
CFTC Issues Request for Comment on Uses of AI

February 2, 2024

On January 25, 2024, the Commodity Futures Trading Commission's (CFTC) Staff issued a request for comment (RFC) on the current and potential uses and risks of artificial intelligence (AI) in the markets that the CFTC regulates.¹ Chairman Rostin Behnam explained that the purpose of the RFC is to help the CFTC “understand current and potential AI use cases and the associated potential risks to [its] jurisdictional markets and the larger financial system.”² He also noted in a recent industry speech that the RFC will support the Commissioners and the Staff as they “strategically identify the highest priorities and return-on-investment projects to pursue.”³ In a statement issued in support of the RFC, Commissioner Kristin Johnson emphasized the need for policymakers and regulators alike to monitor the development and deployment of AI and, where necessary, act to counter the challenges that AI creates.⁴ She noted that “comments that the [CFTC] will receive in response to the RFC will enable the Commission to evaluate the need for any formal guidance and possibly rulemakings regarding the integration of AI in CFTC-regulated markets.”⁵

The RFC includes 20 questions that are specific to the use of AI in CFTC-regulated markets and are divided into two parts: the first concerns current and potential uses of AI in CFTC-regulated markets; the second concerns the potential risks that AI could pose to CFTC-regulated markets. Public comments are due by April 24, 2024.

There are several noteworthy aspects of the RFC.

¹ CFTC Staff, Request for Comment on the Use of Artificial Intelligence in CFTC-Regulated Markets (Jan. 25, 2024), https://www.cftc.gov/media/10156/AI_RFC_012524/download.

² *Id.*

³ Rostin Behnam, Keynote of Chairman Rostin Behnam at the ABA Business Law Section Derivatives & Futures Law Committee Winter Meeting (Jan. 26, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam41#_ftnref13.

⁴ Kristin N. Johnson, Commissioner Kristin N. Johnson Statement on the CFTC RFC on AI: Building a Regulatory Framework for AI in Financial Markets (Jan. 25, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement012524>.

⁵ *Id.*

First, the RFC is published by CFTC Staff and not the CFTC itself. The RFC is not published in the *Federal Register*. It is not a proposed rule or agency action, and it is not subject to the Administrative Procedure Act.⁶ Further, the RFC notes that this request was prompted in part by the Executive Order issued by the Biden Administration, which encourages independent regulatory agencies, such as the CFTC, to use their authorities to protect consumers from fraud and other risks posed by the use of AI.⁷

Second, the Staff's purpose in issuing the RFC is to enable it to "assess the benefits and risks associated with the use of AI in CFTC-regulated markets, to inform Staff's supervisory oversight and to evaluate the need for any future guidance and rulemakings."⁸ Consistent with this stated purpose, many of the questions posed by the Staff are focused on the potential challenges in supervising and controlling AI-driven decisions and not on whether the new technology complies with existing regulatory provisions.

We believe the CFTC and its Staff will use the information gathered in this exercise to inform future AI-related initiatives and support more formal regulatory actions. Given the Biden Administration's directive for the safe, secure and trustworthy development of AI, this RFC suggests the CFTC's intent to be an important participant in governmentwide financial services discussions about AI in the future.

AI Use in CFTC-Regulated Markets

The RFC highlights the impact of rapidly changing technology on global markets and the financial services industry. While the Staff acknowledges the potential advantages that AI could bring to CFTC-regulated markets, such as efficiency, risk mitigation and reduced costs for market participants, the Staff is also aware of potential risks. Thus, the Staff's first eight questions aim to understand how participants in CFTC-regulated markets use AI or envision using AI going forward. Specifically, the RFC first seeks input on the following:

- **Scope.** The scope and definition of AI, including whether the definition of AI in the Executive Order⁹ translates to CFTC-regulated markets and what criteria should be used to differentiate AI from other forms of automated trading.
- **General Uses.** The RFC specifies certain activities of CFTC registrants that might be impacted by AI as areas of particular interest for feedback. Those activities include but are

⁶ This is not the first RFC issued by CFTC Staff. In June 2023, the Staff published a request for comment on the impact of affiliations on certain CFTC-regulated entities. *See* CFTC Staff, Request for Comment on the Impact of Affiliations on Certain CFTC-Regulated Entities (Jun. 27, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8734-23>.

