⁹³

The JSC reviews each application fully and must issue a license within sixty days if the application is in order and the applicant meets all of the requisite standards. The licensing requirement is a continuing necessity, mandating periodic recertification of a market professional's license.⁹⁴ While not written into the Securities Law, the process of recertification should include, at the minimum, a review of the market professional's business practices, character, and financial standing, and could include a re-testing of basic skills and knowledge.

Given the central role market professionals like brokers and dealers play in a capital market, it is not surprising that the Securities Law sets out the duties of these professionals. Market professionals owe duties to their clients. Specifically, market professionals should act with "loyalty and dedication to maximize their clients' interests."⁹⁵ Also, market professionals must refrain from charging clients excessive service fees or commissions, and engaging in deceptive practices. Duties of market professionals also include the duty to maintain accounting records and the duty to separate their money and securities from the money and securities of their client.⁹⁶ Any violation of these duties may result in sanctions by the JSC.⁹⁷

91. See *id.* art. 47(B)-(D).

92. See *id.* art. 47(C). The instructions of the JSC will determine the level of training, experience, competence, testing, and capital requirements. *Id.*

93. See *id.* art. 48.

94. See Securities Law for the Year 2002, art. 49, 59(A), 59(B) (stating that licenses expire on December 31st of each year).

95. *Id.* art. 57.

96. *Id.* art. 54(C), 55(A).

97. *Id.* art. 60(A) (noting that the board may "deny, suspend or revoke the license of any person found to have violated any provision of the law").

For example, the JSC could suspend or revoke the license or registration of a market professional who violates the Securities Law or the JSC rules and instructions.

The Securities Law does not create a long, exhaustive list of duties. Such a list would have hampered the growth of professionalism. Moreover, including all the duties in the law would be impractical since they would be difficult to change at a later date. The current system of regulation allows greater input from market professionals and thereby takes advantage of their perspectives and experiences in dealing with the law and the JSC.

Market professionals must file reports as required in the instructions and rules of the JSC. These periodic reports form the regulators' general oversight of market professionals. Furthermore, the JSC has the power to carry out investigations and inspections of any licensed market professional in order to determine if a violation has occurred or is about to occur.⁹⁸ This power includes the authority to compel the attendance of witnesses and to take evidence. The JSC must also supervise the compulsory or voluntary liquidation of any market professional's business.⁹⁹ This supervision should allow the JSC to protect investors' interests in these cases.

Finally, the JSC has the power to grant an order suspending the license of any broker who has passed away or has not engaged in business as a broker.¹⁰⁰ This provision is designed as a housekeeping measure whereby the JSC strikes all those who have died or ceased to be brokers from its list.

E. MUTUAL FUNDS AND INVESTMENT COMPANIES

The second common type of market professionals that may promote trading are mutual funds and investment companies. Although individuals in Jordan own stock directly, they can also own

98. *See id.* art. 17(A), 68 (providing the JSC with broad power to investigate any violations of the law); *see also id.* art. 56 (detailing the types of conduct that would make a licensed market professional in violation of this law).

99. Securities Law for the Year 2002, art. 62(A).

100. *Id.* art. 61. The language of this provision is similar to that found in the U.S. securities laws. *See* Securities Exchange Act of 1934, 15 U.S.C. § 780(b)(5) (2007) (stating that "if the Commission finds that any registered broker or dealer is no longer in existence or has ceased to do business as a broker or a dealer, the Commission . . . shall cancel the registration of such broker or dealer").

stock indirectly, through mutual funds and the like. Such institutional arrangements isolate the individual investor from the trading decision. Trading occurs only at the institutional manager's behest.

Mutual funds and other investment companies are financial intermediaries that pool money from investors and entrust such money to professional managers to make investments on behalf of the investors. Mutual funds and investment companies offer two primary benefits.¹⁰¹ First, by pooling the financial resources of dispersed investors, they allow investors to gain access to the expertise of professional managers.¹⁰² Second, investors gain access to the advantages of wide diversification of ownership in the securities market. According to modern finance theory, an efficient portfolio is one that secures the maximum return for a given level of risk.¹⁰³ Thus, diversification is essential to eliminating what appears to be a risk in taking in specific securities.

