

SAFE HARBOR FROM CONTROL RULE: LENDER OPTIONS

Public comment on the proposed initial allocation rule expressed concern that the control rules could inhibit financial institutions that might have an interest in quota shares (QS)/quota pounds (QP) as loan collateral. In response, National Marine Fisheries Service modified the final initial allocation rule to address this issue. The following is an excerpt from the final initial allocation rule published in the *Federal Register* on October 1, 2010. Underlining has been added to highlight the additions made in the final rule to address the concern about the effect of the control rule on financial institutions.

<p>660.140(d)(4) <i>Accumulation limits</i>—(i) <i>QS and IBQ control limits.</i> QS and IBQ control limits are accumulation limits and are the amount of QS and IBQ that a person, individually or collectively, may own or control. QS and IBQ control limits are expressed as a percentage of the Shorebased IFQ Program’s allocation.</p> <p>(A) <i>Control limits for individual species.</i> No person may own or control, or have a controlling influence over, by any means whatsoever an amount of QS or IBQ for any individual species that exceeds the Shorebased IFQ Program accumulation limits.</p> <p>(B) <i>Control limit for aggregate . . .</i></p> <p>(C) The Shorebased IFQ Program accumulation limits are as follows: [see Table of QS Control Limits]</p> <p>(ii) <i>Ownership—individual and collective rule.</i> The QS or IBQ that counts toward a person’s accumulation limit will include:</p> <p>(A) The QS or IBQ owned by that person, and</p> <p>(B) That portion of the QS or IBQ owned by an entity in which that person has an economic or financial interest, where the person’s share of interest in that entity will determine the portion of that entity’s QS or IBQ that counts toward the person’s limit.</p>	<p>(iii) <i>Control.</i> Control means, but is not limited to, the following:</p> <p>(A) The person has the right to direct, or does direct, in whole or in part, the business of the entity to which the QS or IBQ are registered;</p> <p>(B) The person has the right to limit the actions of or replace, or does limit the actions of or replace, the chief executive officer, a majority of the board of directors, any general partner, or any person serving in a management capacity of the entity to which the QS or IBQ are registered;</p> <p>(C) The person has the right to direct, or does direct, and/or the right to prevent or delay, or does prevent or delay, the transfer of QS or IBQ, or the resulting QP or IBQ pounds;</p> <p>(D) The person, through loan covenants or any other means, has the right to restrict, or does restrict, and/or has a controlling influence over the day to day business activities or management policies of the entity to which the QS or IBQ are registered;</p>	<p>(E) The person, <u>excluding banks and other financial institutions that rely on QS or IBQ as collateral for loans</u>, through loan covenants or any other means, has the right to restrict, or does restrict, any activity related to QS or IBQ or QP or IBQ pounds, including, but not limited to, use of QS or IBQ, or the resulting QP or IBQ pounds, or disposition of fish harvested under the resulting QP or IBQ pounds;</p> <p>(F) The person, <u>excluding banks and other financial institutions that rely on QS or IBQ as collateral for loans</u>, has the right to control, or does control, the management of, or to be a controlling factor in, the entity to which the QS or IBQ, or the resulting QP or IBQ pounds, are registered;</p> <p>(G) The person, <u>excluding banks and other financial institutions that rely on QS or IBQ as collateral for loans</u>, has the right to cause or prevent, or does cause or prevent, the sale, lease or other disposition of QS or IBQ, or the resulting QP or IBQ pounds; and</p> <p>(H) The person has the ability through any means whatsoever to control or have a controlling influence over the entity to which QS or IBQ is registered.</p>
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In response to the modifications in the final rule, concern has been expressed that those lending money and taking QS as collateral could be allowed to exert considerable influence over how that QS is used. For example, under paragraph (iii)(E) banks and other financial institutions could impose restrictions on the disposition of fish harvested under the resulting QP or individual bycatch quota pounds. While it seems unlikely that any purely financial institution might have an interest in imposing performance constraining conditions on the use of QP from QS it holds as collateral (e.g. requiring delivery to a particular port or processor or at a particular price), there is a question about what types of entities might qualify as a “bank or other financial institution?” For example, it is traditional in the fishery for processors to lend harvesters money for capital

acquisitions. Under what circumstances would such a lender qualify as a “bank or other financial institution.” As a step in developing alternatives pertaining to lenders, the Council staff has asked National Oceanic and Atmospheric Administration General Counsel for guidance on the criteria for meeting this exception.

The Council has provided no specific guidance on developing options on this issue. The following options have been developed by staff to facilitate discussion.

No Action Alternative. Control rule provisions as listed above.

Straw Dog Alternative 1: Modify the above alternatives to indicate that the only activity a bank or financial institution may influence with respect to QS it holds as collateral, and in excess of control limits, is the transfer of that QS. All associated QP will be distributed to the borrower unless the bank or financial institution provides evidence that the borrower is in default on the loan, in which case the related QP will be distributed to the adaptive management program until such time as any the QS held by the bank or financial institution is sold, or the QS holdings of the bank or financial institution are below the QS control limits.

After reviewing the guidance for defining “bank or other financial institutions,” it would be helpful for the Council to provide additional guidance on this issue, including the further development of options, if the Council decides to proceed.

PFMC
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