

Chapter 9. Corporate Governance in Jordan: Role of the External Auditor

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INTRODUCTION

In our globalized world, competition for capital is intense and only jurisdictions with superior corporate governance will attract the FDI crucial for economic growth and development.²⁹ Corporate governance encompasses numerous aspects of how a business is governed and the relationship between the company and various stakeholders. An important marker of good corporate governance is transparent and reliable financial reporting since investment decisions are based on financial statements which must be reliable and trustworthy. Indeed, accurate financial reporting of publicly-traded companies constitutes “the” source of information for a myriad of stakeholders including: company manager; shareholders, government regulators and potential investors.³⁰ If company financial statements cannot be trusted, investors can be victimized³¹ and economic development deterred as capital is unlikely to be invested when fraud is a concern. Recent multi-billion dollar global corporate accounting scandals prove the crucial importance of company external auditors in corporate governance.³²

An external auditor, through his professional opinion, plays a significant role in validating financial statements. The auditor’s responsibilities include examining the company’s books and records and preparing a comprehensive report summarizing the auditor’s findings and conclusions regarding the financial standing of a company.³³ In addition, the auditor may propose solutions

²⁹ See Jingchen Zhao, Promoting a More Efficient Corporate Governance Model in Emerging Markets through Corporate Law, 15 Wash. U. Global Stud. L. Rev. 447, 471 (2016).

³⁰ See James A. Fanto, Internationalization of Securities: Article: The Absence of Cross-Cultural Communication: SEC Mandatory Disclosure and Foreign Corporate Governance, 17 NW. J. INT’L L. & BUS. 119, 135-146 (1996).

³¹ Jordan had its headline-grabbing corporate scandals involving companies and banks. One corporate scandal involved Petra Bank which was Jordan’s second bank. Due to poor auditing controls, Petra Bank collapsed and became one of the biggest corporate scandals in Jordan’s history. See A Delicate State of Affairs, *The Economist* (Oct. 4, 2003). Other cases involved four local banks. See Isam Qadamani, White Revolution in Banks, *Al-Rai Newspaper* (July 2, 2007).

³² For example, the “Enron scandal” in 2001 involved irregular accounting procedures throughout the 1990s which led Enron to file for bankruptcy protection. Many of Enron’s debts and losses were not reported in its financial statements. See William W. Bratton and Adam J. Levitin, A Transactional Genealogy of Scandal: from Michael Milken to Enron to Goldman Sachs, 86 S. Cal. L. Rev. 783, 822-825 (2013). Post-Enron scandal, it was the collapse of the US giant telecommunications company WorldCom in 2002. The debt of that company has reached in that year the amount of 28 billion USD and, at the same time, its general manager got a loan from the company of 366 million USD. See Warren G. Lavey, Responses by the Federal Communications Commission to WorldCom’s Accounting Fraud, 58 Fed. Comm. L.J. 613, 621 (2006). See also Joel Slawotsky, The Virtues of Shareholder Value Driven Activism: Avoiding Governance Pitfalls, 12 *Hastings Bus. L.J.* 521, 560 (2016) (Toshiba admitted to a huge multi-year, billion-dollar accounting scandal, after being caught. The once mighty business entity has suffered huge financial losses, a plunging share price and debt cut to junk).

³³ Over the years, there have been charges that companies hide information and claims of fraud on the part of auditors. See M. Al-Basheer, The Non-Seriousness of the Regulatory Authorities Prevented Stopping Corruption and Failure of Companies, *Al-Rai Newspaper* (Apr. 21, 2001).

for weaknesses in company's finance and assist management in increasing production capacity of the company.

Due to the substantial role the auditor plays in the company's affairs, the Jordanian legislator enacted several provisions in order to articulate the external auditor's rights and duties. The legislator carved out a special section in the Company Legislation No. 22 of 1997 to deal with matters such as election of an auditor, contents of auditor's report, attendance of the general assembly meetings, and prohibitions.

Given the remarkable changes due to globalization in recent years, regional transformations and the intense competition for foreign direct investment, Jordan's government has instituted a strategic plan "Jordan 2025" in a bid to raise Jordanian competitiveness and revitalize the economy. To the extent that Jordan seeks to become a center of finance and trade, a stable and reliable legal system is essential. To successfully achieve the goal of becoming a financial center, investors need to have confidence that Jordanian companies will accurately report their results. This in turns calls for an analysis of the current law on auditors in Jordan.

The goal of this chapter is to assess the legal regime of external auditors – as opposed to internal auditors - per Company Legislation of 1997 and provide suggestions for improvement in the current legal regime.³⁴ Part II discusses global trends in corporate governance with respect to the role of the external auditor. Part III of the chapter provides an overview of the development of the auditing profession in Jordan. In Part IV, the chapter analyzes in detail the specific provisions related to auditors in the Company Legislation of 1997. The part also points out various shortcomings and inconsistencies between rights and duties of auditors and makes suggested proposals for amending the current law.

THE EXTERNAL AUDITOR IN THE CONTEXT OF CORPORATE GOVERNANCE

Jordan has instituted a long term plan "Jordan 2025" in a bid to strengthen and modernize the Jordanian economy.³⁵ The principal goal of "Jordan 2025" is to

³⁴ See Jillian M. Lutz, Analysis of the Proposed NYSE Corporate Governance and Audit Committee Listing Requirements, 2 DePaul Bus. & Comm. L.J. 99, 112, 131-132 (2003). While internal Audit refers to an ongoing audit function performed within company by its employees, an external audit is an audit function performed by a third party which is not a part of the company. The objective of the internal audit is to review the routine activities and provide suggestion for the improvement. On the other hand, the objective of the external audit is to check and verify the financial statement of the company. See The UK Chartered Institute of Internal Auditors, Internal's Audit Relationship with External Audit, IIA Policy Paper (2015), available at < <https://www.iaa.org.uk/media/1042664/internal-audit-relationship-with-external-audit-march-2015.pdf> >. See also Mishiel Said Suwaidan and Amer Qasim, External Auditors' Reliance on Internal Auditors and its Impact on Audit Fees: An Empirical Investigation, 25 Managerial Auditing Journal 509, 520 (2010) (external auditors in Jordan consider the objectivity, competence and work performance of internal auditors as very important factors affecting their reliance decisions).

³⁵ see Jordan 2025, available at < <http://inform.gov.jo/en-us/by-date/report-details/articleid/247/jordan-2025> > (last visited June 20, 2017).

implement the right policies and legal structures to foster “a dynamic private sector that is able to compete internationally.”³⁶

The blueprint envisions Jordan as a regional economic gateway to regional markets that is also taking advantage of free trade agreements the Kingdom has signed with several countries in order to achieve an export-oriented economy.³⁷

A successful implementation of “Jordan 2025” requires a high level of corporate governance since this is inextricably linked to healthy capital markets, an ability to attract and retain FDI and generally superior economic performance.³⁸ Investors are unlikely to pour capital into a nation which does not promote a transparent and reliable financial reporting governance environment. Jordanian FDI has not been robust, “FDI inflows, which remains modest with respect to local investments and as a share of GDP.”³⁹ According to the World Bank the lack of robust FDI is:

*traceable to the weak and inefficient institutional environment. Jordan ranks 71 in the World Economic Forum’s 2011/12 Global Competitiveness Report, ahead of Morocco (73) but behind Tunisia (40) and the Gulf economies. The country has fallen from 50th position in 2009 because of deterioration in its institutional environment, government bureaucracy, and financial markets.*⁴⁰

Therefore, improving governance is important to facilitating Jordan’s plans of an improved and modern economy capable of competing in a globalized market. The role of the auditor in corporate governance is vital since investors depend on transparent, accurate and reliable financial reporting. Lackluster laws on auditors can indicate poor corporate governance. There should be no tolerance for managerial and employee wrongdoing. An economy may be derailed by allowing management to continue to mismanage the corporate sector through accounting “irregularities”. Weak corporate governance will scare off foreign investors and an economy will decline.

