



## Overview of Final Rules on Recordkeeping and Reporting of Swaps

February 21, 2012

This memorandum discusses the final rules adopted by the Commodity Futures Trading Commission (the “CFTC” or the “Commission”) governing recordkeeping and reporting of swaps.<sup>1</sup> These regulations establish an extensive recordkeeping and reporting regime, which has significant implications for all swap counterparties, including end-users. Alongside record retention and retrievability requirements, the final rules create a dual framework for the periodic and real-time reporting of swap transaction data. This scheme implements section 727 of the Dodd-Frank Act, which requires all swaps, whether cleared or uncleared, to be reported to swap data repositories (“SDRs”) that will collect and maintain swap transaction data, making such information available to regulators and, to a lesser extent, the public.

### A. SWAP DATA RECORDKEEPING & REPORTING

#### 1. Swap Data Recordkeeping

New CFTC regulation 45.2 establishes recordkeeping requirements for swaps entered into on or after the rule’s compliance date.<sup>2</sup> For entities required to be registered with the CFTC, such as swap execution facilities (“SEFs”), designated contract markets (“DCMs”), derivatives clearing organizations (“DCOs”), swap dealers (“SDs”) and major swap participants (“MSPs”)<sup>3</sup> (collectively “Registered Entities”) the rule requires, among other things, that the registered entity “keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of such entity or person with respect to swaps.” Without limitation, these records include any document required to be retained pursuant to other Commission regulations. For non-SD/MSP counterparties, including end-users, the breadth of the rule is somewhat narrower, requiring only the retention of “full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which [the non-SD/MSP is] a counterparty.”

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<sup>1</sup> See Swap Data Recordkeeping and Reporting Requirements, 77 F.R. 2136 (Jan. 13, 2012); Real-Time Public Reporting of Swap Transaction Data, 77 F.R. 1182 (Jan. 9, 2012).

<sup>2</sup> See subsection 3 below for a more detailed description of the applicable compliance dates. Recordkeeping requirements for swaps executed prior to the applicable compliance date will be provided in part 46 of the Commission’s regulations. Although the Commission has issued a notice of proposed rulemaking for these swaps, a final rule has not been adopted. See 76 F.R. 22833 (Apr. 25, 2011).

<sup>3</sup> The CFTC and the SEC have not issued a final rule defining the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” and “major security-based swap participant.” They have, however, issued a joint proposed rule. See 75 F.R. 80174 (Dec. 21, 2010).

For all swap counterparties, regulation 45.2 requires all records to be retained throughout the life of the swap and for a period of five years thereafter. While Registered Entities and non-SD/MSP counterparties may maintain any record in an electronic format, Registered Entities can only retain records in paper form if the record was originally created and exclusively maintained in that medium. For non-SD/MSP counterparties, there is no corresponding restriction on paper records, so long as the information is retrievable and reportable within the required timeframe. During the life of a swap and for a period of two years thereafter, Registered Entities must have real time electronic access to the records that are required to be retained. Afterwards, Registered Entities must be able to retrieve these records within three business days for the remaining three years of the retention period. In contrast, the final rule only requires non-SD/MSP counterparties to retrieve records within five business days during the retention period. Importantly, all records covered by the new regulation must be open for inspection by the CFTC, the Department of Justice, the SEC, or any prudential regulator authorized by the Commission. Given the breadth of documents to be retained, along with the corresponding retention and retrievability requirements, it would be wise for swap counterparties to begin to prepare and adopt compliance policies to meet these impending regulatory obligations.

## *2. Swap Data Reporting*

Section 727 of the Dodd-Frank Act requires every swap, whether cleared or uncleared, to be reported to an SDR. New CFTC regulations 45.3 and 45.4 implement this statutory mandate for swaps executed on or after the rules' compliance date.<sup>4</sup> Together, these regulations provide for the electronic reporting of swap data at both the creation of a swap and throughout the life of a swap until its expiration or termination. Whereas regulation 45.3 governs the initial reporting of "swap creation data," regulation 45.4 establishes recurring reporting obligations for "swap continuation data." Under both rules, the data reported to an SDR is available to the CFTC and to other financial regulators; it is not, however, otherwise disclosed to the public.

