

## SWITZERLAND<sup>1</sup>

### **I. Overview of Country**

The Swiss Confederation is a federal semi-direct democracy steeped in the civil legal tradition. Switzerland comprises 26 cantons and half cantons. Switzerland recognizes many different forms of association, for economic purposes or otherwise. This research focuses on corporations limited by shares (or stock corporations), limited liability companies, and branch offices for for-profit organizations. It then focus on non-profit organizations in Switzerland, analyzing the association, the foundation, and the corporation limited by shares with a non-commercial purpose.

As Switzerland is a federal state, the federal government and the cantons share legislative, executive and judicial power. This research focuses on the rules at the federal level and will point out main areas in which the cantons are competent to legislate.

Article 23(1) of the Federal Constitution guarantees the freedom of association.<sup>2</sup> Indeed, every person has the right to form, join or belong to an association and to participate in the activities of an association (Article 23(2) of the Federal Constitution). Further, no person may be compelled to join or to belong to an association (Article 23(3) of the Federal Constitution).

### **II. Registration & Deregistration Procedures**

#### **A. For-Profit Organizations**

##### **a. Laws**

Switzerland recognizes many different forms of for-profit organizations, including companies limited by shares, limited liability companies, and branch offices. The Swiss Code of Obligations (CO)<sup>3</sup> and its various ordinances, such as the Ordinance on the Commercial Registry (OCR), regulate these organizations.<sup>4</sup> There are 26 cantonal commercial registers and one federal office of the commercial register (3-5 OCR). The cantonal commercial registers are responsible for the day-to-day operations on their territory, while the federal office of the commercial register notably supervises the correct application of the rules and regulations relating to the commercial register (*Id.*).

It generally takes a few days for a company to be entered in the commercial register, assuming the file is complete. In the Canton of Vaud for instance, approximately 57 percent of all requests are reviewed and completed on the same day.<sup>5</sup>

#### **1. Registration Process for the Company Limited by Shares**

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<sup>1</sup> The following memorandum was prepared by pro bono counsel for the ABA Center for Human Rights. It is intended as background information only and should not be relied upon as legal advice on a particular case. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>2</sup> An unofficial translation of the Federal Constitution is available at: <http://www.admin.ch/opc/en/classified-compilation/19995395/index.html>. The majority of the provisions presented in this report use this translation.

<sup>3</sup> An unofficial translation of the CO is available at: <http://www.admin.ch/opc/en/classified-compilation/19110009/index.html>. The majority of the provisions presented in this report use this translation.

<sup>4</sup> Other acts regulate more specific organizations.

<sup>5</sup> See generally <http://www.vd.ch/themes/economie/registre-du-commerce/questions-frequentes/#c35044>.

Article 620(1) CO defines a “company limited by shares” as a company with its own business name; pre-determined capital (share capital) that is determined in advance and divided into specific amounts (shares); and whose liabilities are payable only from the company assets.

Article 629(1) CO stipulates that the establishment of the company limited by shares requires the founders to declare by public deed that they are forming a company limited by shares, to lay down the articles of association therein and to appoint the governing bodies. The company must be entered in the commercial register of the place of its seat (640 CO).

The founder members draw up a written statutory report in which they give account of: (1) the nature and condition of contributions in kind or acquisitions in kind and the appropriateness of their valuation; (2) the existence of debts and whether such debts may be set off; and (3) the reasons for and appropriateness of special privileges accorded to found members or other persons (635 CO). A licensed auditor will verify the statutory report for completeness and accuracy (635a CO).

In order to acquire legal personality, a company limited by shares must apply for entry in the commercial register (643(1) CO).

Third parties may object to the entry and the officer will block the registration process (162(1) OCR). But the third party needs to challenge the entry before the civil court; otherwise, the officer of the commercial register will unblock the entry if, within 10 days, the third party fails to prove that it had filed for provisional measures before the competent court or if the competent court rejects the prayer for provisional measures (162(3) OCR).