Jordan, to compete in a globalized world, must modernize its corporate governance and in particular, must ensure best practices for the role of the auditor. The following part discusses the development and regulation of auditors in Jordan.

³⁶ see Omar obeidat, gov’t launches ‘Jordan 2025’ development blueprint, jordan times, available at <<http://www.jordantimes.com/news/local/gov't-launches-jordan-2025-development-blueprint>> (may 11, 2015).

³⁷ id.

³⁸ see Ronald j. Gilson, transparency, corporate governance and capital markets, the latin American corporate governance roundtable (2000), available at <<http://www.oecd.org/daf/ca/corporategovernanceprinciples/1921785.pdf>> (last visited sep. 12, 2017).

³⁹ see Jordan economic monitor, maintaining stability and fostering shared prosperity amid regional turmoil, page 23, available at <www.worldbank.org.jo>.

⁴⁰ Id. at page 25.

DEVELOPMENT AND INCIPIENT REGULATION OF THE AUDITING PROFESSION IN JORDAN

The auditor profession in Jordan has undergone dramatic growth since the first audit office, George Khader's firm, opened in 1944.⁴¹ Saba & Co, a prominent Arab audit firm, established its branch office in Jordan in 1948.⁴² In the ensuing years, the profession has increased in size and sophistication and currently, there are almost 200 audit firms and offices including firms affiliated with the Big Four and other global firms.⁴³ International auditor firms, especially those associated with Deloitte Touche Tohmatsu, dominate the market for auditing banks and insurance companies, and have a considerable share of the audit market for other corporations.⁴⁴ In addition to domestic companies, foreign companies operating in Jordan must have their subsidiaries audited by Jordanian licensed auditors.

Regulation of the audit profession in Jordan is a relatively recent phenomenon; as recently as 1961, audit practice was unorganized and practitioners were not required to satisfy any level of academic knowledge or work experience.⁴⁵ Thus, any person was inherently eligible to practice auditing regardless of educational qualification or skill level.

The first audit qualification law was enacted in 1961 and outlined certain conditions that had to be fulfilled by an individual licensed to practice audit.⁴⁶ However, the law did not fully enumerate the duties and rights nor specify prohibited activities for an auditor.⁴⁷ In sum, the 1961 law provided lax conditions for practicing auditing.

Given economic development in Jordan in the 1970s and 1980s and the increasing number of publicly traded shareholding companies,⁴⁸ a need arose for a more comprehensive and updated audit law, leading to the issuance of the Law

⁴¹ See Ahmed Saadah, *The Evolution of the Accounting and Auditing Profession in Jordan*, Vol. 29 *The Auditing Journal* 23-25 (1996).

⁴² *Id.*

⁴³ See Modar A. Abdullatif, *The Role of Auditing in Jordan: An Empirical Study Expectations* 85 (2003) (unpublished Ph.D dissertation, University of Manchester) (on file with author). The Big Four are: Deloitte & Touche LLP, Ernst & Young LLP, KPMG LLP, and PriceWaterhouseCoopers LLP.

⁴⁴ See Mohammad Ebrahim Nawaiseh, *Can Earnings Management be Influenced by Audit Quality?* 5 *International Journal of Finance and Accounting* 209, 210 (2016).

⁴⁵ See N.S. Khouri, *The Evolution of the Audit Profession in Jordan*, *Al-Iqtisadi Al-Urduni* (The Jordanian Economist) 82-83 (1994).

⁴⁶ See Law of Practicing the Auditing Profession No. 10 of 1961 (permitted licensing of individuals possessing intermediate school certificates and six years of experience).

⁴⁷ See K.A. Abdullah, *The Audit Profession in Jordan and Kuwait: A Comparative Analytical Study*, 9.2 *Dirasat Journal* 131-151 (1982).

⁴⁸ Since the establishment of Amman Financial Market and then the founding of Amman Stock Exchange, trading has increased. For instance, trading on the Secondary Market rose from JD9.7 million in 1978 to JD3.0 billion in 2013; market capitalization of subscribed shares is currently around JD18.2 billion, as compared to around JD286 million by the end of 1978; and the number of listed companies went up from 66 in 1978 to 240 by the end of 2013. Originally 57 companies were listed on Amman Financial Market, rising to 120 companies in 1988. A total of 224 of public shareholding companies were listed on the Amman Stock Exchange by the end of 2016, compared with 201 by the end of 2005; their market capitalization by end of 2016 rose to US\$18,233 million, compared to US\$4,943 million at the end of 2005. In addition, by the end of July 2017, shares owned by non-Jordanians represented 37.9% of ASE capitalization. See Amman Stock Exchange, *Trading Statistics*, available at < <http://www.ase.com.jo/en/main-indices>> (last visited Sep. 15, 2017).

of the Audit Profession No. 32 of 1985.⁴⁹ The 1985 Law revised the provisions concerning qualifications and required that in order to be licensed; the auditor must possess at least a community college degree in accounting and must pass an exam administered by the Audit Profession Council.⁵⁰ The law also empowered the Audit Profession Council to supervise the audit profession. The 1985 Law specifically banned auditors from engaging in ten acts including unethical advertising, disclosure of clients' information, and deliberately giving wrong opinions on financial statements.

In 2003, a new law was enacted to streamline the governance of the audit profession.⁵¹ The 2003 law provides for the formation of a supervisory authority, known as the Audit Profession Association, similar to the existing one under the 1985 Law. However, the Audit Profession Association includes both auditors and accountants.⁵² The Audit Profession Association monitors the performance of auditors and accountants to ensure their compliance with laws and accounting and auditing standards.⁵³ These standards include not only Jordanian accounting rules but also GAAP and global standards. The law also substantially revised the level of qualification needed for practicing auditing including a requirement of training.⁵⁴ Significantly, the 2003 law obligates certain entities, such as partnerships and corporations, to appoint licensed auditors.⁵⁵ The mandatory appointment for these entities will provide additional working opportunities for auditors.

The Regulation for Classifying Auditors No. 30 of 1986 classified licensed auditors into categories.⁵⁶ For example, the Regulation for Classifying Auditors designated category A for the highest qualified auditors i.e. those with the highest academic qualifications and experiences who can audit any company or establishment. On the other hand, auditors in categories B and C can only audit specified institutions excluding banks, insurance companies, or industrial companies. This practice of classification was tolerated in a period when there few auditors with first university degree. Nowadays, this practice has changed. The Provisional Law on Organizing the Audit Profession No. 73 of 2003 abolished this classification since all auditors are required to have first university degree in the field and enjoy practical experience.

⁴⁹ See Law of Auditing Profession. Law No. 32 (1985).

