

April 30, 2020

Eni S.p.A. Agrees to Resolve FCPA Charges As Controlling Minority Shareholder of Saipem S.p.A.

On April 17, 2020, the U.S. Securities and Exchange Commission (“SEC”) announced that it had resolved charges against Eni S.p.A., an Italian headquartered multinational oil and gas company, for violations of the recordkeeping and internal accounting controls provisions of the Foreign Corrupt Practices Act (“FCPA”). Without admitting or denying the SEC’s findings, Eni, whose American Depositary Receipts are traded on the New York Stock Exchange and is thus an “issuer” within the meaning of the FCPA, agreed to pay a combined \$24.5 million in disgorgement and prejudgment interest. Notably, though the alleged facts involve substantial improper payments to senior foreign public officials to secure billions of dollars in business, and those payments were made with the knowledge and involvement of Eni’s CFO, the bribery allegations lack any apparent connection to the territory of the U.S. or the U.S. financial system, and the charges do not include any alleged violations of the FCPA’s anti-bribery provisions.

According to the consent order, the charges arose out of an alleged improper payment scheme in Algeria between 2007 and 2010 by Saipem S.p.A., in which Eni was a controlling minority shareholder. Saipem allegedly contracted with an intermediary in order to obtain business from Algeria’s state-owned oil company, Sonatrach, but the intermediary provided no legitimate services. Nonetheless, Saipem’s financial statements, which were consolidated into Eni’s financial statements, falsely recorded payments to the intermediary as “brokerage fees” in violation of the books-and-records provision of the FCPA. Eni additionally faced charges for failing to use good faith efforts to cause Saipem to devise and maintain a system of internal accounting controls in compliance with the FCPA. This allegation is based in part on the fact that Saipem’s then-CFO—who later became Eni’s CFO—was aware of and participated in Saipem’s illicit conduct during the relevant period.¹

This is the second FCPA resolution for Eni, having been previously charged by the SEC in 2010 for violations in connection with a scheme in Nigeria by Snamprogetti Netherlands, B.V., Eni’s then wholly-owned subsidiary, which was later merged into Saipem.² As explained further below, the resolution brings to a close long-running investigations by the DOJ and the SEC that began in 2012 into Eni’s activities in Algeria,

¹ See *In the Matter of Eni S.p.A.*, Exchange Act Release No. 88679 (Apr. 17, 2020), available [here](#); Press Release, Sec. Exch. Comm’n, *SEC Charges Eni S.p.A. with FCPA Violations* (Apr. 17, 2020), available [here](#).

² *Id.*; see also *SEC v. Eni, S.p.A. et al.*, No. 4:10-cv-2414 (July 7, 2010), available [here](#); Press Release, Sec. Exch. Comm’n, *SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials With Carloads of Cash* (July 7, 2010), available [here](#).

though the DOJ's September 2019 declination letter notes that the DOJ could re-open its investigation pending the outcome of prosecutions in Italy involving related allegations.

Factual Allegations

The SEC's charges center around sham contracts that Saipem, an Italian oilfield services company in which Eni had a controlling minority interest,³ entered into with an unnamed intermediary in order to acquire contracts with Sonatrach.⁴ In early 2006, Saipem learned from the intermediary's owner—whom Algeria's Energy Minister, Chakib Khelil, referred to as both his "son" and his personal secretary in meetings with Saipem's management—that Saipem would need to hire the intermediary in order to obtain business in Algeria.⁵ Saipem then entered into at least four sham contracts with the intermediary, who never rendered any legitimate services to Saipem.⁶ Saipem paid the intermediary approximately €198 million (\$215 million), a portion of which the intermediary directed to Algerian government officials, including the Energy Minister.⁷ Sonatrach awarded Saipem at least seven contracts worth €8 billion (\$8.7 billion).⁸

Saipem did not conduct adequate due diligence, performing no review of the intermediary's business or reputation, and the company falsely characterized the payments in its books and records as "brokerage fees."⁹ Alessandro Bernini, referred to as Executive A in the Order, served as Saipem's CFO from 1996 to 2008 and later became Eni's CFO in August 2008, until departing Eni in 2012.¹⁰ While at Saipem, Bernini allegedly participated in the approval of the intermediary contracts and facilitated the payments to the intermediary, despite knowing that there was inadequate due diligence and that the intermediary was not

