

Briefing on Magnuson-Stevens Act Financial Disclosure and Recusal Requirements

Presented by

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What does the Magnuson-Stevens Act require?

Section 302(j) of the Magnuson-Stevens Act requires an *affected individual* to:

- ▶ Disclose relevant financial interests, and
- ▶ Recuse himself or herself from voting on a Council decision that would have a significant and predictable effect on the individual's financial interests.

Who are “affected individuals”?

- ▶ For the Pacific Council, “affected individuals” are:

Those Council members nominated by the Governor of a State or appointed by the Secretary of Commerce to serve as a voting member on the Council and any Tribal representative “who is not subject to disclosure and recusal requirements under the laws of an Indian tribal government”

- ▶ Does not include the NMFS representative or the State officials for California, Idaho, Washington, and Oregon.

Why must I disclose my financial interests?

- ▶ Financial disclosure provides important information on your background and financial interests in the fisheries managed by your Council
- ▶ Financial disclosure satisfies Magnuson-Stevens Act requirements and allows you to participate in and vote on fishery matters that would otherwise present a conflict of interest.

What financial interests must be disclosed?

- ▶ In general, you must disclose:
 - ownership in, or employment with, any company engaged in *harvesting, processing, lobbying, advocacy, or marketing activity* that is being, or will be, undertaken in any fishery under the jurisdiction of the Council
 - employment with, or service as an officer, director, or trustee of, an association or organization whose members participate in the fisheries
 - entities that participate in the fisheries and that own, or are owned by, your employer or your company
- ▶ The regulations and financial disclosure form provide specific detail on what must be disclosed

Whose financial interests must be disclosed?

You must disclose relevant financial interests held by:

- you,
- your spouse, minor child, or partner; and
- any organization in which you are serving as an officer, director, trustee, partner, or employee.

When must financial interests be disclosed?

- ▶ Within 45 days of taking office;
- ▶ Within 30 days of any change to the affected individual's financial interests; and
- ▶ Annually by February 1st regardless of whether an affected individual's financial interests have changed

When is an affected individual recused from voting?

When a *Council decision* would have a *significant and predictable effect* on a financial interest required to be disclosed.

MSA section 302(j)(7)(A)

“Significant and Predictable Effect” is defined as:

A close causal link between the Council decision and an *expected and substantially disproportionate benefit* to the individual’s financial interest relative to the financial interests of other participants in the same gear type or sector of the fishery.

MSA section 302(j)(7)(A).

Multi-step test for recusal determinations

- ▶ **Step One:** Is there a Council decision?
- ▶ **Step Two:** Is there a Council member with a financial interest in the fishery affected by the Council's action?
- ▶ **Step Three:** Is there a *close causal link* between the council decision and the Council member's financial interests?
- ▶ **Step Four:** Is there an *expected and substantially disproportionate benefit* to the Council member's financial interests?

If the answer to any of these questions is “no,” a voting recusal is not required.

“Council decision” is defined as:

- ▶ Approval of an FMP or FMP amendment (including any proposed regulations);
- ▶ Request for changes to regulations implementing an FMP;
- ▶ Finding that a fishery emergency exists, including recommendations for responding to the emergency; and
- ▶ Comments to the Secretary on Secretarial FMPs or FMP amendments.

This regulatory definition was not changed by the final rule.

“Close causal link”

- ▶ “Close causal link” is defined to mean “that a Council decision would reasonably be expected to directly impact or affect the financial interests of an affected individual.”

“An expected and substantially disproportionate benefit”

- ▶ Is defined as “a positive or negative impact with regard to a Council decision that is likely to affect a fishery or sector of a fishery in which the affected individual has a *significant financial interest*.”
- ▶ Exists if a Council member has a significant financial interest in the fishery or sector of the fishery that is likely to be positively or negatively affected by the Council decision.

“Significant financial interest” is defined as

- ▶ A greater than 10% interest in the total harvest of the fishery or sector of the fishery affected by the Council decision;
- ▶ A greater than 10% interest in the marketing or processing of the total harvest of the fishery or sector of the fishery affected by the Council decision; or
- ▶ Full or partial ownership of more than 10% of the vessels using the same gear type within the fishery or sector of the fishery affected by the Council decision.

These thresholds were not substantively changed by the final rule.