The Securities Law includes detailed provisions for the regulation of mutual funds. The law defines mutual funds as "funds established to invest in a portfolio of securities or other financial assets for the purpose of providing professional management of collective investment on behalf of holders."¹⁰⁴ Thus, the Securities Law recognizes a new class of market professionals—portfolio or investment managers. Although the activities of portfolio managers would technically fall within the definition of "broker," the

101. Mutual funds and investment companies provide other benefits. In jurisdictions that impose no officially fixed commission rates, mutual funds provide the benefit of lower transaction costs resulting from volume discounts on brokerage commissions. Moreover, to keep attuned to investor needs, mutual fund industries in some countries have adapted and expanded their services to suit investors' needs. For instance, many mutual funds offer automatic reinvestment programs, automatic withdrawal, exchange privileges, and other services.

102. In selecting the securities in which to invest, managers perform extensive economic and financial research. The aim of this research is to develop data so that intelligent decisions can be made about securities in the portfolio. Portfolio managers use sophisticated portfolio management theories (for example, risk-reward, stock-picking, efficient market hypothesis and indexation) to conduct securities analysis.

103. See Robert N. Rapp, *Rethinking Risky Investments for that Little Old Lady: A Realistic Role for Modern Portfolio Theory in Assessing Suitability Obligations of Stockbrokers*, 24 OHIO N.U. L. REV. 189, 243-48 (1998) (explaining through statistical analysis that efficiency in a portfolio is found when the compensation for a security matches its risk premium).

104. See Securities Law for the Year 2002, art. 2.

Securities Law carves out a specific definition and role for them.¹⁰⁵ Instead of encumbering either group of market professionals with rules written with the other group in mind, the Securities Law treats each group individually, creating more leeway for specialized treatment of portfolio managers.

The JSC regulates mutual funds and investment companies. Subjects of regulation include registration requirements for mutual funds and investment companies.¹⁰⁶ Registration requirements are arguably the most important part of any legislation addressing investment companies. In that respect, the regulatory scheme of the Jordanian Securities Law follows the ideology of the U.S. law, which requires all investment companies to register.¹⁰⁷ A few points in the Jordanian Securities Law demand special attention with regard to registration requirements. First, the Securities Law subjects mutual funds and other investment companies to licensing requirements different from those imposed upon broker-dealers and other market participants.¹⁰⁸ Thus, the approach followed by the Securities Law does not create uniformity in licenses for all market participants and makes it difficult for the JSC, which has yet to acquire expertise, to control the process of licensing. Second, the Securities Law specifies exemptions for certain investment companies from its licensing process.¹⁰⁹

The Securities Law also provides that the shares and investment units of an investment company or mutual fund are subject to the

105. See *id.* art. 2 (distinguishing between a financial broker and an investment or portfolio manager). A portfolio manager is defined as any person who, on the basis of a contractual arrangement, engages in the business of managing securities portfolios for the account of others, including the management of mutual funds. *Id.*

106. *Id.* art. 92.

107. See Investment Company Act of 1940 § 8, 15 U.S.C. § 80a-8 (1994) (requiring investment companies to register with the SEC and setting forth the manner in which investment companies must register); see also *id.* § 7, 15 U.S.C. § 80a-7 (prohibiting unregistered investment companies from engaging in interstate transactions).

108. See Securities Law for the Year 2002, arts. 104-105 (placing special requirements on investment managers of mutual fund—such as promoting and marketing the mutual fund's shares and monitoring the fund's management—in addition to those imposed on all "Licensed Persons" discussed earlier in this Article).

109. *Id.* art. 94.

registration requirements of the law.¹¹⁰ This provision makes clear that other registration requirements, as they pertain to the investment companies and its management, do not relieve the company from an obligation to register its securities under the Securities Law.

The final licensing requirement pertains to managers of mutual funds and investment companies.¹¹¹ These persons must be licensed by the JSC. The language of the Jordanian Securities Law most closely parallels section 203 of the U.S. Investment Advisers Act, which requires investment advisers to register.¹¹² The purpose of licensing investment managers is to prevent persons with certain criminal records from acting as investment advisers. To that end, for example, investment companies may refuse employment to a manager of a mutual fund or an investment company if the person applying for such a position has been found guilty of forgery or counterfeiting.

The Securities Law left the investment companies relatively free to organize in any form they wish. For example, investment companies can be in the form of open joint-stock companies, partnerships, or limited liability companies. A mutual fund and an investment company must include the words “mutual fund” or “investment company” in its name; no other company may use such designation.¹¹³ This requirement echoes the provisions of general corporation laws that attempt to prevent companies from deceiving the general population by using misleading names.

Like ordinary corporations, the mutual fund establishes a hierarchical and centralized management body. The Securities Law requires that “shareholders” elect a board of directors.¹¹⁴ It is important to note at the outset that the description of investors as “shareholders” in the mutual fund suggests that they are entitled to the same set of shareholder rights as corporate shareholders. Their

110. *Id.* art. 105.