⁵⁰ The Audit Profession Council is mainly government-dominated and consists of twelve members such as the chairman of the Accounting Bureau, head of the Income Tax Department, and governor of the Central Bank of Jordan. See Khouri, *supra* note 17, at 83. See also M. Al-Basheer, Regulations...Is there Anyone to Respond!!!! Vol. 47 The Auditing Journal 1 (2001).

⁵¹ See Provisional Law on Organizing the Audit Profession No. 73 of 2003, Office Gazette No. 4606 (June 16, 2003).

⁵² *Id.* art. 4.

⁵³ *Id.* art. 8 & 9.

⁵⁴ *Id.* art. 22 & 28.

⁵⁵ *Id.* art. 30.

⁵⁶ See also Regulation for Classifying Auditors No. 30 of 1986, Official Gazette No. 3389 (April 16, 1986).

The 2003 law and its implementing regulation provide guidelines for promoting auditors to higher categories.⁵⁷ The classification of auditors into categories may prove irrelevant as the majority of auditors can be classified into category A.⁵⁸ Moreover, on average, promotion from category B or C to category A can be accomplished in one year or less.

The representation of auditors is by a society rather than a union or federation. In contrast to the lack of a union for auditors, unions have worked to improve the professions they represent by defending their rights. For instance, attorneys in Jordan have a union since the 1950s.⁵⁹ The Jordanian accounting society has functional challenges when functioning as a professional body; it has a shortage of resources and no quality guarantee procedures to follow. Moreover, the 2003 law does not regulate some welfare matters such as minimum audit fees and social safety net programs i.e. retirement system and health insurance. The fact that auditors are not represented by a union may indicate that it is assigned a low level of importance compared to other professions such as attorneys, doctors, teachers, and pharmacists.

REGULATION OF AUDITORS IN THE COMPANY LEGISLATION

The regulation of auditors in a given country is related to that country's legal system. In Jordan, like other code law countries, laws stipulate minimum requirements and rules tend to be highly prescriptive and procedural.⁶⁰ The degree to which rules are legislated can substantially impact the nature of the auditing regime.

The Company Law No. 22 of 1997 (“1997 Company Law”) is considered a major source for regulating auditors.⁶¹ In addition to regulating general matters related to companies, the 1997 Company Law governs auditors. For example, the issues of auditors' election, remuneration, report, and liability are dealt with in

⁵⁷ The guidelines include possessing additional university degree, additional experience, or professional qualification. See Provisional Law on Organizing the Audit Profession No. 73 of 2003, *supra* note 23, at art. 26.

⁵⁸ Category A requires a minimum of a first university degree in accounting and three years of experience in accounting and auditing. *Id.*

⁵⁹ See History of Jordan Bar Union, available at <<http://www.jba.org.jo/AboutUs/AboutUs.aspx>> (last visited April 12, 2017). In the U.S., the American Bar Association (ABA), founded August 21, 1878, is a voluntary bar association of lawyers, law students, and others interested in the law and the legal profession. The ABA's most important stated activities are the setting of academic standards for law schools, and the formulation of model ethical codes related to the legal profession. See Quintin Johnstone, Bar Associations: Policies and Performance, 15 Yale L. & Pol'y Rev. 193, 207, 212 (1996).

⁶⁰ In common law countries, such as the United States, laws establish limits beyond which it is illegal to venture, and within those limits experimentation is encouraged. See Stephen Salter & Timothy Douplik, The Relationship between Legal Systems and Accounting Practices: A Classification Exercise, 5 Advances Int'l. Acct. 3 (1992) (provides empirical support for the hypothesis that a legal system is a significant predictor of auditing practices and concludes that a dichotomization of accounting practices, procedures, and rules consistent with the common law/code law classification of legal systems).

⁶¹ See Company Law No. 22 of 1997 as amended by Provisional Law No. 17 of 2003, Official Gazette No. 4589, art. 192. a (March 16, 2003). Other laws relating to auditors include securities, banking, and insurance laws. See Provisional Securities Law No. 76 of 2002, Official Gazette No. 4579 (December 31, 2002). See Banking Law No. 28 of 2000, Official Gazette No. 4448, art. 60 (August 2000). See also Insurance Law No. 33 of 1999 as amended by Provisional Law No. 67 of 2002, Official Gazette No. 4572, art. 40 (November 17, 2002).

the 1997 Company Law. The following sub-sections consider these issues in detail.

Election of Auditors

The 1997 Company Law specified which companies should appoint an auditor. These companies include the public shareholding company; limited liability company; and private shareholding company. The Company Law excluded from the list general and limited partnerships and *Mahassa Company* (silent company).⁶² There is no obvious reason why the Jordanian legislator excluded partnerships and *Mahassa Company* from those companies whom their financial statements must be externally audited. It can be presumed that partnerships and *Mahassa Company* are generally small or medium-size companies and their nature do not merit appointment of auditors as they may not maintain organized commercial books. However, these reasons do not justify exclusion from appointing auditors especially knowing that auditors play an important role in verifying financial reports which are crucial for third parties who deal with partnerships and *mahassa* entities. The Company Law should be amended so as to oblige all types of companies to appoint auditors and have their financial statements audited. Until such amendment is incorporated, it should be required that if a company is not required to appoint an auditor it should make this disclaimer in all contracts to alert third parties.

Management of the company – as represented by the board of directors-nominates auditor(s) among those authorized to practice in Jordan. At the annual general shareholder meeting, the shareholders vote either in favor of or against that auditor.⁶³ Significantly, the right of shareholders to elect an auditor is rarely exercised. Moreover, the ability to select the auditor or to effectuate a change to a new auditor is substantially reduced because of the ownership structure in many Jordanian companies. In reality, the general meeting of shareholders' rubbers stamps the decision of selecting an auditor which has already been made by management. Therefore, the process of selecting an auditor can be more accurately described as "appointment" by the controlling owner rather than a true election. A further issue that arises is the fact that the majority of Jordanian companies have concentrated ownership.⁶⁴ Based upon the ownership structure

⁶² *Mahassa* company is a type of company that neither acquires juristic personality nor partners acquire the quality of merchants. Third parties are unaware of the existence of *mahassa* company. Thus, third parties have recourse only against partners in the *mahassa* company with whom they have dealt so long as the existence of the company is undisclosed. If the *mahassa* company is disclosed to third parties, it is treated as a general partnership with respect to such third parties. See Michael J.T. McMillen, Islamic Shari'a-Compliant Project Finance: Collateral Security and Financing Structure Case Studies, 24 Fordham Int'l L.J. 1184, 1233 (2001).

⁶³ See Company Law No. 22 of 1997, *supra* note 33, art. 192.a

⁶⁴ See World Bank, Corporate Governance Country Assessment: Jordan 1-2 (2004), available at <http://www.worldbank.org/ifa/jor_rose_cg.pdf> (last visited Sep. 9, 2017).

in many large companies, the controlling shareholder generally selects the auditor. This state of affair presents an additional avenue for making suggested reforms by giving minority shareholders the opportunity to override the controlling/dominant owner in decision making/votes.

The Company Law of 1997 did not include specific qualifications, whether academic or professional, for auditors. Rather, the matter of qualifications is referred to the Provisional Law on Organizing the Audit Profession No. 73 of 2003. Auditors are appointed for one year renewable.⁶⁵ However, the Company Law does not determine if the one-year period is renewable once or more and for how long. It can be argued, though, that the general meeting of shareholders has the right to dismiss an auditor since it is the authority which elected him. In other words, an auditor should be dismissed in the same manner in which he was elected. Thus, if the auditor was elected by the general meeting of shareholders, he would be dismissed by the general meeting of shareholders.