### *a. Reporting of Swap Creation Data*

Regulation 45.3 establishes the reporting criteria for swap creation data, which includes both "primary economic terms data" ("PET Data") as well as "confirmation data" for each swap. PET Data encompasses "all of the primary economic terms of a swap," including "all of the terms . . . matched or affirmed by the counterparties in verifying the swap." At the very least, PET Data incorporates each of the minimum primary economic terms designated by the Commission for swaps in a particular swap asset class. The swap asset classes include: credit swaps, equity swaps, foreign exchange swaps (other than cross-currency swaps), interest rate swaps (including cross-currency swaps), and other commodity swaps.

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<sup>4</sup> Reporting requirements for swaps executed prior to the applicable compliance date but in existence on or after July 21, 2010, will be provided in part 46 of the Commission's regulations. Although the Commission has issued a notice of proposed rulemaking for these swaps, a final rule has not been adopted. See 76 F.R. 22833 (Apr. 25, 2011). The Commission has, however, issued interim final rules. See 75 F.R. 63080 (Oct. 14, 2010); 75 F.R. 78892 (Dec. 17, 2010).

In addition to PET Data, regulation 45.3 also requires the reporting of “confirmation data.” This includes “all of the terms of a swap matched and agreed upon by the parties in confirming the swap.” “Confirming” a swap is “the consummation (electronically or otherwise) of legally binding documentation . . . that memorializes the agreement of the parties to all terms of a swap.” Critically, a “confirmation” must be in writing and must “legally supersede” any previous agreement between the counterparties.

For swaps executed on an SEF or DCM, a single report, incorporating both PET Data and confirmation data, will satisfy the swap creation data reporting requirement, so long as the report is made as soon as technologically practicable after the execution of the swap. For swaps not executed on an SEF or DCM (collectively, “off-facility swaps”), the Commission has expressed concern over the potential for delay between the “verification of primary economic terms” and the eventual “confirmation” of the swap. For example, while PET Data for off-facility swaps must be reported as soon as technologically practicable after execution for uncleared swaps and, in most cases, as soon as technologically practicable after clearing for cleared swaps, confirmation data for uncleared swaps is due, at the earliest, as soon as technologically practicable after confirmation. Under these circumstances, if there is a delay between the “verification of primary economic terms” and the eventual “confirmation” of the swap, the Commission will require two separate reports—one for PET Data, after the swap is executed, and one for confirmation data, after the swap is confirmed. According to the Commission, separating these reports will help regulators to see a “current picture” of the entire swap market even though there may be a substantial delay between the execution and the confirmation of certain off-facility transactions.

#### *b. Reporting of Swap Continuation Data*

In addition to swap creation data, regulation 45.4 calls for the reporting of “swap continuation data,” which the Commission defines as “all of the data elements that must be reported during the existence of a swap to ensure that all data concerning the swap . . . remains current and accurate.” Specifically, “swap continuation data” encompasses “all changes to the primary economic terms of the swap occurring during the existence of the swap.” Under this rule, a reporting party must submit data concerning these changes on either a “life cycle” or “state data” basis, in conjunction with periodic “valuation data” reports.

The Commission defines “life cycle event data” as “any event that would result in either a change to a primary economic term . . . or to any [PET Data] previously reported to [an SDR.]” Among others, these events include: a counterparty change; a partial or full termination of the swap; a change to the end date for the swap; a change in the cash flows or rates originally reported; or a corporate action affecting a security or securities on which the swap is based, such as a merger, dividend, stock split, or bankruptcy. By contrast, reports on the “state data” basis encompass “all of the data elements necessary to provide a snapshot view, on a daily basis, of all the primary economic terms of a swap.” This daily snapshot incorporates any change to a primary economic term as well as any change to previously-reported PET Data. At a minimum, state data reports must include data for each of the minimum primary economic terms designated by the Commission for the swap’s asset class. If the designated SDR accepts data on both the lifecycle and the state data basis, the reporting party may choose between the

two reporting methods. If, however, the SDR accepts only one method of reporting, the reporting party must submit its reports using that basis.

