

LATIN LAWYER REGULATORS 2020

Superintendency of Pensions (Chile)

Cristián Figueroa, Patricia Silberman,
Arturo Poblete, Mariana Tupper, Felipe Moro,
Fernando Noriega, Diego Lasagna
and Matías Garcés
Carey

AUGUST 2020

Useful pages on the regulator website

- Main homepage
- List of entities supervised by the SP
- Applicable laws and regulations
- Registry of monetary and non-monetary sanctions
- Organisational structure

Key individuals

- Osvaldo Macías, Superintendent, SP chief officer
- Jorge Mastrangelo, Oversight Manager
- Olga Fuentes, Regulations Manager
- Mario Valderrama, Legal Counsel

Regulatory oversight

The SP is responsible for the oversight and control of pension fund managers (AFPs) in the legal, administrative and financial fields. It also supervises other participants in and aspects of the Chilean pension system, such as unemployment fund managers and the Social Security Institute, in connection with the social solidarity pensions system created in 2008.

The most relevant functions and authorities of the SP are as follows:

- to authorise requests to create new AFPs or for changes of control in an existing AFP;
- to oversee the operations of AFPs and the correct provision of services and payments of pensions to their users;
- to inform users of the system of their rights and obligations with respect to the system;
- to provide for generally applicable and binding interpretations of the laws and regulations of the pension fund system and issue generally applicable rules for the correct application of such laws and regulations by AFPs and other supervised entities;
- to control AFPs' compliance with the minimum equity and other solvency and financial requirements;
- to control the investments of pension funds and the composition of the portfolio of each fund in accordance with the rules set forth in the pension funds investment regime;
- to supervise the commissions charged to affiliated individuals;
- to assist the Ministerio del Trabajo y Seguridad Social (Ministry of Work and Social Security) in all aspects subject to its competence and propose legal and regulatory modifications advisable from a technical perspective;
- to require any and all financial information necessary to ensure the compliance of AFPs with applicable laws and regulations and review all the books and records of overseen entities;
- to address all consultations, requests or claims made by the beneficiaries of AFPs;
- to conduct investigations of the operations of any AFP and apply the corresponding applicable sanctions or fines (and to file criminal claims with the criminal courts, if applicable);
- to conduct the liquidation of AFPs and pension funds;
- to oversee the use of privileged information and investigate insider trading conduct in connection with investments of pension funds, and the operations of AFPs and those individuals who have access to privileged information; and
- to appoint a special representative upon the occurrence of certain events such as, among others, material breaches of laws and regulations, commencement of a bankruptcy procedure and a shortfall in the minimum equity required by law.

Reporting and disclosure obligations

AFPs must be incorporated as publicly held corporations, and therefore are subject to all reporting and disclosure obligations applicable to those entities under the Chilean corporations law and securities law, and the applicable rules of the Comisión

para el Mercado Financiero (CMF) (Commission for the Financial Market). Corporations subject to the supervision of the CMF, such as AFPs, shall also disclose to the CMF, in a truthful, sufficient and prompt manner, any material or essential information about themselves or their securities. Material information in this case is any information that a prudent person would consider important in his or her investment decision-making and that is related to facts or events that are capable of having a significant impact on a company's assets and liabilities, business or financial condition. Corporations must report to the CMF any material information as soon as they become aware of it; however, boards of directors, with a three-quarters majority vote, may report certain information on a reserved basis when it refers to pending negotiations the knowledge of which may harm the best interests of a company. AFPs, as publicly held corporations, must also periodically report to the market certain information that is generally determined by the CMF, such as annual audited financial statements (consolidated or individual) and quarterly financial statements (consolidated or individual).

