

TUESDAY, FEBRUARY 15, 2022

## **Should Companies Be Concerned about the New Guidance from the DOJ for Prosecuting Corporate Crime?**

## SPEAKERS

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**JACK KNIGHT**

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# Deputy Attorney General Lisa Monaco

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- October 28, 2021, speech at the ABA White Collar convention and follow-up memo to all DOJ attorneys
- DOJ's corporate enforcement priorities
- Principles of Federal Prosecution to be amended
- “Accountability starts with the individuals responsible for criminal conduct,” but DOJ “will not hesitate to hold companies accountable.”
- Compliance programs: “[w]e will ensure the absence of such programs inevitably proves a costly omission for companies who end up the focus of Department investigations.”

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- Individual Accountability
- Cooperation Credit for Companies who voluntarily provide information to the DOJ
- 2015 “Yates Memo” memo under Obama administration – **All** individuals involved in the misconduct at issue to receive any cooperation credit
- Trump administration – must provide individuals “**substantially involved**” to receive credit
- Monaco – the DOJ will return to the “**All**” standard

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- “Broader view” of corporations’ historical conduct
- Complete criminal, civil, and regulatory history considered in DOJ charging decisions
- Possible Implications
  - Civil settlements?
  - Neither admit nor deny?
  - What regulatory issues are considered material?

# *United States v. NatWest Markets PLC*

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- Fraud Section of the DOJ's Criminal Division
- Guilty plea on December 21, 2021, to wire and securities Fraud
- Market manipulation “spoofing” case
- \$35MM and three years of an independent monitor
  - Did not voluntarily report to the DOJ
  - Repeat offender
  - Cooperated
  - “Other criminal conduct and civil and regulatory actions”
  - 2017 Civil settlement with CFTC – neither admit nor deny

# ***United States v. Balfour Beatty Communities***

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- Fraud Section of the DOJ
- Guilty plea December 22, 2021 - Fraud Against the United States
- Defrauded US military through reporting related to outsourced private military housing
- Inadequate and ineffective compliance program
- \$65MM and three years of an independent compliance monitor
  - Did not self-report to the DOJ
  - Cooperated
  - No prior criminal history of civil or regulatory enforcement actions

# What Can We Expect Next?

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- More courts are reopening and clearing backlogs
- Additional U.S. Attorney appointments and confirmations
- More resources for DOJ to back up their policy shift
- More grand jury investigations
- Monaco - these are “only the first steps”
- Robust, proactive compliance programs mandatory

