

How to comply with FinSA regulations if you are an insurance intermediary

**Duty to register in a register of advisers
pursuant to FinSA when offering pillar 2 and
pillar 3a pension solutions**



Table of contents

A regulatory gap within FinSA causes challenges for insurance intermediaries	3
Two separate registers for advisers and insurance intermediaries	4
Same business, same risks, same rules	5
Broad definition of financial services	6
Qualifying a pension solution as a financial instrument is key	7
Duty to register	10
Contacts	12



A regulatory gap within FinSA causes challenges for insurance intermediaries



The Financial Services Act ('FinSA') contains cross-sectoral conduct rules (including so called 'point of sale' conduct rules) for financial service providers and for client advisers of financial service providers when advising investment clients. It requires an entry in a register of advisers pursuant to Art. 28 Para. 1 FinSA, which in particular ensures that financial service providers and client advisers possess the necessary skills, knowledge and experience to perform their work (Art. 22 FinSA). Together with other conduct rules, the FinSA register aims to increase the quality of advice given and, ultimately, serves client protection.

The scope of application of the duty to register under FinSA causes significant challenges in practice with regard to insurance intermediaries when offering pillar 2 and pillar 3a pension solutions (including 1e pension plans). The questions are whether and when insurance intermediaries are required to be entered into a register of advisers pursuant to FinSA. The background to this is that under the Insurance Supervision Act ('ISA'), insurance intermediary activities are already subject to mandatory registration in the FINMA register of insurance intermediaries. However, the Swiss legislator does not explicitly regulate either in FinSA or in ISA whether and when insurance intermediaries are also required to be entered into a register of advisers pursuant to FinSA for their activities, which represents a gap in terms of regulatory clarity. Furthermore, there are currently no legal provisions or legal materials which conclusively discuss a possible double entry for insurance intermediaries.

In light of this, many insurance intermediaries are uncertain about the current regulatory situation regarding the duty to be entered into a register of advisers pursuant to FinSA. These uncertainties have led to different opinions and applications of the duty to register in practice. In the event of misinterpretation of the existing regulatory framework, insurance intermediaries are at risk of non-compliance with FinSA duties resulting in an increase of regulatory risk exposure.

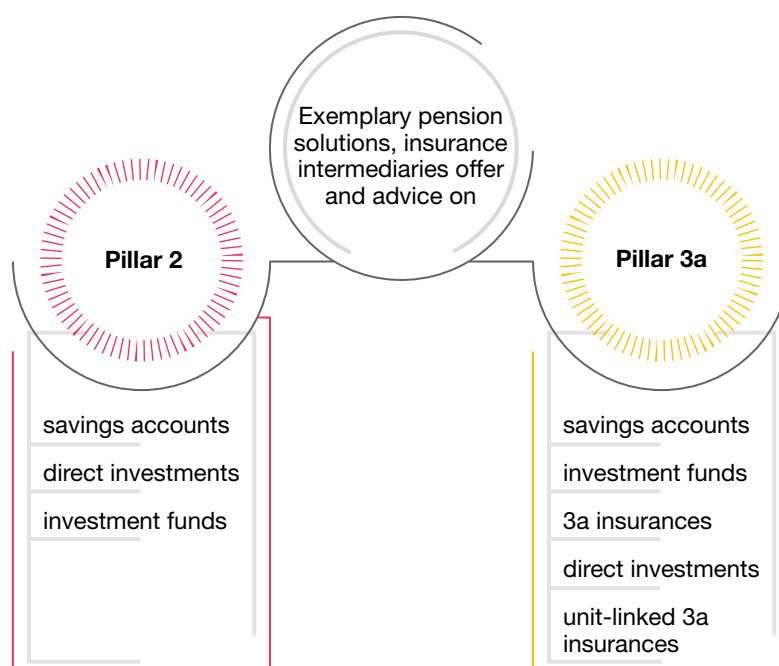
This whitepaper addresses the above questions and thus the circumstances in which insurance intermediaries must comply with FinSA duties and in particular when an entry in a register of advisers is required.

