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October 30, 2018

Office of International Corporate Finance  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F St., NE  
Washington, DC 20549

Re: Compliance with Rule 10A-3 by Brazilian Foreign Private Issuers –  
Request for Interpretation

Ladies and Gentlemen:

Rule 10A-3 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), adopted in 2003 pursuant to Section 301 of the Sarbanes-Oxley Act of 2002, sets forth audit committee requirements that apply, pursuant to rules of each national securities exchange, to an issuer of securities that are listed on any such exchange.

Cleary Gottlieb Steen & Hamilton LLP and Simpson Thacher & Bartlett LLP have drawn the attention of the staff of the Division of Corporation Finance (the “Staff”) to questions about how Rule 10A-3 applies to Brazilian issuers with equity securities listed in both Brazil and the United States. (We refer to such issuers below as “dual-listed Brazilian issuers.”) In particular, developments in Brazilian regulation and listing rules have established a high-quality, well-developed Brazilian regime governing audit committees for listed issuers, and under this regime an audit committee may include a combination of members of the board of directors and other persons who are not members of the board of directors. (We refer to this practice below as “mixed composition.”)

As discussed below, a foreign private issuer that has a board of auditors (or similar body) established pursuant to its home country legal regime or listing rules may rely on an exemption set forth in paragraph (c)(3) of Rule 10A-3.<sup>1</sup> One of the requirements for the paragraph (c)(3) exemption, set forth in sub-paragraph (ii) of paragraph (c)(3), is that this body be “*required under home country legal or listing requirements to be either: (A) [s]eparate from the board of directors; or (B) [c]omposed of one or more members of the board of directors and one or more members that are not also members of the board of directors*” (emphasis added).<sup>2</sup> The purpose of this letter is to request that the Staff concur with our interpretation that, under the circumstances described in this letter, an audit committee with mixed composition at a dual-

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<sup>1</sup> 17 CFR 240.10A-3(c)(3).

<sup>2</sup> 17 CFR 240.10A-3(c)(3)(ii).

listed Brazilian issuer meets the requirement set forth in sub-paragraph (ii)(B) for the exemption under paragraph (c)(3) of Rule 10A-3.

## I – Background

### A. The general regime under paragraph (b)(1) of Rule 10A-3

Rule 10A-3 requires that national securities exchanges and national securities associations prohibit the initial or continued listing of any security of an issuer that is not in compliance with the listing standards relating to audit committees adopted to implement Rule 10A-3.<sup>3</sup> The purpose of Rule 10A-3 is to ensure that every listed company has an audit committee that effectively carries out its functions and responsibilities of providing independent review and oversight of an issuer’s financial reporting processes, internal controls and independent auditors.<sup>4</sup>

The general regime for audit committees, set forth in paragraph (b)(1) of Rule 10A-3, contemplates a committee of the board of directors as the practice arose in the United States,<sup>5</sup> and it consequently requires that each member of the audit committee be a member of the board of directors of the listed issuer and comply with the independence requirements set forth in paragraph (b)(1). The policy behind these requirements is that an audit committee composed of independent directors is better situated to assess objectively the quality of an issuer’s financial disclosure and the adequacy of internal controls, compared to a committee that is affiliated with management.<sup>6</sup>

### B. The exemption under paragraph (c)(3) of Rule 10A-3

In adopting Rule 10A-3, the SEC acknowledged that the requirements of the general regime may conflict with legal requirements, corporate governance standards and methods for providing auditor oversight in the home jurisdictions of some foreign private issuers.<sup>7</sup> To address this concern, paragraph (c)(3) of Rule 10A-3 provides a foreign private issuer with an exemption from the requirements of paragraph (b)(1) if:

- it has a board of auditors (or similar body) established and selected pursuant to home country legal or listing provisions expressly requiring or permitting such a board or similar body;
- such board or body is required under home country legal or listing requirements to be either (A) separate from the board of directors or (B) composed of one or

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<sup>3</sup> 17 CFR 240.10A-3(a)(1) and (a)(2).

<sup>4</sup> Release Nos. 33-8220; 34-47654; IC-26001; File No. S7-02-03 (the “10A-3 Adopting Release”), Part I.

<sup>5</sup> 17 CFR 240.10A-3(b)(1). The adopting release traced the evolution of audit committee practices in the United States since the 1940s. 10A-3 Adopting Release, Part I and Part II.A.1.