## 2. Registration Process for Limited Liability Companies

According to Article 772(1) CO, a limited liability company is an incorporated company with separate legal personality in which one or more persons or commercial enterprises participate, with a nominal capital specified in the articles of association and with a liability for its obligations extending only to the company assets.

The limited liability company is established when the founders declare by public deed that they are founding a limited liability company, that they are laying down the articles of association and that they are appointing the management bodies (777(1) CO). In the certificate of incorporation, the founders subscribe for the capital contributions and state that: (1) all capital contributions are validly subscribed for; (2) the capital contributions correspond to their total issue price; (3) the statutory requirements and requirements of the articles of association for the payment of the capital contributions are fulfilled; and (4) they accept the obligations in terms of the articles of association to make additional financial or material contributions (771(2) CO). Finally, the company must be entered in the commercial register of the place of its seat (778 CO).

The company acquires legal personality through entry in the commercial register (779(1) CO).

Third parties may object to the entry and the officer will block the registration process (162(1) OCR). But the third party needs to challenge the entry before the civil court; otherwise, the officer of the commercial register will unblock the entry if, within 10 days, the third party fails to prove that it had filed for provisional measures before the competent court or if the competent court rejects the prayer for provisional measures (162(3) OCR).

## 3. Registration Process for Branch Offices

A branch office is a commercial establishment that, in its dependence to a main company of which it is legally a part, operates a similar activity, in the long term and in separate premises, and enjoys a certain autonomy in the economic and business world (ATF 117 II 85).

Swiss branch offices of firms whose head office is in Switzerland must be entered in the register for the place in which they are located once the entry for the head office has been made (935(1) CO). Swiss branch offices of firms whose head office is abroad must be entered in the same manner as branch offices of Swiss firms, providing the applicable foreign law does not require a different approach (935(2) CO). Further, a commercial agent resident in Switzerland and with the right of commercial representation must be appointed for such branch offices (935(2) CO). The documents required differ whether the head office of the branch office is located within Switzerland or without Switzerland (*see generally* 109 *et seq.* OCR). For a branch office whose head office is located abroad, the request must generally be accompanied by 1) a conforming copy of the commercial register of the country where the head office is located; 2) for legal entities, a conforming copy of the bylaws in force or other similar documents; 3) the minutes or a conforming copy of the minutes on the creation of the branch office; and 4) the minutes or a conforming copy of the minutes designating the persons authorized to act on behalf of the branch office (113(1) OCR).

Third parties may object to the entry and the officer will block the registration process (162(1) OCR). But the third party needs to challenge the entry before the civil court; otherwise, the officer of the commercial register will unblock the entry if, within 10 days, the third party fails to prove that it had filed for provisional measures before the competent court or if the competent court rejects the prayer for provisional measures (162(3) OCR).

#### 4. Deregistration Process for the Company Limited by Shares

A company is dissolved: 1) in accordance with the articles of association; 2) by resolution of the general meeting, to be recorded in a public deed; 3) by the commencement of insolvency proceedings; 4) by court order if shareholders together representing at least ten percent of the share capital request its dissolution for good cause (the court may order a different solution if appropriate and conscionable for the interested parties); and 5) in the other cases envisaged by law, namely if the company lacks the necessary corporate bodies, following an action challenging the establishment of the company, or if the company pursues an immoral or illicit purpose (736 CO).

If the company is dissolved for reasons other than insolvency or a court judgment, the board of directors notifies the dissolution for entry in the commercial register (737 CO). Further, on completion of the liquidation process, the liquidators apply to the commercial registry for the deletion of the business name (746 CO).

#### 5. Deregistration Process for the Limited Liability Company

A limited liability company must be dissolved: 1) if a ground for dissolution stated in the articles of association applies; 2) if the members' general meeting so resolves; 3) if bankruptcy proceedings are commenced; or 4) in the other cases provided for by the law, namely following an action challenging the establishment of the company or if the company pursues an immoral or illicit purpose (821 CO).