In addition to life cycle/state data reports, regulation 45.4 also requires the reporting of “valuation data” for each swap. “Valuation data” is all of the data necessary to fully describe the daily mark of the transaction. Depending on a number of factors, including whether an SD/MSP or a non-SD/MSP is the reporting party, valuation data must be reported on either a daily or quarterly basis.

### *c. Determining Reporting Obligations*

Under regulation 45.8, the reporting party and the reporting deadlines will depend on three factors:

- first, whether an SD/MSP or non-SD/MSP is the reporting party;
- second, whether the swap was executed on an SEF or DCM; and
- third, whether the swap was cleared through a DCO.

To determine whether an SD/MSP or non-SD/MSP is the reporting party, the Commission has issued the following guidelines:

- if only one party is an SD, the SD is the reporting party;
- if neither party is an SD and one party is an MSP, the MSP is the reporting party;
- if both parties are non-SDs/MSPs, but only one party is a financial entity,<sup>5</sup> the financial entity is the reporting party;
- if both parties are non-SDs/MSPs, but only one party is a U.S. person, the U.S. person is the reporting party;
- if neither party is a U.S. person, but the swap is executed on an SEF, DCM or otherwise executed in the U.S. or cleared through a DCO, the parties must agree which party will be the reporting party; and
- if both parties fall within the same entity classification—e.g., both parties are non-SD/MSPs and neither party is a financial entity—the parties must agree which party will be the reporting party.

The CFTC has issued a reporting obligations flowchart, which is attached as Annex 1, to assist in determining the reporting obligations and reporting deadlines for various swap transactions.

To ensure the completeness and accuracy of data available to financial regulators, all reports for a given swap must be made to a single SDR, which is the SDR that received the initial report of

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<sup>5</sup> In general, a “financial entity” includes: an SD/MSP, a security-based SD/MSP, a commodity pool, a private fund, an employee benefit plan, and any “person predominately engaged in activities that are in the business of banking.” 7 U.S.C. § 2(h)(7)(C).

swap creation data.<sup>6</sup> In the event that no SDR accepts swap data for a particular asset class, reports for that swap asset class must be made directly to the Commission.

### 3. Compliance Dates

For the swap recordkeeping rule and the swap data reporting rules, the Commission has provided for limited compliance phasing by both asset class and counterparty type.

- For Registered Entities, including SDs and MSPs, the compliance date for credit swaps and interest rate swaps will be the later of: July 16, 2012 or 60 calendar days after the publication in the *Federal Register* of the Commission's final rule defining the term "swap" or the Commission's final rule defining the terms "swap dealer" or "major swap participant" ("Compliance Date 1").
- For Registered Entities, the compliance date for equity swaps, foreign exchange swaps, and other commodity swaps will be 90 calendar days after Compliance Date 1 ("Compliance Date 2").
- For Non-SD/MSP counterparties, including end-users, full compliance will begin 90 calendar days after Compliance Date 2.

## B. REAL-TIME SWAP DATA REPORTING

The real-time reporting rule set forth in CFTC regulation 43 is designed to make swap transaction and pricing data available to the public in real-time. The reporting party to a "publicly reportable swap transaction" is responsible for reporting certain data to the appropriate SDR. The CFTC broadly defines "publicly reportable swap transaction" to include any swap that is an arm's-length transaction that results in a change in the market risk position between the two parties. It does not include internal swaps between wholly-owned subsidiaries of the same parent entity and portfolio compression exercises.<sup>7</sup> A "publicly reportable swap transaction" also covers any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of a swap. As a result, the real-time reporting rule creates ongoing reporting obligations.

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<sup>6</sup> To facilitate the tracking of swap transaction data, the new regulations also provide that every swap will be identified by a unique swap identifier; counterparties will be identified by a single legal entity identifier; and each "sufficiently standardized" swap will be identified by a unique product identifier. See 17 C.F.R. §§ 45.5–45.7. Special reporting rules will also apply for post-allocation swaps, multi-asset swaps, mixed-swaps, and international swaps.

