



**Lowenstein Sandler's Employee Benefits & Executive Compensation Podcast:
Just Compensation**

**Episode 36 –
Staying Compliant: Understanding the New
QPAM Exemption Rules**

By [Andrew E. Graw](#), [Megan Monson](#), [Jessica I. Kriegsfeld](#)

JUNE 2024

Kevin Iredell: Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts, or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, SoundCloud, or YouTube. Now let's take a listen.

Jessica Kriegsfeld: Welcome to the latest episode of Just Compensation. My name is Jessica Kriegsfeld and I'm an associate in Lowenstein Sandler's Executive Compensation, Employment and Benefits Practice Group. I'm joined today by two partners in my group, Andy Graw and Megan Monson.

Andrew Graw: Hi, I'm Andy Graw, I chair the group and happy to be with you, Jessica and Megan.

Megan Monson: And I'm Megan Monson, happy to be here as well.

Jessica Kriegsfeld: Today we'll discuss the Department of Labor's final amendment to the Prohibited Transaction Class exemption 84-14, notice the qualified professional asset manager or QPAM exemption and how the Final Amendment may affect current investment managers relying on this exemption. This episode is a follow-up to our prior episode titled preparing for changes to the QPAM Exemption, which was recorded when the now final rule was initially proposed. ERISA prohibits a wide range of transactions involving a plan and a party in interest. However, the DOL has granted a number of class exemptions which provide for relief, and if the conditions of an exemption have been satisfied, the transaction will not constitute a prohibited transaction.

One of the most commonly used exemptions is the QPAM exemption. At a high level, the QPAM exemption allows employee benefit plans to engage in transactions that would otherwise be prohibited by ERISA and/or the Internal Revenue Code. The QPAM exemption is frequently relied upon by investment fiduciaries, including fund managers and investment managers. This episode will discuss the current QPAM exemption, modifications to the requirements for qualifying as a QPAM and as a result of the QPAM amendment, and key takeaways for investment managers. As always, this is not intended to be an exhaustive discussion, so we encourage you to consult with your legal counsel if you have questions about the intricacies of being a QPAM. Under the current QPAM exemption, how does one qualify for the exemption?

Megan Monson: In order to take advantage of the QPAM exemption you have to comply with two sets of rules, the first being the criteria for actually qualifying as a QPAM, while the other sets forth criteria that must be met in order for the QPAM exemption to be available to

a specific transaction that the QPAM engages in. So for the first test, in order to qualify as a QPAM, an investment manager generally must be a registered investment manager that has, as of the last day of the most recent fiscal year, total assets under management in excess of \$85 million and have shareholder or partner's equity in excess of \$1 million.

Andrew Graw: And for a transaction to qualify for the QPAM exemption, it has to meet a number of particular transactional criteria. One, the party in interest involved in the transaction cannot have, at the time of the transaction, authority to appoint or terminate the QPAM or negotiate the terms of the QPAM's engagement. Two, the terms of the transaction must be negotiated on behalf of the plan under the authority and direction of the QPAM. Three, the party in interest involved in the transaction cannot be the QPAM or an affiliate of the QPAM. Four, the transaction cannot be entered into with a party in interest with respect to any plan whose assets managed by the QPAM represent more than 20% of the total client assets managed by the QPAM at the time of the transaction. Five, the terms of the transaction must be at least as favorable to the plan as the terms generally available in an arms-length transaction between unrelated parties. And lastly, neither the QPAM nor any affiliate of the QPAM can have been convicted of a felony within the ten-year period preceding the transaction.

Megan Monson: And I think while this sounds like a very comprehensive list, in practice QPAMs who are regularly relying on the QPAM exemption are just doing this in normal course. And as long as they're aware of these requirements, it kind of becomes commonplace as part of their practice to meet the transaction-based exceptions.

Jessica Kriegsfeld: When are the changes effective?

Megan Monson: So under the amendment to the QPAM exemption, the changes are generally effective as of June 17th of this year but some of the changes that we'll get into in our discussion are going to be delayed.

Jessica Kriegsfeld: How does the Final Amendment modify the requirements for qualifying as a QPAM?

Andrew Graw: Well, one of the primary things it does is increase the thresholds that apply for QPAM status. There are two kinds of thresholds. There are assets under management and shareholders or partners equity, as Megan mentioned earlier. Those thresholds are increasing, and they increase in stages. So the first increase is for fiscal 2024, and it will increase from \$85 million assets under management to just under \$102 million. And then it will go up further starting in 2027 to almost \$119 million. And then to almost 136 million in 2030. On the shareholders partners equity side, those thresholds will increase from \$1 million to \$1,346,000 for the period 2024 through 2026. Then we'll increase further to almost \$1.7 million for the period 2027 through 2029. And then it will increase to \$2,040,000 in 2030. After 2030 both of those thresholds will increase based on cost-of-living adjustments that will be announced by the Department of Labor. Important takeaway here for QPAMs to take immediate notice of is that they'll need to comply with the new thresholds for their first fiscal year in 2024. So for calendar year QPAMs, they'll need to satisfy the newer thresholds by the end of 2024. Of course, QPAMs should not only be mindful of these new thresholds, but to the extent that they're under those thresholds, they need to start taking action almost immediately in order to make sure that they're going to meet those thresholds by December 31st of this year.