Two separate registers for advisers and insurance intermediaries

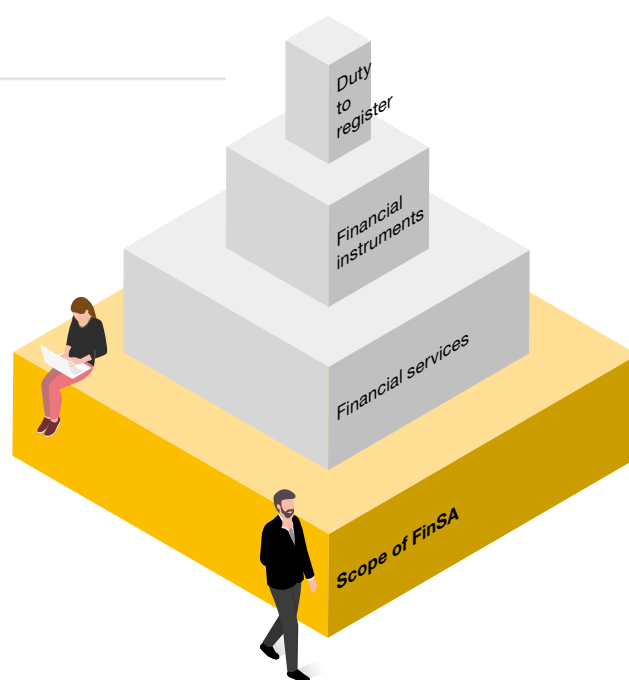


Art. 28 Para. 1 FinSA stipulates that client advisers of domestic financial service providers which are not supervised pursuant to FINMASA and client advisers of foreign financial service providers may only carry out their activity in Switzerland if they are entered into a register of advisers. The obligation to register extends to third parties appointed by a financial service provider (e.g. banks or asset managers) to provide financial services (Art. 23 FinSA). While expressing specific obligations, FinSA remains silent regarding how it applies to independent insurance intermediaries.

Independent insurance intermediaries are required to be entered into the register of insurance intermediaries supervised by FINMA to offer and conclude insurance contracts (Art. 41 and 43 Para. 1 ISA). Pension solutions are of significant importance for the insurance industry, in particular within the scope of pillar 2 and pillar 3a. Thereby, insurance intermediaries may cooperate closely with pension institutions or financial service providers when offering pension solutions. However, ISA does not refer to the register of advisers within the meaning of FinSA.



Same business, same risks, same rules



When do insurance intermediaries fall within the scope of FinSA?

The purpose of the duty to register according to FinSA is to ensure that, in addition to the financial service provider itself, its employees and appointed third parties are aware of their conduct duties when offering or providing financial services pursuant to FinSA and apply them in practice. The ultimate goal of FinSA is client protection and the client advisers and the appointed third parties are the link between the financial service providers and their clients. They therefore play a crucial role in ensuring compliance with the conduct duties under FinSA. If the employees of the financial service provider and the third parties involved know the conduct rules and comply with them, appropriate advice and service of the clients should be ensured. Hence, the duty to register strengthens client protection and the reputation of the Swiss financial market (Art. 1 Para. 1 FinSA) and, consequently, implements the principle of 'same business, same risks, same rules'.

Insurance intermediaries are in particular confronted with the duty to register within the meaning of FinSA in three cases.

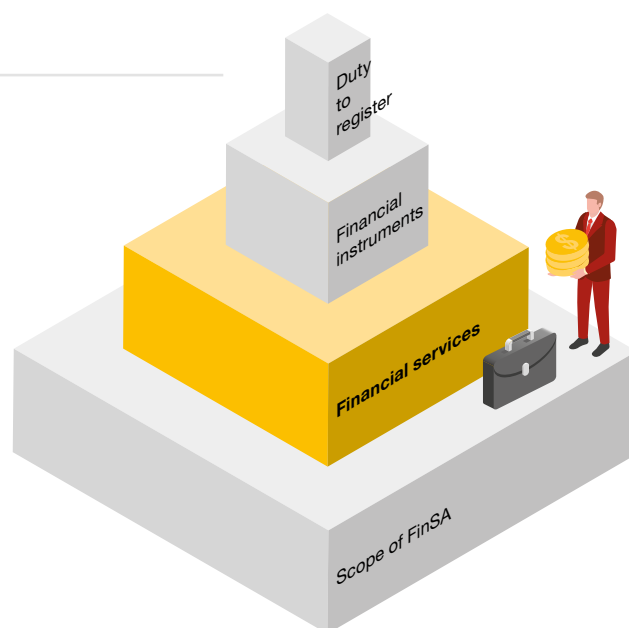
The first case is when financial service providers appoint insurance intermediaries as third parties to provide financial services (Art. 23 FinSA) to their end clients. In such a case, the financial service providers

must verify their entry in a register of advisers and must not appoint them without registration. Compliance with the duty to carefully select the appointed third parties is a clear regulatory requirement.

