

**INTERVIEW WITH BETHANY HENGSBACH,  
PARTNER, SHEPPARD MULLIN,  
LOS ANGELES, CALIFORNIA**

Sometimes, the lawyers who know the ins and outs of the Foreign Corrupt Practices Act best (FCPA) are those who train the sales people and the board members.

They get the questions that reflect the reality on the ground.

Take Bethany Hengsbach.

She's a partner at Sheppard Mullin in Los Angeles.

Since 2008, Hengsbach has been immersed in the FCPA – training sales agents for clients in China, India and around the world.

And training higher level executives and board members on the ins and outs of the FCPA.

She gets the questions that are reflected in the day to day reality of the multinational business world.

We interviewed Hengsbach on March 14, 2011.

**CCR:** You graduated from DePaul University Law School in 1997. What have you been doing since?

**HENGSBACH:** From 1997 to 2005, I practiced in Chicago, doing primarily commercial litigation for several Fortune 500 clients. I was with Wildman Harrold.

From 2006 I have been with Sheppard Mullin – primarily in the Los Angeles office – although I do practice extensively out of our Washington, D.C. office as well.

My practice is focused on government investigations and compliance.

Since about 2008, I have been doing more and more Foreign Corrupt Practices Act work.

**CCR:** Tell us about Sheppard Mullin and your practice there.

**HENGSBACH:** Sheppard Mullin is a law firm with about 600 lawyers worldwide.

We have offices throughout California – also in New York, Washington, D.C. and Shanghai. We also have lawyers in Tel Aviv and Brussels.

I am in our Government Contacts and Regulated Industries Practice Group.

We service mostly government contractors, assisting them with all of their legal needs, including government investigations, compliance, and litigation that they face – as well as white collar defense issues.

**CCR:** I see where the firm also has a White Collar and Civil Fraud Defense unit.

**HENGSBACH:** There is quite a bit of overlap, particularly when we are talking about FCPA, which has white collar criminal as well as governmental compliance implications.

**CCR:** What part of your practice is FCPA?

**HENGSBACH:** It is becoming the majority of my practice.

The enforcement of the statute has exploded in the last few years. It is rapidly becoming the vast majority of what I do.

**CCR:** Are you seeing an increase of FCPA cases out of China?

**HENGSBACH:** Yes. China is a tricky area. There are political reasons. There are cultural reasons.

Under the FCPA, executives at state owned enterprises (SOEs) are considered foreign officials.

When you are dealing with state owned enterprises in China, you are dealing with foreign officials under the FCPA.

That fact alone makes China a dicey place to do business these days.

Secondly, there are cultural considerations. There is a culture of gift giving and receiving in business transactions in China.

And as U.S. companies often find out, sometimes those types of gratuities are expected in the business world. And they can lead a company to get tripped up under the FCPA.

Third, when you look at the countries that have a history of corruption, China is definitely going to be high on that list.

**CCR:** On the question of foreign officials, the FCPA was drafted to deter corrupt practices. Is it your position that the law shouldn't apply to state owned enterprises?

**HENGSBACH:** This is an extremely controversial issue right now.

There are four motions pending where defendants are arguing that the U.S. government's position on this issue is outside the letter of the statute.

One of the briefs says that if we were applying the same construct to the United States, we would have to conclude that every executive of General Motors is a foreign official – because of the U.S. government's control over General Motors.

So, it's a controversial issue. And many of us in the compliance community feel that the government is taking an unduly broad view of what it means to

be a foreign official.

**CCR:** One case is Lindsey Manufacturing. Is that a Los Angeles case?

**HENGSBACH:** Yes. And I believe that the case is going to trial on March 29. It is before Judge Matz in Los Angeles.

**CCR:** Do you have any involvement in these cases?

**HENGSBACH:** No, we do not have any direct involvement.

**CCR:** What's your take on how they might come out? Do you have a take on how they should come out?

**HENGSBACH:** I can't comment on the ongoing litigation.

I can tell you that the definition of foreign official and the fact that the government has taken an increasingly broad view of what it means to be a foreign official under the FCPA is very problematic from a compliance standpoint.

From that perspective, it would certainly not be disappointing to see a ruling in favor of the defendants on that issue.

**CCR:** In the vast majority of FCPA cases, there is some kind of settlement. The case is dropped, or there is a deferred prosecution, or there is a guilty plea. But rarely do they go to trial.

Do you see this as some kind of a trend where defendants in FCPA cases start standing up to the government?