Megan Monson: So under the existing QPAM exemption, there is not any sort of notice or filing requirement. But one of the key changes that the Final Amendment makes is that to qualify as a QPAM, now all investment managers who want to rely on this exemption must notify the Department of Labor of its intention via email within 90 days of their initial reliance on the exemption. While there is a 90-day cure period for failing to

timely notify the Department of Labor, if the QPAM does not notify the DOL within 180 days, they lose the ability to rely on the exemption. And so it's a very quick and easy criteria to satisfy. However, if QPAMs are not aware of this, they could inadvertently lose their QPAM status. Now, once the Department of Labor is notified, no further notice is required unless the QPAM either changes its legal name or desires to no longer rely on the exemption.

So it's again, a one-time notification and the Department of Labor has advised that they intend to publish on their website a list of all QPAMs that have provided the notice. So that can be used in particular for clients that are looking to engage with investment managers to know whether they are relying upon the QPAM exemption. Key takeaway for existing investment managers is that if they are currently relying upon the QPAM exemption, they should notify the Department of Labor of the QPAM status as soon as possible, but in no event later than the expiration of the 90-day cure period. So by September 14th of this year, to ensure that their continued QPAM status is available.

Andrew Graw: Right Megan, we're actually recommending our clients to get that notice in as quickly as possible, and there's sort of a practical reason for that. QPAMs have to make representations that they satisfy the QPAM requirements. If they haven't satisfied the notice requirement, then they either need to slightly modify that representation or do something else. Rather than do something else or modify the representation, the easiest thing to do is to simply get that notice in as possible and be able to give a clean representation as to QPAM status.

Jessica Kriegsfeld: What other noteworthy changes did the Final Amendment make to the QPAM exemption?

Andrew Graw: The QPAM Amendment changes some of the transactional requirements that we listed out earlier. One of the changes that the amendment has is to require QPAMs to have sole responsibility over approval of a transaction, and it requires that QPAMs take a very active role in determining whether or not the transaction is appropriate and should be approved. I think that QPAMs would normally do that anyway. However, going forward, we think that it's appropriate for QPAMs to document how they've undertaken the obligation to assure that they have taken sole responsibility over the transaction. That could be as small as keeping a diary of conversations, phone calls, writings, anything that has to do with the transaction the QPAM should be keeping the record of and then holding onto that record so that they can show that they've satisfied this requirement.

Megan Monson: So one of the other criteria that Andy mentioned earlier is that the QPAM exemption is not available to an investment manager who has been convicted of a felony within the past 10 years. This is still a requirement, however, the QPAM Amendment expands the list of disqualifying crimes to expressly cover convictions in non-U.S. jurisdictions of crimes that are substantially equivalent to a felony in the US. It also extends the list of disqualifying activities to cover entering into a domestic non-prosecution agreement or deferred prosecution agreement that if prosecuted would have been a disqualifying crime. So simply by not being convicted of a felony, even if you've agreed that it has occurred, you'll still be disqualified from relying upon the QPAM exemption. Similarly, engaging in a repeated practice or pattern of activity that violates the QPAM exemption or intentionally engaging in conduct that violates the QPAM exemption, would also disqualify you from relying upon the QPAM exemption for go-forward. Lastly, providing materially misleading information to the Department of Labor or other regulatory bodies in connection with relying upon the QPAM exemption is another action that would disqualify you from being able to rely on the QPAM exemption.

Andrew Graw: And also, the final Amendment to the QPAM exemption requires QPAMs to maintain records, evidence and compliance, with the exemption for six years. I think that most QPAMs were already doing that because the general statute of limitations for fiduciary breaches under ERISA is six years. So QPAMs tended to maintain their records for six years. The QPAM amendment now essentially codifies that practice by requiring QPAMs to maintain their records for six years.

Jessica Kriegsfeld: What are key takeaways for investment managers?

Megan Monson: We've touched on most of the key takeaways throughout the discussion, but just to briefly recap, investment managers should prepare for and notify the Department of Labor of their QPAM status as soon as possible. They should determine whether any action is needed to meet the new assets under management and equity requirements that Andy outlined. They should also review their investment management agreements with ERISA clients to determine if any changes are needed. And lastly, they should review their record keeping practices and procedures to determine whether any changes are needed to conform to the new record keeping requirements. As Andy mentioned, some of these things they may or may not already be doing, but just going through the checklist and seeing what they need to do to make sure they're satisfying both the criteria for qualifying as well as the criteria for a transaction to meet the QPAM exemption is critical.

Jessica Kriegsfeld: The final QPAM exemption will be effective on June 2024, and investment fiduciaries should be mindful of how the changes may impact their ability to rely on the QPAM exemption going forward. If you have any questions about the complexities of being a QPAM, we encourage you to consult with counsel. Thank you for joining us today. We look forward to having you back for our next episode of Just Compensation.

Kevin Iredell: Thank you for listening to today's episode. Please subscribe to our podcast series at lowenstein.com/podcasts or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, SoundCloud or YouTube. Lowenstein Sandler podcast series is presented by Lowenstein Sandler and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. Content reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast and all rights are reserved.