The dissolution of a limited liability company must be entered in the commercial register. Where dissolution is ordered by the court, the court must notify the commercial register without delay. Where dissolution is on other grounds, the company must notify the commercial register (821a(2) CO).

#### 6. Deregistration Process for the Branch Office

When a branch office is no longer used, its deregistration from the commercial register must be required provided that the tax authorities approved of its deregistration (115(1-2) ORC).

b. Case Law

The case law is limited and the relevant case law is integrated in the law section above.

B. Not-For Profit Organizations

a. Laws

1. Registration Process for Associations

The typical not-for profit organizations are associations. Article 60 of the Swiss Civil Code (CC)<sup>6</sup> stipulates that associations with a political, religious, scientific, cultural, charitable, social, or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association. This must be in writing and indicate the objects of the association, its resources, and its organization.

Once the articles of association have been ratified and the committee appointed, the association is eligible for entry in the commercial register (61(1) CC). But the association must be registered if it conducts a commercial operation in pursuit of its objects or is subject to an audit requirement (61(2)). The request for entry in the commercial register is accompanied notably by: 1) the minutes of the general assembly on the adoption of the bylaws, the nomination of the members of the committee, the nomination of the auditors if the association is subject to an audit requirements; 2) the bylaws signed by a member of the committee; 3) a declaration of the members of the committee, and, if appropriate, of the auditor indicating that they accept their nomination; 4) a decision of the general assembly or of the committee if a designation of third parties authorized to act on the association's behalf (90 ORC).

2. Registration Process for Foundations

A foundation is established by the endowment of assets for a particular purpose and is created by public deed or by testamentary disposition (80 & 81(1) CC). The foundation must be entered in the commercial register and may be subject to auditing requirements if the foundation conducts any commercial activity for which the provisions of the bookkeeping and accounting of companies limited by shares apply by analogy (81(2) & 83(2) CC; ATF 110 Ib 17).

Foundations are supervised by the state authority (Confederation, canton, municipality) to which they are assigned (84(1) CC). The supervisory authority must ensure that the foundation's assets are used for their declared purpose (84(2) CC). The board of trustees shall appoint external auditors (83b(1) CC). The supervisory authority may exempt a foundation from the duty to appoint external auditors, as prescribed by the Federal Council (83b(2) CC).

The request for entry in the commercial register is accompanied notably by: 1) the document establishing the endowment or a conforming copy of the provision of the will establishing the foundation; 2) proof of the nomination of the members of the board of trustees and of third parties authorized to represent the foundation; 3) the minutes of the board of trustees of the foundation on the nomination of

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<sup>6</sup> An unofficial translation of the CC is available at: <http://www.admin.ch/opc/en/classified-compilation/19070042/index.html>. The majority of the provisions presented in this report use this translation.

the auditor or the declaration from the supervisory public authority exempting the foundation of the audit requirement; 4) the declaration of the members of the board of trustees accepting their nomination (94 ORC).

### 3. Registration Process for Other Not-For Profit Organizations

Article 620(3) CO allows for companies limited by shares to have a non-commercial purpose. The registration process for companies limited by shares with no commercial purpose is the same as for companies limited by share with a commercial purpose.

### 4. Deregistration Process for Associations

The members of the association may dissolve the association through a resolution at any time (76 CC). If the association is insolvent or if the committee may no longer be appointed in accordance with the articles of association, the association is dissolved by operation of law (77 CC). Lastly, where the objects of the association are unlawful or immoral, the competent authority, such as the cantonal public prosecutor, or an interested party may apply for a court order of dissolution (78 CC in conjunction with the cantonal laws applying the Civil Code).

If the association is registered with the commercial register, the committee or the court shall inform the commercial registrar of the dissolution so that the entry may be deleted (79 CC). The dissolution procedure for associations is the same as for companies limited by shares (93 OCR).

