

OPTING-OUT

AN OVERVIEW ON THE SWISS AUDIT EXEMPTION

EXECUTIVE SUMMARY

- Swiss stock corporations (*Aktiengesellschaften*) subject to a limited audit requirement and with fewer than ten full-time equivalent positions on an annual average may waive this requirement with the consent of all shareholders – a so-called "Opting-Out".
- Since 1 January 2025, such a waiver is only possible for *future* financial years (art. 727a CO).
- The Federal Commercial Registry Office (EHRA) commented on this new provision in two practice notices issued in 2024 and 2025, yet various practical questions remained unresolved in day-to-day legal practice. The EHRA addressed these in its Practice Notice 1/2026 of 3 March 2026.
- The company must pass the Opting-Out shareholder resolution and file it with the commercial register before the beginning of the financial year for which the Opting-Out shall take effect. For the financial year in which the Opting-Out resolution is passed, the audit obligation and the mandate of the auditor remain in force until approval of the audited annual financial statements.
- When filing the Opting-Out with the commercial register, the most recently audited annual financial statements must be submitted. The EHRA has clarified that the penultimate

annual financial statements also suffice if the most recent ones have not yet been approved by the shareholders' meeting.

- An Opting-Out at the time of incorporation of a company remains permissible.
- The prohibition on retroactive effect also applies to Opting-Outs for foundations.

REQUIREMENTS FOR OPTING-OUT

Companies that exceed two of the following thresholds in two consecutive financial years must have their annual financial statements audited (ordinary audit):

- a. total assets of CHF 20 million,
- b. revenue of CHF 40 million,
- c. 250 full-time equivalent positions on an annual average.

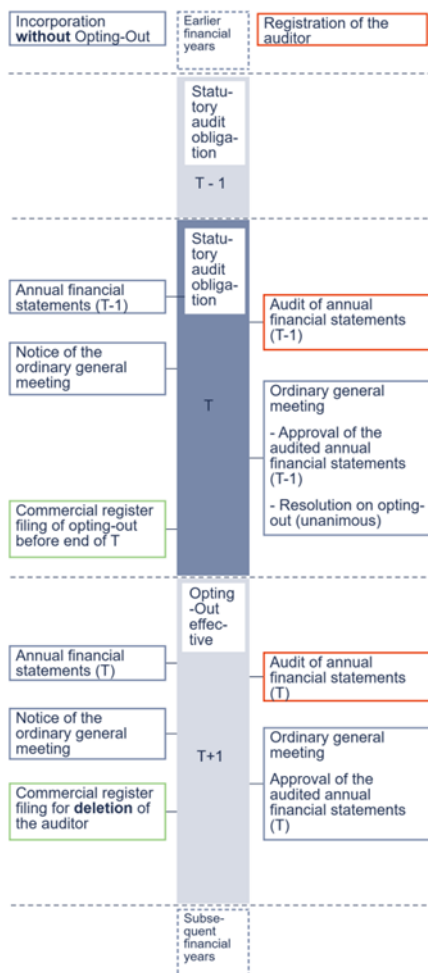
If these thresholds are not met, the company must have its annual financial statements reviewed (i.e. a limited audit; art. 727a para. 1 CO).

Companies subject to a limited audit may, with the consent of all shareholders and provided they have no more than ten full-time equivalent positions, also waive the limited audit and therefore forgo an audit entirely (Opting-Out; art. 727a CO).

Publicly listed companies and companies required to prepare consolidated financial statements are always subject to an ordinary audit (art. 727 para. 1 nos. 1 and 3 CO) and cannot resolve on an Opting-Out.

If a company is subject to a limited audit and wishes to opt out, a three-step process must be followed: 1) consent of all shareholders, 2) timely filing with the commercial register and 3) deregistration of the auditor from the commercial register.

INDIVIDUAL STEPS FOR THE OPTING-OUT



1) RESOLUTION

An Opting-Out requires the consent of all shareholders, which may be given at an ordinary or extraordinary general meeting of shareholders.

A resolution passed in the current year T takes effect no earlier than financial year T+1. An Opting-Out with (partial) retroactive effect for the current financial year is not permitted.

2) FILING OF THE OPTING-OUT AND ITS EFFECT

The Opting-Out must be filed before the beginning of the financial year in which it is to take effect. Accordingly, filing must occur during financial year T for the Opting-Out to apply from financial year T+1 onwards. Late filings cannot be remedied and will be rejected.

Pursuant to art. 727a para. 2bis CO and art. 62 para. 2 CRO, the following documents must be submitted to the commercial register:

- the waiver by all shareholders or the corresponding minutes of the respective general meeting of shareholders;
- the annual financial statements for the last completed financial year as approved by the general meeting, the corresponding audit report and the corresponding minutes of the general meeting.

Regarding the last point (most recently approved annual financial statements), a practical question arose as to whether the immediately preceding year's financial statements (T-1) were strictly required – which may not yet be available at the time the shareholders resolve on the Opting-Out – or whether the penultimate statements (T-2) could suffice. The EHRA has now clarified in its Practice Notice 1/2026 that the penultimate T-2 financial statements may be submitted if the T-1 financial statements have not yet been approved at the time the Opting-Out resolution is passed. This provides a practical solution.