³ During the relevant period, Saipem was a subsidiary of Eni and was therefore subject to the "direction and coordination" of Eni, pursuant to Article 2497 of the Italian Civil Code. See Saipem S.p.A, ANNUAL REPORT 2009, at 65 (2010), available [here](#). Eni held a 43% interest in Saipem, and Eni was Saipem's only shareholder with an ownership interest greater than 5%. *Id.*

⁴ *In the Matter of Eni S.p.A.*, ¶¶ 3–5.

⁵ See *Id.* ¶ 9; Gaia Pianigiani & Stanley Reed, *Eni Scrambles to Contain Damage From Inquiry*, N.Y. TIMES (Feb. 8, 2013), available [here](#).

⁶ *In the Matter of Eni S.p.A.*, ¶ 9.

⁷ *Id.* ¶ 11.

⁸ *Id.* ¶ 12; Emilio Parodi & Alfredo Faieta, *Italian Appeals Court Acquits Saipem, Eni in Algerian Graft Case*, REUTERS (Jan. 15, 2020), available [here](#).

⁹ *In the Matter of Eni S.p.A.*, ¶¶ 15, 17.

¹⁰ *Id.* ¶ 2; Dylan Tokar, *Italian Oil Giant Eni Forfeits \$24.5 Million to Resolve Bribery Probe*, WALL ST. J. (Apr 21, 2020), available [here](#).

rendering legally compensable services.¹¹ Once at Eni, Bernini continued to facilitate Saipem's payments to the intermediary.¹²

At the time of the violations, Eni held a 43% interest in Saipem, which was consolidated into Eni's financial statements.¹³ As a result, Eni inaccurately characterized the approximately \$215 million in payments to the intermediary in violation of the books-and-records provisions of Section 13(b)(2)(A) of the Exchange Act.¹⁴ In connection with the reported "brokerage fees," Saipem improperly obtained a \$57 million tax benefit, of which approximately \$19.75 million flowed to Eni as a result of its 43% interest in Saipem during the time Bernini was Eni's CFO.¹⁵ Pursuant to the consent order, Eni agreed to disgorge \$19.75 million, its share of the tax benefit obtained, along with prejudgment interest of \$4.75 million to the SEC.

Further, in part because of Bernini's conduct as Eni's CFO, the SEC alleged violations of the FCPA's internal accounting controls provisions. Section 13(b)(6) of the Exchange Act provides that when an issuer holds "50 per centum or less of the voting power" with respect to a subsidiary, the Exchange Act requires only that the issuer "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances," to cause the subsidiary to devise and maintain a system of internal accounting controls consistent with the FCPA's recordkeeping and internal controls provisions.¹⁶ The SEC alleged that Eni did not do enough to exert its influence in good faith to cause Saipem to design and maintain effective internal controls because neither Saipem's legal department nor its internal audit department performed any substantive review of the contracts, and Bernini, along with other senior officials at Saipem, routinely bypassed contracting controls, including by falsifying and backdating documents.¹⁷ After Bernini became Eni's CFO, he continued communicating with the intermediary and concealing Saipem's sham intermediary contracts. The Order states that Bernini, as CFO of Eni, "could not have been proceeding in good faith" to cause Saipem to devise and maintain sufficient internal accounting controls while simultaneously being aware of, and participating in, conduct at Saipem that undermined those controls.¹⁸

¹¹ *In the Matter of Eni S.p.A.*, ¶ 13.

¹² *Id.* ¶ 15.

¹³ *Id.* ¶¶ 1, 14.

¹⁴ *Id.*

¹⁵ *Id.* ¶ 15.

¹⁶ 15 U.S.C. § 78m(b)(6).

¹⁷ *In the Matter of Eni S.p.A.*, ¶ 16.

¹⁸ *Id.* ¶ 24.