<sup>6</sup> 10A-3 Adopting Release, Part II.A.1.

<sup>7</sup> 10A-3 Adopting Release, Part II.F.3.a.

more members of the board of directors and one or more members that are not also members of the board of directors;

- the board of auditors (or similar body) is not elected by management of the issuer and no executive officer of the issuer is a member of the board of auditors;
- home country legal or listing provisions set forth or provide for standards for the independence of the board of auditors from the issuer or the management of the issuer;
- the board of auditors, in accordance with any applicable home country legal or listing requirements or the issuer's governing documents, is responsible, to the extent permitted by law, for the appointment, retention and oversight of the work of any registered public accounting firm engaged (including, to the extent permitted by law, the resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer; and
- the remaining requirements of the general regime under Rule 10A-3, such as the complaint procedures requirement, advisors requirement and funding requirement, apply to the board of auditors, to the extent permitted by law.

In adopting the paragraph (c)(3) exemption, the SEC specifically referred to several jurisdictions, including Brazil, in which corporate law provides for a body such as the exemption describes.<sup>8</sup> The specific case of Brazil had been brought to the SEC's attention in several comment letters, including one from the Brazilian securities regulator, the *Comissão de Valores Mobiliários* (the "CVM").<sup>9</sup>

### C. Compliance with Rule 10A-3 by Brazilian issuers

A number of Brazilian issuers have securities listed on U.S. national securities exchanges and, accordingly, are subject to listing rules that require compliance with Rule 10A-3. Generally, these are dual-listed Brazilian issuers that also have securities listed on the principal securities exchange in Brazil, the B3 (formerly known as BM&FBovespa).

Some of these dual-listed Brazilian issuers comply with the general regime under paragraph (b)(1) of Rule 10A-3.

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<sup>8</sup> Rule 10A-3 Adopting Release, note 160 ("We understand that effective April 1, 2003, Japanese corporations will have the option to elect either a governance system with a separate board of directors and board of corporate auditors or a system based on nominating, audit and compensation committees under the board of directors. We also understand that the Italian corporate governance regime provides for an independent board of statutory auditors ("Collegio Sindicale") and the Brazilian corporate governance regime allows a Fiscal Council ("Conselho Fiscal").")

<sup>9</sup> Letter of Luiz Leonardo Cantidiano, Chairman of the *Comissão de Valores Mobiliários*, dated March 7, 2003. See also letter of Cleary, Gottlieb, Steen & Hamilton, dated February 18, 2003.

Other dual-listed Brazilian issuers rely on the paragraph (c)(3) exemption and the existence of the fiscal council (*Conselho Fiscal*), a body contemplated by the Brazilian Corporate Law with the main purpose of monitoring actions of the board of directors and executive officers and their compliance with legal and statutory duties, including with respect to financial reporting.<sup>10</sup> The fiscal council may be permanent, or it may be appointed for a specific fiscal year, at the request of shareholders holding at least ten percent of the voting shares of the company or five percent of the non-voting shares of the company.<sup>11</sup> The fiscal council must be separate from the board of directors, which satisfies the requirement under sub-paragraph (ii)(A) of paragraph (c)(3), and its members are elected directly by shareholders.<sup>12</sup> The Brazilian Corporate Law specifies certain powers of the fiscal council,<sup>13</sup> and the *estatuto social* (bylaws<sup>14</sup>) of a dual-listed Brazilian issuer that seeks to rely on the paragraph (c)(3) exemption generally provides the fiscal council with some additional powers and responsibilities, in order to meet the requirements of the exemption.<sup>15</sup>

Still other dual-listed Brazilian issuers take the position that an audit committee established under the rules described in the following section satisfies the paragraph (c)(3) exemption.

#### D. New Brazilian audit committee rules

Brazilian corporate governance practices have evolved since the adoption of Rule 10A-3. Notably, changes in CVM and B3 rules have fostered the development of a practice that, compared to the fiscal council, is more similar to a U.S. audit committee.

- In 2011, the CVM approved an Instruction governing the *comitê de auditoria estatutário* (“statutory audit committee”), an audit committee established under the bylaws of the issuer and subject to certain requirements described in the CVM Audit Committee Rule.<sup>16</sup> An issuer is not required to establish a statutory audit committee, but pursuant to the CVM Audit Committee Rule, an issuer that does so is provided with the benefit of a longer rotation period for its independent auditor.