If the general meeting of shareholders fails to elect an auditor, then the board of directors shall nominate to the Companies Controller of the Ministry of Industry and Trade three auditors at least whereby the Companies Controller can select one among them.⁶⁶ In this instance, the Company Law refers the matter to the Companies Controller considering the fact that it is the umbrella entity responsible for monitoring and regulating companies in Jordan.⁶⁷ Rather than invoking this time consuming process that divests the right from the shareholders, the Company Law should be amended to provide that a second opportunity to elect an auditor will be allowed at an extraordinary meeting of shareholders. Under this proposal, only if the extraordinary meeting of shareholders fails to elect an auditor, would the Companies Controller intervene.

In addition to the external company auditor, audit committees play an important role in accounting matters. Audit committees of corporate boards of directors are central to corporate governance in many countries.⁶⁸ Audit committees oversee, among other things, the financial reporting process which is important to promote reliable financial statements. Thus, Audit committees protect investors and other stakeholders by aiding in deterring, detecting, and preventing fraudulent financial reporting. At present, there is no such mechanism in Jordan. The Company Law of 1997 should be revised to allow companies to establish an audit committee.

⁶⁵ See Company Law No. 22 of 1997; *supra* note 33, at art. 192.a.

⁶⁶ *Id.* art. 192.b.

⁶⁷ See Companies Controller Directorate, An Overview 2-3 (2007)

⁶⁸ See Kon Sik Kim, Transplanting Audit Committees to Korean Soil: A Window into the Evolution of Korean Corporate Governance, 9 Asian-Pacific L. & Pol'y J. 163, 171-180 (2007) (discussing which directors should serve on the audit committee, the scope of its duties, and how it should operate).

The external audit fee is determined either by the general meeting of shareholders or the board of directors.⁶⁹ Audit fee in Jordan is regarded as low especially if compared with other countries. For example, audit fee for public shareholding companies stands at JD 1500 (equivalent to US \$2116).⁷⁰ Arguably, managers of companies do not appreciate or value the role of auditing and perceive auditing as a service that does not provide tangible value. Alternatively, it may be the self-interest of managers who have conflicts of interest with the company that “incentivizes” low compensation so as to avoid substantial scrutiny. Managers might not want to push for higher fees to avoid comprehensive review. From an auditor's viewpoint, they may accept the audit missions offered at low prices in the hope that they will deliver profitable consultancies, taxation review, and non-audit services for the same client. However, the low level of auditor's fee may adversely affect his performance since he may not be able to meet all required duties at such a remuneration level.⁷¹ Further regulations should set a minimum level of auditor's fee commensurate with his duties and risks. In the alternative, the market itself could set the price i.e. de-regulation.

Auditors Independence

The auditor must be objective in reviewing financial statements and an auditor's independence from his client is one of the hallmarks of superior corporate governance. To be objective, the auditor must at from the outset of the relationship and throughout the engagement maintain his independence. The 1997 Company Law does not define the term “independence.”⁷² Rather, the 1997 Company Law enumerates the kinds of relationships and activities that create conflicts of interest and could cause the auditor to jeopardize his independence. For example, an auditor is prohibited from participating in the establishment of a public shareholding company.⁷³ Auditors are also barred from serving as a member of a company's board of directors, partner to any member of the board of

⁶⁹ See Company Law No. 22 of 1997, *supra* note 33, at art. 192.a. See also Jordanian Court of Cassation, Case No. 2002/575, Adaleh Publications (March 13, 2002).

⁷⁰ See Jordan Association of Certified Public Accountants, Circular (June 19, 2007).

⁷¹ However, courts in Jordan held that auditors should do their job in proper manner even though their remunerations were low. See Court of Cassation, Case No. 1976/135, Jordanian Bar Association Journal 1907 (January 1, 1976) (Although the auditor audits accounts for the company once or twice a month and his fees are low, he must do his work properly). See also Husam Al-Khaddash, Rana Al Nawas, and Abdulhadi Ramadan, Factors affecting the quality of Auditing: The Case of Jordanian Commercial Banks, 4 International Journal of Business and Social Science 206, 209 (2013).

⁷² In the U.S., the Independence Standards Board provided a definition of independence for auditors. Auditor independence is both independence of mind - freedom from the effects of threats to auditor independence and independence in appearance - absence of circumstances that would lead well-informed investors and other users to conclude that there is an unacceptably high risk that an auditor lacks independence of mind. See Sean M. O'Connor, Strengthening Auditor Independence: Reestablishing Audits as Control and Premium Signaling Mechanisms, 81 Wash. L. Rev. 525, 566-568 (2006).

⁷³ See Company Law No. 22 of 1997, *supra* note 33, at art. 197. Thus, an auditor could be prohibited from acting as a promoter or underwriter.

directors, or employee of any board member.⁷⁴ These prohibitions are designed to disconnect the auditor from any financial interest whatsoever in the company.

Over the years, auditing firms have come to offer many types of services to their audit clients.⁷⁵ Now, the ability of auditing firms to perform such services is limited. The 1997 Company Law prevents an auditor from providing "permanently" any technical, administrative or consultancy services to a company whose accounts he audits. In other words, an auditor is not permitted to engage in non-audit services which can include, for example, financial consulting, pension services, and marketing services.⁷⁶ These services may be unsuitable for the role of auditors. Additionally, by providing non-audit services, companies can exercise leverage over auditing firms to influence their opinions on the financial statements. Therefore, any non-audit service provided to clients will violate the 1997 Company Law prohibitions. However, the prohibitions are limited to "permanent" delivery of non-audit services. Thus, "temporary" or "circumstantial" delivery of non-audit services may be permitted. The 1997 Company Law should be amended to prohibit the delivery of non-audit services without distinction between permanent and temporary because both have the same undesired effects. This would bring Jordan in line with global best practices and enhance corporate governance.

Rotation of auditors every three or four years should be a priority for legislative amendment to law. This allows for transparency and avoiding any cases of potential conflict of interests.⁷⁷ Another significant area for improvement is the meaning of the term "independence" found in the 1997 Company Law. The term is general and in some cases can be interpreted ambiguously. For example, the 1997 Company Law does not define with sufficient clarity the term "participation" in the establishment of a company which would prohibit an auditor from delivering his services to this company. Furthermore, it is not clear if any of the prohibitions against an auditor extend to his immediate family. Because there is no guidance, interested parties may have difficulty applying the existing independence rules to the large number of potential permutations. Moreover, the 1997 Company Law refers to absolute prohibition when listing its independence rules. The law should permit certain activities but restrict their

⁷⁴ *Id.*

⁷⁵ See Andrew D. Bailey, Jr., *The MultiDisciplinary Practice of Certified Public Accountants and Lawyers*, 52 Case W. Res. 895, 897, 902 (2002) (the breadth of non-audit client/management services had increased to the point that it is the norm to refer to the "business" of public accounting rather than the "profession").

⁷⁶ See Matthew J. Barrett, "Tax Services" as a Trojan Horse in the Auditor Independence Provisions of Sarbanes-Oxley, 2004 Mich. St. L. Rev. 463, 472, 486 (2004). Auditing firms have attempted to expand their services to include certain legal services. See Alison H. Mijares, *The Securities and Exchange Commission's Ban on Legal Services by Audit Firms: Amendments to Rule 2-01 of Regulation S-X Under the Securities Exchange Act of 1934*, 36 U.S.F. L. Rev. 209, 226-228 (2001).

