

## Cabinet News and Views

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### CFTC Sanctions Registered CTA for Operating Unregistered SEF



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On September 26, the Commodity Futures Trading Commission (“CFTC”) published an order settling charges against Asset Risk Management, LLC (“ARM”), a registered commodity trading advisor (“CTA”) headquartered in Houston, Texas, for failing to register as a swap execution facility (“SEF”). This order represents the CFTC’s first attempt to sanction an otherwise CFTC-registered entity under its recently expanded interpretation of what constitutes a SEF. This broad interpretation was articulated in September 2021 in a controversial CFTC staff advisory, [CFTC Staff Letter No. 21-19](#) (“Advisory”), which materially alters market understanding of what is a SEF.

Instead of providing greater certainty to the market, the Advisory has accomplished the opposite; additionally, the ARM enforcement action demonstrates an increased risk for CFTC-registered and unregistered swap market participants to be assessed against an overexpanding notion of a SEF and/or potentially face aiding and abetting charges for having a business relationship with these entities.

The order finds that, for several years, ARM operated an unregistered SEF that provided clients the ability to execute natural gas and crude oil swaps by accepting bids and offers made by multiple participants on a trading system or platform in various swap tenors and volumes. To communicate with clients and counterparties and execute the swaps, ARM used various means of interstate commerce, including phone, instant messaging, and email.

As a CTA, ARM provided advice relating to these energy swaps and assisted its customers with executing swaps under their existing ISDA agreements with various swap counterparties. It is true that ARM’s customers were able to execute swaps with other multiple participants; however, it is also clear that ARM was not operating a trading facility as it is commonly understood. Instead, the CFTC made an argument that ARM provided participants with the “ability” to execute swaps with other participants and “facilitated” the execution of swaps.

This enforcement action is a classic example of regulation by enforcement because the Advisory was not adopted by the CFTC in compliance with the requirements of the Administrative Procedure Act ("APA"). In fact, in 2018, then-CFTC Chairman J. Christopher Giancarlo had introduced a formal proposed [rule](#) where a virtually identical interpretation of the concept of SEF was introduced. However, that rulemaking was formally [withdrawn](#) by then-CFTC Chairman Heath Tarbert in 2020. Publication and enforcement under the Advisory serve as CFTC's back-door approach to amend the 2013 SEF [rule](#) without following the procedures under the APA.

All market participants should assess their swap execution processes in light of the Advisory and the CFTC's ARM order.

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