**HENGSBACH:** I don't think we can say at this point that it is a trend.

But it is rare to see defendants pushing the government to trial – given how difficult it is to defend against an FCPA allegation.

Very few FCPA cases are going to trial now.

**CCR:** Is your practice exclusively defense side?

**HENGSBACH:** Yes. And that's true for most defense firms. It would be difficult to represent both sides in these types of cases.

**CCR:** Many lawyers are interested in the new whistleblower provisions of the Dodd-Frank law. What do you see developing?

**HENGSBACH:** There are plaintiffs firms that have traditionally represented qui tam plaintiffs who are now representing plaintiffs in these FCPA cases.

We predicted that there would be several lawyers lined up ready to shepherd potential plaintiffs through the reporting process.

And that has already come true.

In terms of actual cases – it's a little bit early for that.

But I can tell you that everyone is expecting the whistleblower provisions to lead to yet another uptick in FCPA enforcement.

**CCR:** Is part of your business defense of False Claims Act cases?

**HENGSBACH:** Yes.

**CCR:** So, FCPA is the majority of your business. What are some other areas you are busy in?

**HENGSBACH:** The False Claims Act has traditionally been an area of focus for Sheppard Mullin and for my group in particular.

There are folks in my group who do exclusively False Claims Act work.

For me, it's a small percentage of my current work.

**CCR:** There is a split of opinion on this. Some people say no way the Dodd-Frank whistleblower law is going to rival the False Claims Act. What's your take?

**HENGSBACH:** I wouldn't say there is no way that is going to happen. If I were a betting person, I would say that the whistleblower provisions in the Dodd-Frank law will lead to certainly an increase in enforcement.

And there is the potential for a False Claims Act like climate that would be dramatic.

**CCR:** This is a good thing to have whistleblowers come out and blow the whistle on potential foreign bribery, right?

**HENGSBACH:** Everybody in the anti-corruption community wants to reduce the incidence of corruption.

The problem is where the incentives lie and what the impact is.

This law incentivizes whistleblowers to bypass the perfectly functioning internal compliance mechanism that a company has in place.

**CCR:** Prosecutors and plaintiffs attorneys would obviously dispute the claim that it is perfectly functioning.

Often, these whistleblowers go up the chain of command in the corporation and end up with nothing – either being fired, or the corporations ignoring their concerns.

We just interviewed a qui tam attorney in one of these major cases.

The whistleblower went through corporate channels and ended up being fired.

You would define that as a perfectly functioning system would you?

**HENGSBACH:** No. But those aren't FCPA cases.

And second, those are anecdotal.

For every case where the chain of command has not functioned properly and the internal hotline for example has failed – and there certainly are those cases, no doubt – for every one of those there are hundreds of reports that nobody hears about where the issue gets dealt with appropriately internally.

**CCR:** Do you know of cases that are in the pipeline as a result of this new law?

**HENGSBACH:** I do not know of such a case. But it's still early. The SEC came out with some proposed rules in November.

We are still awaiting final rules. So, it is still real early.

**CCR:** What part of your practice is corporate compared to individual representation?

**HENGSBACH:** I do a tremendous amount of compliance work.

My compliance work is exclusively for corporations.

When it comes down to FCPA investigations, we do a lot of representation of individuals.

So, the answer is – we do both.

**CCR:** I'm sensing that attorneys like yourself who do a lot of compliance work are more reluctant to go to the government to self-report FCPA problems and lay yourself out at the mercy of the government. Are you sensing that also?

**HENGSBACH:** I absolutely am. And this is an area where we need to push the government for some clear guidelines.

We want to tell our clients that there is a firm benefit to self-disclosure.

For example – one times the bribe is the maximum of your penalty.

And I just throw that out there as an example. But now, there is no certainty.

What we are seeing instead is a regime where there are no clear incentives.

It is just not at all clear what disclosure and self-reporting get you.

If you talk to the government – and there are several public statements available on this – they will tell you that they absolutely take it into consideration and that the penalties are reduced for companies who come forward and self-report.

The problem is that when you are trying to advise a client on whether to self-report, there are no clear guidelines.

And when you are in that situation, it is all about what is going to happen, not what might

happen.

**CCR:** One idea being floated in the defense community is something similar to the immunity program being set up in the antitrust area. First in gets full immunity or leniency.

**HENGSBACH:** We want to be able to tell our clients that there are black and white guidelines.

We want to be able to tell them what the benefit of self-reporting will be.

Whether it is immunity from prosecution, a penalty that is capped at one times the bribe – or something of that nature.