The second case is when independent insurance intermediaries act as individual financial service providers and provide financial services on a professional basis (Art. 2 Para. 1 lit. a and Art. 3 lit. d FinSA). In such a case, an entry into a register of advisers is also required and pension solutions of pension institutions can be offered.

The third case is when insurance intermediaries provide financial services for an institution which is itself not subject to FinSA and, consequently, act as 'extended arms' of that institution and as the excluded institution would itself act. In such cases, the relationship between the parties is material for determining if the activities are subject to FinSA. If, for example, insurance intermediaries solely act as 'extended arms' of pension institutions which are not subject to FinSA (Art. 2 Para. 2 lit. c FinSA), their activities fall outside the scope of FinSA. Conversely, if they act independently, the insurance intermediaries may be subject to FinSA as independent providers of financial instruments (Art. 2 Para. 1 lit. c FinSA).

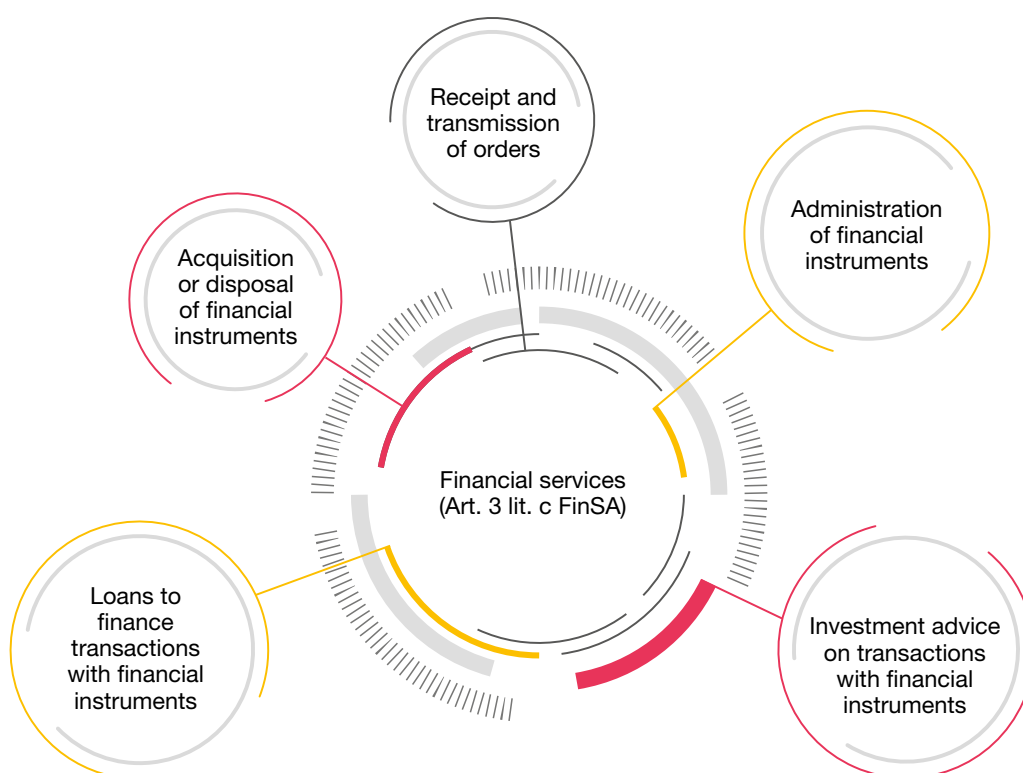
Broad definition of financial services



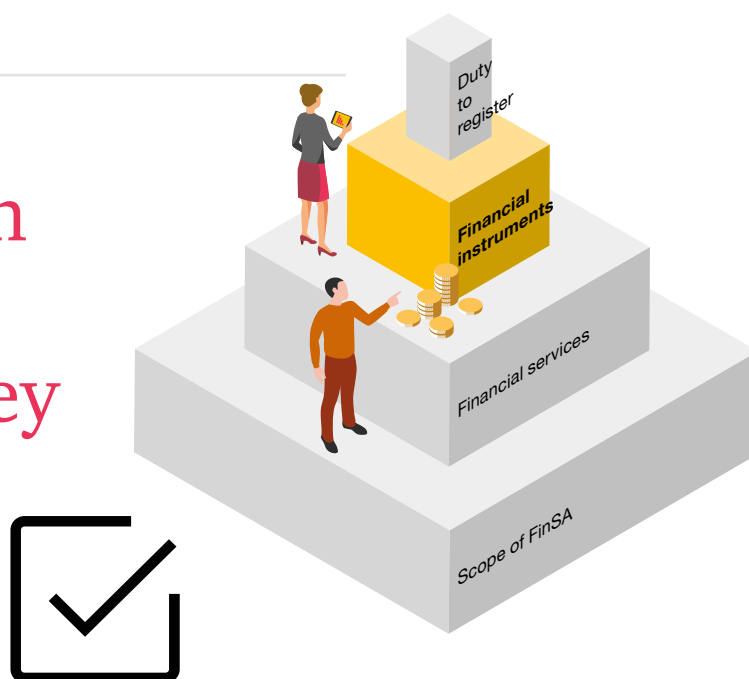
When is the activity a financial service?

In order to fall within the scope of FinSA, and thus trigger the duty to be entered into a register of advisers, the activity of the insurance intermediary must qualify as a financial service. The purpose of FinSA is to introduce conduct rules across sectors for all market participants. Consequently, the Swiss legislator deliberately defined the term 'financial service' in a broad sense.

Insurance intermediaries advise on and offer investment solutions and prima facie appear to provide financial services. As the definition of financial service is however intrinsically linked to that of financial instruments, as defined in FinSA, it is therefore necessary to determine whether the investment solutions they offer or advise on qualify as such.



Qualifying a pension solution as a financial instrument is key



Pillar 2 and pillar 3a investment funds as financial instruments pursuant to FinSA

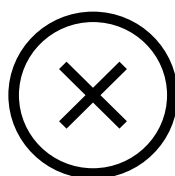
In the area of pillar 3a, besides the mere account solution, the beneficiary may also invest its pillar 3 pension assets in the form of a unit-linked savings solution in units in collective investment schemes within the meaning of the collective Investment Schemes Act ('CISA') (Art. 5 Para. 1 and 3 BVV 3 in conjunction with Art. 56 BVV 2). The assets are raised from investors and are managed for the account of the investors (Art. 2 Para. 1 CISA). FinSA qualifies units in collective investment schemes as financial instruments (Art. 3 lit. a No. 3 FinSA). Their offer in turn constitutes a financial service, and insurance intermediaries must be entered in a register of advisers pursuant to FinSA.