111. *See id.* art. 103 (providing that a mutual fund’s investments are to be managed by a licensed investment manager).

112. *See* Investment Advisers Act § 203(a), 15 U.S.C. § 80b-3(a) (prohibiting investment advisors from using “any means or instrumentality of interstate commerce” in connection with their business unless they are registered).

113. *See* Securities Law for the Year 2002, art. 2 (giving the definitions of “Mutual Fund” and “Investment Company” under Jordanian law).

114. Securities Law for the Year 2002, art. 95.

participation rights are based on a preconception of the rights associated with "shareholder" or "owner." The Securities Law also requires that no more than twenty percent of the board of directors be affiliated with the manager.¹¹⁵ This requirement is predicated on the belief that the mutual fund governance system works best when the functions required of independent directors are performed by individuals who are truly independent. The board of directors is principally responsible for reviewing and evaluating the management and distribution arrangements of the manager.

Although mutual funds are nominally independent and supervised by their own boards of directors, they are managed by an investment manager pursuant to a contractual arrangement that is subject to general review by its board of directors.¹¹⁶ The directors must annually approve the advisory agreement between the mutual fund and the manager. An investment manager's control over the fund typically includes organizing and promoting the fund, managing the fund's portfolio, and supervising the business operations of the fund.¹¹⁷ The extensive control over the fund wielded by the manager is a matter of necessity because the fund's directors usually do not possess the expertise needed to manage the fund. Thus, the directors' dependence on the adviser is problematic.

In addition to the manager, a mutual fund usually contracts with a custodian, a transfer agent, a principal underwriter, and other third-party service providers to distribute fund shares. Under the Securities Law, principal underwriting contracts are subject to similar board scrutiny.¹¹⁸ Shareholders must evaluate and approve such contracts and any renewals.

The Securities Law envisions two types of investment companies and mutual funds: open and closed.¹¹⁹ An open type of authorized fund of an investment company is a fund that issues securities with

115. *Id.* (signifying that affiliation is one of the criteria for whether a director is independent).

116. *Id.* arts. 95(A), 103(A)-(B) (stating also that the contractual agreement must be published and provided to all shareholders before coming into effect).

117. *Id.* art. 104.

118. *See supra* note 116 and accompanying text.

119. Securities Law for the Year 2002, art. 96(A) (describing the elements of closed-end and open-end, and noting that a closed-end fund may transform into an open-end fund if certain criteria are met).

an obligation to redeem them (that is, buy them back); and a closed type fund is one that does not have such an obligation.¹²⁰ The classification of investment companies under the Jordanian Securities Law is the same as the one used for investment companies in the United States under section 5 of the Investment Company Act of 1940.¹²¹

One distinctive feature of mutual funds is the redeemable nature of the claims that investors hold. Investors have the right to redeem their shares at their current average net asset value.¹²² A redeemable security entitles the holder at his option to receive his pro rata share of the pool's current net assets. Thus, mutual fund investors hold fluctuating claims, not a fixed claim like debt holders. The right to redeem shares is self-enforcing because its enforcement is not dependent on judicial intervention or third-party decisions. The decision of the claim holder to withdraw resources is a form of partial takeover or liquidation, which deprives management of control over a portion of the fund's assets. Thus, this control right can be exercised independently by each claim holder. Admittedly, in determining whether to exercise redemption rights, investors have to take into consideration factors such as redemption fees and tax consequences. To summarize, the availability of redemption rights within mutual funds would result in high investor mobility and a competitive environment for mutual funds.

Investors are the judges of the legal and economic arrangements that they purchase and the Securities Law does not impose any standard with respect to the securities in which these companies may invest their assets. Nonetheless, the Securities Law restricts the freedom of mutual funds and investment companies to invest in certain transactions.¹²³ The Securities Law prohibits mutual fund and

120. *Id.* art. 97(A); *see id.* arts. 97-98(A) (stipulating that the shares of an open-end fund are generally not transferable, whereas shares of a closed-end fund are transferable and tradable).

121. *See* Investment Company Act § 5(a)(1)-(2), 15 U.S.C. § 80a-5(a)(1) (2004) (defining open-end companies as those that issue redeemable securities and closed-end companies as those that issue non-redeemable securities).