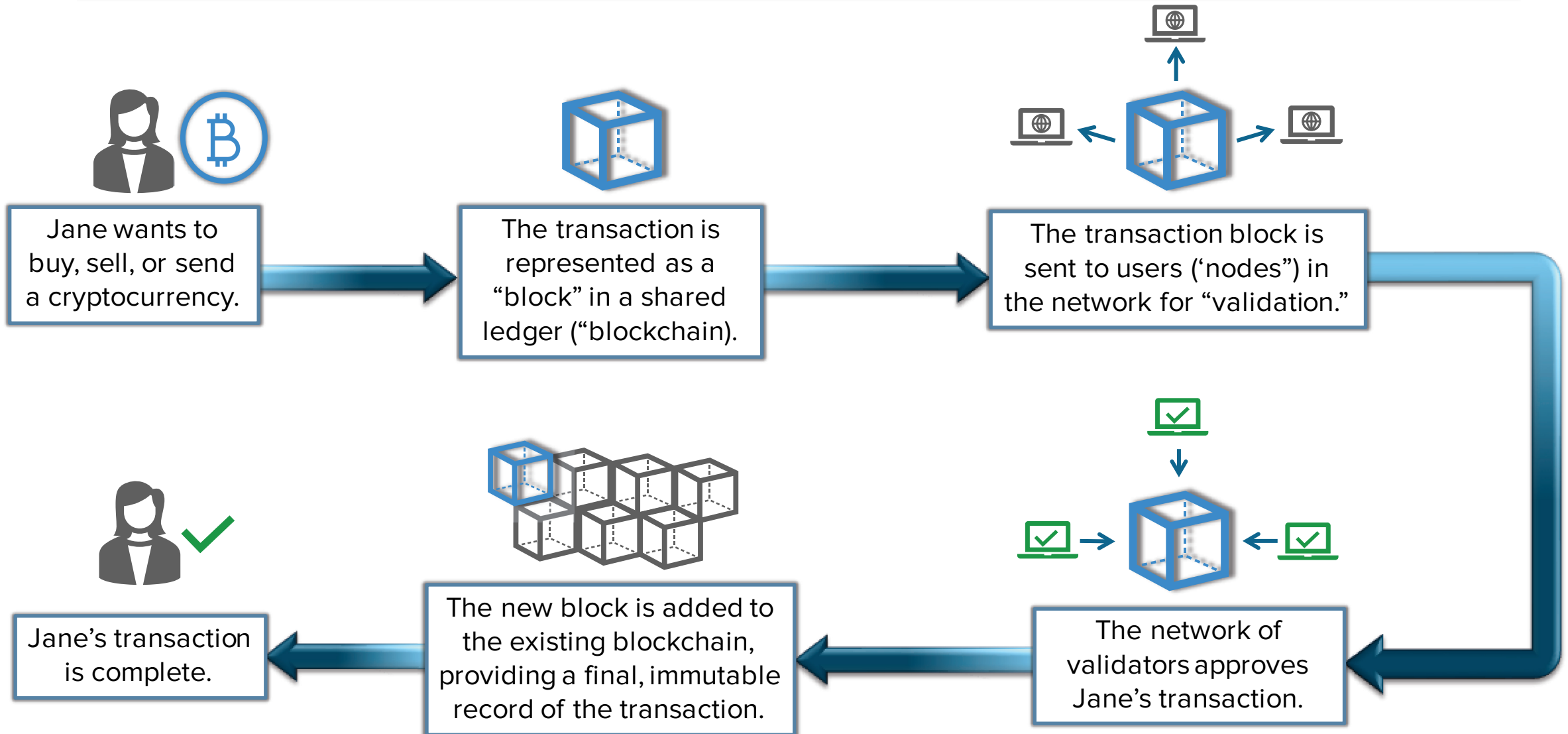


# Practical Takeaways

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- ❑ Companies should reassess internal controls and compliance programs because DOJ appears to be setting the bar higher
- ❑ Whether to cooperate with the government is now a more complicated decision because the risks associated with DOJ's definition of "all" individuals involved
- ❑ New considerations for civil settlements and regulatory enforcement actions because of future implications
- ❑ Corporations need to make sure their internal whistleblower protections and procedures work efficiently, promptly and encourage participation

