

CFTC Taking on AI

Article By:

Peter Y. Malyshev

Mercedes Kelley Tunstall

On January 25, 2024, the Commodity Futures Trading Commission (“CFTC”) published, first, [Release No. 8854-24](#), a customer advisory cautioning the public to beware of artificial intelligence (“AI”) scams (the “AI Advisory”), and second a [Request for Comment](#) (“AI RFC”), in which it began to articulate its regulatory approach to AI and the use of this emerging technology by CFTC-regulated entities. Following on the heels of Biden’s [Executive Order on AI](#) at the end of 2023, the CFTC wants to determine: (1) how AI is already being used by commodity market participants; (2) the inherent risks of use of this technology by such participants; (3) what the CFTC can and should do in response to the proliferation of AI; and (4) how AI and the use of AI fits within the existing regulatory framework established by the CFTC, the National Futures Association (“NFA”) and prevailing market practices. Combined, the AI Advisory and the AI RFC are the CFTC’s first regulatory involvement in AI.

In the AI Advisory, the CFTC analyses AI-related schemes through the lens of its division of enforcement. Technically, proliferation of these scams has nothing to do with serious uses of AI, as these scams are the same as regular fraud where a proprietor makes outlandish claims of potential profits through the use of new popular technology and then simply misappropriates customers’ money, oftentimes without even trading or employing any AI-related technology. The CFTC explains that no matter how innovative the technology may be, AI neither has the ability to “predict the future” nor to foresee “sudden market changes” – in other words, these scams are tantamount to Ponzi schemes that are dressed up in AI marketing.

Separately, the AI RFC marks the first time the CFTC is meaningfully engaging with AI technology from the regulatory perspective. Specifically, the AI RFC has posed 20 detailed questions about various aspects of AI, including how to identify risks relating to market safety and customer protection, what kind of governance would be appropriate for the use and development of AI solutions, what impacts AI will have on data privacy and cybersecurity concerns, special considerations necessary for the use of third-party service providers for AI solutions, and how to best mitigate AI’s known tendency towards bias. The CFTC’s questions focus on many practical considerations that all market participants should be thinking about when evaluating AI strategies and solutions.

For example, similar to unregistered, decentralized autonomous organizations (“DAOs”) platforms

that may qualify as commodity exchanges or brokers or clearing houses, should unregistered autonomous AI bots be deemed to be commodity trading advisers or introducing brokers; and if the answer is “yes”, how and where should such entities be registered and regulated, and who should be responsible for regulatory compliance? Or, would a compliance department of a CFTC registrant meet its statutory duties if it extensively used AI in market surveillance or contracted with third-party service providers who rely upon AI in providing such services? Or, should the NFA require its members to disclose to their clients that they are using AI, similar to what the NFA already [requires with respect to digital assets](#)? The AI RFC identifies these numerous practical considerations.

The AI RFC is not the first time the CFTC has addressed emerging technologies – in 2015, for example, the CFTC proposed, but never finalized, [its automated trading rule](#), partially in response to the development of high-frequency trading technologies. Of course, had that rule been finalized, it would be completely obsolete by now. AI is probably going to be relevant for many decades to come, in contrast. In contrast to the [enforcement](#) where the CFTC attempted to formulate its policy with respect to DAOs, it is commendable that with respect to the AI, the CFTC offered for public comment its regulatory concerns.

Given the types of questions asked, the resulting guidance from the CFTC will likely address at least the following topics:

- the extent of the use of AI technology by market participants today and projected going forward;
- the types of AI-assisted or AI-initiated conduct that would qualify as “regulated” and therefore subject to CFTC’s and NFA’s oversight;
- whether traditional categories of registrants and regulated entities would capture this conduct; and
- surveillance, compliance and ethical considerations for the commodity derivatives industry as a whole.

Several industry associations will be responding to the AI RFC, partly because many individual market participants may be reluctant to comment individually due to competition considerations that may not be fully addressed by confidential treatment under [Title 17](#) of CFTC Regulations. Comments are due by April 24, 2024.

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