### 5. Deregistration Process for Foundations

The competent federal or cantonal authority shall dissolve the foundation on application or of its own accord if the foundation's objects have become unattainable and the foundation cannot be maintained by modifying its charter or its objects have become unlawful or immoral (88(1) CC). Any interested party may file an application or bring an action for the dissolution of a foundation (89(1) CC). A dissolution must be reported to the commercial registrar so that the entry may be deleted (89(2) CC). If the competent authority has ordered the liquidation of the foundation, the rules concerning the dissolution of companies limited by shares apply by analogy to the dissolution of the foundation and the deletion of its entry in the commercial register (97(2) OCR).

### 6. Deregistration Process for Other Not-For Profit Organizations

The rules are the same as for their for profit counterparts.

#### b. Case Law

The case law is limited and the relevant case law is integrated in the law section above.

### C. Analytical Comparison of the Legal Process of Registration

Swiss law does not require any specific registration process for not-for profit associations, other than the usual registration in the commercial registry should the not-for profit association also have a commercial purpose. Foundations must, however, register in the commercial registry in every instance.

## III. Tax Laws

### A. For-Profit Organizations

Both the Confederacy and the cantons tax corporations and natural persons.<sup>7</sup> As such, there are 27 different tax laws in Switzerland. Municipalities also levy taxes. This research focuses only on taxes at the federal level.

a. Laws

The federal tax rate on benefits amounts to 8.5 percent of net benefits. The federal administration also levies other taxes, such as a value added tax (8 percent) and a stamp duty. No federal tax on capital exists; however, cantons may tax the corporation's capital pursuant to their own tax laws.

If a canton grants a cantonal tax holiday (which may be granted for a maximum of 10 years, exempting the company of cantonal and municipal tax on net benefits and capital), then the federal government may also grant a federal tax holiday from 50 to 100 percent of the federal tax on net benefits.<sup>8</sup> Yet, to benefit from a complete or partial federal tax exemption, companies “must carry out their activity in the industrial sector (manufacturing) or provide production-related services;” “are located in specific regions,” such as mountainous regions and in the countryside; “have additional and important impact on the local economy in terms of their investments, job creation or maintenance, training activities, R&D cooperation with local institutions of higher education in relation to the project, local procurement and subcontracting;” and “create value in developing products, manufacturing new products, launching new production processes.”<sup>9</sup> The federal exemptions may not exceed any term of the cantonal exemption, including scope and duration.<sup>10</sup>

Industries eligible for tax holidays are software firms, “technical call centers or shared service centers, or activities that are part of the industrial process (R&D, manufacturing management, marketing, logistics) or part of headquarters operations (closely related to the manufacturing process), production, stock management, order management, logistics, finance and treasury management.”<sup>11</sup> “Service providers, such as law and accounting firms, banks and insurance companies, distributors, hotels and fitness clubs, are not eligible for federal tax holidays.”<sup>12</sup>

b. Case Law

We did not locate case law that provides additional relevant information.

B. Not-For Profit Organizations

a. Laws

Associations, foundations, and other legal entities of public interest that pursue a public interest or serve other public goals generally do not pay taxes on earnings or on capital. Similar rules generally apply to associations, foundations and other legal entities whose purpose is social, humanitarian, related

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<sup>7</sup> See generally Conférence suisse des impôts, *Imposition des personnes morales*, Avril 2014.

<sup>8</sup> See generally <http://ggba-switzerland.ch/en/getting-started/government-incentives-and-support/>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

to worship, or cultural.<sup>13</sup> The tax authorities determine whether an association, foundation, or other legal entities of public interest ought to be exempted from taxes on earnings or on capital.

b. Case Law

We did not locate case law that provides additional relevant information.

C. Analytical Comparison

Swiss law does not levy income generated for a non-commercial purpose.

**IV. Financial Transaction Laws**

i. Foreign Investments/Foreign Funding Laws

Switzerland does not generally have specific financial transaction laws. Specific areas of law, such as real property, banking or financial institutions, or civil aviation, require specific permits or restrict ownership for foreign entities or citizens.