With regard to vested benefits savings, in addition to the pure savings solution, the beneficiary may also maintain its pillar 2 vested benefits in the form of an investment-linked savings solution and consequently invest its pillar 2 vested benefits capital in particular in units in collective investment schemes according to CISA (Art. 13 Para. 5 and Art. 19a Para. 2 FZV in conjunction with Art. 56 BVV 2). The Federal Council's dispatch on FinSA provides that occupational pension assets are not considered as financial investments. However, the term 'financial investment' is not congruent with the term 'financial instrument'. In addition, the dispatch does not differentiate between the pure savings solutions and the investment-linked savings solutions. As a result, the Federal Council's dispatch has led to different opinions in the literature and in practice regarding the qualification of pillar 2 investment funds as financial instruments pursuant to FinSA.

The aim of FinSA is client protection and creating a level playing field for comparable activities. It would not be consistent with the purpose of FinSA if the offering of investment funds in pillar 2 was exempt from the conduct obligations under FinSA while the offering of investment funds within pillar 3a was covered. Both pension solutions involve collective investment schemes and their offering. In addition, it is possible that the pension funds of both pillars have almost identical investment components. The investment funds of pillar 2 shall therefore be qualified as financial instruments according to FinSA. As a result, insurance intermediaries offering or advising on investment-linked savings solutions in pillar 2 must be entered into a register of advisers pursuant to FinSA.

Direct investments within pillar 2 and pillar 3a

Besides investment funds, the legal framework for pillars 2 and 3a allows for the possibility of investing in direct investments such as shares or bonds (Art. 5 Para. 3 BVV 3 in conjunction with Art. 53 Para. 1 lit. a-d and Para. 2 BVV 2). Pursuant to Art. 3 lit. a No. 1 and 7 FinSA, direct investments such as shares and bonds are legally qualified as financial instruments. Insurance intermediaries, therefore, must be entered into a register of advisers under FinSA if they give advice on and offer direct investments.



