

# Amendments to the fees regime of the pension funds managers (Afores)

May 2019

**Authors:** [Vicente Corta Fernández](#), [Rafael Llano](#), [Ismael Reyes Retana Tello](#), [Francisco de Rosenzweig](#), [Carlos González](#), [Fernando García Gómez](#), [Juan Pablo Hugues](#), [Laura Campos Carrillo](#)

As previously reported in our Client Alerts dated January 25 and May 6, 2019, on January 23, 2019, a bill submitted by the Mexican Federal Executive branch was published in the House of Representatives Parliamentary Gazette, with a draft decree amending, adding, and repealing various provisions of the Retirement Savings Systems Law. As part of the applicable legislative process, on April 29, 2019, the Mexican House of Representatives approved a revised bill, including revisions added by the House's Finance and Public Credit Committee, as well as certain amendments to the bill that was originally submitted by the Mexican Federal Executive branch (the "**Revised Bill**").

The Revised Bill is still subject to the legislative process, and must be approved by the Senate, which may still include additional amendments. Once approved by both the House of Representatives and the Senate, the bill must be promulgated by the President and published in the Official Federal Gazette.

Simultaneously with this legislative process, on May 10, 2019, the Mexican Commission for Retirement Savings System (*Comisión Nacional del Sistema de Ahorro para el Retiro*, "**CONSAR**") published on the website of the National Commission for Regulatory Improvement (*Comisión Nacional de Mejora Regulatoria*) a draft agreement of CONSAR's Board of Governors, setting out policies and guidelines regulating the fee authorization process as of 2020 (the "**Agreement of the CONSAR's Board of Governors**"). This Agreement will be published in the Official Federal Gazette in order to enter into force.

Please find below a brief discussion of possible impacts on the pension funds managers ("**Afores**") due to the regulatory changes proposed by the governmental institutions involved, and national and international procedural avenues where those impacts could be challenged.

## [Proposal of the Revised Bill to Amend the Fee Regime](#)

One of the main amendments included in the Revised Bill that may affect the operation of Afores is related to the fees that such managers can charge to their users.

The Revised Bill proposes that Afores charge a single fee comprised of a percentage of the assets under management, as they currently do, plus an additional component calculated over the returns received by workers above a threshold to be determined by CONSAR, through enabling regulation. In order for the CONSAR's Board of Governors to authorize the calculation methodology to set this threshold, it must obtain the favorable opinion of CONSAR's Risk Analysis Committee regarding the additional component calculated over returns, as well as regarding the threshold.

Importantly, the Revised Bill also includes two additional concepts through Transitory Articles:

- I. The amounts that Afores may charge as integrated single fees are capped to the amount authorized to each Afore on the date that the reforms are published. When authorizing fees to Afores, CONSAR's Board of Governors will need to consider that those fees should decrease proportionally to the growth in the assets managed by each Afore; and

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- II. CONSAR must publish the enabling regulations to set the additional component calculated over returns, within six months following the entry into force of the reforms. The Revised Bill adds that these enabling regulations must include guiding principles to prevent fees from becoming excessive to the workers, and to encourage the progressive reduction of fees, with the purpose of increasing workers' pensions.

### Agreement of CONSAR's Board of Governors on Pension Fund Fees

The Agreement of CONSAR's Board of Governors establishes the methodology for determining when fees are to be deemed excessive fees to the workers. This methodology defines an adjustment curve on the fee on the assets managed by the Afore, seeking that the fees decrease in proportion to the annual increase in real terms of the assets under management. The fees that are higher than the above-mentioned curve are considered excessive. If that occurs and the request filed by the Afore to the CONSAR's Board of Governors under Article 37 of the Retirement Savings System Law is denied, the relevant Afore must charge a fee equivalent to the average of the rest of the fees authorized by the CONSAR's Board of Governors for the corresponding period.

### Remedies Against the Amendments to the Fee Regime

The proposal to amend the fee regime for the Afores could adversely affect their operations and generate reductions in their expected returns, so Afores could have access to the following remedies to seek to challenge the potential harm.

- I. **Amparo Trial.** An *amparo* trial is the standard constitutional remedy against laws or any type of general provisions. Through this proceeding, any person with sufficient standing may challenge violations of their fundamental rights recognized by the Constitution or by international treaties.

In the case in question, there could be elements to show harm to the Afores. Given that the change in the framework for the collection of fees would alter the circumstances under which authorizations to the Afores were granted, the Afores could argue that the proposed amendments: (i) affect their vested rights, (ii) infringe their right to receive adequate compensation for rendering their services and, (iii) affect the purpose of the retirement savings system.

- II. **International Treaties.** Mexico has ratified international treaties that contain procedural and substantive protections to investors from the world's major economies, including more than 30 countries from five different continents. A key requirement in order to gain access to such protections is to establish that there is a covered "investor" and "investment" under those treaties. Typically, such treaties allow investors to commence arbitration claim against the state, before international fora, for breaches of standards of substantive protection under public international law. Although the types and scope of these protections may vary by treaty, the usual substantive standards of protection are the following:
  - a. **Expropriation or nationalization.** An expropriation, direct or indirect, is lawful under international law if the following requirements are met: (i) it is conducted for public purposes; (ii) it is not discriminatory; (iii) the state paid prompt, adequate and effective compensation; and (iv) due process is respected. Failure to satisfy any of these requirements typically allows for expropriation claims.
  - b. **Fair and equitable treatment.** This standard refers to a general prohibition of the state to conduct itself arbitrarily or inconsistently with investors. In general, it also comprises the prohibition to change the regulatory framework in such a manner that it breaches covered investors' legitimate expectations. This standard generally includes the minimum standard of treatment of customary international law, as well as full protection and security. It also protects against denial of justice by the state courts.
  - c. **Lack of national treatment and/or most favored nation treatment (MFN).** This standard constitutes a duty to accord foreign investors the same treatment provided to national investors or to investors from third-party states, including as a result of other treaties granting different or additional protections.

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- d. **Umbrella clauses.** So-called umbrella provisions in certain investment protection treaties provide an obligation of the state to respect and comply with its contractual or other obligations with investors.

Depending on the specific Afores and any applicable treaties to their foreign investors, there could be elements to support claims of this nature against the Mexican state. In previous years, controversies have arisen in Latin America in the retirement's funds market under international treaties.

White & Case, S.C.  
Torre del Bosque – PH  
Blvd. Manuel Avila Camacho #24  
11000 Ciudad de México  
Mexico

**T** +52 55 5540 9600

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