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<sup>10</sup> Brazilian Federal Law No. 6,404 of December 15, 1976, as amended (the “Brazilian Corporate Law”), Articles 161 to 165-A.

<sup>11</sup> Brazilian Corporate Law, Article 161, Second Paragraph. CVM Instruction No. 324 of January 19, 2000 provides for lower thresholds based on the amount of the issuer’s share capital.

<sup>12</sup> Brazilian Corporate Law, Article 161, First Paragraph.

<sup>13</sup> Brazilian Corporate Law, Article 163.

<sup>14</sup> Under the Brazilian Corporate Law, a Brazilian company has one organizational document, the *estatuto social*. The *estatuto social* of a Brazilian company is functionally equivalent to the charter and the bylaws, taken together, of a Delaware corporation. For this reason, the term *estatuto social* is often translated into English as “charter” or as “bylaws.”

<sup>15</sup> It has become customary in Brazil to refer to such a fiscal council as “*turbinado*” (turbo-charged).

<sup>16</sup> CVM Instruction No. 509 of November 16, 2011, amending CVM Instruction No. 308 of May 14, 1999, Articles 31 to 31-D (the “CVM Audit Committee Rule”).

- In September 2017, the B3 approved new listing rules for its Novo Mercado segment, requiring that a company listed on the Novo Mercado create and implement an audit committee.<sup>17</sup> The new listing rules became effective in January 2018.<sup>18</sup> The Novo Mercado segment of B3 is a premium listing segment for Brazilian companies that meet the highest standards of corporate governance.

These changes arose from the view of Brazilian regulators and corporate governance institutions that, under certain circumstances, an audit committee may be more effective than a fiscal council as a means to achieve governance objectives relating to oversight of financial reporting and auditing.

The CVM Audit Committee Rule and the B3 Audit Committee Rule both require that at least one member of the audit committee be a board member, but they permit the appointment of other members who are not members of the board of directors.<sup>19</sup>

Both the CVM Audit Committee Rule and the B3 Audit Committee Rule establish standards for the independence of the audit committee. Under each regime, none of the audit committee members may be an executive officer of the issuer or of a subsidiary, parent company, affiliate or company under common control with the issuer, directly or indirectly.<sup>20</sup> In addition, the CVM Audit Committee Rule requires that at least the majority of the members comply with certain additional independence requirements,<sup>21</sup> and the B3 Audit Committee Rule requires that at least one member be an independent director pursuant to the Novo Mercado Listing Rules.<sup>22</sup>

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<sup>17</sup> Listing rules for the Novo Mercado segment of the B3 (the “Novo Mercado Listing Rules”), Article 22 (the “B3 Audit Committee Rule”).

<sup>18</sup> An issuer seeking to list securities on the Novo Mercado after the effective date of the new listing rules must comply with this requirement immediately. According to Letter No. 618 of October 3, 2017 of the Issuers’ Regulation Office of the B3, an issuer that had securities listed on the Novo Mercado before the effective date of the new listing rules has until April 2021 to create and implement an audit committee that complies with the new listing rules.

<sup>19</sup> CVM Audit Committee Rule, Article 31-C; Novo Mercado Listing Rules, Article 23, V, (a).

<sup>20</sup> CVM Audit Committee Rule, Article 31-C, First Paragraph; Novo Mercado Listing Rules, Article 22, Third Paragraph.

<sup>21</sup> CVM Audit Committee Rule, Article 31-C, Second Paragraph requires that, for an audit committee member to be considered independent, such member comply with the following independence rules: (i) the member has not been, in the last five years, an officer or employee of the company, its parent company, subsidiary, affiliate or company under common control, directly or indirectly, or the technical supervisor of the team involved in the audit work of the institution; and (ii) the member is not a spouse, a direct or collateral relative up to the third degree, or a relative by affinity up to the second degree, of any of the persons referred to in item (i).