⁷⁷ See Mahmoud Ababneh, *The Phenomenon of Companies Corruption*, 40 Journal of Law 359, 385-386 (2016).

extent or permit certain activities but require the auditor to publicly disclose information about them.

No Judicial decisions exist in which an auditor's independence was an important issue. Due to the non-existence of judicial cases that address auditor independence, courts have not had the opportunity to act as policymakers in this area. Thus, the Jordanian legislator ought to modernize independence rules of the Company Law to be more finely tuned.

Duties of Auditors

Although the auditor comes to the company as a contractor under a contract, he assumes a responsibility transcending any employment relationship. The auditor is an agent for numerous stakeholders such as company shareholders whose interests the auditor is charged to protect.⁷⁸ The relationship between auditors and shareholders is a classic agent-principal issue.⁷⁹ Thus, the auditor-agent owes duties to the shareholder-principal. The Company Law articulates several duties for an auditor.

The 1997 Company Law enumerates a list of specific duties auditors are obligated to perform. First, an auditor is responsible for monitoring the company's activities.⁸⁰ However, the obligation to "monitor the company's activities" is not specifically defined or illustrated. The obligation should be better defined and examples or guidance provided. As the law currently stands, the responsibility is general and ambiguous since monitoring the activities of the company may include many issues an auditor cannot be reasonably asked to perform such as verifying efficiency in managing the company's affairs. Further, the duty of an auditor to monitor the activities of the company is not backed by any auditing standard.⁸¹

Second, an auditor is required to audit the company's accounts pursuant to recognized auditing, scientific, and technical standards.⁸² As for standards of

⁷⁸ See Company Law No. 22 of 1997, *supra* note 33, at art. 199.

⁷⁹ The principal-agent characterization resonates well in corporate law. See Faith Stevelman Kahn, Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure, 34 Ga. L. Rev. 505, 507-18 (2000). Another viewpoint argues that auditors cannot engage in an agency relationship with the shareholders where by definition they become subject to the principal's control. Auditor duties should be conceived in formal rather than relational terms, with fidelity going to the rules, to the texts, and to the system that auditors apply. In other words, an auditor is faithful to Generally Accepted Accounting Principles, the elaborate system of rules and standards that determines accounting treatments. See William W. Bratton, Shareholder Value and Auditor Independence, 53 Duke L.J. 439, 445, 486 (2003). See also Amy Shapiro, Who Pays the Auditor Calls the Tune? Auditing Regulation and Clients' Incentives, 35 Seton Hall L. Rev. 1029, 1033 (2005) (auditors has come to serve two masters- the public and the corporation. The auditor is supposed to play the first role of scrutinizing the corporation's financial statements in order to give a candid assessment of quality. The auditor's actual fee-paying client, however, is the audited corporation who hires the auditor to play the second role, that of certifying information).

⁸⁰ See Company Law No. 22 of 1997, *supra* note 33, at art. 193.a. The duty to monitor the company' activities was added in the Company Law of 1997. This duty was included in the 1989 Company Law as a general guideline, but in the 1997 Company Law it is included in the list of duties.

⁸¹ See Ali A. Thnibat, Analytical Critical Study of the Consistency of the Auditors' Duties and Responsibilities Mentioned by the Jordanian Acts with those of the International Auditing Standards, 31.1 Dirasat Journal: Administrative Sciences Series 10, 14 (2004).

⁸² See Company Law No. 22 of 1997, *supra* note 33, at art.193.b.

auditing and accounting, the 1997 Company Law provided a relatively better definition compared to the previous law of 1989.⁸³ The Company Law of 1997 states that those standards are the accounting and auditing principles agreed upon internationally and required in Jordan by the designated professional parties. Notwithstanding this improvement, the 1997 Company Law does not define these designated professional parties mentioned in the law.⁸⁴

An auditor is also required to examine company's internal financial controls to ensure their suitability with regard to the company's business and safeguard its assets.⁸⁵ Although the term "examining internal financial controls" is to some extent general and undefined, it is a common responsibility of auditors and conforms to International Standards on Auditing.⁸⁶ Among other duties, the auditor is mandated to verify the company's assets, its ownership, and ascertain the legality and correctness of the company's obligations.⁸⁷ This duty is considered a vital responsibility that can be used to gauge the status of the company and ascertain the ultimate ownership/control of the company and its true market value. However, the 1997 Company Law is short on details regarding the auditor's duty to verify the company's assets.

The 1997 Company Law expanded the power of the company auditor to encompass reviewing management affairs and is required to examine decisions of the board of directors and the general meeting of shareholders.⁸⁸ For example, an auditor could examine a decision to purchase or sell to ensure that such financial transactions are done in a legal manner. The list of auditor's duties ends in a "catch-all" phrase. The auditor may perform any other duties as required by other laws.⁸⁹ The "catch-all" phrase empowers the respective regulatory body to expand duties of an auditor as it sees fit. Providing examples of expected auditor oversight would improve this aspect of the 1997 Company Law.

Although article 193 of the Company Law of 1997 is supposed to list all duties of auditor, articles 202 and 203 provide for additional duties. Taken together, these articles form the "do's and don'ts" rules for auditors. In other words, the list of duties included in article 193 is drafted in a positive form. For example, auditors are responsible for monitoring company's performance, auditing its accounts, ensuring that its books were kept in a proper manner. On the other

⁸³ The Company Law of 1989 did not specify what was considered as generally accepted accounting and auditing standards. The Company Law of 1989 used the term in a vague form given that there were no such generally accepted standards applied in Jordan.

⁸⁴ Arguably, professional parties include the Audit Profession Society.

⁸⁵ *Id.* art. 193.c.

⁸⁶ See Thomas C. Pearson, *Creating Accountability: Increased Legal Status of Accounting and Auditing Authorities in the Global Capital Markets*, 31 N.C.J. Int'l L. & Com. Reg. 65, 74-78 (2005).

⁸⁷ See Company Law No. 22 of 1997, *supra* note 33, at art. 193.d.

⁸⁸ *Id.* art. 193.e.

⁸⁹ *Id.* art. 193.f.

hand, articles 202 and 203 are drafted in the negative. For example, auditors are prohibited from disclosing information or speculating on client's shares.

In addition, the auditor owes a duty of confidentiality and is thus prohibited from disclosing to shareholders and others any information that comes to his knowledge in the course of exercising his work.⁹⁰ However, the duty of confidentiality does not apply when an auditor discovers fraud or any other violation of the laws. In the latter case, the auditor shall disclose these violations and report them to the appropriate authorities. In sum, the duty of confidentiality is not absolute but rather is inapplicable when the duty conflicts with the interest of shareholders and others in obtaining crucial information.