122. Securities Law for the Year 2002, art. 100(B).

123. *Compare id.* art. 102(B) (restricting the ability of Jordanian investment advisers to invest or own certain types or amounts of securities), *with* Investment Company Act §§ 8(b), 12(a)-(b), 15 U.S.C. §§ 80a-8(b), 12(a)-(b) (1994) (demonstrating that, rather than relying on restrictions to regulate investment

investment companies from conducting any activity other than the business of investment, or activity related to the business of investment. The law's prohibition on incurring debt above the limits prescribed or investing in securities of one issuer above the limits prescribed assures the financial security of an investment company.¹²⁴ The law also prohibits a mutual fund or investment company from issuing preferred shares.¹²⁵ All these restrictions fight potential abuses because of the importance of investment funds and investment companies in the capital market. The Securities Law attempted to ensure that these funds would not undermine public trust in the capital market by engaging in fraudulent practices.

As this review of mutual funds and investment companies provisions in Jordan indicates, the Securities Law is simple and straightforward. The simplicity of the Securities Law is justified by the conditions of the Jordanian market.¹²⁶ Securities regulation should be made with an eye toward future developments, but excessively complex regulation could unduly burden the Jordanian market. In sum, even though managers of Jordanian mutual funds and investment companies, unlike their Western counterparts, do not have to deal with all the complexities of modern investment strategies, their primary task of composing a financially sound

companies, the U.S. law relies mainly on disclosure). U.S. investment companies are required to disclose to the investing public their investment policies in advance. *Id.* § 8(b), 15 U.S.C. § 80a-8(b). The Investment Companies Act also states that investment companies must seek approval of the majority of shareholders before changing their investment policies. *Id.* § 8(b), 15 U.S.C. § 80a-8(b). Finally, the SEC is empowered to regulate certain transactions that are deemed to be particularly risky. *Id.* Nevertheless, like the Jordanian securities statute, the Investment Company Act does enumerate certain restrictions on investment company transactions, such as limiting the availability of purchasing securities on margins and engaging in short selling. *Id.* § 12(a), 15 U.S.C. § 80a-12(a).

124. See Securities Law for the Year 2002, art. 102(B).

125. See *id.* arts. 95(A), 100(A) (noting that Mutual Fund's capital must be divided into shares with "equal entitlements").

126. Most of the complexities of the U.S. Investment Companies Act of 1940, the most extensive U.S. securities statute, are inapplicable to the investment vehicles that exist in Jordan. For example, the Jordanian Securities Law does not cover issuers that issue face-amount certificates of the installment type. See generally Tamar Frankel, *The Scope and Jurisprudence of the Investment Management Regulation*, 83 WASH. U. L.Q. 939 (2005) (describing the development of investment company regulation by the SEC).

investment portfolio is basically the same as that of the managers at Vanguard or Fidelity.

F. VIOLATIONS AND SANCTIONS

The Securities Law supplies the tools necessary for the JSC to enforce its rules. The Securities Law authorizes two approaches to enforcement: public actions and private suits. The law affords the JSC a range of powers to enforce its rules. These powers run from suspension of license to criminal sanctions. Additionally, the law allows for private suits to recover money lost due to the illegal activities of others.

The Securities Law empowers the JSC to take public action against anyone who violates the law, JSC rules, or its decisions. In these cases, the JSC has the power to levy a fine not exceeding Jordanian Dinar 100,000 (approximately \$141,113 USD) against that person.¹²⁷ The law also imposes heavy fines, not less than twice the amount of profit made or loss avoided, against any person responsible for violating the law or any rule.

The law imposes public sanctions against anyone operating as a broker without a license. Unlicensed brokers can be imprisoned for up to one year.¹²⁸ Brokers are paid a commission on every stock transaction they execute, profiting from trades regardless of whether the trading investor profits. Therefore, they have financial incentives to encourage trading. One way brokers can persuade investors to trade is by providing them with imperfect information suggesting that a particular stock or industry sector is significantly underpriced and therefore will create perceived opportunities for speculative profits. Therefore, the law prohibits brokers from using fraud in the sale of securities.¹²⁹ It is extremely difficult, however, to prove that slanted advice was fraudulent because of the evidentiary problems involved in proving both intent and the content of brokers' often-verbal representations. The investor who falls prey to an unscrupulous or overoptimistic broker, in the meantime, may have

127. Securities Law for the Year 2002, art. 110(A).

128. *Id.* art. 110(B)(2).

129. *See id.* art. 112(B) (asserting that if the JSC finds that any broker or agent has committed fraud or deceit, it may revoke or suspend the broker's license).

suffered substantial losses from bad trades and brokerage commissions.