<sup>7</sup> In the CFTC's proposed regulation 23 release relating to "Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants," portfolio compression is defined as "a mechanism whereby substantially similar transactions among two or more counterparties are terminated and replaced with a smaller number of transactions of decreased notional value in an effort to reduce the risk, cost, and inefficiency of maintaining unnecessary transactions on the counterparties' books." See 75 F.R. 81532 (Dec. 28, 2010). According to the CFTC, the purpose of such transactions is to mitigate risk between counterparties and any new swaps that were executed as a result of portfolio compression exercises would be a result of the compression itself and not an arm's-length transaction between the parties.

### ***1. Reporting of Swap Data***

Regulation 43 requires the reporting party to report “swap transaction and pricing data” to an SDR as soon as technologically practicable after the swap has been “executed.” Execution occurs simultaneously with, or immediately following, the affirmation of the swap. Affirmation is the process by which parties to a swap verify that they agree on, at a minimum, the primary economic terms of a swap. A swap has been “executed” when there is an agreement by the parties (whether orally, in writing, electronically, or otherwise) to the terms of a swap that legally binds the parties to such swap terms under applicable law. The swap transaction and pricing data to be reported includes, among others, the contract type, a description of the underlying assets and tenor, pricing data, an indication of collateralization, payment frequency and the execution venue.

### ***2. Determining Reporting Obligations***

The parties to a publicly reportable swap transaction satisfy the real-time reporting requirement if the swap is executed on or pursuant to the rules of an SEF or DCM. In that case, the SEF or DCM must transmit the swap transaction and pricing data to an SDR as soon as technologically practicable.

The parties to an off-facility swap can designate the reporting party before the execution of the publicly reportable swap transaction. In the absence of such an election, the CFTC has issued the following guidelines:

- if only one party is an SD or MSP, then the SD or MSP is the reporting party;
- if one party is an SD and the other party is an MSP, then the SD is the reporting party;
- in all other situations, the parties must designate which party will be the reporting party.

### ***3. Publicly Disseminated Data***

As adopted, regulation 43.4(d)(2) requires that reporting parties, SEFs, and DCMs provide the SDR with swap transaction and pricing data that includes the actual description of the underlying assets and tenor. To protect the anonymity of market participants while enabling price discovery for market participants and the public, regulation 43.4(g) and (h) require the SDR to apply the appropriate time delay, rounding convention, and notional cap prior to the public dissemination of the swap transaction and pricing data. The SDR must publicly disseminate the swap transaction and pricing data pursuant to Appendix A to regulation 43<sup>8</sup> as soon as technologically practicable after the SDR receives such data, unless the publicly reportable swap transaction is subject to a time delay enumerated under regulation 43. Regulation 43.5 and Appendix C to regulation 43 describe the time delays for the public

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<sup>8</sup> Appendix A to regulation 43 includes: (1) data fields to be publicly disseminated; (2) a description of the type of information to be captured in the data fields; (3) an example of how the data fields may be reported; and (4) the application of the data fields.

dissemination of swap transaction and pricing data based on the type of execution, underlying asset, and market participant, among other things.<sup>9</sup>

#### 4. Compliance Dates

The CFTC adopted a three-phase schedule for compliance with regulation 43 that depends on both asset class and counterparty type, and mirrors the compliance phase in for the swap recordkeeping rule and the swap data reporting rule discussed above. To assist Registered Entities as well as non-SD/MSP parties in determining initial compliance dates and time delays for public dissemination for various publicly reportable swap transactions, the CFTC has issued a chart, which is attached as Annex 2.

### C. CONCLUSION

The swap recordkeeping and reporting rules impose new regulatory burdens on all swap users. Going forward, swap counterparties will need to consider the impact of these regulations on their legal and compliance policies as well as their swap documentation and execution process. Among other considerations, swap counterparties may wish to contemplate:

- an update to their recordkeeping policies and record-retention procedures;
- a review of their technological capabilities with respect to record-retrieval and electronic data reporting;
- the inclusion of a reporting party election in the ISDA documentation; and
- the addition of entity representations—e.g., SD/MSP, non-SD/MSP—in the ISDA documentation.