In determining the appropriate settlement, the SEC considered Eni's remedial efforts and cooperation with the SEC, which included compiling financial data and analysis relating to the transactions at issue, making substantive presentations on key topics and providing translations of key documents.¹⁹

International Proceedings

In related international proceedings, Eni, Saipem, Bernini and other Eni senior executives were charged and later acquitted of the Italian crime of international corruption based on the same bribery scheme alleged in the SEC's Order.²⁰ An Italian trial court initially found Saipem and Bernini guilty of international corruption and acquitted Eni and the other executives of the same and related charges.²¹ The trial court sentenced Bernini to 49 months in prison and ordered Saipem to pay a €400,000 fine and forfeit approximately €198 million, which the court variously described as "the crime's profit," "the amount of the bribe paid by Saipem," "the quantum paid for the acquisition of the contracts and, as such, the proceeds of the crime" and "commissions" paid to the intermediary.²² On January 15, 2020, the Milan Court of Appeals affirmed the trial court's acquittal of Eni and its officers but overruled the trial court and acquitted Saipem and Bernini of all charges, revoking the €198 million forfeiture.²³ It remains to be seen whether Italian prosecutors will appeal this ruling to the Supreme Court of Italy.

Separately, on April 22, 2020, Eni announced that the SEC has closed its investigation into the company's activities in Nigeria and the Republic of Congo without recommending any enforcement action.²⁴ The DOJ, which had been investigating Eni for related conduct in Algeria and Nigeria, issued a declination letter in September 2019 stating that it had closed its inquiries into Eni partly because of ongoing prosecutions by authorities in Italy, but noting that it could reopen its investigation if circumstances were to change.²⁵ Eni remains on trial in Italy over allegations that the company acquired an offshore oilfield in Nigeria in 2011

¹⁹ *Id.* ¶ 25.

²⁰ *Id.* ¶ 7. In Italy, the crime of international corruption is among the offenses pursuant to Legislative Decree No. 231/01, which provides for corporate liability for crimes committed by employees.

²¹ *Id.*

²² *Id.*

²³ *Id.* See also Press Release, Saipem S.p.A., *Company Acquitted by the Milan Court of Appeal in the "Algeria" Proceedings* (Jan. 15, 2020), available [here](#).

²⁴ See Press Release, Eni S.p.A., *SEC Closes Its Investigation in Nigeria and Congo Matters* (Apr. 22, 2020), available [here](#). Eni and Royal Dutch Shell, the U.K.-incorporated and Netherlands headquartered oil and gas company, each announced that the SEC has dropped its inquiry into the companies' joint acquisition of OPL 245, an offshore oil block in Nigeria. See Ron Bousso, *SEC Drops Inquiry into Shell's OPL 245 Deal, Company Says*, REUTERS (Apr. 23, 2020), available [here](#).

²⁵ See Letter from Christopher Cestaro, U.S. Dep't of Justice, to Nicolas Bourtin, Sullivan & Cromwell LLP (Sept. 27, 2019), available [here](#).

knowing that most of the \$1.3 billion purchase price would be paid to agents as bribes.²⁶ The verdict, which can be appealed twice in the Italian court system, is expected later this year.

Analysis

This resolution with Eni is a further example of the SEC using the FCPA's accounting provisions in cases in which there appears to be an absence of a U.S. nexus to support an anti-bribery charge. Non-U.S. companies, including SEC-registered foreign "issuers" such as Eni, are subject to prosecution under the FCPA's anti-bribery provisions only if they "corruptly make use of the mails or any means or instrumentality of interstate commerce" within the U.S.²⁷ However, the FCPA's recordkeeping and internal controls provisions apply to "issuers" like Eni independent of any anti-bribery violation and do not require any nexus to the U.S. beyond "issuer" status.