<sup>22</sup> The independence status of a director, under the Novo Mercado Listing Rules, must be confirmed by a shareholder vote. Novo Mercado Listing Rules, Article 17. In order to be considered independent pursuant to the Novo Mercado Listing Rules, a director may not be a controlling shareholder of the company, be bound by a shareholders’ agreement or have been, in the past three years, an officer or employee of the company or its controlling shareholder. Novo Mercado Listing Rules, Article 16, First Paragraph. The Novo Mercado Listing Rules also list a number of circumstances that must be taken into consideration in the determination of a director’s independence, including commercial relationships with the controlling

## II – Request for Interpretation

Cleary Gottlieb and Simpson Thacher believe that a dual-listed Brazilian issuer should be viewed as meeting the requirement under sub-paragraph (ii)(B) of paragraph (c)(3) of Rule 10A-3, for purposes of relying on the paragraph (c)(3) exemption, where:

- the issuer establishes an audit committee that complies with the CVM Audit Committee Rule or the B3 Audit Committee Rule; and
- the issuer’s bylaws expressly require that the audit committee consist of (a) one or more persons who are members of the board of directors and (b) one or more persons who are not members of the board of directors.

We respectfully request that the Staff confirm that it concurs with this interpretation.

As described in the attached opinion of Brazilian law firm Barbosa, Müssnich, Aragão, a bylaw provision is binding on the issuer and its board of directors, and a director would be subject to personal liability for violating it. Consequently, the bylaw provision should be understood to satisfy the requirement under sub-paragraph (ii)(B) of paragraph (c)(3) that the body be “required under home country legal or listing requirements”<sup>23</sup> to be “composed of one or more members of the board of directors and one or more members that are not also members of the board of directors.”<sup>24</sup>

In support of this interpretation, we note that the features of an audit committee under the CVM Audit Committee Rule and the B3 Audit Committee Rule are significantly closer, compared to the fiscal council, to the features of the general regime under paragraph (b)(1) of Rule 10A-3. As a result, such an audit committee will readily meet the requirements of the exemption. In particular:

- Brazilian law provides that a member of an advisory committee created pursuant to the bylaws of an issuer has the same fiduciary duties to the issuer and to the shareholders of the issuer as the members of the board of directors.<sup>25</sup> In this respect, a member of the audit committee who is not a board member is subject to liability for violation of its fiduciary duties as if he or she were a board member.
- The CVM Audit Committee Rule and the B3 Audit Committee Rule provide criteria for the independence of audit committee members, as described above.<sup>26</sup>

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shareholders and receipt of compensation from the company or its affiliates in connection with activities other than such director’s position on the board of directors or other committees of the company. Novo Mercado Listing Rules, Article 16, Second Paragraph.

<sup>23</sup> 17 CFR 240.10A-3(c)(3)(ii).

<sup>24</sup> 17 CFR 240.10A-3(c)(3)(ii)(B).

<sup>25</sup> Brazilian Corporate Law, Article 160.

<sup>26</sup> Novo Mercado Listing Rules, Article 22, V, (a) and Article 22, Third Paragraph; CVM Audit Committee Rule, Article 31-C, Second Paragraph.

- The members of the audit committee are not elected by the management of the issuer.
- Both the CVM Audit Committee Rule and the B3 Audit Committee Rule include, in the attributes of the audit committee, functions that satisfy the remaining requirements in Rule 10A-3, to the extent permitted by law, including the complaint procedures requirement, advisors requirement and funding requirement.

The board of directors of a Brazilian company is prohibited from delegating its responsibilities provided by law to a committee or any other body. Therefore, consistent with Instruction 2 to Rule 10A-3, an audit committee is an advisory body to the board of directors, with the function of advising the board of directors on the appointment, retention and oversight of the work of any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer.

### III – Conclusion

For the reasons stated above, we request that the Staff issue an interpretive letter confirming that a Brazilian issuer with securities listed in Brazil and on a national securities exchange will be, under the circumstances described in this letter, viewed as meeting the requirement set forth in sub-paragraph (ii)(B) for the exemption under paragraph (c)(3) of Rule 10A-3.

This request for interpretation refers only to the requirement under sub-paragraph (ii)(B) for the exemption under paragraph (c)(3) of Rule 10A-3. We acknowledge that, to rely on the paragraph (c)(3) exemption, an audit committee must comply with the other requirements under paragraph (c)(3) of Rule 10A-3.

We would appreciate the opportunity to discuss the Staff's concerns prior to any written response to this letter. Should you have any questions or require any additional information in connection with this request, please call Nick Grabar at 212-225-2414, Jonathan Mendes de Oliveira at 212-225-2827, John Ericson at 212-455-3520 or Grenfel Calheiros at 212-455-2295.