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For more information about any of the foregoing, please contact a member of the Firm's Derivatives Practice Group.

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<sup>9</sup> All block trades and large notional off-facility swaps at or above the appropriate minimum block sizes will be subject to the time delays for public dissemination described in regulation 43.5 and Appendix C. The CFTC did not establish "appropriate minimum block sizes" in the final real-time reporting rule, and noted that further study and analysis of block trade data is necessary. As a result, regulation 43.5 adopts interim time delays for all swaps until such time that appropriate minimum block sizes are finalized in a forthcoming CFTC release.

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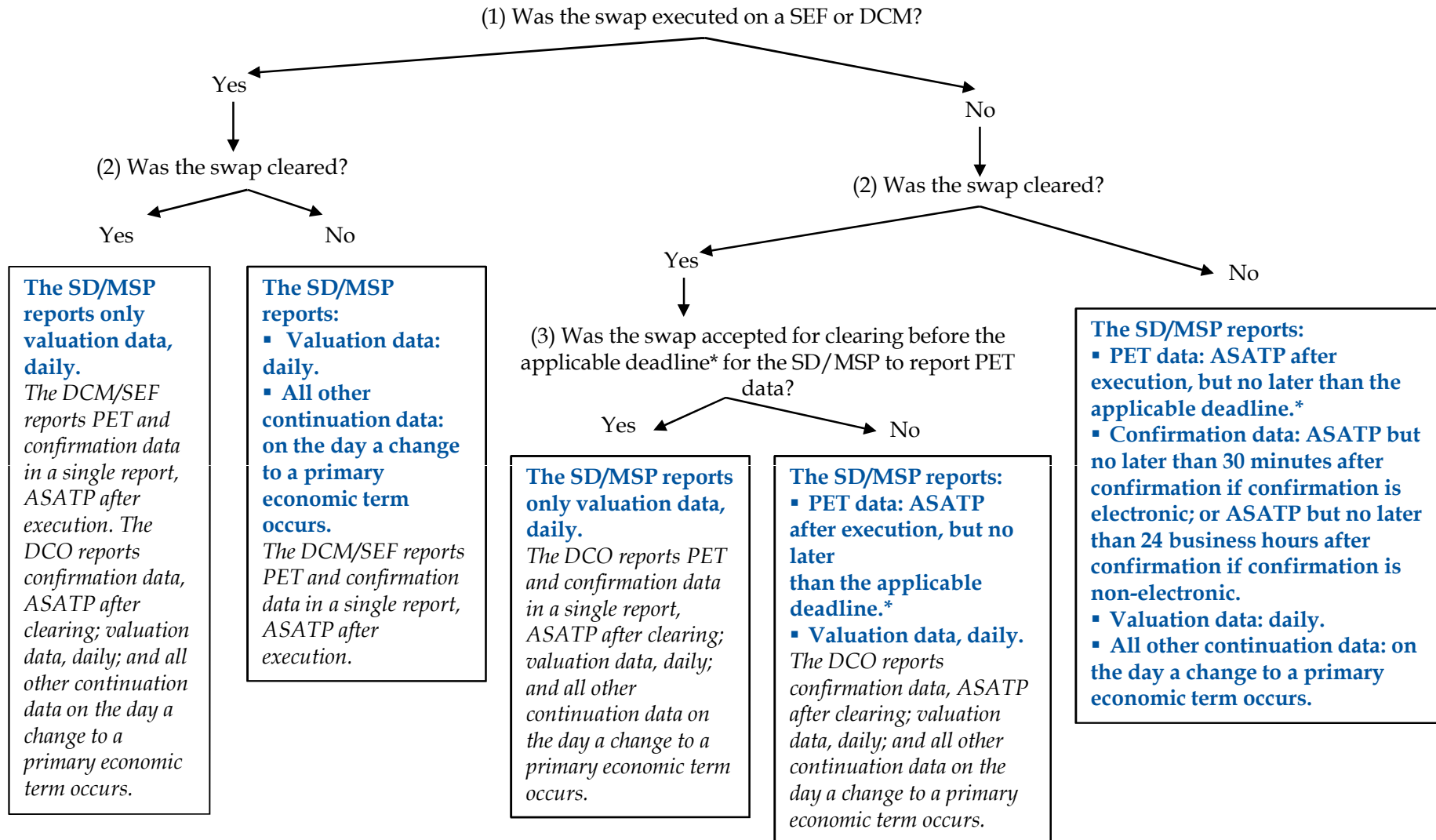
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## Reporting Obligations Flowchart When An SD or MSP Is The Reporting Counterparty