Other new responsibilities of auditors under the 1997 Company Law include a prohibition on speculation.⁹¹ This duty is to be added to previous one of confidentiality. Due to the nature of his work, an auditor knows the nuts and bolts of the company and has invaluable inside information as to the business. The auditor can easily speculate and profit on the company's shares to gain a profit based upon this knowledge. Thus, to avoid speculation, the 1997 Company Law expressly prohibits an auditor from speculating on client's shares or otherwise profiting from insider knowledge.⁹² However, interestingly the 1997 Company Law limits the scope of the prohibition to trading in company shares only. Indeed, by way of inference, the Company Law does not extend the prohibition to include subsidiary companies. Thus, the auditor could potentially profit from the inside information via debt trading, or even trading shares of company subsidiaries or rival companies based upon this knowledge. Therefore, the law should be amended to include a comprehensive prohibition of making transactions in the financial markets based upon information learned during the auditor engagement.⁹³

A new feature of the 1997 Company Law is that an auditor, if unable to perform his/ her duties, is to withdraw from the audit engagement and disclose the withdrawal both to the board of directors and the Companies Controller.⁹⁴ The Companies Controller is charged with discussing the disengagement with the board of directors and, if unable to solve the problems, can disclose that to a general meeting of shareholders if deemed necessary. The law should be amended

⁹⁰ *Id.* art. 202.

⁹¹ *Id.* art. 203.

⁹² See Bashar Malkawi, Reflections on the Securities Law of Jordan, 23 AM. U. Int'l L. Rev. 763 (2007) (Article 108 of the Jordanian Securities Law deals exclusively with insider trading. This article prohibits anyone to capitalize on nonpublic information through the purchase or sale of securities resulting in the unjust enrichment at the expense of others).

⁹³ Debentures are long-term debt notes issued pursuant to a trust indenture. The contract under which debentures are generally issued is called the trust indenture. The trust indenture is entered into between a trustee and the issuing corporation. The trust indenture specifies the rights and obligations of the debenture holders and the issuing corporation and usually delineates the terms of the securities. The indenture trustee has the responsibility of safeguarding the interests of the debenture holders. See Nancy T. Oliver, Fiduciary Obligations to Holders of Convertible Debentures, 58 U. Cin. L. Rev. 751, 754 (1989).

⁹⁴ The report of the auditor must include the reasons or circumstances hindering the auditor's work. See Company Law No. 22 of 1997, *supra* note 33, at art. 194.

to mandate public disclosure by the company to alert shareholders and other stakeholders of the auditor withdrawal.

Auditor's Report and its Content

The origin of the modern auditor's report can be traced to late nineteenth century British audit reporting practices.⁹⁵ The purpose of auditor's report is to evaluate a company's financial information and state the auditor's opinion of the balance sheet and profits and losses account. Auditors are required to present a report to the general meeting of shareholders.⁹⁶ The 1997 Company Law sets forth mandatory information that must be included in the auditor's report.

The company whom accounts are being audited must facilitate the job of the auditor. For instance, the company in question must furnish documentation if requested by the auditor. The auditor should provide this statement whether or not he obtained the necessary information and clarifications. In the auditor's report, the auditor must include a statement that the company's management and board of directors provided him with information or statements he requested and facilitated his audit.⁹⁷ The Jordanian legislator could have required the auditor to provide this statement only if he does not obtain the needed information. Thus, the auditor would not be required to supply this statement if he obtained the information. However, the Jordanian legislator opted to require the auditor to supply this statement whether he obtained the information or not.

The auditor, in his report, is required to disclose if the company maintains accounts, the extent to which financial statements are prepared according to internationally accepted accounting and auditing standards, and the company's financial statements confirmed with its books.⁹⁸ Again, the auditor should provide this information whether or not the company maintained accounts or not. The Jordanian legislator could have required the auditor to disclose this information only if the company does not maintain accounts or its financial statements are not prepared according to internationally accepted accounting and auditing standards.

The auditor must state that auditing procedures carried out by his firm, in his opinion, a reasonable basis to express his opinion regarding the company's financial position, and results of its operations and cash flow according to internationally accepted auditing standards.⁹⁹ Hence, not only does the 1997

⁹⁵ See Marshall A. Geiger, *Setting the Standard for the New Auditor's Report: An Analysis of Attempts to Influence the Auditing Standards Board*, 1 *Studies in Managerial and Financial Accounting* 7-12 (1993).

⁹⁶ See Company Law No. 22 of 1997, *supra* note 33, at art. 193.g.

⁹⁷ *Id.* art. 195.a.1.

⁹⁸ *Id.* art. 195.a.2.

⁹⁹ *Id.* art. 195.a.3.

Company Law require the auditor to state that the auditing procedures form a reasonable basis to express his opinion, but also specifies the type of information and documents that this obligation applies to. The information and documents are the company's financial position, results of its operations, and cash flow statement.

The report also must include an item stating that the financial statements found in the board of director's report to the general meeting of shareholders comply with the company's records and registers.¹⁰⁰ Once again, the auditor must state this item in his report whether or not the financial statements comply with company's records and registers.

The auditor should report any violation of the 1997 Company Law or the company's articles of association that is committed during the year and which has a material effect on the financial position of the company, and whether any such violation still exists.¹⁰¹ The auditor's report of any violation must be within the limits of the information available to him or that is knowable based upon his professional duties.¹⁰²

This means that auditors are not required to detect violations. But if these violations are discovered in the course of the auditor's duty and within the limits of information available to him, the auditor then should report them as required by the law. In other words, the auditor cannot play the role of a detective and examine every suspicious case *ex officio*.

Not every violation of the 1997 Company Law or the company's articles of associations should be reported. The auditor must report any violation that has a "material effect" on the company's operations or its financial position. The law does not provide a definition of "material effect" or provide examples of violations that have material effects. Additionally, the Company Law does not require the auditor to immediately notify the board of directors or the Companies Controller if he discovers any violation that adversely affects the financial position of the company. To the contrary, any mention of violations must be made in the auditor's report.

In reporting violations, a question could arise with regard to the status of violations that are committed but fixed later. Is the auditor required to report these violations or not since they are dealt with? The Company Law of 1997 does not provide an express answer. However, by looking at the general language used in reporting violations, one can assume that any violation must be stated in the auditor's report whether this violation still exists or is dealt with.

¹⁰⁰ *Id.* art. 195.a.4.

¹⁰¹ *Id.* art. 195.a.5.

¹⁰² *Id.*

After the audit is complete, the auditor issues an opinion regarding the company's balance sheet and profits and losses account.¹⁰³ Now, the auditor can issue three opinions. First, the auditor can approve without reservation the balance sheet, profits and losses account, and cash flow. Second, the auditor approves with reservation the balance sheet, profits and losses account, and cash flow provided that he justifies his reservation. Third, the auditor does not approve the balance sheet, profits and losses account, and cash flow with a justification for this rejection. In the latter case, the auditor sends the financial statements to the board of directors whereby the general meeting of shareholders requires the board to correct these statements.¹⁰⁴ If the board of directors refuses to make the necessary changes to bring financial statements into conformity, the matter will be referred to the Companies Controller who appoints licensed auditors to settle the issue.

The Company Law does not grant the auditor the right to issue an adverse opinion if he finds that financial statements do not show the company's true financial position.¹⁰⁵ The result, according to the Company Law of 1997, is that auditors can provide a total of three opinions: one opinion on balance sheet, one opinion on profits and losses account, and one opinion on cash flow. The three-opinion arrangement creates the possibility of different combinations of opinions. For example, these combinations may include the case of approval without reservation or non-approval on all or approval without reservation on balance sheet and non-approval of profits and losses account and cash flow.