Exclusion of pillar 2 vested benefit savings accounts and pillar 3a savings accounts from FinSA

The Swiss legislator does not refer to pillar 3a solutions in FinSA, neither in the regulation itself nor in the corresponding legal materials. The beneficiary may open a pillar 3a savings account in a bank subject to the Banking Act (Art. 5 Para. 1 BVV 3). Pillar 3a savings accounts do not qualify as financial instruments within the meaning of FinSA, since claims arising from an account agreement are not deemed to be financial instruments (Art. 3 Para. 1 FinSO in conjunction with Art. 53 Para. 1 lit. b No. 1 BVV 2). As a result, merely providing account advice and brokerage does not relate to any financial instrument. Consequently, there is no financial service provided and insurance intermediaries are not required to be entered into a register of advisers pursuant to FinSA.

The FinSA and the FZG ('Freizügigkeitsgesetz') remain silent regarding the qualification of pillar 2 vested benefits savings accounts pursuant to Art. 13 Para. 5 and Art. 19 Para 1. FZV ('Freizügigkeitsverordnung') as a financial instrument within the meaning of FinSA. Due to the absence of other regulations for vested benefits, vested benefits savings accounts are qualified as pension accounts within the meaning of Art. 3 Para. 1 FinSO and, consequently, fall outside the scope of financial instruments. Insurance intermediaries do not need to be entered into a register of advisers pursuant to FinSA in order to provide advice and services related to vested benefits savings accounts.

Pillar 3a insurance solutions within the scope of ISA

Insurance companies offer their clients pillar 3a solutions in combination with risk insurance (Art. 1 Para. 1 lit. a and Para. 2 BVV 2). The pension recipient is obliged to pay a regular premium. In return, the insurer guarantees a monetary payment in the event of survival, disability or death. Pillar 3a insurance solutions, therefore, qualify as insurance contracts. When offering and concluding insurance contracts under ISA, insurance intermediaries must be entered into the insurance intermediary register supervised by FINMA. (Art. 40 and 42 Para. 1 ISA). As a consequence, the provisions of FinSA do not apply (Art. 2 Para. 2 lit. d FinSA). Insurance intermediaries are not required to be entered into a register of advisers pursuant to FinSA.





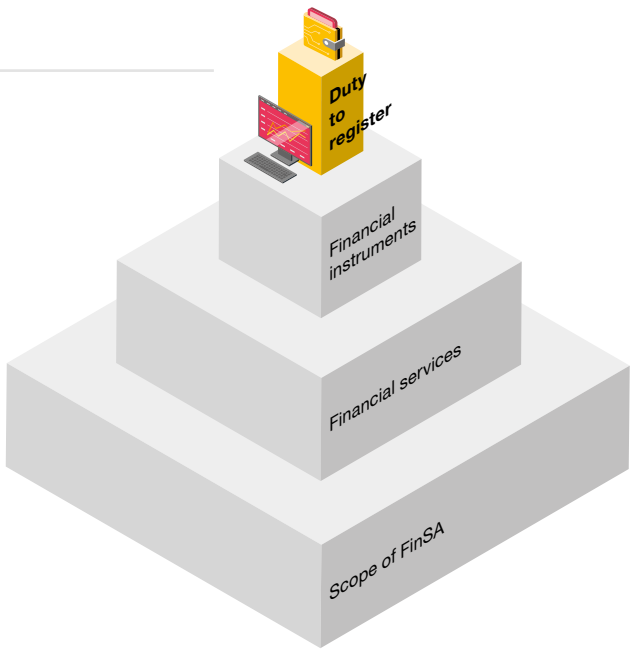
Unit-linked pillar 3a insurance: a partial revision of the ISA to bring clarity in the near future

In the event of unit-linked pillar 3a insurance, in addition to the insurance component the pension capital is invested in units in collective investment schemes within the meaning of CISA. Consequently, it must be assessed on a case-by-case basis which component predominates. If the insurance component outweighs the investment, the pension solution is qualified as an insurance contract within the scope of ISA. Conversely, if the investment purpose is the main component, the unit-linked pillar 3a insurance solution is considered a financial instrument within the scope of FinSA. This opinion is also reflected in the Federal Council's dispatch on FinSA, according to which activities that do not constitute financial services but serve a different purpose for clients should not be subject to the scope of FinSA.