The relatively modest size of the financial component of the resolution may reflect the absence of bribery charges, the fact of ongoing criminal proceedings in Italy or—given the recent acquittals of Eni, Saipem, Bernini and other Eni senior executives of related corruption charges in Italy—the insufficiency of evidence to prove bribery. The dollar value of Eni's disgorgement—\$19.75 million—reflects only its portion of the \$57 million in tax deductions, but no amount for any profits derived from the \$8.7 billion in contracts awarded by Sonatrach to Saipem in connection with the \$215 million in improper payments to the intermediary, part of which was allegedly paid to Algeria's Minister of Energy and other officials. This seemingly lenient settlement is equally noteworthy because this is Eni's second resolution under the FCPA in which the underlying misconduct involved large improper payments to high-ranking foreign officials for multi-billion dollar contracts. In July 2010, Eni consented to the entry of a court order permanently enjoining the company from violating the FCPA's recordkeeping and internal controls provisions in connection with a scheme in Nigeria by Snamprogetti Netherlands, B.V., Eni's then wholly-owned subsidiary.²⁸ That scheme involved large scale bribe payments to several successive Nigerian heads of state, along with Nigeria's then Minister of Oil and other senior officials. In resolving the more recent allegations against Saipem, the SEC did not allege that Eni violated the permanent injunction, likely because the present allegations relate to a separate bribe scheme that predated the court order in *SEC v. Eni, S.p.A.*, though the conduct in Algeria did overlap with the prior investigation and prosecution.

²⁶ See Client Memorandum, Paul, Weiss Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2019 Year in Review, at 35 (Jan. 24, 2020), available [here](#); Sarah McFarlane & Eric Sylvers, *Italy's Oil King Fights to Preserve His Legacy*, WALL ST. J. (Jan. 25, 2020), available [here](#).

²⁷ 15 U.S.C. § 78dd-1.

²⁸ See *Id.* ¶ 8; Press Release, Sec. Exch. Comm'n, *SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials With Carloads of Cash* (July 7, 2010), available [here](#).

This case again illustrates the importance to issuers of establishing anti-bribery compliance and internal controls programs that are reasonably designed to mitigate the risk of bribery engaged in by subsidiaries, even minority-owned ones, particularly if those subsidiaries operate in high risk foreign markets. This is one of the rare cases in which the SEC has enforced the FCPA's internal controls provision against a company with less than 50% ownership of the offending subsidiary.²⁹ Section 13(b)(6) of the Exchange Act requires only that an issuer exercise "good faith to use its influence" to cause the other entity to devise and maintain an adequate system of internal accounting controls. The issuer's obligation to influence its subsidiary's behavior increases with the degree to which it can exercise control over the subsidiary. Here, Saipem was a subsidiary of Eni subject to Eni's "direction and coordination," pursuant to Italian law.³⁰ Although Eni has stated in its public filings that Saipem enjoyed operational autonomy during the relevant period,³¹ Eni had a substantial ownership interest in Saipem, at 43%, and enjoyed "change of control" protections that enabled Eni to remain Saipem's controlling minority shareholder.³² Eni, as the controlling minority shareholder, further required Saipem to maintain its own internal controls policies, including adopting Eni's directives of transparency, traceability, and anti-bribery compliance.³³ Further, the fact that Bernini was at Saipem when the misconduct began, and continued to participate in and conceal Saipem's misconduct after becoming Eni's CFO, likely contributed to the SEC's decision to enforce the provision against a controlling minority shareholder parent company.

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²⁹ See, e.g., *In the Matter of BellSouth Corp.*, Exchange Act Release No. 45279 (Jan. 15, 2002), available [here](#) (ordering BellSouth Corporation to cease and desist from violating the FCPA's recordkeeping and internal controls provisions where Telefonía Celular de Nicaragua, S.A.—BellSouth's 49% owned subsidiary—improperly recorded payments to the wife of a Nicaraguan legislator, and BellSouth, through its operational control, had the ability to cause Telefonía to comply with the FCPA).

³⁰ See Saipem S.p.A, ANNUAL REPORT 2009, at 65 (2010), available [here](#).

³¹ See Eni S.p.A, Annual Report (Form 20-K), at F-97 (Apr. 4, 2020), available [here](#).

³² See Saipem S.p.A, ANNUAL REPORT 2009, at 65–66 (2010), available [here](#).

³³ *In the Matter of Eni S.p.A.*, ¶ 16.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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