In addition to public actions, investors in the Jordanian securities market have two private causes of action under the Securities Law. The first cause of action is the right of recovery in the event that an investor incurs a loss as a result of the sale of securities.¹³⁰ The investor must prove that the sale of securities was carried out in manner contrary to the Securities Law, its regulations, instructions, and decisions. Further, privity is required.¹³¹ In other words, the investor must prove that he incurred the loss as a result of the sale of securities.

The second private cause of action is to recover damages resulting from a material misrepresentation in a prospectus.¹³² The law provides that a material misrepresentation is an untrue statement of fact or the omission of a necessary, material fact. Materiality is proven by showing that the untrue statement or omission affected the decision of an investor to sell, buy, or continue to hold the securities.¹³³ Under this standard, the effect of the statement or omission on the investor's decision will be determined on a case-by-case basis. The misstatement or omission must exist at the time the prospectus is approved by the JSC for a cause of action to accrue under the law. Issuers, therefore, can make any necessary corrections at any time prior to final approval. However, the law does not state whether there is still a cause of action or not where events occur that render the prospectus materially misleading subsequent to its approval. Therefore, the JSC will need to issue instructions or rules for publishing a corrected prospectus and designating how long an issuer has to act before an uncorrected prospectus becomes subject to suit.

130. *Id.* art. 111(A).

131. *See id.* art. 111(A)(2) (implying that a sale must have occurred for an action to take place).

132. *Compare id.* arts. 42(A), 42(B), 107(C), 110(E), 111(B) (setting forth a private cause of action for misrepresentations in a prospectus mirroring U.S. provisions for such liability), *with* Securities Act of 1933 § 11, *as amended* at 15 U.S.C. § 77k (1998) (providing a cause of action for victims of registration statements containing "untrue statement[s] of . . . material fact").

133. *Id.* art. 111(B)(1)-(2).

Just as with U.S. law, the Jordanian Securities Law provides a list of individuals who may be found liable for misrepresentations.¹³⁴ Any one of these individuals may avoid liability upon a showing of due diligence. The Jordanian Securities Law, however, does not detail the standard for due diligence. For example, the law does not state a necessity to show that after “reasonable investigation,” and on the basis of reasonable grounds, an individual was convinced that that there was no material omission or misstatement. The law does not specify the standard of reasonableness for due diligence.¹³⁵ In addition, the Securities Law, on its face, is silent as to the knowledge of truth by a purchaser at the time of purchase as a defense to misrepresentation. Thus, arguably, the Securities Law does not bar an action by a purchaser for false and misleading statements if the purchaser knew the truth about the securities, despite the misleading statements.

The basic rule for measuring damages under all these private causes of action is the amount of loss suffered or profits foregone. However, the defendants may reduce the measure of the damages by showing that any loss suffered or profit foregone was not caused by the violation in question.

The Securities Law provides limitation periods. Litigants must initiate suits under these two private rights of action within two years.¹³⁶ Parties may not, by an agreement or otherwise, change the duration of the limitations period. The limitations period begins to run from the date of the sale of securities or the effective date of the prospectus.

134. This list of individuals is dispersed in several places in the Securities Law. *See id.* arts. 42, 107(C), 110(E) (including on this list of individuals the issuer, board of directors, executives, general partners, employees, and any auditor or accountant certifying the truthfulness of the prospectus). In harmony with the American model, the signatories to the prospectus are potentially liable. Thus, one can argue that the issuer’s counsel is included in the list. Although not stated expressly in the law, the auditor’s liability can be limited only to the sections of the prospectus he actually certified.

135. The standard of reasonableness for due diligence could be that of the prudent man in the management of his property.

136. Securities Law for the Year 2002, art. 111(C). Most statutes of limitations under the U.S. securities laws allow an action to be brought within one year from discovery of untrue facts, but no more than three years from the date of occurrence or event giving rise to the cause of action. *See Lampf et al. v. Gilbertson*, 501 U.S. 350, 361 (1991).

An important provision in the Securities Law provides for speedy trials of securities cases by courts.¹³⁷ The speedy nature of securities cases does not contradict the notion of due process. Indeed, in many respects, it is far better than utilizing Jordan's normal adjudication system, which is so slow that it precludes effective remedies in fast-moving markets such as the capital market. Investors should rest easier knowing that all securities disputes will be treated expeditiously.

The private right of action for violation of securities laws arises out of specific legislative provisions that expressly give an individual such a right. For example, the Securities Law provides no private right of action for damages against the ASE for failure to enforce its rules and regulations.¹³⁸ The question remains, however, whether, under the Jordanian Securities Law, a private right of action may arise out of those provisions of the law that do not expressly give a private plaintiff the right to sue but simply make certain activities that have injured the plaintiff unlawful. Courts of other countries have found an implied private right of action.¹³⁹ It is too difficult to predict whether Jordanian courts will adopt implied private rights of action for violations of the securities law.