AFPs shall also periodically report to the SP disaggregated information regarding:

- the amount of funds they manage (note that funds are divided in five types of funds, ranging from the most aggressive from an investment risk-return standpoint (Fund A) to the most conservative (Fund E);
- the profitability of each pension fund;
- the ratio between pension funds and AFPs' own funds invested in the same instruments;
- the fees that affiliated individuals shall pay to AFPs;
- the composition of the investment portfolio of each pension fund;
- information regarding mandatory versus voluntary contributions (known as voluntary pension contributions or APV) made by affiliated individuals;
- any relevant change to, inter alia, their corporate governance, portfolio or equity; and
- any other information that SP may request.

Monetary sanctions and recent behaviour

The SP is entitled to impose the following monetary sanctions:

- fines of up to 15,000 Unidades de Fomento (UF) (unit of account) (approximately US\$540,000) or up to 30% of the amount of the operations conducted or agreements executed in breach of the applicable laws and regulations; or
- revocation of the SP's authorisation of the existence of the AFP.

The latter sanction is only applicable in cases of material breach of the applicable laws and regulations, when such laws and regulations provide for this specific sanction, or if an AFP has been repeatedly sanctioned for breaching one or more laws and the applicable regulations or instructions of the SP.

During 2019, the SP imposed 24 fines on AFPs: one was non-monetary, while the remaining 23 were monetary, with fines generally ranging from UF200 (approximately US\$7,240) to UF400 (approximately US\$14,480). The highest fine imposed in 2019 was UF5,000 (approximately US\$180,000). The sanctions were mostly based on delayed, incomplete or incorrect compliance with disclosure obligations (either financial or administrative), while others referred to the breach of other duties and non-compliance with obligations by affiliated individuals.

Non-monetary sanctioning powers and behaviour

While the SP is entitled to reprimand supervised entities, this is a very rare sanction. The SP imposed only one non-monetary sanction during the past 12 months, and is rather inclined to impose low-amount monetary sanctions instead. The non-monetary sanction imposed during 2019 referred to a breach of a reporting obligation, but there is no additional public information available in this respect.

Recent and upcoming developments

There is currently an important, in-depth discussion occurring about the pensions system in Chile. There is currently a bill of law under discussion in the Congress about, among other things, the following matters:

- increasing the amount to be collected by AFPs to increase AFP-affiliated individuals' pensions; and determining the portion of such amount to be allocated to increase the pensions of the individuals paying such amounts, and the portion of such amount destined to increase the pensions of individuals receiving lower pension amounts;
- imposing liability on AFPs for losses generated to their funds as a consequence of their management;
- creating a state-managed entity related to social security funds; and
- allowing other entities (such as general fund managers or cooperatives) to manage pension funds to increase competition and obtain lower commissions for affiliated individuals.

These modifications would require the SP to supervise additional tasks and roles of AFPs and other entities, and to issue relevant regulations containing instructions about, among other things, new collection mechanisms, calculation methodologies and pension payment processes.

Due to the current situation related to the covid-19 outbreak in Chile, Congress has concentrated its efforts on discussing certain particular regulations to face the crisis and protect the funds of those individuals who were in the process of retiring at the time the outbreak occurred. This scenario has consequently delayed discussion of the above-mentioned bill of law seeking to incorporate relevant changes into the Chilean pensions system.

Challenges

During the past few years, the appropriateness of a pensions system based on individual accounts managed by AFPs has been questioned, mainly because it may result in low pensions for affiliates. Two consecutive governments have proposed some bills of law modifying the pension system (some changes being more structural than others), and the latest bill is currently under discussion in the Congress. This has forced the SP to continuously assess the impact that such reform would have on specific regulations, pensions and the market, as well as how to implement any possible regulatory outcome.

Additionally, and especially in the past few months, AFPs and the SP have faced complex litigation from several individuals who have challenged the pension system in court – for example, to gain the possibility of accessing pension funds prior to retirement or becoming disabled, so they may use their funds for other purposes, or to access SP and AFP sensitive information based on the Transparency and Access to Public Information Law.