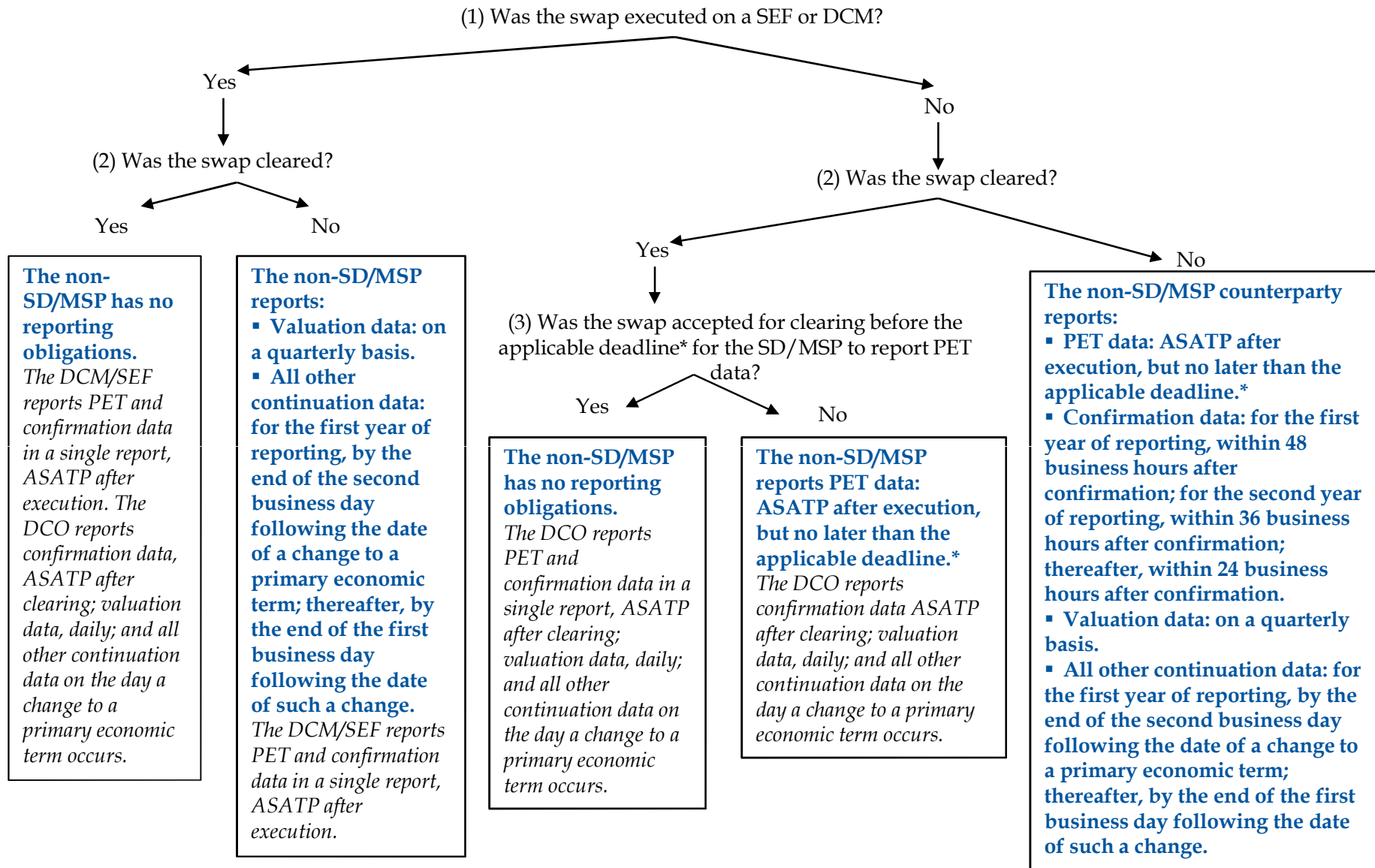


\* Swap subject to mandatory clearing: 30 minutes after execution (year 1), 15 minutes after execution (thereafter).

Swap not subject to mandatory clearing (credit, equity, FX, rates): 1 hour after execution (year 1), 30 minutes after execution (thereafter). But if the non-RCP is not a financial entity, and verification is not electronic: 24 business hours after execution (year 1), 12 business hours after execution (year 2), 30 minutes after execution (thereafter).

Swap not subject to mandatory clearing (other commodities): 4 hours after execution (year 1), 2 hours after execution (thereafter). But if the non-RCP is not a financial entity, and verification is not electronic: 24 business hours after execution (year 1), 12 business hours after execution (year 2), 30 minutes after execution (thereafter).