1. Insider Trading and Market Manipulation

The offenses of insider trading and market manipulation are the most detrimental to the creation of investor confidence in the capital market and thus have been singled out in the Securities Law.¹⁴⁰

137. See Securities Law for the Year 2002, art. 113(A) (mandating that enforcement of these decisions is also expeditious).

138. The reason for not holding the ASE liable is based on the fact that it is a not-for-profit entity with extensive regulatory functions.

139. See *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 (1971) (showing that U.S. courts have found an implied private right of action under section 10(b) of the Securities Exchange Act); see also *Case 26/62, Van Gend & Loos v. Nederlandse Administratie der Belastingen* [Netherlands Inland Revenue Administration], 1963 E.C.R. 1 (1963) (illustrating that the European Court of Justice implied a private right of action under the Treaty Establishing the European Economic Community and giving direct effect to the treaty where the treaty itself did not provide for such a private right of action).

140. The are several bases for prohibiting insider trading: an ethical basis which deems that allowing a select group of investors to acquire advantages simply by virtue of their insider status is inherently unfair; and an economic rationale which deems that unequal access to information will deter investors from entering a risky

Article 108 deals exclusively with insider trading. This Article prohibits capitalizing on nonpublic information through the purchase or sale of securities resulting in unjust enrichment at the expense of others.¹⁴¹ Although the law claims to regulate insider trading, it is hard to understand how a single article can regulate such a complex matter. The law fails to provide categories of insiders, such as corporate insiders and temporary insiders.¹⁴² The law does not provide details as to the elements of an insider trading violation, such as whether trading on the basis of inside information is dispositive, whether and what defenses may be offered, and what activities by analysts constitute insider trading. The law also fails to address the presence of scienter and causation.

Anyone who violates the insider trading prohibition may be imprisoned for up to three years.¹⁴³ However, convictions of insider trading in Jordan are rare. The State did not convict anyone for insider trading during the first five years the provision was in effect.¹⁴⁴ Not to mention, the Securities Law should be amended to provide severe civil penalties. Moreover, the staff of the JSC and prosecutors must be adequately trained to have the legal and financial background to handle insider trading offences, which are often very technical in nature.

market, inevitably resulting in the demise of the market. See JONATHAN R. MACEY, *INSIDER TRADING: ECONOMICS, POLITICS, AND POLICY* 25 (1991); see also Emily A. Malone, Note, *Insider Trading: Why to Commit the Crime from a Legal and Psychological Perspective*, 12 J.L. & POL'Y 327, 337-38 (2003) (describing insider trading as fundamentally unfair). Malone also discusses an interesting counterargument to the notion that insider trading is unfair and harms shareholders to whom the insider information is not available. *Id.*

141. Securities Law for the Year 2002, art. 108(B)(1); see *id.* art. 2 (providing a definition as to insider information). Insider information is information relating to one or several issuers or to one or several securities which has not been made public and which, if it were made public, would likely affect the price of any such security. *Id.* The definition of insider information does not include the debatable issue of tentative information which includes estimates, projections, and opinions.

142. Corporate insiders traditionally include directors, officers, and other employees of a company. Temporary insiders are those who perform services for a public company where the relationship entails receipt of inside information that the client expects to be kept confidential.

143. Securities Law for the Year 2002, art. 110(B)(1).

144. Telephone Interview with Rami Salah, Public Prosecutor of Northern Amman, Court of Northern Amman (July 8, 2007).

The Securities Law dedicates only one article to regulating market manipulation which aims to create a false market of supply and demand.¹⁴⁵ Manipulation not only affects the integrity of the market, but is also contrary to the principles of a market economy in which an equilibrium between supply and demand is sought. Securities manipulation disrupts this equilibrium by sending signals that might compel investors to react based on information that will ultimately prove false.

The Securities Law provides that anyone who violates the market manipulation prohibition may be imprisoned up to three years.¹⁴⁶ This market manipulation provision is too widely drawn. It does not, for example, exempt stabilization techniques.¹⁴⁷ Stabilization is important for successful placement of securities. The law should provide for such an exemption. In addition, the law should enumerate the requirements for such exemptions, define the stabilizing period, and establish a stabilization register.

Market manipulation cases could overlap with untrue statements of material fact cases. However, there is a distinction between these two cases. While civil liability for both cases requires harm to an individual investor in buying or selling, or refraining from buying and selling a security, criminal liability for market manipulation does

145. See Securities Law for the Year 2002, art. 109 (suggesting that market manipulation occurs through various means such as noisy trade—rumors or fads, for example).