The ISA will be partially revised as of 1 July 2023, and will include new framework and requirements regarding brokerage activities. The revised act contains conduct rules for insurance intermediaries when offering insurance products that have an investment character. The aforementioned insurance products are to be subject to the new conduct rules of ISA, which will ensure a level playing field regarding investment products outside the insurance sector that are subject to FinSA. Insurance contracts where the policyholder bears an investment risk and where the investment character is not merely reflected in a surplus participation will consequently fall within the scope of the ISA conduct rules in the near future. Hence, the legislator closes a regulatory gap which currently leaves uncertainties regarding the classification of unit-linked pillar 3a insurance solutions in favour of the insurance contract and the ISA scope.

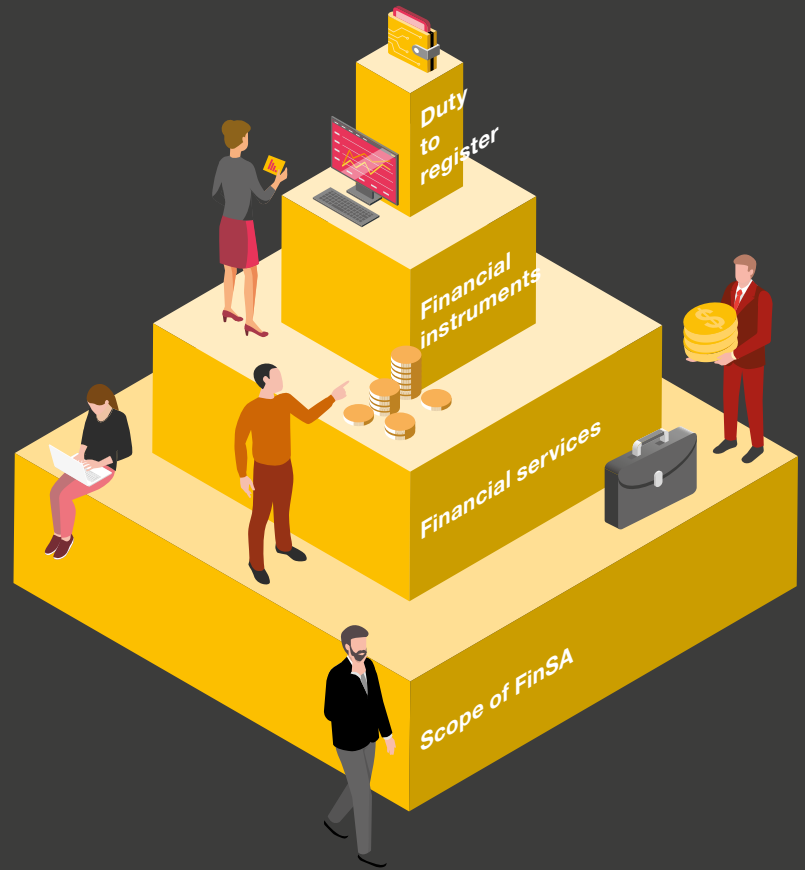


Duty to register

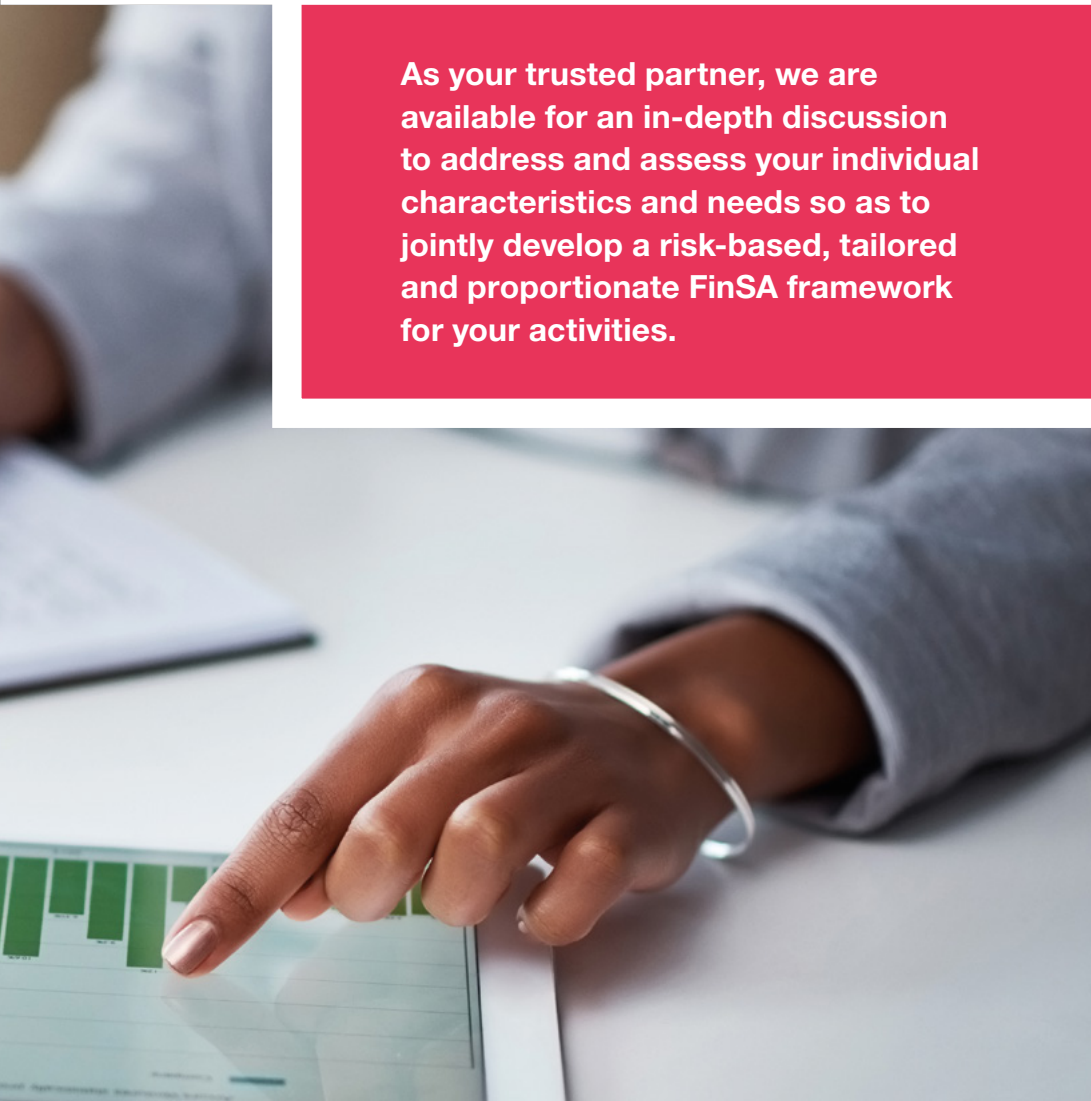


The duty to register in the register pursuant to FinSA depends on the qualification of the product as a financial instrument

Entry in a register of advisers is required 	No entry in a register of advisers is required 	Evaluated on a case-by-case basis 