There is no mention in the Company Law of the auditor's responsibility to attest to or certify the truthfulness of financial statements. The auditor does not opine on the accuracy of the financial report. Instead, the auditor opines that the financial statements "present fairly."¹⁰⁶ The auditor's report is not a certification of a fact but an expression of opinion based on professional judgment. In other words, the auditor job is to express an opinion on the financial statements, which are the responsibility of the company's management, based on his audits. In sum, the audit report is not a guarantee. What supports this summation is the fact that audits do not evaluate all recorded transactions for a company.¹⁰⁷ Audits are

¹⁰³ *Id.* art. 195.b.

¹⁰⁴ *Id.* art. 196.

¹⁰⁵ See Lawrence A. Cunningham, Facilitating Auditing's New Early Warning System: Control Disclosure, Auditor Liability, and Safe Harbors, 55 *Hastings L.J.* 1449, 1454-1460 (2004) (discussing the circumstances leading to the issuance of adverse opinion and other forms of qualified opinions).

¹⁰⁶ The notion of "presents fairly" is a source of continuing debate and controversy over its intended meaning because reasonable minds will differ as to when the financial statements "presents fairly" its results. The point at which financial information no longer "presents fairly" will differ based upon the judgment, experience, and tolerance level of the auditor. See Arthur Acevedo, How Sarbanes-Oxley Should be used to Expose the Secrets of Discretion, Judgment, and Materiality of the Auditor's Report, 4 *DePaul Bus. & Comm. L.J.* 1, 24 (2005).

¹⁰⁷ Much of what an audit requires is a review by the auditor of the accounting principles used by the company and an analysis of the estimates made in preparation of the company's financial statements. The application of these principles depends on the particular business situation. Estimates

conducted by choosing a sample of transactions on a predetermined basis and determining if the sample chosen is properly recorded.

The public in Jordan has been more willing to question the quality of auditors' work.¹⁰⁸ Questioning of auditor's work is due to the gap between what auditors actually deliver and what the public usually expects, known as the expectation gap.¹⁰⁹ This gap refers to a difference between auditors' understanding of their function and investors' expectations of the auditor's role.¹¹⁰

Attendance of the General Meeting of Shareholders

The Company Law compels the auditor to attend the general meeting of shareholders.¹¹¹ Attendance of the auditor allows shareholders to discuss with him directly issues that arise from the financial statements of the company.¹¹² In addition to the general meeting of shareholders, the law should allow shareholders to request a meeting with the auditor without the presence of board of directors or management. The purpose of such a meeting is to communicate with the auditor without any influence of the board of directors on the agenda of the meeting which may occur in the general meeting of shareholders. Meeting with the auditor in the absence of the board of directors can take place either before or after the general meeting of shareholders.

Liability of Auditors

Pursuant to Jordanian law, external auditors are potentially liable for failing to fulfill their obligations.¹¹³ Liability for failure to provide accurate reporting is an important incentive for auditors to be honest. Applicable legal requirements generally derive from relevant auditing standards and various laws. Auditors can be sued by the company which they audit its accounts, shareholders, and users of financial statements.¹¹⁴ Users of financial statements include investors and

can vary greatly as well. The auditor may interview management, confer with outside sources, and look to industry standards to determine if the principles applied and the estimates made are reasonable.

¹⁰⁸ Can you cite?

¹⁰⁹ See Where was the Auditor in Jordan, Vol. 1.2 The Auditing Journal 1 (1990). See also Amending Accounting Information is not the Auditor's Authority, Vo. 2.6 The Auditing Journal 1 (1991).

¹¹⁰ The expectation gap has been examined in several countries in academic and practitioner literature including the United Kingdom, Canada, and the United States. See David F. Birke, Toothless Watchdog: Corporate Fraud and the Independent Audit - How Can the Public's Confidence Be Restored? 58 U. Miami L. Rev. 891 (2004). See also Donald C. Langevoort, Managing the "Expectations Gap" in Investor Protection: The SEC and the Post-ENRON Reform Agenda, 48 Vill. L. Rev. 1139 (2003).

¹¹¹ See Company Law No. 22 of 1997, *supra* note 33, at art. 198.

¹¹² *Id.* art. 199.b.

¹¹³ See Jordanian Court of Cassation, Case No. 1998/336, Adaleh Publications (May 9, 1998) (the auditor is the one who drafts the auditor's report and signs it. Thus, the auditor is liable for what is stated in his report).

¹¹⁴ See Company Law No. 22 of 1997, *supra* note 33, at art. 201.

banks that as a result of relying on the auditors' opinion will likely make poor investment decisions or extend credits.¹¹⁵ It is not clear if all the above parties can sue for all of the violations.¹¹⁶ Also, it is also not clear if the government can file a civil claim.

Violations of the Company Law carry compensatory damages and criminal penalties.¹¹⁷ However, the Company Law does not determine the level or range of damages and jail sentences. The Company Law lacks sufficient details as to the standard for professional auditor liability in Jordan. It is not clear if the standard is mere negligence or gross negligence for instance. Also, there is no clear answer if punitive damages are available for intentional misconduct and if this standard is for all the violations or would some require less or more negligence.

If the company has more than one auditor who committed an illegal act or erred, then they are jointly liable.¹¹⁸ Under joint and several liabilities, one auditor can be held liable for all damages in an action. The joint and several liability systems seem unfair as one auditor can be held liable for all damages despite the fact that he committed insubstantial or marginal audit error. In addition, the issue of contribution raises some controversy. For example, if Auditor (A) is 10% liable and Auditor (B) 90% and the plaintiff gets all the money from (A), it is not obvious if (A) can then sue (B) for the 90%.

A time limit is set for bringing a civil suit against an auditor. The statute of limitations period is three years starting on the date the company's general shareholders meeting where the auditor's report is read.¹¹⁹ The purpose of the time limitation is to require diligent prosecution of claims, thus providing predictability and finality.

The liability language of the 1997 Company Law suggests that the auditor has broad and potentially unlimited liability. Thus, an auditor can be sued for mere negligence or mistake. Being liable for mere negligence is harsh given the fact that routine errors do occur. The law should be improved by limiting the liability of an auditor to misconduct that rises to a level of gross negligence or

¹¹⁵ It is not an easy task to determine which users of financial statements or third parties could benefit from the audited statements and thus the auditor can be liable to. The United States apply one of four legal standards to decide which non-clients have a cause of action against auditors: (1) privity; (2) near-privity; (3) the known users; and (4) the reasonable foreseeability rule. These four standards lie on a continuum. They can lead to different outcomes as to whether the non-client has a right to sue even when they are applied to the same set of facts. See Denzl *Caen*, *Accountants' Liability in an Indeterminate Amount for an Indeterminate Class: An Analysis of Touche Ross & Co. v. Commercial Union Ins. Co.*, 57 Miss. L.J. 379, 380 (1987).

¹¹⁶ There are extensive experiences in various countries concerning third-party liability of auditors. The U.S., France, and Switzerland go quite far in holding auditors liable. In the Netherlands, there is third-party liability without a statutory cap under specific circumstances. By contrast, Germany has set a very low ceiling of one million Euro, or four million Euro in the case of listed corporations, for liability toward the corporation in case of an audit of annual accounts. See Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 *Am. J. Comp. L.* 1, 16 (2011). In the UK, there are two types of liability claim against an auditor: claims by his client which will be direct claim based on the violation by the auditor of his obligation contractual; and claims in tort by third parties who are not in any contractual relationship with the company's auditor but who claim damages for losses arising from his reliance on negligently audited financial statement and accounts. See *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, 2 All ER 575, 1963. See also Brenda Hannigan, *Company Law* 402 (Oxford University Press, 2nd edition, 2009).

