The safest strategy in the near term is to treat all ICOs as securities offerings. Token issuers, then, have two possible courses of action: register the ICO with the SEC and conduct an initial public offering, or find an exemption.

In the remainder of this section, we will define five such exemptions: Regulation D Rule 506(c), Regulation S, Regulation CF, Regulation A+, and Rule 147.

Regulation D

Most token sales to date have used Rule 506(c) of Regulation D, which covers the general solicitation of securities. This option is a popular choice because it allows for general solicitation and has no cap on the amount of money that can be raised. In addition, this rule preempts state securities laws; state-by-state registration and pre-launch disclosure filings are not necessary.

The drawback to this option is that tokens or token-based securities can only be sold to accredited investors, and issuers must verify this status by receiving certain personal information from those investors – which may significantly limit participation in the sale. (Accredited investors make up just 7% of the US population.) Tokens or token-based securities sold pursuant to this exemption also generally have a one-year holding period before they can be freely traded.

Regulation S

Regulation S concerns securities offerings that take place outside of the United States, and can apply as long as the issuers conducting an offshore transaction make no “direct selling efforts” in the United States. Regulation S offerings are categorized by the likelihood that securities will flow back into the United States, and face variable restrictions on holding periods, information requirements, and the like depending on that categorization. A Regulation S deal can be run simultaneously with a Regulation D deal in order to solicit both US and foreign investors where investor qualifications differ from those in the US (assuming compliance with local laws).

Regulation CF

Regulation CF, in contrast to Regulation D, allows anyone (including non accredited investors) to invest but limits the fundraise to just over $1 million in a 12-month period. Each investor is also limited to a certain investment amount, usually around $2,000. (Considering the size of many ICOs and ICO investments to date, these limitations may seem particularly onerous.) This transaction can, however, be combined with a Regulation D transaction mentioned above to increase the amount raised and allow for non-accredited investor participation.

Regulation CF brings its own regulatory obligations, like the need to use a registered crowdfunding platform and to file certain documentation with the SEC prior to launching the deal and on an ongoing basis. This exemption also preempts most state securities laws and requires a mandatory one-year holding period prior to trading.

Regulation A+

Regulation A+ allows token developers to raise up to $50 million from unaccredited investors, increases the possible investment amount to roughly 10% of an investor's income or net worth, and allows tokens and token-based securities to be freely tradeable once issued.

This regulation necessitates an arduous SEC qualification process, however, that requires communication with the SEC in advance of the token offering. Regulation A+ also mandates the provision of audited financial statements and continued reporting once the offering has concluded. The security types that can be issued in these offerings are limited, and state securities laws are again preempted.

Rule 147

Rule 147 allows for intrastate offerings so long as such sales comply with that state's securities regulations. In order to qualify for this exemption, the issuer must have some "nexus" (business operations, employees, customers, assets, etc.) within the applicable state and can only raise funds from residents within that state. Investors do not need to be accredited investors, and after a six-month holding period the securities are freely tradeable (prior to the holding period they can be resold within the state).

(3) Technology Solutions for ICO Compliance

Where there is pain, there is opportunity, and it strikes us that a technology solution to manage and comply with ICO regulations is a necessity.

Compliance with securities law – and its many, varied exemptions – is far from simple, but the SEC seems to have little sympathy for would-be issuers. SEC Chairman Jay Clayton said recently that “Many ICOs are being conducted illegally. Their promoters and other participants are not following our security laws. Some people say that’s because the law isn’t clear. I do not buy that for a moment.”

Clayton also reportedly **isolated the importance of compliance** with the “spirit of the law” and “the professional obligations of the U.S. securities bar.” These broad concerns, when paired with the immense scale at which some of these ICOs operate, compound potential compliance issues.

This is a real, present problem for individuals trying to raise collectively billions of dollars. To us, that feels like a prime opportunity for technology innovation.

What’s the future of the ICO?

Looking forward, ***we appear to be entering a new era of distributed fundraising***. The cypherpunk dream of radically decentralized fundraising may be lost, but there is still reason for tentative optimism: regulatory uncertainty is largely gone, fraud is likely to decrease, and the crypto community may be bolstered by additional education and public awareness.

In the end, well-intentioned founders still have a path to raise vast sums of money and develop the next generation of blockchain technology. Despite the challenges of compliance, the outlook for ICOs is bright. We hope that this rational, measured optimism can nudge the community towards fighting for regulatory clarity, and cashing in on the legitimacy that increased consumer protections may bring to the blockchain ecosystem.