

March 20, 2019

VIA ELECTRONIC MAIL

Táisa Oliveira Maciel  
Gerente Executiva - General Counsel  
Petróleo Brasileiro S.A. - Petrobras  
Av. República do Chile, 65 - sala 2002 - Centro  
Rio de Janeiro - RJ - 20031-912

Re: U.S. Offset of Brazilian Monetary Component of Coordinated Agreements

Dear Táisa:

On September 26, 2018, Petróleo Brasileiro S.A. – Petrobras (“Petrobras” or the “Company”) entered into a Non-Prosecution Agreement (“NPA”) with the U.S. Department of Justice (“DOJ”) and an administrative cease-and-desist order with the U.S. Securities and Exchange Commission (the “SEC” and, collectively with DOJ, the “U.S. Authorities”) to resolve the U.S. Authorities’ investigations into violations of the accounting provisions of the U.S. Foreign Corrupt Practices Act (“FCPA”). Petrobras concurrently negotiated a related Commitment Assumption Agreement with the Brazilian Ministério Público Federal (the “MPF”), which was finalized on January 23, 2019.<sup>1</sup>

In cross-border investigations and resolutions, the U.S. Authorities often include foreign offsets to the penalty assessed in the United States, such that the SEC and DOJ credit companies’ payments to other enforcement authorities against the total assessed penalty. In Petrobras’s case, DOJ’s NPA and the SEC’s cease-and-desist order (collectively, the “U.S. Resolutions”) imposed a total criminal penalty of \$853,200,000 against Petrobras. The U.S. Resolutions allow Petrobras to credit up to \$682,560,000 to be paid in Brazil pursuant to a future agreement between Petrobras and the Brazilian authorities.<sup>2</sup> The U.S. Resolutions also

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<sup>1</sup> This letter provides a post-resolution analysis of Petrobras’s agreements with the U.S. and Brazilian authorities; it does not include any pre-resolution analysis or evaluations, and it does not implicate any pre-resolution discussions.

<sup>2</sup> The SEC’s cease-and-desist order describes the Brazilian payment as a payment to “the Brazilian authorities,” while DOJ’s NPA refers to “Brazilian authorities” and “Brazil.”

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provide that, if the Company does not pay any part of the \$682,560,000 to Brazilian authorities, the Company must pay that amount to the U.S. Authorities.

Although cross-border resolutions with foreign offsets are relatively common with the U.S. Authorities, the Petrobras resolutions are unique in several key respects: (1) although Petrobras admitted criminal liability for violations of the FCPA's books-and-records and internal controls provisions in the United States, the Brazilian resolution does not include a finding of liability under Brazilian law, and Petrobras remains an Assistant to the Prosecution<sup>3</sup> in Brazil; (2) the Company's controlling shareholder—the government of Brazil, some of whose members were implicated in the underlying wrongdoing—would be receiving the \$682,560,000 in Brazil; and (3) criminal prosecution of state-owned entities is extraordinarily rare in light of sovereign immunity defenses, which Petrobras expressly reserved in the U.S. Resolutions. Although the SEC and DOJ agreed that Brazilian authorities should receive the majority of funds paid pursuant to Petrobras's resolutions, these unique circumstances raised questions about how Petrobras's payment in Brazil would be structured to avoid refunding, in effect, the penalty back to Petrobras, which would reduce the deterrent effect of the Company's U.S. Resolutions and undermine the purpose of the assessed penalty in the United States. The SEC and DOJ resolutions each include provisions intended to prevent Petrobras from benefiting from its payment in Brazil, and each provide for the Brazilian component of the resolution amount to be repaid in the United States if the payment in Brazil is deemed to violate the U.S. Resolutions. The U.S. Authorities have been informed of, and have not raised objection to, the nature and structure of the agreement Petrobras ultimately entered into with the MPF as part of finalizing the U.S. Resolutions.

## **I. The Structure of the Agreements**

The U.S. Resolutions impose a total criminal penalty of \$853,200,000. Of this amount, the Brazilian authorities would receive 80% and the SEC and DOJ each would receive 10%. Accordingly, Petrobras was required to pay only \$85,320,000 to DOJ and \$85,320,000 to the SEC, and the U.S. Authorities agreed to credit the remaining amount of \$682,560,000 against the amount Petrobras pays to the Brazilian authorities pursuant to the Company's separate agreement in Brazil. To obtain credit for its payments in Brazil, Petrobras must make its payment to the Brazilian authorities by the time specified in the Company's agreement with the MPF (*i.e.*, within 30 days of the homologation of the agreement between Petrobras and the

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<sup>3</sup> The SEC's cease-and-desist order states that Petrobras "immediately cooperated with the Brazilian authorities' investigation, and has served as an Assistant to the Prosecution in 51 proceedings in Brazil." Similarly, DOJ's NPA noted that "a number of executives of the Company engaged in an embezzlement scheme that victimized the Company and its shareholders."