All of the above issues have placed stress on the relationship between the SP and AFPs: people appear to be requiring the regulatory authorities to scrutinise AFPs' operations more strictly, seeking to obtain a solution to the low amounts of their individual pension funds. Pensions are at the centre of discussions about the demands that caused the social unrest Chile has faced since October 2019.

Additionally, within the past two years the SP has issued several regulations concerning the investments of AFPs, allowing regulated entities to invest pension funds into new risk assets such as private equity funds, operations and agreements representing real estate investments, private debt and infrastructure. These new regulations provide for, inter alia, new investment limitation thresholds, valuation mechanisms, and provisions regarding the safety of investments and the custody of foreign instruments. These regulatory innovations have consequently represented challenges for the SP in terms of supervision functions and authorities, and the modernisation and sophistication of the tools necessary to supervise, and resulted in the SP recently issuing a formal, consolidated regulation in this respect.

Interacting with the regulator

Most communications with the SP are made through an electronic system on which AFPs must file their periodical reports. It is also very common that formal communications are made through the mail, such as any official letter issued by the SP. In cases where a personal meeting is required, it shall be requested in compliance with the Lobby Law (Law 20,730) requirements and outline the topics to be discussed and attendees. This information should be made public by the SP on its official website.

Notes for foreign investors

All AFPs operating in Chile must be locally incorporated. The oversight authorities of the regulator in connection with foreign investors are mainly exercised at the time of an AFP's local incorporation, when a range of information (financial, corporate

governance, corporate group information, management, etc) regarding those shareholders holding 1% or more of the shares of an AFP shall be provided for review and approval. The SP also exercises its authorities over foreign entities, when applicable, every time there is a change of control of the property of an AFP.

Other regulators it works closely with

- Comisión para el Mercado Financiero (CMF): Financial Market Commission (Chile);
- Ministerio del Trabajo y Seguridad Social (MTSS): Ministry of Work and Social Security (Chile);
- Comisión Clasificadora de Riesgos (CCR): Risk Qualification Commission (Chile); and
- Consejo de Estabilidad Financiera (CEF): Financial Stability Counsel (Chile).



Felipe Moro
Carey

Felipe Moro is a partner at Carey and co-head of the firm's banking and finance group. His practice focuses primarily on lending transactions, project financing, structured products and derivative transactions. He also has vast experience in the area of mergers and acquisitions.

Mr Moro has been recognised as a leading individual in projects and banking and finance by several international publications including, among others, *Latin Lawyer*, *Chambers and Partners* and *Best Lawyers*.

He has been a professor of the Master of Business Law programme at Universidad de Los Andes (2014–2015), and an assistant professor of securities market law at different universities.

Mr Moro graduated from Universidad Católica de Chile and holds an LLM degree from the University of Chicago. Between 2005 and 2006 he worked as a foreign associate in the finance group of Shearman and Sterling in New York.



Cristián Figueroa
Carey

Cristián Figueroa is a partner at Carey and co-head of the firm's corporate, mergers and acquisitions and capital markets groups. His practice focuses on advising international and local clients in mergers and acquisitions, including tender offers, private asset and stock acquisitions, auction processes, project development, joint ventures, private equity, securities and debt offerings, capital markets, corporate law, commercial law, derivative transactions, infrastructure concessions and general practice.

Mr Figueroa has been recognised in corporate, M&A and capital markets by several international publications such as *Latin Lawyer 250*, *Leading Lawyers* and *Best Lawyers*.

He has been a professor of the LLM programme at Universidad Católica de Chile since 2015.

Mr Figueroa graduated from Universidad Católica de Chile and holds a degree in tax planning from Universidad Católica de Chile and an MSc in law and finance from the University of Oxford. Between 2011 and 2012 he worked as a foreign associate at Cleary Gottlieb Steen & Hamilton LLP in London, England.



Patricia Silberman
Carey

Patricia Silberman is a partner at Carey and co-head of the corporate, mergers and acquisitions and capital markets groups. Her practice focuses on mergers and acquisitions, corporate and commercial law, national and international financing and capital markets.