146. Securities Law for the Year 2002, art. 110(B)(1).

147. See Jonathan A. Shayne & Larry D. Soderquist, *Inefficiency in the Market for Initial Public Offerings*, 48 VAND. L. REV. 965, 977-78 (1995) (referring to the Exchange Act Release No. 2446 which describes stabilization as “the buying of a security for the limited purpose of preventing or retarding a decline in its open market price in order to facilitate its distribution to the public”). These authors further contend:

Stabilization thus prevents any price downside of the securities below issue price during the issue period. As an example, in an IPO in which shares are being sold at a fixed price of \$20, the lead underwriter, on behalf of the underwriting syndicate, would stabilize price by maintaining, during the distribution, an offer to buy shares at the offering price. The bid keeps the price of the stock from dropping, if demand is weak, below the offering price, and thus creates the appearance that the issue is more desirable to the market than it actually is.

Id. at 978. There are several practices associated with stabilization such as creating artificial demand through buy-backs, ramping, and squeezing the shorts.

not require any actual harm suffered by any investor; the act itself is the crime.

The available literature suggests that the JSC rarely enforces the prohibition against market manipulation. Whether this limited application of the prohibition reflects enforcement difficulties or model market behavior is debatable. Again, qualified personnel and training are paramount for successful implementation of the prohibition against market manipulation. The point here is that the prohibition against market manipulation has not found its way into practice. However, given the way in which legislators drafted the market manipulation provision, it is hard to see how the JSC could ever efficiently use it.

The Securities Law provides punishment for violating insider trading and market manipulation prohibitions in the form of imprisonment for up to three years.¹⁴⁸ In the very same provision, the Securities Law provides a three-year prison sentence for any licensed broker who sells any security without written authorization from its owner.¹⁴⁹ Having uniform sanctions for these three violations assumes that they are of the same nature and thus warrant a uniform sanction. However, the Securities Law fails to take into account the fact that insider trading and market manipulation can harm the market substantially. On the other hand, the selling of a security by a broker without written authorization does not have the same effect on the market. Moreover, a law should not apply uniform sanctions for one specific type of violation, but rather should take into account that, in some cases, the violation may have been unintentional or in good faith. The current version of the Securities Law contemplates this reality, calling for different levels of sanctions for insider trading and market manipulation depending on the gravity of these offenses.

Finally, the Securities Law does not provide a private right of action for insider trading and market manipulation offenses. This omission is not surprising in a law that deals with these complex matters in a single article. Therefore, the Securities Law or its implementing regulations should introduce a private right of action against those who trade while in possession of insider information or affect the price of a security through manipulative practices.

148. Securities Law for the Year 2002, art.110(B)(1).

149. *Id.*

CONCLUSION

The Jordanian government enacted the Securities Law of 2002 to jumpstart its market and to attract investment that would transform its economy into a major regional player. This was the first step toward regulating the securities market. Much more must be done to create an appropriate regulatory scheme. Countless regulations need to be adopted to assure proper functioning of the market.

Although the internationalization of the Jordanian securities market increases the availability of funds from foreign investors, there could be drawbacks. This internationalization could increase the exposure of investors who would reconsider their portfolio investments if expected returns fall.

The Jordanian government should restructure the operation of its stock market. As of now, trading occurs for a limited time, from 9:30 a.m. to 12:00 p.m. There is also a trading limit at the opening phase of each day for the orderly clearing of outstanding orders prior to fully opening the market. An afternoon session (from 12:30 p.m. to 2:30 p.m.) should be added, and expanded, later on. Ultimately, the market should have continuous trading from 9:30 a.m. to 3:00 p.m. This way, Jordan will bring the hours of its securities market more in line with other markets.

The Securities Law calls for the creation of a central authority, the JSC, which acts pursuant to the legislative authority to control and monitor issuer behavior. The JSC enjoys broad regulatory powers. For example, it can develop rules on securities and oversee industry professionals by issuing broker-dealer and other professional licenses. The powers of the JSC in the enforcement area are, however, less specific. Although the law does contain enforcement provisions stipulating that the issuer and the issuer's management bodies are responsible for the completeness and reliability of information presented in required documents and subjecting them to civil and criminal action, there is no indication that these provisions will have any immediate impact on actual enforcement efforts. As with the disclosure requirements generally, enforcement provisions are critical and will play an important part in a regulatory scheme in the long run.