# Cryptocurrency: *Overview*



# Cryptocurrency: *Market Cap*



# Cryptocurrency: *Wild West*?

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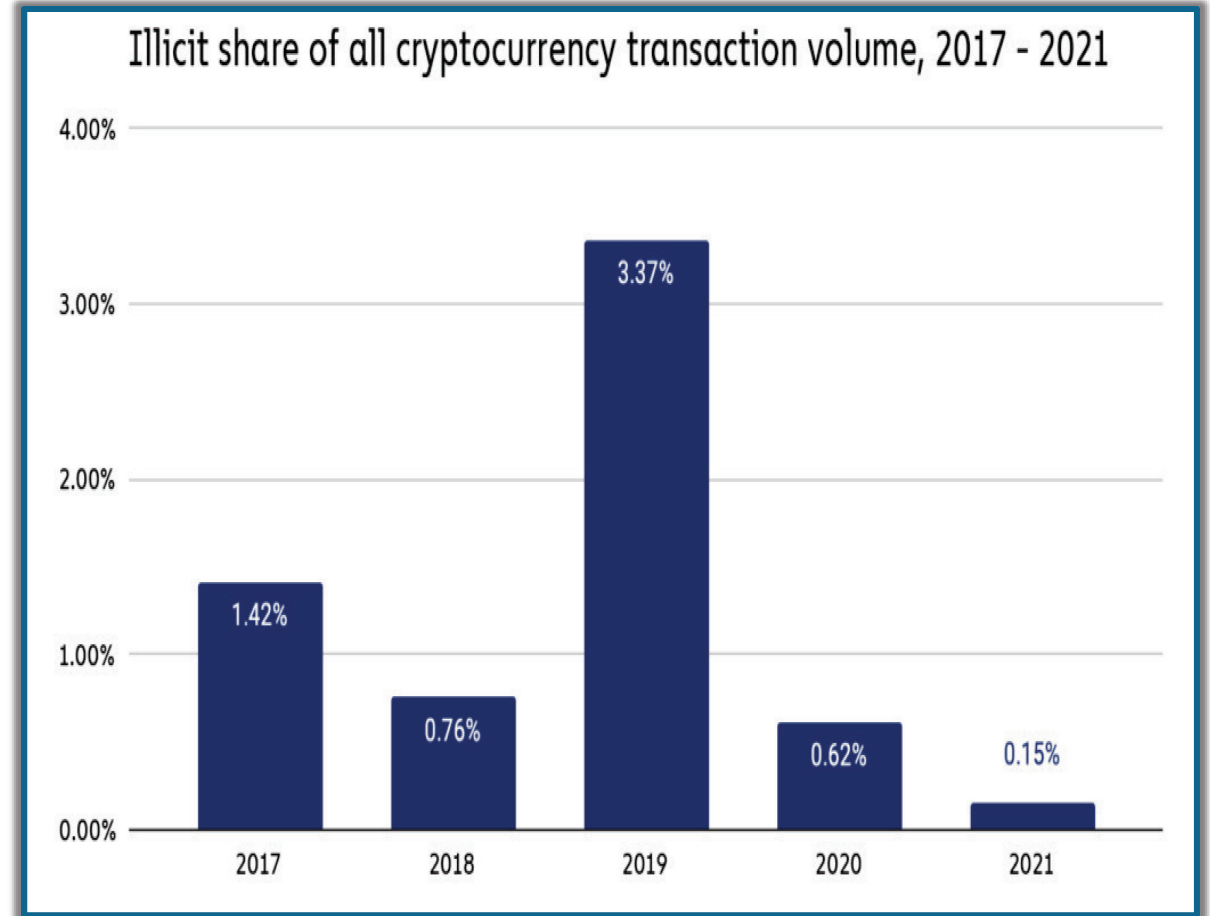
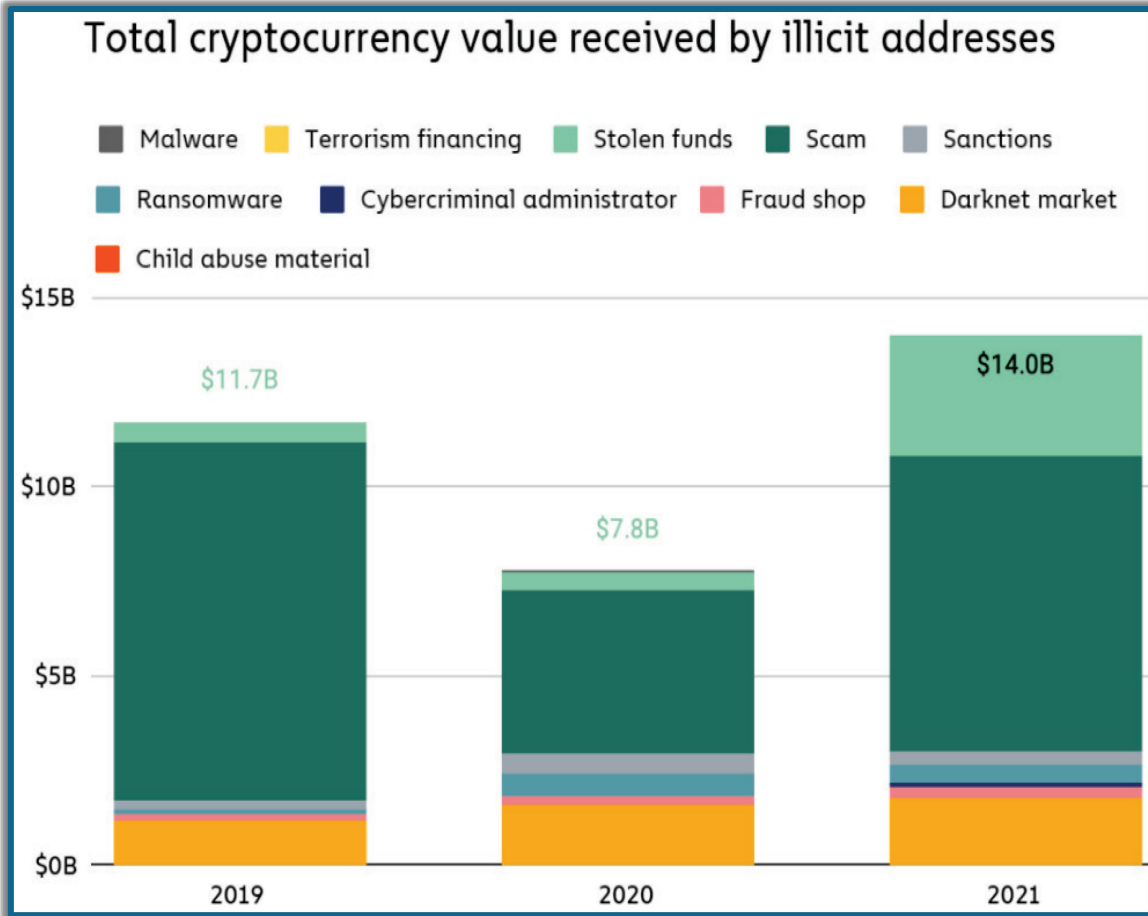
Currently, we just don't have enough investor protection in crypto finance, issuance, trading, or lending. Frankly, at this time, *it's more like the Wild West* or the old world of 'buyer beware' that existed before the securities laws were enacted. This asset class is rife with fraud, scams, and abuse in certain applications. We can do better.

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# Cryptocurrency: *Wild West?*



# Cryptocurrency: *Criminal Activity Trends*



Source: Chainalysis report published January 6, 2022

# Cryptocurrency: *Criminal and Civil Enforcement*

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## Criminal

- Department of Justice National Cryptocurrency Enforcement Team
- Financial Enforcement Network and Office of Foreign Assets Control

## Civil

- Securities and Exchange Commission
- Commodities Futures Trading Commission
- State Attorneys' General

# Cryptocurrency: *Considerations for Businesses*

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- ❑ Increased demand from businesses and consumers
- ❑ Implementation and ongoing assessment of robust compliance policies and procedures
- ❑ Evolution of accounting and taxation
- ❑ Privacy and data security



WINSTON  
& STRAWN  
LLP