Pillar 2 and 3a investment funds	Pillar 2 vested benefits savings accounts	Unit-linked pillar 3a insurance
Direct investments within pillar 2 and 3a	Pillar 3a savings accounts	
Pillar 3a insurance solutions		



As your trusted partner, we are available for an in-depth discussion to address and assess your individual characteristics and needs so as to jointly develop a risk-based, tailored and proportionate FinSA framework for your activities.



Contacts



Michèle Hess

Partner, Compliance & Regulation,
Advisory, PwC Switzerland
michele.hess@pwc.ch
+41 58 792 46 67



Jean-Claude Spillmann

Partner, Asset & Wealth Management and
Banking Regulatory, PwC Switzerland
jean-claude.spillmann@pwc.ch
+41 58 792 43 94



Emmanuel Genequand

Partner, Regulatory & Compliance
Services, Assurance, PwC Switzerland
emmanuel.genequand@pwc.ch
+41 58 792 95 75



Luca Bonato

Director, Compliance & Regulation,
Advisory, PwC Switzerland
luca.bonato@pwc.ch
+41 58 792 46 69



Elena Ortega

Manager, Compliance & Regulation,
Advisory, PwC Switzerland
ortega.elena@pwc.ch
+41 58 792 16 87



Patrick Siegenthaler

Associate, Compliance & Regulation,
Advisory, PwC Switzerland
patrick.siegenthaler@pwc.ch
+41 58 792 44 00

For more information: www.pwc.ch