Switzerland has set up anti-laundering legislation forcing financial intermediaries, as defined by the Swiss Anti-Money Laundering Act, to verify the identity of the customer. Therefore, financial intermediaries have to ensure that their clients are truly who they represent themselves to be.

*ii. Political Contribution Laws*

We were unable to locate political contribution law.

**V. Auditing/Reporting Requirements**

Switzerland requires companies to respect several principles of accounting. In particular, companies must ensure that the following principles are respected: 1) the complete, truthful and systematic recording of transactions and events; 2) the documentary proof for individual accounting procedures; 3) clarity; 4) fitness for purpose given the form and size of the undertaking; and 5) verifiability (957a(2) CO). Financial reports must apply the following principles: 1) they must be clear and understandable; 2) they must be complete; 3) they must be reliable; 4) they must include all essential information; 5) they must be prudent; 6) the same rules must apply in presentation and valuation; 7) assets and liabilities and income and expenditure may not be offset against each other (958c(1) CO).

A. For-Profit Organizations

a. Laws

Publicly traded companies (i.e., that have shares listed on a stock exchange, that have bonds outstanding, or that contribute at least 20 percent of the assets or of the turnover to the consolidated accounts of a company), companies that exceed certain thresholds, and companies that are required to prepare consolidated accounts must have their annual accounts audited by an auditor in an ordinary audit (727(1) CO). Other possibilities for an ordinary audit exist (727(2-3) CO). If the requirements for an ordinary audit are not met, the company must have its annual accounts reviewed by an auditor in a limited

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<sup>13</sup> Natural persons may generally deduct donations to organizations acting in the public interest up to a certain amount that varies from canton to canton.

audit (review). These rules also apply to limited liability companies (818(1) CO). These rules serve the purpose of meeting the corporations' financial obligations pursuant to the Code of Obligations.

b. Case Law

We did not locate case law that provides additional relevant information.

B. Not-For Profit Organizations

a. Laws

An association's executive body, the committee, also has to maintain the association's business ledgers (69a CC). The association must submit its accounts to a full audit by external auditors if two of the following figures are exceeded in two successive business years: 1) total assets of CHF 10 million; 2) turnover of CHF 20 million; 3) average annual total of 50 full-time staff (69b(1) CC). If a member with personal liability or an obligation to provide further capital so requests, the association must submit its accounts to a limited audit performed by external auditors (69(b)(2) CC). The rules provided in Articles 727 *et seq.* CO apply to the auditing requirements for associations (69(b)(3) CC).

The supreme governing body of the foundation shall maintain its business ledgers. The provisions of the Code of Obligations on commercial bookkeeping and accounting apply *mutatis mutandis* (83a CC). Where there are no special provisions for foundations, the provisions of the Code of Obligations on external auditors for public limited companies apply *mutatis mutandis* (83b(3) CC). If the foundation has a duty to carry out a limited audit, the supervisory authority may require a full audit where necessary for a reliable assessment of the foundation's financial situation (83b(4) CC). The external auditors must provide the supervisory authority with a copy of the audit report and all important communications with the foundation (83c CC).

The auditing and reporting requirements for companies limited by shares with no commercial purpose are the same as for companies limited by share with a commercial purpose.

b. Case Law

We did not locate case law that provides additional relevant information.

C. Analytical Comparison

Except under the circumstances described above where associations exceed certain thresholds or member may be liable through the acts of the association, not-for profit associations generally do not need to have their accounts audited.

## VI. Penalties for Non-Compliance

i. Civil

The rules of tort law generally applies to everyone who causes damages to another.<sup>14</sup> In tandem with the governing bodies expressing the will of their respective legal entities and binding their respective

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<sup>14</sup> Any person who unlawfully causes loss or damage to another, whether willfully or negligently, is required to provide compensation (41 CO).



legal entities by concluding transactions and other actions (55 CC), a company is liable for any loss or damage caused by unauthorized acts carried out in the exercise of a company function by a person with authority to represent the company or manage its business (722 CO). Further, the governing officers of any organization are personally liable for their wrongful acts (55(3) CC).