**CCR:** What makes you pick one times the bribe?

**HENGSBACH:** That just is an example of a possible clear guideline – what a penalty might be.

It could be two times or three times the bribe.

But the point is that it should be clearly delineated so that we can tell our clients – here is what disclosure gets you.

**CCR:** Is there any indication that this Justice Department is moving in that direction?

**HENGSBACH:** None that I see. And its unfortunate.

Our clients want to do the right thing. And they are spending tremendous resources to comply.

And everybody knows that there will always be issues, in spite of the company's best efforts.

And we would like a situation that allows us to advise our clients that they can self-report and that there will be tangible benefit and some certainty in exchange for that self-reporting.

And at this point, we are just not able to do that.

**CCR:** Are you sensing that companies are not self-reporting the way they were?

**HENGSBACH:** I would not go that far. I would say that the question about whether and when to report – that question is even more difficult now than it ever was.

**CCR:** Most FCPA cases are originated out of the SEC or the Justice Department in DC. But you reported recently that the SEC office in San Francisco has opened an FCPA unit.

**HENGSBACH:** We have to read the tea leaves as to why the government is opening an FCPA unit in San Francisco.

But we can't overlook the proximity to Asia and to the technology sector.

FCPA issues in China are becoming more and more common.

**CCR:** Before the FCPA started to ramp up, what was the majority of your practice?

**HENGSBACH:** I was doing a lot of False Claims Act investigations and compliance. Since 2008, we started seeing clients focusing more and more on their FCPA compliance. That's when things started to shift.

**CCR:** What part of the compliance work has to do with the new UK Bribery Act?

**HENGSBACH:** A lot of it. That's really just another layer. Obviously, the Act has not come into effect yet. There have been many delays in its implementation. The latest word is that we can expect guidance on what constitutes adequate procedures under the Act. The UK government has indicated that the Act will not go into effect until 90 days after those guidelines come out.

So, we are in a holding pattern, waiting to see what those guidelines will look like.

**CCR:** Do you spend most of the year traveling outside of Los Angeles?

**HENGSBACH:** Yes. A big part of compliance is training. So, a significant part of what I do is train employees of our clients on how to comply with the FCPA.

That obviously leads to a lot of travel.

I will go to a company's sales meeting.

As part of that sales meeting, I will give a training.

I will go to a company headquarters and train the board of directors on the FCPA.

And then of course, when we have an internal investigation, that leads us to wherever the activity is.

I spent a lot of time last spring in India and China.

**CCR:** You probably get a lot of questions from company employees overseas. Are they concerned about getting into trouble for minor infractions?

**HENGSBACH:** That is something that we deal with quite often in the FCPA community.

There is no materiality requirement.

There is no de minimus threshold.

For example, at least theoretically, a bribe of a dollar could get an entire corporation into hot water.

A lot of our struggle in the compliance community is dealing with the situation that you just described.

And there is still the sense that – this is just how business is done in the given country.

And of course, that is just not an appropriate answer. Nor is it any kind of a defense under the Act.

So, in the compliance community, that is what we are battling.

**CCR:** What do you see developing on the horizon?

**HENGSBACH:** One big development in 2011 is the new whistleblowing provision.

The other big development in 2011 is the UK Bribery Act. Some people believed that it might be repealed by the new government. But the latest comments out of the UK government seem to indicate that they are moving forward, but the timing is a big question.

Also, I'm starting now to see a significant lobbying push in the U.S. against this incredible explosion of FCPA enforcement.

I believe that the Chamber of Commerce is starting to push back.

It just becomes incredibly difficult for companies who want to do the right thing.

So, we are going to see some more push back from the business community in the coming year.

**CCR:** Given the cuts in government budgets, I'm wondering whether the SEC is going to be able to handle the reports it will get under the new law?

**HENGSBACH:** There was just testimony from the SEC on that point – their budget is being slashed, and yet now they have this new whistleblower provision to deal with.

But on the other hand, we are seeing FBI agents almost wholly devoted to FCPA investigations. We see the FCPA unit in San Francisco.

So, in an era of tightening budgets, the government moves forward.

**CCR:** Give us a window on your China and India practice.

**HENGSBACH:** We have an office in Shanghai. When we handle FCPA investigations that involve China, we are able to utilize our Shanghai lawyers who are expert in the commercial law. And China has its own commercial and criminal bribery statutes.

**CCR:** When you do training, do you train on those laws too?

**HENGSBACH:** When we train in China, yes.

India is becoming more and more difficult from an FCPA perspective. There is in general a lax regulatory attitude that we have to combat against when training there.

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