Calculating significant financial interest

- ▶ The final rule added a number of attribution principles.
- ▶ Many of them codified existing practice.
- ▶ Several represent a change from past practice.
- ▶ NOAA GC will examine all financial interests (for example, if a Council member is an owner and an employee of a fishing company, both interests will be examined)

Brief overview of attribution principles

- ▶ **Direct Ownership (change from past practice and from proposed rule)**
 - “proportional attribution”
- ▶ **Direct Employment (no change from past practice)**
 - “full attribution” of fishing activity if the Council member is employed by a company with financial interests in the affected fishery
- ▶ **Indirect Ownership (change from past practice)**
 - “proportional attribution”
- ▶ **Parent Ownership (no change from past practice)**
 - No attribution of fishing activity if the parent owns less than 50% of the Council member’s company or employer
 - “full attribution” of fishing activity if the parent owns 50% or more of the Council member’s company or employer

Brief overview of attribution principles continued

- ▶ **Employment or service with associations or organizations (no change from past practice)**
 - No attribution of vessels owned by, or activity conducted by, the members if the organization or association, as an entity separate from its members, does not own any vessels and is not directly engaged in harvesting, processing or marketing.
 - If organization or association receives from NMFS an allocation of harvesting or processing privileges, owns vessels, or is directly engaged in harvesting, processing or marketing, that activity is attributed to the affected individual.
- ▶ **Spouse, partner or minor child (some changes from past practice)**
 - For ownership, proportional attribution
 - For employment, attribution dependent on form of compensation

Changes to financial disclosure in the final rule

The final rule focused primarily on recusal, but several regulations are important for financial disclosure:

- The designated official will presume the information provided in the financial disclosure form is true and correct and is not responsible for determining the veracity of the information provided
- If specific ownership percentages are not provided, 100% of the fishing activity of, and vessels owned by, your financial interests will be attributed to you.

Who initiates recusal determinations?

- ▶ An affected individual can request a determination from NOAA General Counsel, or
- ▶ NOAA General Counsel can initiate a determination.

You are encouraged to contact your NOAA General Counsel as soon as possible for a determination if you think a Council decision could have a significant and predictable effect on your financial interests.

What happens if I am recused from voting?

- ▶ You may participate in Council and committee deliberations relating to the decision *after*:
 - Notifying the Council of the voting recusal, and
 - Identifying the financial interest that would be affected.
- ▶ You may state for the record how you would have voted on the Council decision

Can NOAA GC's recusal determinations be reviewed?

Yes. Any Council member may file a written request to the NOAA General Counsel for review of the determination.

A request for review must be received within 10 days of the determination.

The NOAA General Counsel has 30 days from the date of receipt of the request for review to complete the review and issue a decision.

Reversal of a determination may not be treated as cause for the invalidation or reconsideration by the Secretary of a Council's decision.

Regional recusal determination procedure handbooks

- ▶ The final rule requires regions to develop a recusal determination procedure handbook.
- ▶ The Handbook will explain the typical process and procedure followed by the region in preparing and issuing recusal determinations.
- ▶ With publication of the final rule, NMFS is in the process of amending Procedural Directive 01-116-01 to provide guidance on how each region will work with its council(s) in developing the region's Handbook.

In addition to the MSA, 50 C.F.R. § 600.225(b)(9) states:

- ▶ “No Council member may participate personally and substantially as a member ... in a particular matter primarily of individual concern, such as a contract, in which he or she has a financial interest, even if the interest has been disclosed in accordance with §600.235.”
- ▶ This provision implements the prohibitions contained in the criminal conflict of interest statute found at 18 U.S.C. 208.

Are there consequences for not complying with the financial disclosure and recusal requirements?

You may be subject to:

- ▶ Criminal and civil penalties at 18 U.S.C. § 216 if your conduct constitutes an offense of 18 U.S.C. § 208.
- ▶ Magnuson-Stevens Act penalties if your conduct violates § 307(1)(O) by:
 - Knowingly and willfully failing to disclose, or falsely disclosing, any financial interest required to be disclosed under the MSA, or
 - Knowingly voting on a Council decision that would have a significant and predictable effect on the individual's financial interests.
- ▶ Removal from the Council under 50 C.F.R. § 600.235(i).

Where can I get more information?

- ▶ Magnuson-Stevens Act provisions governing financial disclosure and recusal can be found at 16 U.S.C. § 1852(j)
- ▶ Regulations governing financial disclosure and recusal can be found at 50 C.F.R. §§ 600.225 and 600.235
- ▶ Proposed rule can be found at: 83 Fed. Reg. 57,705 (November 16, 2018)
- ▶ Final rule can be found at: 85 Fed. Reg. 56,177 (September 11, 2020)
- ▶ Completed PFMC member disclosure forms can be found at: <https://www.pcouncil.org/navigating-the-council/membership-groups-and-staff/council-members/>