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MPF). The NPA, for example, requires that, if Petrobras “does not pay to Brazil any part of the \$682,560,000 in the timeframe specified in the agreement,”<sup>4</sup> then Petrobras must pay that amount to the U.S. Authorities.<sup>5</sup> The SEC’s cease-and-desist order refers back to the NPA and adopts its requirements.

The NPA further prohibits the Company from “seek[ing] or accept[ing] directly or indirectly reimbursement or indemnification from any source with regard to the penalty amounts that the Company pays[.]”<sup>6</sup> The SEC cease-and-desist order similarly states that, if any portion of Petrobras’s \$682,560,000 payment is “returned to [Petrobras], or any subsidiary of [Petrobras], or any entity that [Petrobras] owns or controls, that amount will not be credited as an offset to [Petrobras’s] penalty obligation” and will be due to the U.S. Authorities.<sup>7</sup> In the event that Petrobras forfeits its credit to Brazil and is required to pay any portion of the \$682,560,000 to the U.S. Authorities, the SEC and DOJ will split the payment evenly.

## II. U.S. Resolutions’ Restrictions on Petrobras’s Payment in Brazil

Although there are numerous reasons why the U.S. Authorities enter into resolutions with companies, two of their primary motivations include deterring future misconduct (typically by imposing penalties and fines) and compensating harmed parties (*e.g.*, through restitution payments). The circumstances of this matter implicated unique concerns regarding the ways in which the \$682,560,000 payment in Brazil might be structured. Accordingly, the U.S. Resolutions include language that ensures that, in the event any of the money paid in Brazil was used to benefit Petrobras, the Company will be required to pay that amount in the United States (*i.e.*, the Company would not receive a credit for any payments that were directly or indirectly returned to Petrobras).

Throughout the U.S. Authorities’ investigations, the Company explained its relationship with the Brazilian government, including how Petrobras took steps ensure its operations remain insulated from improper political influence. This context, and the evaluation of the arm’s-length relationship between the Brazilian government and the Company, made the circumstances of this cross-border resolution more complicated than most. In a typical case, a company could make a payment to enforcement authorities in its home country without generating concerns that those payments might be routed back to that same company in contravention of the cross-border resolution and its intended penalty. Here, on the other hand,

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<sup>4</sup> Petrobras NPA at 6 (Sept. 26, 2018).

<sup>5</sup> Petrobras NPA at 6 (Sept. 26, 2018).

<sup>6</sup> Petrobras NPA at 6 (Sept. 26, 2018).

<sup>7</sup> Petrobras Cease-and-Desist Order at 9 (Sept. 27, 2018).

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the U.S. Resolutions explicitly included language that prohibits Petrobras from receiving credit in the United States for the \$682,560,000 paid in Brazil, if those payments ever are returned to Petrobras, or if the Company receives reimbursement or indemnification for them. In other words, the U.S. Authorities drafted their resolutions to address any doubts regarding whether payments to the Brazilian government would be directly or indirectly returned to Petrobras.

Although the U.S. Resolutions do not dictate how Brazil, a co-equal sovereign, could use the money received from Petrobras, their language explicitly ensures that Petrobras cannot reduce its total criminal penalty by paying \$682,560,000 to its controlling shareholder and then having that money returned to it by its controlling shareholder. This language protects the deterrent effect of the SEC and DOJ resolutions by ensuring that, no matter how the Brazilian agreement was structured, Petrobras would be required to pay its full \$853,200,000 penalty. Accordingly, if the U.S. Authorities determine that Petrobras's payment in Brazil is somehow returning to the Company, Petrobras will be required to pay an additional \$682,560,000 to the U.S. Authorities.

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Petrobras remains subject to ongoing cooperation and disclosure obligations pursuant to its NPA. We expect the U.S. Authorities to be sensitive to any suggestion that Petrobras's payment in Brazil could be used to the Company's benefit, as opposed to promoting compliance, compensating harmed shareholders as provided in the agreement, or advancing other proper purposes as determined by Brazil. Although the U.S. Resolutions do not dictate what Brazil does within its own jurisdiction, they reflect the U.S. Authorities' commitment to preserving the deterrent effect of their assessed criminal penalty and ensuring that Petrobras pays the full required amount. Accordingly, if the U.S. Authorities conclude that Petrobras's payment in Brazil is being directly or indirectly returned to it (or to any entity it controls) in violation of the terms of the resolutions, Petrobras will be required to pay that amount to the SEC and DOJ, in addition to the \$170,640,000 it already was required to pay in the United States.

Sincerely,



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F. Joseph Warin