3) DEREGISTRATION OF THE AUDITOR

Since the Opting-Out applies only from financial year T+1, the financial statements for the current year T remain subject to limited audit. The auditor's mandate therefore continues until the shareholders' meeting that takes place in T+1 and approves the audited T statements. Deregistration may only follow thereafter and may be filed by the company or the auditor itself.

Commercial registry offices so far had different practices regarding which document must be filed. It is therefore advisable to clarify in advance with the competent cantonal commercial registry office which documents are required for the deregistration. Practice Notice 1/2026 has clarified, however, that the commercial registry office may not require proof that the annual financial statements for the current financial year T have been audited as a condition of deregistration.

RENEWAL OF THE OPTING-OUT AND REVIVAL OF THE AUDIT OBLIGATION

Shareholder Right to a Limited Audit

Pursuant to art. 727a para. 4 sentence 2 CO, each shareholder has the right to request a limited audit of the annual financial statements at the latest ten days before the ordinary general meeting at which the annual financial statements are to be approved.

In its Practice Notice 2/2024, the EHRA addresses various scenarios regarding the request for a limited audit pursuant to art. 727a para. 4 CO:

If such a request is made at the latest ten days before the ordinary general meeting, an auditor must be elected and subsequently registered. The annual financial statements in question must be audited retroactively. Consequently, the approval of the (now to-be-audited) annual financial statements by the general meeting must be postponed. As a result of such a request, the Opting-Out is revoked and all subsequent annual financial statements (including those for the current financial year) are subject to a limited audit until a new Opting-Out is resolved, if any.

If the request is made fewer than ten days before the general meeting, the annual financial statements to be approved at that general meeting do not need to be audited; however, according to the EHRA, an auditor must be elected and the Opting-Out is revoked for the current and all following financial years.

Direction by the Commercial Registry Office

The commercial registry office must require a company with an existing Opting-Out to either renew the declaration of waiver by all shareholders or to designate an auditor if either the tax authorities report that no annual financial statements have been filed or if other circumstances indicate that the requirements for an Opting-Out are no longer met.

If the company fails to comply with the request, the commercial registry office must refer the case to the competent court pursuant to art. 939 or art. 731b CO, which may, as an *ultima ratio*, dissolve the company and order its liquidation in accordance with the rules on bankruptcy (art. 731b para. 1bis no. 3 CO).

OPTING-OUT IN CONNECTION WITH INCORPORATIONS, INTERNATIONAL TRANSFERS OF REGISTERED OFFICE AND CONVERSIONS

In its Practice Notice 2/2024, the EHRA confirmed that an Opting-Out at the time of incorporation remains permissible.

The same applies, according to Practice Notice 1/2025, where a foreign company transfers its legal seat to Switzerland or where a general partnership (*Kollektivgesellschaft*), a limited partnership

(*Kommanditgesellschaft*) or an association (*Verein*) is converted into a stock corporation.

In all these scenarios, the waiver may take effect immediately upon registration of the incorporation, transfer of registered office or conversion.

OPTING-OUT FOR FOUNDATIONS

For foundations, art. 83b CC provides, in principle, for the obligation to designate an auditor. The requirements for an exemption are set out in the Ordinance on the Auditor of Foundations, without expressly regulating the temporal scope of an Opting-Out.

In Practice Notice 1/2026, the EHRA clarifies that – as for stock corporations – an Opting-Out is only possible for the future and not for the current financial year T.

Unlike with stock corporations, an Opting-Out for foundations requires, prior to registration in the commercial register, the additional approval of the competent supervisory authority.

For stock corporations, the date of filing with the commercial register is decisive for the effect of the Opting-Out. For foundations, on the other hand, the relevant date is that of the supervisory authority's decision (which must have been issued before the beginning of the financial year for which the Opting-Out is to apply).

For foundations, the filing of the Opting-Out with the commercial register is made by the supervisory authority, not by the foundation itself. The decision of the supervisory authority suffices as a document for the commercial register.

CONCLUSION AND PRACTICAL GUIDANCE

Practice Notices 2/2024, 1/2025 and 1/2026 of the EHRA provide welcome clarity for the implementation of an Opting-Out in practice.

To avoid unintended delays, companies should plan the timing of their annual financial statements, the Opting-Out resolution, and the commercial register filing carefully and in the correct sequence.

For foundations, it is additionally important to ensure that the required order of the supervisory authority is obtained in a timely manner.

AUTHORS



Dr. Luca Jagmetti

Partner

Luca.Jagmetti@BaerKarrer.ch

T: +41 58 261 52 62



Thomas Stoltz

Partner

Thomas.Stoltz@BaerKarrer.ch

T: +41 58 261 59 32



Philippe Schmid

Associate

Philippe.Schmid@baerkarrer.ch

T: +41 58 261 59 18