Where information that is inaccurate, misleading or in breach of statutory requirements is given in issue prospectuses or similar statements disseminated when the company is established or on the issue of shares, bonds or other securities, any person involved whether willfully or through negligence is liable to the acquirers of such securities for the resultant losses (752 CO).

Founding members, members of the board of directors and all persons involved in establishing the company are liable both to the company and to the individual shareholders and creditors for the losses arising where they: 1) willfully or negligently conceal, disguise or give inaccurate or misleading information on contributions in kind, acquisitions in kind or the granting of special privileges to shareholders or other persons in the articles of association, the statutory report or a capital increase report or otherwise act unlawfully in approving such a measure; 2) willfully or negligently induce the entry of the company in the commercial register on the basis of a certificate or deed containing inaccurate information; or 3) knowingly contribute to the acceptance of subscriptions from insolvent persons (753 CO).

The members of the board of directors and all persons engaged in the business management or liquidation of the company are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties (754(1) CO). A person who, as authorized, delegates the performance of a task to another governing officer is liable for any losses caused by such officer unless he can prove that he acted with all due diligence when selecting, instructing and supervising that person (754(2) CO).

All persons engaged in auditing the annual and consolidated accounts, the company's establishment, a capital increase or a capital reduction are liable both to the company and to the individual shareholders and creditors for the losses arising from any intentional or negligent breach of their duties (755(1) CO).

Where two or more persons are liable for the losses, each is jointly and severally liable with the others to the extent that the damage is personally attributable to him on account of his own fault and the circumstances (759(1) CO).

The relevant provisions on companies limited by shares apply to the liability of persons who are involved in the establishment, management, auditing or liquidation of a limited liability company (827 CO).

The association is liable for its obligations with its assets. Such liability is limited to the assets unless the articles of association provide otherwise (75a CC).

## ii. Criminal

The Swiss Criminal Code ("SCC")<sup>15</sup> is the main source for criminal provisions in Switzerland. Modern acts generally contain, however, specific criminal provisions.<sup>16</sup>

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<sup>15</sup> An unofficial translation of the SCC is available at: <http://www.admin.ch/opc/en/classified-compilation/19370083/index.html>. The majority of the provisions presented in this report use this translation.

Article 152 SCC punishes false or misleading statements of substantial significance by persons such a founder or a partner with unlimited liability. Further, any person who causes an official responsible for the commercial register to make a false entry in the commercial or withholds required information from said authority shall be criminally liable as well (153 SCC).

The SCC also prohibits forgery of documents and certificates (251-252 SCC). Article 325 prohibits failure to comply with the statutory duty to keep proper accounts or to preserve accounts and the statutory duty to preserve accounts.

These provisions apply regardless of the commercial or non-commercial nature of the organization.

### OVERVIEW CHART

Although not exhaustive of all the similarities and differences discussed in the above sections, this is to help highlight some of the biggest differences or similarities.

Issue	For-Profit Organizations	Not-For Profit Organizations	Similarities
Registration Procedures	Corporations must register.	Not-for profit associations may elect to register; if above a certain size then they are required to register. Foundations must register.	
Tax Laws	Corporations are taxed, some may benefit from partial tax breaks (or tax holidays)	Generally not taxed on their public interest work.	
Financial Transaction Laws			There does not seem to be a difference between not-for profit and for profit organizations in terms of financial transaction laws.
Auditing/Reporting Requirements			Once the obligation to maintain records is required, the provisions are the same.
Penalties			There does not seem to be any difference between not-for profit organizations and for-profit organizations in terms of penalties. The

<sup>16</sup> For instance, Article 37(1) of the Anti-Money Laundering Act punishes with a fine of up to CHF 500,000 anyone who fails to comply with the duty to report to the proper authority *e.g.*, assets known to the financial intermediary to be the proceeds of a felony.

			civil penalties are more detailed for for-profit organizations, however.
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