

## REGULATORY INTELLIGENCE

**Back to basics: Lessons learned from the Eni S.p.A. settlement**

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On April 17, 2020, Italian energy company Eni SpA reached a \$24.5 million settlement with the U.S. Securities and Exchange Commission (SEC) to resolve allegations of [Foreign Corrupt Practices Act \(FCPA\)](#) books and records violations.

In its administrative order, the SEC alleges that between 2007 and 2010, Eni SpA's subsidiary, Saipem, paid more than 198 million euros to a sham intermediary, a portion of which was funneled to government officials or their designees, to secure business from the Algerian state-owned oil company. This conduct was purportedly orchestrated by Saipem's chief financial officer (CFO), who was later promoted to be Eni's CFO, until his separation from the company in 2012 when his role in this matter came to light.

While the size of this settlement means it is unlikely to make any top-10 lists, the simplicity of the fact pattern provides some excellent learning points for compliance teams, particularly with regard to FCPA compliance basics.

**Integrity (and oversight) at the top is crucial**

The primary bad actor in this case was the chief financial officer of Saipem between 1996 and 2008, who is referred to in the SEC Order as "Executive A". Executive A, along with other senior Saipem executives, purportedly oversaw the engagement of the intermediary (without conducting any due diligence), falsified and backdated documents, and circumvented numerous internal controls. Saipem won at least seven projects from the Algerian state-owned oil company during the relevant period. Executive A was promoted in 2008 to be CFO of Eni and continued to facilitate Saipem's improper payments to the intermediary.

**Parent companies can be held liable for subsidiaries' corrupt actions**

During the relevant period, Eni held a 43% minority-controlling interest in its subsidiary Saipem. Despite owning less than 50% of Saipem, the SEC alleges that Eni "failed to proceed in good faith" to ensure that Saipem "devise[d] and maintain[ed] sufficient internal accounting controls" as required by s 13(b)(2) of the Exchange Act.

**Incorporation outside the United States will not prevent U.S. authorities from extending prosecutorial reach**

Saipem and Eni SpA are headquartered in Milan and Rome, Italy, respectively. There is no indication that any of the individuals involved in the case was a U.S. person under the FCPA. The SEC nevertheless could assert jurisdiction because Eni has its American depository receipts (ADRs) listed on the New York Stock Exchange.

**Companies can be prosecuted for conduct that occurred years ago**

The relevant period of conduct asserted by the SEC in this case is 2007-2010. It appears likely that Eni, as a repeat-offender, may have agreed to waive the limitations period as a gesture of cooperation with the SEC.

**Prosecution in one country will not prevent prosecution in another**

Italian prosecutors brought criminal international corruption charges against Eni, Saipem and a number of executives of both companies on the same set of facts. Eni was acquitted at trial; only Saipem and "Executive A" were convicted but were successful on appeal in January 2020 (prosecutors may still appeal further to the Supreme Court of Italy). The fact that Eni and Saipem were unsuccessfully prosecuted by Italian authorities did not dissuade the SEC from pursuing its own charges.

Further, it is more common now than ever before for regulators to cooperate with their counterparts in other jurisdictions. While the degree of cooperation here between Italian prosecutors and the SEC is unknown, it is likely that the SEC received some assistance.

**Inaccurate accounting for a bribe can lead to FCPA books and records violation**

The SEC alleges that Saipem funneled money through sham contracts with a third-party intermediary, who used a portion of the fund to make payments to Algerian government officials (including the Algerian energy minister) for the purpose of securing business for Saipem. This conduct, if true, would amount to criminal bribery under the FCPA. Eni was, however, charged with a books and records violation, on the basis that Saipem improperly accounted for the payments to the intermediary as "brokerage fees" and that the false line item was further reflected in Eni's consolidated financial statements and annual reports filed with the SEC. A civil books and records violation involves a lower standard of proof than a criminal conviction for bribery.

**Third-party due diligence is crucial; red flags can be easy to spot**

The SEC noted that Saipem conducted "little or no due diligence" before engaging the intermediary. Industry-standard due diligence procedures would have easily identified the following red flags:

*State-owned enterprise in a territory with a reputation for corruption.* Saipem sought to win contracts from Algeria's state-owned oil company. Algeria ranks 105/180 on Transparency International's 2019 Corruption Perceptions Index (with an overall score of 35 out of 100).

*Referral source.* The intermediary was not referred to Saipem by an independent or objective referral source. Rather, the politically-connected owner of the intermediary contacted Saipem and informed it that, to obtain any business in Algeria, it would need to work through them.

*The intermediary had an unusually close relationship with Algerian government officials.* While intermediaries are frequently used in difficult-to-access markets, in no small part because of their connections to potential clients, the relationship here was unusually close. The Algerian energy minister stated to Saipem's management that the owner of the intermediary was his "personal secretary", and someone he viewed as a "son".

*No fixed physical address in the relevant territory.* The intermediary had no address or employees in Algeria and maintained only a "virtual office" in Switzerland.

*No actual ability to carry out the contracted services.* The intermediary had no technical expertise in the energy design sector and, according to the SEC, was "wholly unequipped to provide the contemplated consulting services" described in the contracts.

#### **Internal audit and legal personnel should be trained to identify and escalate red flags**

The SEC found that although Saipem had an internal audit department, it failed to detect the bribery because its work appeared to consist of merely matching invoices to payment amounts. In addition, Saipem's legal department reviewed contracts that did not include the intermediary's name. It is crucial to train personnel in these gatekeeping functions to identify bribery and corruption red flags and to escalate them appropriately.

A company's remedial efforts and cooperation will be taken into account by regulators in reaching a settlement. The SEC noted that it had considered the "remedial acts promptly undertaken" by Eni as well its cooperation with Commission staff.

#### **Final thoughts**

When it comes to effective ethics and compliance training, it is essential to keep concepts simple and straightforward. While some of the bigger bribery and corruption cases make the headlines, they are not always useful for training purposes because they involve complex facts and legal issues. The Eni SpA case demonstrates that failure to attend to the "basics" can result in financial and reputational harm for any company.

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