⁷ Executive Office of the President, Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence, Sec. 8(a) (Oct. 30, 2023) (Executive Order).

⁸ RFC, at 1.

⁹ The Executive Order defines AI as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." Executive Order, Sec. 3(b).

not limited to (a) trading, (b) data processing and analytics, (c) risk management, (d) compliance, (e) books and records, (f) systems development, (g) cybersecurity and resilience, and (h) customer interactions.

- **Potential Uses of AI.** The CFTC also requests input on the potential uses of AI, even if not currently used by CFTC registrants for the abovementioned activities.
- **AI and Geography.** The RFC requests feedback on whether the application of AI within a firm is segmented based on the location of the facility or the customer.
- **AI Roadblocks.** The Staff requests input on any obstacles impeding the acquisition, application or use of AI for any of the abovementioned activities, and whether those barriers are generic or activity-specific. In particular, the RFC asks whether regulatory clarity is a concern or impediment to AI implementation.
- **AI and Third-Party Service Providers.** The extent to which registrants rely on third-party service providers for the provision of AI services to support the abovementioned activities and the extent to which registrants can rely on in-house staff rather than third-party service providers. In addition, the Staff is interested in the specific third-party AI-based software that market participants are adopting and the potential challenges in managing such software.
- **Governance of AI Uses.** Ways in which firms are tracking the use of AI by both in-house operations and the third-party service providers they rely on, particularly in terms of accountability, accuracy and safety.
- **Additional AI Uses.** Commenters are asked to include in their response any additional current or prospective uses of AI in CFTC-regulated markets or by CFTC registrants.

AI Risks in CFTC-Regulated Markets

In addition to exploring AI use cases, the RFC seeks input on the potential risks associated with the use of AI and the potential impact on CFTC-regulated markets. As reflected below, many of the Staff's questions focus on the potential governance, supervision and operational risks that could be triggered by the opacity of AI-driven decision-making, including the risks that could arise for AI systems trained on incomplete or biased data sets.

- **Governance.** The RFC notes that the risks associated with AI differ from traditional software risks. Given these challenges, the Staff requests input on how CFTC registrants have modified their governance structure to specifically address AI and whether such structure appoints a human to be "in the loop" to prevent AI-driven failures.
- **Cybersecurity.** The RFC requests input on whether market participants identify AI as a source of cybersecurity vulnerability and the associated concerns over using AI to probe digital systems. The Staff also seeks comment on how risk management frameworks have been modified to account for cybersecurity and safeguard against AI risks.
- **Explainability and Transparency.** The Staff asks whether transparency and explainability are more of an issue with third-party service providers, and whether procuring AI from a

third party impacts the ability of a registrant to manage explainability. In addition, the Staff would like to know how explainability issues might impact self-regulatory organizations (SROs) that are using AI to oversee members in the context of investigations and enforcement actions.

