

**Kobre & Kim's Government
Enforcement Defense
Contacts****Calvin K. Koo**

Hong Kong
calvin.koo@kobrekim.com

**Evelyn B. Sheehan**

Miami
evelyn.sheehan@kobrekim.com

**Paul Hughes**

Dubai
paul.hughes@kobrekim.com

**Timothy de Swardt**

BVI
timothy.deswardt@kobrekim.com

**Victor D. V.
Clementino**

São Paulo
victor.clementino@kobrekim.com

FEBRUARY 22, 2023

Lessons from LBRY: Standing Up to Regulatory Oversight

Many in the global crypto industry thought the LBRY amici had secured a win against the U.S. Securities and Exchange Commission, but enforcement threats are in fact at an all-time high. Industry players should not rest - rather, they should prepare for more enforcement actions. Below, we lay out some aggressive strategies to beat emboldened regulators like the SEC.

While some in the global cryptocurrency industry thought the LBRY amici had secured a win against the U.S. Securities and Exchange Commission (SEC) on behalf of secondary market purchasers and sellers of digital assets, unfortunately, that bright spot was short-lived. Enforcement threats from the SEC and others are at an **all-time high**, as evidenced by the recent Kraken settlement and investigation into Paxos. Industry players should prepare for potential enforcement actions against them.

A U.S. federal court **ruled in favor of the SEC** that token issuer LBRY sold unregistered securities when it offered the LBC token on and off exchanges in November 2022. This placed the token under the ambit of U.S. securities regulation. Combined with the increasingly aggressive overseas reach of U.S. regulators, this puts global issuers and exchanges under the threat of SEC enforcement.

However, it was widely reported that in a January 2023 hearing, the SEC admitted – and the judge agreed – that the LBC token is not a security. Many have **celebrated this** as a win for the industry. However, the SEC in fact, was only responding, based on well-established precedent, to a narrow hypothetical posed by the judge, and the court has issued no ruling

on this question yet. The November ruling still stands. The threat is still here.

Global crypto stakeholders would be wise not to hang up their battle axes and should rather prepare for investigations and enforcement actions from an emboldened SEC. To beat tough regulators like the SEC, crypto stakeholders will have to be willing to deploy aggressive strategies:

1. **Know Your Foe.** Most countries do not have an established crypto regulatory framework, and multiple regulators fight to oversee the domestic crypto industry. This includes the U.S. – the U.S. Commodities Futures Trading Commission (CFTC) is competing with the SEC for a slice of the pie. Stakeholders should therefore keep in mind the strengths and weaknesses of each agency before responding. For example, dissuading the U.S. Department of Justice from trial may require extensive, burdensome information disclosures, whereas proactively engaging with the CFTC can provide more flexibility.

This content provides information on legal issues and developments of interest to our clients and friends and should not be construed as legal advice on any matter, specific facts or circumstances. The distribution of our content is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

2. **Reconsider Cooperation.** Many targets of regulatory enforcement reflexively cooperate, hoping for a better outcome. They should reconsider this approach: targets are often “rewarded” with rounds of invasive and costly information demands that result in little cooperation credit.
3. **Go On Offense.** Crypto stakeholders should not be afraid to act with speed and aggression. They should test the reach of a regulator’s authority (both within the crypto industry and, for foreign stakeholders, across jurisdictions), seize control of the narrative, challenge the enforcement process and raise the stakes for regulators through strategic cross-border court filings and information demands.

With U.S. and global regulators aggressively asserting themselves over the crypto space, issuers and exchanges need to take stock and shore up their defenses against a potentially multijurisdictional threat. Those who can combine battle-tested, globally coordinated government enforcement defense strategies with deep familiarity of the burgeoning cryptocurrency space are the ones most likely to succeed.

About Kobre & Kim

Kobre & Kim is a conflict-free Am Law 200 law firm focused on disputes and investigations, often involving fraud and misconduct.

Our team of independent advocates in cross-border government enforcement investigations and actions:

- includes almost twenty former U.S. government lawyers based globally;
- has served as lead counsel in prominent enforcement actions including those involving cryptocurrency enforcement, securities law, market manipulation, bribery and corruption, antitrust and competition, economic sanctions, asset forfeiture, money laundering, extradition, fraud and other misconduct; and
- are able to either advocate directly or to work cooperatively with local counsel, in jurisdictions in the U.S., UK, EMEA, Asia, Latin America and key offshore financial centers.