The JSC should establish an enforcement division responsible for market surveillance. The JSC should staff this division with inspectors and lawyers adequately trained and with the understanding that it will increase staff numbers should the volume of trading increase. The division will have to take a proactive approach toward enforcement by attending trading sessions at the ASE, monitoring public offerings, and responding to complaints from investors, among other things.

The ASE, a self-regulatory organization, helps its participants with on-the-ground knowledge to implement the most efficient and effective rules possible. Self-regulation arguably is cost effective because it fosters efficient rules and removes the expensive burden of oversight from the government bureaucracies. However, the self-regulatory nature of the ASE could create conflicts of interest. There could be lack of enthusiasm for regulation on the part of the group to be regulated and industry participants are inclined to advance their interest through the imposition of poorly anti-competitive restraints as opposed to those justified by regulatory needs. In addition, the ASE generates its revenues through the imposition of listing and annual fees. Thus, the financial interest of the ASE in continuing to collect fees may lead to decreased regulatory zeal.

The disclosure requirements are not the last word on the disclosure of material information about securities, rather it is a good start toward creating an efficient securities market. Disclosures to investors are now mandated only annually or semi-annually, and even then are issued long after the year has ended. It appears that detailed and vigorously enforced disclosure requirements can and will assure that the investing public receives all necessary information about the issuer and about the security being issued. While the law defined the materiality concept, it is too vague a concept to serve as the standard that governs the day-to-day conduct of issuers in the real world. Therefore, Jordan should adopt a categorical approach whereby it identifies categories of material events requiring disclosure.

In the context of violations and penalties, the Securities Law is silent as to the knowledge of truth by a purchaser at the time of purchase as a defense to misrepresentation liability for the issuer. Under the Jordanian Securities Law, a private right of action arises

out of specific provisions. However, it remains unclear whether these provisions implicitly give a private plaintiff a right to sue for other unlawful activities that have injured the plaintiff.

Jordan needs to define specifically, rather than in general terms, manipulative and fraudulent practices. The Jordanian Securities Law or its implementing regulations should provide details as to the elements of insider trading and market manipulation violations. Moreover, the state should enforce the prohibition against insider trading and market manipulation effectively. Sanctions against insider trading and market manipulation violations should be increased to be commensurate with the seriousness of these violations and the effects they have on the market.

The Jordanian Securities Law drew on the expertise of well-known and apparently successful foreign securities laws, specifically those of the United States and the United Kingdom. For example, securities laws in Jordan and the United States have mandatory disclosure requirements on the distribution of securities to the public. In spite of similarities between the securities laws of Jordan and the United States, differences of varying degrees of significance remain. For instance, the regulation of insider trading in Jordan is a much more recent phenomenon than it has been in America. Borrowing from other legal systems is typically more efficient than creating a new model from the ground up and, as such, Jordan capitalized on lessons already learned in the U.S. and other countries. However, it is dangerous to assume that the regulatory systems appropriate for the existing U.S. and U.K. markets are necessary or sufficient for Jordan. The regulatory structures currently in use in those markets are the result of evolution in response to changing conditions. The key is to choose provisions that will permit the Jordanian market to undergo its own evolution. For example, because there is only one viable stock exchange in Jordan, it is not necessary or efficient for broker-dealers to form an independent association at this point because there is little role for such a body to play.

As the Jordanian capital market becomes increasingly complex with the introduction of sophisticated financial instruments, and advances in the use of electronic commerce, the regulator risks will be marginalized unless it adapts to these changes. An effective regulatory framework must be proactive, with the objective being to

strike an appropriate balance between the often-competing interests of protecting the investing public and allowing market forces to dictate the speed and direction of healthy competition and innovations. Jordan needs to strike the proper balance between over- and under-regulation. Overly zealous regulation will have the counter-effect of scaring off industry professionals, and will ultimately destroy the securities market.

There must be a change in the culture of investing in the securities market in Jordan. The population, unfamiliar with the workings of the securities market, must gain an understanding of the process and begin to develop a sense of true risk/reward decisions. Jordanian markets should not be perceived as equivalent to gambling arenas. Investors should come to the market for long-term serious investments, not for the promise of quick, extremely advantageous returns. Moreover, the government should constrain excessive speculation in the Jordanian securities market through indirect means such as taxation.

Certainly, the Jordanian market has a great deal to offer investors. Investors want to maximize return on investment in securities and minimize any risk, and only governmental regulation of the market can give them such benefit. The present regulatory regime and culture in Jordan needs further re-structuring. The process may take a long time, but the legislation and regulations reviewed in this Article demonstrate that Jordan is moving in the right direction.