In a speech (available here) delivered at the American Bar Association National Institute on White Collar Crime on March 10, Kenneth A. Blanco, Acting Assistant Attorney General for the Department of Justice (“DOJ”) Criminal Division headquartered in Washington, DC, spoke at length about the Criminal Division’s growing focus on cross-border investigations and prosecutions, including under the U.S. Foreign Corrupt Practices Act (“FCPA”). Mr. Blanco explained that the DOJ is increasingly working with its global enforcement counterparts, including when gathering and sharing evidence, and in planning multi-jurisdictional prosecutions. Mr. Blanco further confirmed that the DOJ’s FCPA Enforcement Plan and Guidance, commonly referred to as the “FCPA Pilot Program,” will continue “in full force” after April 5, pending final decisions on its extension and revision.

The DOJ Criminal Division Sharpens its Focus Even More on Multi-Jurisdictional Evidence-Gathering and Enforcement

Mr. Blanco’s speech underscored the increased global nature of white collar criminal enforcement, highlighting such enforcement under the FCPA, Bank Secrecy Act (“BSA”) 1 efforts to pierce the corporate veil to prevent the abuse of legal entities, and the U.S. Treasury’s final rule on customer due diligence. 2

Mr. Blanco confirmed what many in the corporate community already know: the DOJ and its global counterparts are pursuing transnational crime more often and

1 The BSA requires financial institutions to report certain types of transactions that are most likely to give rise to suspect activity, such money laundering, sanctions violations, or terrorist financing.

2 The U.S. Treasury Department’s final rule on customer due diligence (CDD) aims to strengthen CDD requirements and extend them to the beneficial owners of customer legal entities. The core elements of the rule are (1) identifying and verifying customer identities, including those of legal entities’ beneficial owners, (2) developing risk profiles through understanding customer relationships, and (3) monitoring for suspicious transactions and updating customer information. It applies to a range of financial institutions, including banks, broker-dealers, and mutual funds. The rule took effect on July 11, 2016, but will not be mandatory until May 11, 2018. See “Treasury Announces Key Regulations and Legislation to Counter Money Laundering and Corruption, Combat Tax Evasion,” Dept of Treasury Press Release, May 5, 2016, available here.
more effectively. He explained that the DOJ is working with such counterparts to investigate both U.S.-directed criminal activities abroad and foreign criminal activity involving the U.S. financial system. Mr. Blanco noted “[t]his is no longer the future, it is the here and now of global criminal investigations.”

Mr. Blanco stressed that countries around the world are increasingly focused on white collar enforcement. This applies both to countries exercising jurisdiction over conduct taking place outside their borders, as well as countries’ enhanced enforcement of their own domestic criminal laws. Mr. Blanco stated that “especially in the area of bribery of foreign officials, countries around the world are strengthening their laws, investigating and bringing impactful cases.”

Mr. Blanco noted that multi-jurisdictional enforcement is “the emerging trend” and highlighted the now-familiar scenario where a company operating in one particular country may be subject to jurisdiction and prosecution by multiple countries’ regulatory authorities (using the FCPA as an example). Mr. Blanco did, however, convey that this multi-jurisdictional cooperation extends to resolutions as well. Where appropriate, the DOJ strives for global resolutions so that companies that accept responsibility for their misconduct are not “unfairly penalized for the same conduct by multiple agencies.” To that end, he explained, the DOJ seeks to apportion fines among jurisdictions to avoid multiple penalties. Pointing to several recent DOJ FCPA prosecutions, Mr. Blanco focused on the increasingly international nature of crime. He further stated that because “criminals seek to exploit geographical boundaries to protect themselves and their illegally derived assets . . . the mechanisms of international cooperation [must] serve to disrupt their ability to do so.” Accordingly, Mr. Blanco noted increasing formal requests for legal assistance as well as informal information sharing among prosecutorial authorities, including reciprocal information sharing, high-level counterpart meetings, and the use of attachés posted in embassies.

3 Mr. Blanco discussed several recent cases that demonstrate these trends. In 2016, a transnational investigation revealed that Brazilian construction and petrochemical companies Odebrecht and Braskem had orchestrated a global scheme to bribe government officials in twelve countries using U.S. financial institutions and offshore shell companies. After charges were brought in the U.S., Brazil, and Switzerland, the companies pled guilty, paid a combined $3.5 billion fine, and now reportedly face investigations in an additional ten countries and criminal charges against over 70 individuals. See “Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History,” DOJ Press Release, Dec. 21, 2016, available here. Mr. Blanco also related the use of substantial international cooperation in the case of 1Malaysia (involving identification of beneficial ownership), in cooperative settlements reached in the prosecutions of Rolls Royce (involving the first coordinated deferred prosecution agreements by the DOJ and UK Serious Fraud Office) and VimpelCom (involving the DOJ, the Securities and Exchange Commission, and the Netherlands Public Prosecution Service), and the return of assets corruptly obtained by the family of former Taiwanese President Chen Shui-Bian. See “United States Seeks to Recover More Than $1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund,” DOJ Press Release, July 20, 2016, available here; “Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case,” DOJ Press Release, Jan. 17, 2017, available here; “VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme,” DOJ Press Release Feb. 18, 2016, available here; and “United States Returns $1.5 Million in Forfeited Proceeds from Sale of Property Purchased with Alleged Bribes Paid to Family of Former President of Taiwan,” DOJ Press Release, July 7, 2016, available here.
around the world.

The DOJ’s FCPA Pilot Program for Self-Reporting Will Continue While Under Review

In light of the growing trends in international white collar enforcement, Mr. Blanco announced that the FCPA Pilot Program will continue to operate past its one-year term while the program undergoes a period of review. We previously wrote about the DOJ’s one-year Pilot Program (available here). For those companies that voluntarily self-report misconduct, the program allows for up to a 50% reduction in fines from the recommended U.S. Sentencing Guidelines’ range. Credit for self-reporting is based on three requirements: voluntary self-disclosure, full cooperation, and appropriate remediation. Its aims were to increase transparency and consistency in resolving corporate FCPA investigations, and to encourage companies to cooperate and take responsibility for violations. The program was originally set to expire on April 5, but will now “continue in full force” until the DOJ reaches a final decision on whether to extend it or what revisions, if any, it should make.

Conclusion

For multinational organizations, the threat of coordinated international enforcement across multiple jurisdictions will only increase, according to Mr. Blanco. Further, the continuation of the FCPA Pilot Program suggests that the DOJ will continue to encourage cooperation in multinational and other FCPA matters. Accordingly, Mr. Blanco’s speech signals that the DOJ Criminal Division in Washington, DC will remain focused on aggressive multinational white collar enforcement, despite the change in presidential administrations.