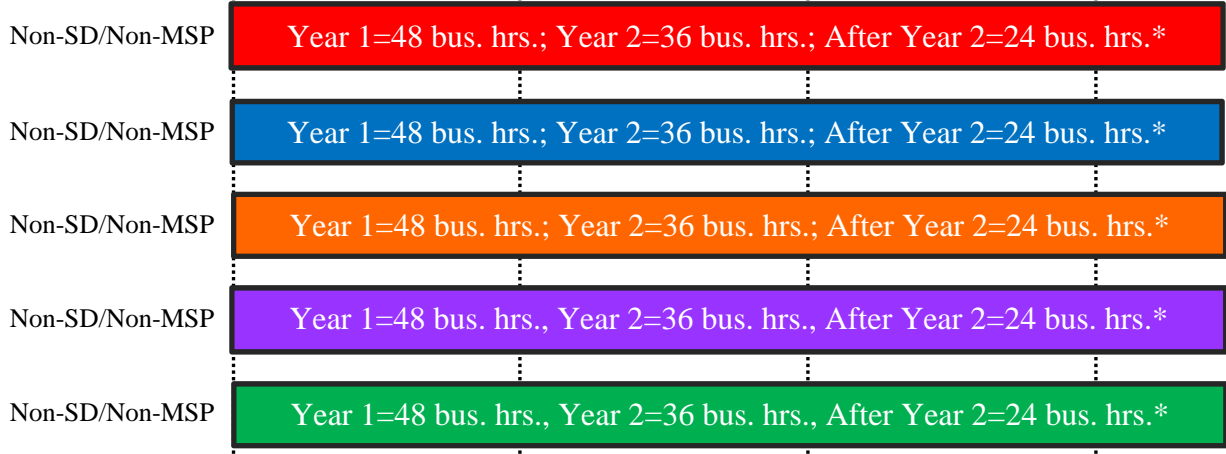
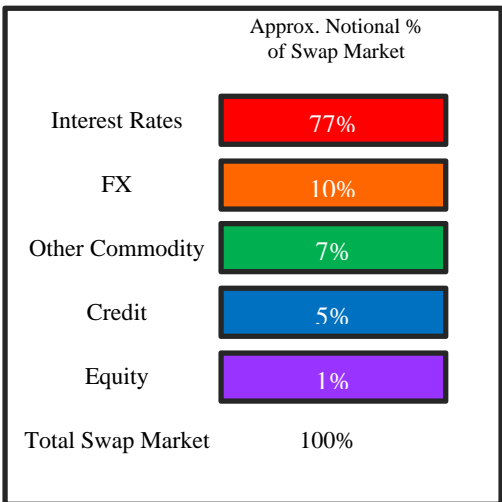
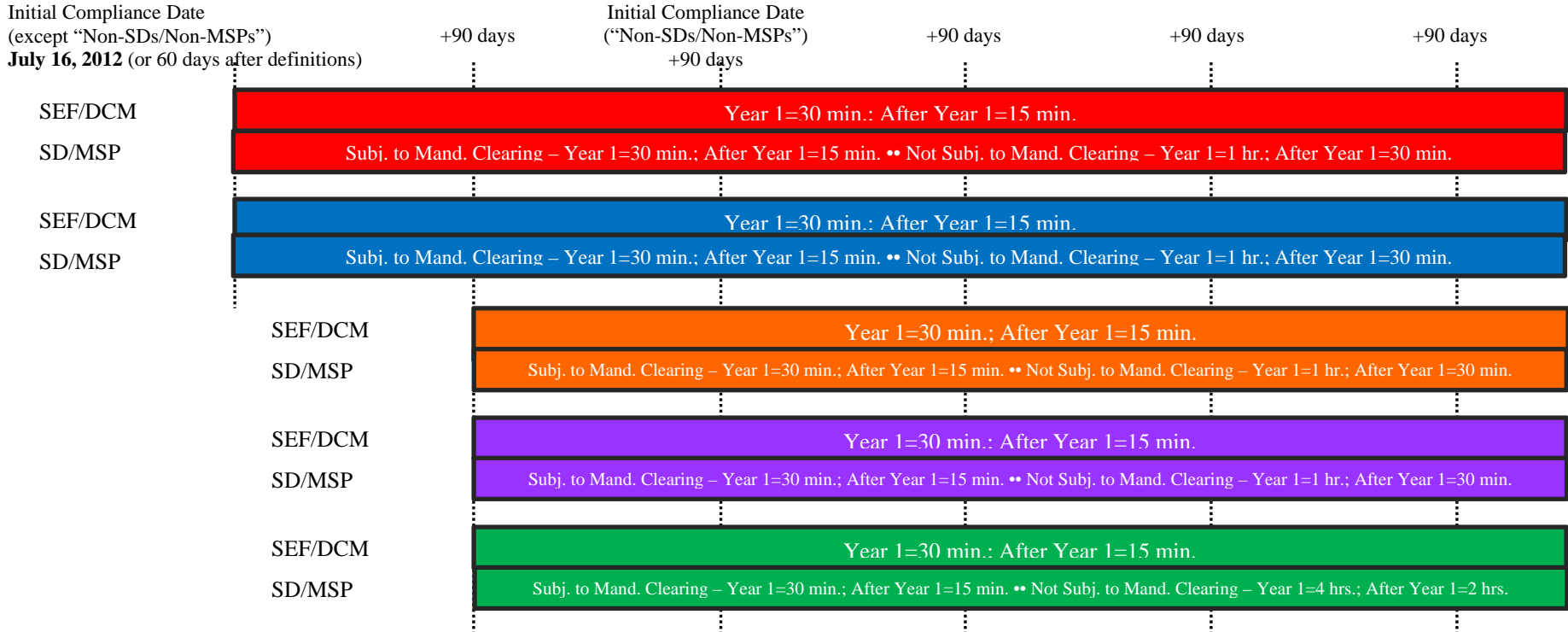
## Reporting Obligations Flowchart When A Non-SD/MSP Counterparty Is The Reporting Counterparty



\* Swap subject to mandatory clearing: 4 hours after execution (year 1), 2 hours after execution (year 2), 1 hour after execution (thereafter)

Swap not subject to mandatory clearing: 48 business hours after execution (year 1), 36 business hours after execution (year 2), 24 business hours after execution (thereafter)

# Phase In – Real-Time Public Reporting Compliance Dates and Time Delays for Public Dissemination (Reference § 43.5 and Appendix C to Part 43 for more Information Regarding Time Delays)



\*With respect to Non-SD/Non-MSP off-facility swaps that are subject to the clearing mandate (excluding those excepted from the clearing mandate pursuant to 2(h)(7) or that are required to be cleared but are not cleared), the following time delays for public dissemination shall apply: Year 1=4 hrs; Year 2=2 hrs.; After Year 2=1 hr.