

Fintech Alert | February 10, 2023  
**ChatGPT Is My Investment Adviser? Legal Considerations for Investment Advisers Using (Or Thinking About Using) Artificial Intelligence To Provide Advice**



Like others experimenting with the artificial intelligence technology, ChatGPT, we asked the AI program on Feb. 8, 2023: “What is an investment adviser’s fiduciary duty if the adviser uses ChatGPT to provide investment advice?”

This is ChatGPT’s answer:

An investment advisor has a fiduciary duty to act in the best interest of their clients when providing investment advice. This includes a duty to provide full and fair disclosure of all material facts, to make suitable recommendations, and to avoid conflicts of interest. If an investment advisor uses ChatGPT to provide investment advice, they are still responsible for ensuring that the advice they provide is in the best interest of their clients and meets their fiduciary duties. The advisor may use the technology as a tool to assist in their decision-making, but the ultimate responsibility for the advice provided rests with the advisor, not with the technology.

This answer technically is correct (and good advice!), but how does the investment adviser satisfy its responsibility vis-à-vis AI technology and what other legal issues should also be considered under the Investment Advisers Act? We decided to take a crack at answering these questions on our own (sorry, ChatGPT).

#### **How Can an Investment Adviser Oversee AI Technology?**

For this one, we look back to a Risk Alert that was released by the SEC’s Division of Examinations on Nov. 9, 2021,<sup>1</sup> discussing its observations from its recent examinations of investment advisers that provide automated digital investment advisory services (often referred to as “robo-advisers”). The Risk Alert did not address AI in particular and preceded the release of ChatGPT by about a year, but many of the findings in the Risk Alert apply equally to the use of AI by advisers, specifically:

- Advisers “[l]acked written policies and procedures related to the operation and supervision of their automated platforms, increasing the risk of algorithms producing unintended and inconsistent results (e.g., due to coding errors or coding insufficient to address unforeseen or unusual market conditions, such as those caused by geopolitical events, substantial oil price movements, or interest rate changes).”

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- Advisers must pay special attention to the construction, testing, and safeguarding of algorithms and any other technology advisers use to deliver advice, likely requiring coordination between an adviser's legal and compliance personnel, on the one hand, and its technology personnel (which in-house or third-party), on the other.

For advisers using third-party-developed AI technology, the SEC's recent proposed rule on Outsourcing By Investment Advisers<sup>2</sup>, released on Oct. 26, 2022, also offers insights into SEC expectations involving AI. In this regard, the SEC specifically called out AI technology, noting that it may form part of an advisory "covered function" that requires enhanced oversight. The SEC also asked in its proposal whether an adviser using third-party AI should "be required to confirm it has sufficient internal expertise to effectively oversee the service provider" or should have to hire another third party to assist with oversight.

### Is an AI Developer an Investment Adviser?

Another important issue is whether the developer of AI (if separate from the investment adviser) is itself acting as an investment adviser and does it owe a fiduciary to its investment adviser clients and to their clients. This line of inquiry is addressed by the SEC in its recent Request for Comment on Certain Information Providers Acting as Investment Advisers,<sup>3</sup> released on June 15, 2022. This release focused on index providers, model portfolio providers and pricing services and did not mention AI. Nevertheless, this request raises relevant questions about whether an AI service provider that produces advice is an "investment adviser," whether the technology is akin to calculating technology that has in the past been considered outside of the investment adviser definition, and whether the so-called "publisher's exclusion" and related First Amendment rights protect AI developers from adviser status.

### How Should the Code of Ethics Be Applied to AI-Produced Advice?

If an investment adviser uses AI technology to produce investment advice, it must also consider whether AI developers or coders are "access persons" for purposes of its Code of Ethics, whether personnel securities reporting obligations need to be expanded, and how to best prohibit and monitor for insider trading and other manipulation concerns.

### What Impacts (If Any) Does the Use of AI for Advice Have on an Adviser's Fees?

An adviser that uses AI to provide investment advice may or may not see an impact on how it determines its fees. Fees might be expected to come down due to the legwork being provided by AI; however, alternatively, costs to pay for and maintain AI technology could be significant, substantiating level or even increased fees.

### Takeaways

ChatGPT is new. It was released by OpenAI in November of 2022. Google's competitor AI technology, Bard, was released just days ago, on Feb. 6, 2023. This area will evolve, and these issues will continue to develop as AI technology develops. Perhaps next time, we'll ask the reigning AI program to discuss the evolution of these legal considerations. But until then, we think it would be wise for investment advisers to carefully review their use or potential use of AI in light of the above considerations.

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<sup>1</sup> Division of Examination, Observations from Examinations of Advisers that Provide Electronic Investment Advice, (Nov. 9, 2021), available at <https://www.sec.gov/files/exams-eia-risk-alert.pdf>.

<sup>2</sup> Available at <https://www.sec.gov/rules/proposed/2022/ia-6176.pdf>.

<sup>3</sup> Available at <https://www.sec.gov/rules/other/2022/ia-6050.pdf>.

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