Very truly yours,



Nicolas Grabar / Jonathan Mendes de Oliveira  
Cleary Gottlieb Steen & Hamilton LLP



John C. Ericson / Grenfel Calheiros  
Simpson Thacher & Bartlett LLP

Attachment: Opinion of Barbosa, Müssnich, Aragão

October 30, 2018

Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F St., NE  
Washington, DC 20549

Re: Compliance with Rule 10A-3 by Brazilian Foreign  
Private Issuers – Brazilian Law Matters.

Ladies and Gentlemen:

We refer to the letter dated October 30, 2018, pursuant to which Cleary Gottlieb Steen & Hamilton LLP and Simpson Thacher & Bartlett LLP request interpretive guidance from the staff of the Securities and Exchange Commission (the "Staff") with respect to compliance with Rule 10A-3 under the Securities Exchange Act of 1934 by Brazilian issuers with equity securities listed in both Brazil and the United States (the "Request for Interpretation"). In connection with the Request for Interpretation, we have been asked to provide our opinion on certain matters of Brazilian law and regulation applicable to the audit committee of a Brazilian publicly-held company.

In Brazil, there are two sets of rules that contemplate the creation of an audit committee by Brazilian publicly-held companies, one issued by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*, or "CVM") and the other by the Brazilian stock exchange ("B3"). In 2011, the CVM approved Instruction No. 509 of November 16, 2011, amending CVM Instruction No. 308 of May 14, 1999 (the "CVM Audit Committee Rule") providing for the "statutory audit committee," an audit committee that is created pursuant to the company's corporate charter and that complies with the requirements of the CVM Audit Committee Rule. The creation of the statutory audit committee is not mandatory, but a company that creates and implements a statutory audit committee is provided with the benefit of a longer rotation period for its independent auditor. In 2017, the B3 amended the rules of the Novo Mercado ("Novo Mercado Listing Rules"), B3's premium listing segment, to require that a company with shares listed in the Novo Mercado create an audit committee that complies with the rules established in the Novo Mercado Listing Rules.

We are qualified to practice law in Brazil, and this opinion is given solely with respect to the law of Brazil as of the date hereof.





We are of the opinion that:

1. A provision of the *estatuto social* (corporate charter) of an issuer incorporated under the laws of Brazil that provides for the creation of an audit committee and requires that it be composed of a combination of members of the board of directors and other persons who are not members of the board of directors ("mandatory mixed composition"), and the creation and implementation of an audit committee with mandatory mixed composition, do not violate the laws of Brazil, the rules and regulations of the CVM or the listing rules of the B3.
2. Both the CVM Audit Committee Rule and the Novo Mercado Listing Rules expressly permit the creation of an audit committee composed of a combination of members of the board of directors and other persons who are not members of the board of directors, in a mixed composition.
3. The creation and implementation of an audit committee with mandatory mixed composition comply with the requirements of the CVM Audit Committee Rule and the Novo Mercado Listing Rules, assuming that such audit committee will comply with the other requirements under the CVM Audit Committee Rule or the Novo Mercado Listing Rules, as the case may be.
4. Under Brazilian law, a provision of the corporate charter of a Brazilian issuer is binding on such issuer and its board of directors, and a director of such issuer is subject to personal liability for violating it.
5. To the extent that the audit committee is created pursuant to a Brazilian issuer's corporate charter, a member of the audit committee who is not a member of the board of directors has the same fiduciary duties to the issuer and to the shareholders of the issuer, and is subject to liability for violation of these fiduciary duties, as if he or she were a member of the board of directors.
6. Under the CVM Audit Committee Rule and the Novo Mercado Listing Rules, there is no distinction between the duties and responsibilities of a member of the audit committee who is not a member of the board of directors and those of a member of the audit committee who is a member of the board of directors. Therefore, board members and non-board members will be subject to the same duties and responsibilities when functioning as members of the audit committee.



7. Each of the CVM Audit Committee Rule and the Novo Mercado Listing Rules establishes standards for the independence of members of the audit committee of a Brazilian issuer.

Yours sincerely,



Luiz Antonio de Sampaio Campos  
BMA – Barbosa Müssnich Aragão