¹¹⁷ See Company Law No. 22 of 1997, *supra* note 33, at art. 201.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

worse (recklessness, intentional). For example, an auditor should be held liable if he acted with the intent to deceive or committed grossly negligent conduct. Alternatively, an auditor's responsibility could be limited in proportion to his fault. Comparative proportional liability allocates fairly the liability between the company's management and the auditor thus discouraging inflated claims and encouraging everyone to be aware of his responsibilities and to act diligently.

Unfortunately, the liability of auditors has been tested only a few times in Jordanian courts.¹²⁰ Reliable estimates of actual penalties and verdicts against auditors are difficult to obtain.¹²¹ Due to this state of affairs in Jordan, it is reasonable to expect that there are no provisions on auditor liability insurance.¹²² In contrast, Canada, the United Kingdom, Australia, New Zealand, and the USA have witnessed a substantial increase in auditor litigation.¹²³ The Company Law in Jordan should specify the level of penalties and increase them to enhance the credibility of the audit profession and reduce possible abuse of minority shareholders and other stakeholders by auditors and management.

CONCLUSION

Superior corporate governance forms the bedrock of a prosperous economy. An integral component of corporate governance is the role of transparent, accurate and freely available information with respect to a company's books and records. Without trustworthy financial reporting, investors will be disinclined to invest in a jurisdiction. The role of the external auditor in vetting financial statements cannot be understated. Current and potential investors, business partners, employees, regulators and the public in general, rely on the integrity of the auditor's opinion. If investors begin to believe that the financial statements of companies are not accurate, they would be less likely to undertake investment.

¹²⁰ In those few cases, auditors were prosecuted mainly on accusation of dishonesty but not on the basis of not reporting illegal acts or not applying professional standards of due care. Telephone Interview with two lawyers linked to corporate fraud cases in Jordan who asked for anonymity (April 21, 2010).

¹²¹ Auditors involved in those cases were handed innocence verdicts or low level of penalties than can fall by obsolescence or general pardon given by the King on certain occasions and covering certain crimes. *Id.*

¹²² Insurance would cover honest mistakes of judgment, but not intentional misbehavior. Persons would not want to occupy auditor positions unless they were protected in situations where they had simply committed errors of judgment. With insurance, moreover, a corporation does not have to bear the entire cost of auditor negligence, because the risk of misfeasance is spread among all corporations as a cost of doing business. See Lawrence A. Cunningham, *Securitizing Audit Failure Risk: An Alternative to Caps on Damages*, 49 *Wm and Mary L. Rev.* 711 (2007). See also Lawrence A. Cunningham, *Choosing Gatekeepers: The Financial Statement Insurance Alternative to Auditor Liability*, 52 *UCLA L. Rev.* 413, 427-429 (2004) (auditors use general malpractice liability insurance to cover all engagements).

¹²³ For example, in 1994 at least Canadian \$1.3 billion of unresolved claims were pending against Canadian accountants. In the United Kingdom, the Big Six (now Big Four) accounting firms faced 627 outstanding legal cases claiming damages of 20 billion by mid-1994. In Australia, accountants faced more than Australian \$3 billion in claims by mid-1993. In New Zealand, the cost of defending legal actions brought against accountants has become a major business problem. In the United States, in 1993, the Big Six accounting firms' expenditures for settling and defending lawsuits were \$ 1.1 billion or 11.9% of U.S. domestic auditing and accounting revenue. See Carl Pacini, Mary Jill Martin, and Lynda Hamilton, *AT the Interface of Law and Accounting: An Examination of a Trend toward a Reduction in the Scope of Auditor Liability to Third Parties in the Common Law Countries*, 37 *Am. Bus. L.J.* 171, 173 (2000). See also Carl Pacini, Andrew Greinke, and Sally Gunz, *Accountant Liability to Nonclient for Negligence in the United Kingdom, Canada, Australia, and New Zealand*, 25 *Suffolk Transnat'l L. Rev.* 17, 18-20 (2001).

This lack of faith and withholding of investments would eventually destroy the financial markets in a country.

As described in this chapter, the law on auditors has undergone significant improvement, yet substantial gaps exist between current law and best practices.

The role of management in selecting an auditor could be contained. The general meeting of shareholders would be empowered to elect the company's auditor, as opposed to the current practice of just voting in favor of or against an auditor already chosen by management. Information about each possible auditor may be included in the proxy materials so that shareholders can make informed decisions. The right of the general meeting of shareholders must be transformed into a more meaningful right to elect. As there are provisions addressing election, there must other provisions that address dismissal of auditors. Currently, the Company Law lacks provisions on the right to dismiss an auditor. In adding provisions to the law regarding dismissal, reasons should be provided to justify the decision to dismiss an auditor. However, a balance that needs to be struck in election and dismissal. The company structure is based on delegation by the board to the management of day-to-day control over company affairs. Allowing shareholders, the exclusive right to elect and dismiss auditors encroaches on this power and may also lead to inefficiencies.

The principle of auditor's independence needs fine tuning from time to time. The language of independence rules found in the Company Law is general and even ambiguous. For example, the Company Law does not define with sufficient clarity the term "participation" in the establishment of a company which would prohibit an auditor from delivering his services to this company. Additionally, the Company Law prevents an auditor from providing "permanently" any technical, administrative or consultancy services to a company whose accounts he audits. Based on this language, "temporary" or "circumstantial" delivery of non-audit services may be permitted. The Company Law should have prohibited the delivery of non-audit services without distinction between permanent and temporary because both produce the same undesired effects.

The Company Law lists specific duties that are required by auditors. For instance, an auditor is required to monitor the company's activities. The duty to monitor company's activities is too general and since monitoring the activities of the company can include many issues an auditor cannot be reasonably asked to perform. The auditor is prohibited from speculating on shares of the company. The Company Law should have widened the scope of prohibition to include shares and debentures.

Auditors are required to deliver a report. The Company Law sets forth mandatory information that must be included in the auditor's report. The auditor should provide this statement whether or not he obtained the necessary

information and clarifications. The Jordanian legislator could have required the auditor to provide this statement only if he does not obtain the needed information. Moreover, the auditor should report any violation of the Company Law or the company's articles of association that is committed during the year and which has a material effect on the company, and whether any such violation still exists. The Company Law does not provide a definition of "material effect." Material effect may include any act that presents a serious damage to the creditworthiness, reputation, or standing of the company in question.

After the audit work is complete, the auditor issues an opinion regarding the company's balance sheet and profits and losses account. The auditor job is to express an opinion on the financial statements based on his audits. The Company Law does not give the auditor the right to issue an adverse opinion if he finds that financial statements do not show the company's true financial position.

Auditors are legally accountable for their work. There is lack of a comprehensive regulation on the important issue of auditors' liability. An adequate liability system should be put in place and should include dissuasive penalties and removal of the auditor from the audit register. The Jordanian law must ensure appropriate disclosure of penalties to the public. Moreover, all auditors should be subject to quality assurance system and code of ethics.

The current legal regime of auditors in Jordan needs revision. Amendments must be taken to fill in the gaps existing in the law. Attuned to these gaps, the legislator must enact appropriate rules. The issues raised here would give the legislator the tools to do so. Good regulatory reforms are likely to achieve the goal of corporate financial integrity and enhance corporate performance. It remains to be seen what will emerge from any future regulatory initiatives.

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