Financial Conduct Authority

Factsheet No.035

For advisers

Pension reforms and insistent clients

This factsheet provides a helpful reminder of our position on insistent clients, given the pension reforms introduced in April 2015. The answers we provide to these questions are not exhaustive but reflect the existing rules and do not reflect any change in policy or interpretation of the rules.

What is an insistent client and where do I find the rules about it?

The Handbook does not refer to insistent clients and there are no rules or guidance specifically about this. In practice, there may be occasions where the client wishes to take a different course of action from the one you recommend and wants you to facilitate the transaction against your advice. When a client does this they are commonly referred to as an insistent client.

What steps should I take when advising an insistent client?

There are three key steps:

1. You must provide advice that is suitable for the individual client, and this advice must be clear to the client. This is the normal advice process.
2. It should be clear to the client that their actions are against your advice.
3. You should be clear with the client what the risks of the alternative course of action are.

Where the advice includes a pension transfer, conversion or opt-out, there may be additional requirements such as ensuring the advice is provided by or checked by a pension transfer specialist, comparing the defined benefit (DB) scheme with the defined contribution (DC) scheme and starting by assuming the transfer is not suitable.[1]

1 COBS 19.1R

Good practice

Information gathering was bespoke for the client, and not restricted by the limitations of a narrow process or template approach.

Omissions, inconsistencies and anomalies were followed up, resolved and documented to create a full record of the facts on which the personal recommendation was based.

Poor practice

Although, from the fact find, it seemed likely that the client's liabilities were a key element in them opting to access the cash against advice, it appears the client was not given any information about how to get debt counselling or loan restructuring advice.

What rules must I be aware of when advising insistent clients?

Although there are no rules specifically in relation to insistent clients, you must follow the normal advice rules first. So you must obtain the necessary information about the client and their investment objectives, financial situation and knowledge and experience so as to enable you to make a personal recommendation which is suitable.[2] You must also act honestly, fairly and professionally in the best interests of the client.[3]

2 COBS 9.2R
3 COBS 2.1.1R

You must ascertain the client's investment objectives before making a recommendation. A request or preference by the client for a particular solution – for example accessing cash from a pension – is not an objective. You must ascertain the client's actual investment objectives so that you can advise on a suitable course of action to meet them.

You must also communicate with the client (for example in the suitability report) in a way that is clear, fair and not misleading.[4]

There is no rule to prevent advisers from transacting business against their advice if the client insists.

Good practice

Where clients indicated that they wanted to access cash, the adviser explored the clients' real need for the cash (and, if driven by the need for debt repayment, helped the client to make an appointment with the Citizens Advice Bureau for support in relation to non-cleared debts).

Poor practice

The advice was purely in respect of the suitability of the transfer itself (ie no consideration was given to the client's wider financial circumstances and transfers had to be to a default DC arrangement with no consideration of existing pension arrangements).

See our Thematic Reviews for more examples.

What concerns does the FCA have about insistent client business?

We have seen cases where:

- there was an inadequate assessment of the other options which would meet the client's objectives;
- excessive numbers of insistent clients resulted from the adviser's advice not being sufficiently clear;
- the risks of the client's preferred course of action were not clearly explained
- it was a 'papering exercise'; ie the adviser had processed the case on an insistent client basis but this was clearly not representative of what had happened in practice
- the adviser advised the client not to transfer out of the DB scheme (although the client insisted) but then recommended a product that was not suitable (with reference to the outcome and assessment of the information gathered about the member).

In the project on enhanced transfer value pension transfers[5] where a high proportion of cases (59%) were insistent clients, 34% were found to be unsuitable and there were disclosure failings in 74% of cases.

How common or rare does the FCA expect insistent client cases to be?

It is unlikely to be common for clients who are seeking advice to disregard that advice. Where clients are required to take advice (for example in relation to DB pensions and other safeguarded benefits) then some may decide to disregard that advice. We do not have a pre-conceived idea about how often this will occur.

What should we include in the suitability report?

In the normal way, the suitability report must specify the client's demands and needs, explain why you have concluded that the recommendation is suitable and explain any possible disadvantages for the client.[6]

For pension transfers, conversions or opt-outs there may be additional requirements, such as:

- comparing the benefits to be paid under the DB scheme with the benefits afforded by the personal/stakeholder scheme
- ensuring that the comparison includes enough information for the client to be able to make an informed decision, for example, explaining the risk transfer from the scheme provider to the client and the extent of the potential loss of benefits, and
- not viewing suitability in the light of the critical yield alone.[7]

Having set out your advice clearly in the suitability report, you need to be clear with the client:

- about the risks of the different course of action
- that he/she is acting against your advice

This could be set out in the suitability report or elsewhere.

4 Principle 7 and COBS 4.2.1R
5 Thematic Review TR14/12: www.fca.org.uk/static/documents/thematic-reviews/tr14-12.pdf
6 COBS 9.4.7R
7 COBS 19.1R

Good practice

- The personal recommendation was expressed in clear and unambiguous terms in relation to both the advice on whether or not to transfer and, if the client transferred, the receiving product and the funds into which the client was advised to invest.
- For an insistent client, their reasons and the risks of not accepting the personal recommendation were discussed with the client. The reasons, the discussion and its outcome were documented in a separate document to the original personal recommendation.
- Robust warnings were given and documented.

Poor practice

- Template paragraphs were used in the personal recommendation which did not relate to the client's specific circumstances.
- Communications with an insistent client did not contain sufficiently strong warnings about the risks of transferring against professional advice.
- The language used to describe the recommendation left the client to decide between various options. For example, the suitability report recommended that the client should stay in the scheme but that the client should transfer if any other objectives were of greater importance to the client than maximising their income at retirement.

What should be on file?

The file should record the normal advice process referred to above. In addition, the file should show that you have made it clear to the client the risks associated with the alternative course of action and that the client is acting against your advice.

Good practice

Contemporaneous records of discussions with clients were made and retained and used to check the client's understanding of the risks and implications of the recommendation.

Poor practice

- The file did not indicate why an insistent client decided to act against advice not to transfer.
- There was no documented process to show how the client was treated as an insistent client.

Do I just need a disclaimer from the client to show they are insistent?

As stated, it should be clear to the client what your advice is, what the risks of the alternative course of action are, and that the client is acting against your advice. There is a risk that a disclaimer form could be seen as 'just another form to sign' and not be clear to the client. If the client uses their own words to indicate that they want to act against your advice then this would normally be clear.

Good practice

The rationale for the insistence was captured in the client's own words.

What should I charge for insistent clients?

It is up to the firm how to charge clients and a firm must determine and use an appropriate charging structure for calculating its adviser charges. The requirements for the disclosure of adviser charges are set out in COBS 6.1A.[8] If you charge on a contingency basis[9] then this may give rise to a conflict of interest. You should recognise – and appropriately manage – any potential conflicts of interest.

Is it OK if I give advice to the client but not transact?

Yes. It is up to firms to decide what services they wish to offer.

If I give advice but don't transact, what do I need to do and keep on file?

If you provide advice (personal recommendation) then you need to meet the requirements set out above, for example, provide suitable advice and a suitability report. This is because the rules around advice apply, irrespective of whether the transaction is arranged or not.

8 See also the findings from the thematic projects, including good and poor practice: www.fca.org.uk/firms/firm-types/financial-adviser/rdr-thematic-work

9 ie you only get paid for your advice if you arrange the transaction