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## Petrobras settlement: biggest FCPA settlement in history

**Petrobras, Brazil's state-owned and controlled (and US-listed) oil and gas company, has agreed to pay US authorities a total of nearly USD 1.8 billion (USD 853.2 million in penalties to the DOJ and USD 933.5 million in disgorgement and prejudgment interest to the SEC) to resolve FCPA charges. In doing so, Petrobras has entered into the biggest FCPA settlement in history. The authorities allege that Petrobras violated the FCPA anti-bribery and anti-corruption rules, the books and records provisions, as well as the rules on internal controls.**

**The settlements demonstrate once more the extent of collaboration between US authorities and foreign counterparts in multiple international jurisdictions. The settlements are significant not only due to their record amount: they also highlight the importance of other payments in related proceedings when assessing penalties and the incorporation of special funds to transfer these penalties to.**

### **The facts**

According to the Non-Prosecution Agreement (NPA) between Petróleo Brasileiro S.A. ("Petrobras") and the DOJ, the investigation by US authorities and Brazilian law enforcement showed that the members of both the Petrobras Executive Board and the Board of Directors were directly and indirectly involved in corrupt payments. Petrobras facilitated and directed the unlawful payment of millions of dollars to politicians and political parties in Brazil between 2004 and 2012. Although the precise amount of money is unknown, the DOJ estimated that more than USD 2 billion was generated and used to make corrupt payments. Half of that amount was directed to corrupt contractors, the other half to politicians and political parties.

In the Statement of Facts attached to the NPA, the DOJ sums up numerous examples of the corrupt schemes within Petrobras. One of them concerns the completion of the *Abreu e Lima Refinery* ("RNEST"), where Petrobras executives conspired with contractors to facilitate millions of dollars in payments to politicians in exchange for business in the RNEST project. Other corrupt schemes include Petrobras executives who directed the payment of illicit funds to stop a parliamentary inquiry into Petrobras contracts, and financial support for the campaign of a Brazilian politician who had oversight of the building location of a Petrobras refinery.

All these corrupt schemes took place at the executive level of the company; these executives were also responsible for the internal financial and accounting controls.

Petrobras admitted that certain executives knowingly and wilfully failed to implement the company's internal controls, and filed false financial statements, in order to continue the facilitation of these bribe payments.

### **Settlements with the SEC and the DOJ**

To resolve the matter in the US, Petrobras agreed to settle with the SEC and the DOJ. The most remarkable aspect of these settlements is that although the Petrobras settlements are the biggest in the history of FCPA enforcement, only less than 10% of the total amount of USD 1.78 billion will actually be collected by the US authorities.

According to the SEC's order, Petrobras filed false and misleading securities filings. In this context, Petrobras agreed to a penalty of USD 933.5 million in disgorgement and prejudgement interest to the SEC. The payment of this disgorgement and prejudgement interest amount is, however, entirely offset by payments Petrobras made to investors (USD 2.95 billion) in a related class-action settlement and penalties (USD 682.6 million) paid to the Brazilian Federal Prosecutor's Office (Ministério Público Federal, or "MPF").

As part of the settlements with the DOJ and SEC, Petrobras accepted a penalty of USD 853.2 million. However, the penalty amounts Petrobras will actually pay to the SEC and the DOJ will be offset by the payments made in agreement with the Brazilian authorities. As a result, Petrobras will pay the Brazilian authorities 80% of the penalty amount (USD 682.6 million) and the SEC and the DOJ will each receive 10% of the penalty amount (USD 85.3 million).

### **Crediting of related payments: anti-piling on**

As shown above, the mere agreement on payment of a criminal penalty and disgorgement and prejudgement interest, assessed by the US authorities, does not necessarily mean that these US authorities will collect the (entire) amount. This may be due to the DOJ's anti-piling on policy. This policy aims to prevent duplicative penalties, assessed by, amongst others, different authorities in different jurisdictions. In context has previously discussed this policy.

Certain US lawyers give an alternative explanation for the fact that the US authorities will collect only a relatively small amount for the FCPA violations. They claim that the US authorities, by entering into an NPA and agreeing to a relatively small payable amount, may have wanted to avoid the issue of whether Petrobras, as a Brazilian state-owned and controlled company, could even be prosecuted by the US.

The Petrobras settlements make clear that, in assessing the payments, both the DOJ and the SEC are crediting payments that a company makes as a result of other related proceedings. Interestingly, this includes not only penalties paid to other law enforcement authorities, but also class action payments in civil litigation, which can also be taken into account when crediting the payment of penalties by the DOJ and SEC.

### ***A special Brazilian fund***

Another development is the use of special funds that receive all or part of the amount of payments for criminal penalties. According to the agreement between Petrobras and the MPF, USD 682.6 million will be deposited by Petrobras into a special fund in Brazil to be used in accordance with the agreement.

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To make use of this, one of the requirements includes development of social and educational programmes to promote transparency, citizenship and compliance in the public sector. This marks the first time that the incorporation of such a special fund has been required as part of a FCPA settlement, and that an enforcement authority has demanded that all the money must be transferred to this fund.