Ms Silberman has been recognised by several international publications including, among others, Chambers and Partners, The Legal 500 and Best Lawyers.

After starting her professional career at Carey, she worked as a foreign associate at Gibson Dunn and as a permanent associate at Chabbourne & Parke, both in New York. She is an arbitrator at the Arbitration and Mediation Centre of the Santiago Chamber of Commerce and a member of the International Steering Committee of the Women in the Profession programme of the Vance Center.

She participates actively as a public speaker and in local and international publications.



Fernando Noriega
Carey

Fernando Noriega is an associate in Carey's banking and finance and capital markets groups. His practice is focused on banking law, lending transactions and project financing, as well as the issuance of debt instruments, capital markets and foreign investment.

Mr Noriega has been recognised in banking and finance by several international publications including Chambers and Partners, The Legal 500 and Leading Lawyers.

He graduated from Universidad de Chile and holds an LLM degree in banking law and financial regulation from the London School of Economics and Political Science. Between 2015 and 2016 he worked as a foreign associate at White & Case in New York.



Arturo Poblete
Carey

Arturo Poblete is an associate in Carey's mergers and acquisitions, capital markets, fund formation and private equity groups. His practice focuses on corporate and commercial law, corporate governance, mergers and acquisitions, capital markets, private equity, infrastructure public works concessions and general practice.

He has been a professor of commercial law at Universidad de Los Andes since 2018.

Mr Poblete graduated from Universidad Católica de Chile and holds an LLM degree from the University of Chicago. Between 2015 and 2016 he worked as a foreign associate at Kirkland & Ellis LLP in New York.



Mariana Tupper
Carey

Mariana Tupper is an associate in Carey's corporate and mergers and acquisitions groups. Her practice focuses on corporate and commercial law and international trade.

She has been a professor of civil law at Universidad de Chile since 2012.

Ms Tupper graduated from Universidad de Chile and holds an LLM degree from Columbia University.



Diego Lasagna
Carey

Diego Lasagna is an associate in Carey's banking and finance group. His practice focuses mainly on commercial, corporate, banking and financial law, advice to local and foreign banks and financial institutions, and local and foreign project financing.

Mr Lasagna graduated from Universidad de Concepción, and he worked as the chief attorney at Bank Itaú Chile (2015–2016) and as a corporate governance attorney at Bank Itaú CorpBanca (2016).

He has also authored several publications.



Matías Garcés
Carey

Matías Garcés is an associate in Carey's capital markets and mergers and acquisitions groups. His practice focuses on commercial and corporate matters, mergers and acquisitions, capital markets and general practice.

Mr Garcés graduated from Universidad Católica de Chile.

/Carey

Carey is Chile's largest law firm, with more than 270 legal professionals.

Carey is a full-service firm. The corporate, litigation and regulatory groups include highly specialised attorneys covering all areas of law.

The firm's client list includes some of the world's largest multinationals, international organisations, and important local companies and institutions.

The firm's lawyers graduated from the best law schools in Chile, and most of its mid and senior level associates have graduate degrees from some of the world's most prominent universities. Several are also currently university professors.

The firm is an effective bridge between legal systems. Most of its partners and senior associates have worked in North America, Asia and Europe as foreign or regular associates with leading international law firms, or as in-house counsel for major corporations or international institutions.

Isidora Goyenechea 2800,
43rd floor
Las Condes,
Santiago,
Chile.

Tel: +56 2 2928 2200
Fax: +56 2 2928 2228

www.carey.cl

Felipe Moro

fmoro@carey.cl

Cristián Figueroa

cfigueroa@carey.cl

Patricia Silberman

psilberman@carey.cl

Fernando Noriega

fnoriega@carey.cl

Arturo Poblete

apoblete@carey.cl

Mariana Tupper

mtupper@carey.cl

Diego Lasagna

dlasagna@carey.cl

Matías Garcés

mgarcesv@carey.cl