- **Data Quality.** The RFC asks whether there are any concerns around the quality of data sets and the controls in place to ensure the quality of data used by AI is based on sufficiently sized data sets. The Staff requests input on whether controls differ if the data is procured by a third party.
- **Market Manipulation and Fraud.** As AI has allowed bad actors to engage in more sophisticated forms of fraud, the RFC requests feedback on what policies the CFTC should consider to address potential increases in illegal conduct using AI. For firms that integrate AI into trading decision-making, the Staff specifically asks that those firms describe the policies they have adopted to prevent market manipulation.
- **Concentration.** The Staff requests input on whether the components of AI models are currently procured from a concentrated number of firms and what risks exist if the key inputs to AI models are, or become, concentrated. In addition, the Staff requests comments on whether the concentration of cloud service providers results in the concentration of AI services.
- **Bias.** The Staff asks about the diversity and inclusivity of the data sets used to develop AI, including what controls registrants are currently using to prevent discrimination and bias in the application of AI. Commenters are asked to explain how biases are identified in algorithms and how they are mitigated or removed to minimize biased outcomes. In addition, the Staff asks whether AI tools are compliant with Section 508 of the Rehabilitation Act, which requires agencies to provide individuals with disabilities equal access to electronic information and data comparable to the access of those who do not have disabilities.¹⁰
- **Customer Protection.** The RFC cites conflicts of interest outlined in the Securities and Exchange Commission’s proposed rule on the use of predictive data analytics by broker-dealers and investment advisors.¹¹ Specifically, the Staff expresses concern over the potential for AI to place a registrant’s interest ahead of customer interests. Commenters are asked to provide information regarding the areas of customer protection that will become increasingly more relevant with the widespread adoption of AI.
- **Privacy and Confidentiality.** The Staff requests insight on whether the advancement of AI in CFTC-regulated markets might result in greater risks to individual privacy rights and the steps taken to mitigate such risks. Also, commenters are asked to explain what

¹⁰ See 29 U.S.C. § 794d.

¹¹ Securities and Exchange Commission, Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, Exchange Act Release No. 34-97990, 88 Fed. Reg. 53960 (Aug. 9, 2023).

privacy-enhancing technologies¹² are being used and what protections they are adopting as a CFTC-regulated entity.

- **Third-Party Service Providers.** In addition to the Staff’s concerns around the reliance on and oversight of third-party service providers, the RFC inquires about the risks specifically associated with using third-party AI technologies. The Staff would like more information on efforts by users of third-party AI technologies to understand the risks of those technologies, as well as diligence procedures used to evaluate those risks prior to adoption. Finally, the Staff asks whether disclosures should be required regarding the use of third-party providers.
- **Risks to Competition.** To address anticompetitiveness in the markets, the RFC asks commenters whether AI’s potential to create large economies of scale presents the potential to harm competition among market participants. The RFC also asks commenters to specify those market functions that are at the greatest risk of harm from increased AI adoption.
- **Other Risks.** The Staff requests input on any AI risks to CFTC-regulated markets that may arise now or in the future that are not already addressed in the RFC.

Conclusion

As market participants continue to explore the use of advanced technologies, regulators are looking to understand AI and the impact its increased adoption would have on the broader financial system. The RFC signals the CFTC’s efforts to promote responsible innovation and align future guidance with collective feedback from market participants. As the CFTC continues to explore AI use cases, information gathered from the RFC will guide policymaking by CFTC Staff.¹³ Interested parties should submit responses to the CFTC Staff prior to the April 25, 2024 deadline.

¹² The Executive Order defines “privacy-enhancing technologies” as any software or hardware solution, technical process, technique, or other technological means of mitigating privacy risks arising from data processing, including by enhancing predictability, manageability, disassociability, storage, security and confidentiality. These technological means may include secure multiparty computation, homomorphic encryption, zero-knowledge proofs, federated learning, secure enclaves, differential privacy and synthetic-data-generation tools. This is also sometimes referred to as “privacy-preserving technology.”

¹³ CFTC, Public Statements & Remarks, Keynote of Chairman Rostin Behnam at the ABA Business Law Section Derivatives & Futures Law Committee Winter Meeting (Jan. 26, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam41>.

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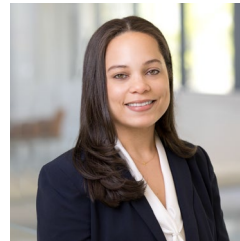
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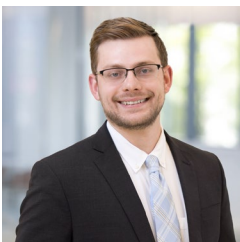
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