

(1) Code of West Virginia, Chapter 22, Article 17: Underground Storage Tank Act

Section 22–17–5 Powers and duties of director; integration with other acts
Section 22–17–6 Promulgation of rules and standards by director, § 22–17–6.(b)(13)

Section 22–17–12 Confidentiality, § 22–17–12.(b)

Section 22–17–13 Inspections, monitoring, and testing

Section 22–17–15 Administrative orders; injunctive relief; requests for reconsideration

Section 22–17–16 Civil penalties

Section 22–17–17 Public participation

Section 22–17–18 Appeal to environmental quality board

Section 22–17–23 Duplicative enforcement prohibited

(2) Code of West Virginia, Chapter 22, Article 1: Department of Environmental Protection

Section 22–1–2 Definitions

(B) The regulatory provisions include:

(1) West Virginia Code of State

Regulations, Title 33: Waste Management Rule, Series 30: Underground Storage Tanks

Section 33–30–5 Delivery Prohibition

(iii) *Provisions not incorporated by reference.* The following statutory and regulatory provisions are “broader in scope” than the federal program, are not part of the approved program, and are not incorporated by reference. These provisions are not federally enforceable.

(A) The statutory provisions include:

(1) Code of West Virginia, Chapter 22, Article 17: Underground Storage Tank Act

Section 22–17–6 Promulgation of rules and standards by director, § 22–17–6.(b)(12) (except as to installation)

Section 22–17–7 Underground storage tank advisory committee; purpose

Section 22–17–19 Disclosures required in deeds and leases

Section 22–17–20 Appropriation of funds; underground storage tank administrative fund

Section 22–17–21 Leaking underground storage tank response fund

(2) [Reserved]

(B) The regulatory provisions include:

(1) West Virginia Code of State

Regulations, Title 33: Waste Management Rule, Series 30: Underground Storage Tanks

Section 33–30–3 Certification Requirements for Individuals who Install, Repair, Retrofit, Upgrade, Perform Change-in-Service, Close or Tightness Test Underground Storage Tank Systems (except as to Individuals who Install)

Section 33–30–6 Operator Training Requirements

(2) West Virginia Code of State Regulations, Title 33: Office of Waste Management Rule, Series 31: Underground Storage Tank Fee Assessments

(2) *Statement of Legal Authority.* “Attorney General’s Statement”, signed by the Acting General Counsel, Chief of the Office of Legal Services, West Virginia Department of Environmental Protection, on June 8, 2017, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(3) *Demonstration of Procedures for Adequate Enforcement.* The “Demonstration of Procedures for Adequate Enforcement” submitted as part of the program revision application on June 24, 2018, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(4) *Program Description.* The program description and any other material submitted as part of the program revision application on June 24, 2018, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 3 and the West Virginia Department of Environmental Protection, signed by the EPA Regional Administrator on July 8, 2018, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

■ 4. Appendix A to part 282 is amended by revising the entry for West Virginia to read as follows:

Appendix A to Part 282—State Requirements Incorporated by Reference in Part 282 of the Code of Federal Regulations

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West Virginia

(a) The statutory provisions include:
(1) Code of West Virginia, Chapter 22, Article 17: Underground Storage Tank Act

Section 22–17–1 Short title

Section 22–17–2 Declaration of policy and purpose

Section 22–17–3 Definitions

Section 22–17–4 Designation of division of environmental protection as the state underground storage tank program lead agency

Section 22–17–6 Promulgation of rules and standards by director, except § 22–17–6.(b)(12) (except as to installation) and (b)(13)

Section 22–17–8 Notification requirements

Section 22–17–9 Registration requirements; undertaking activities without registration

Section 22–17–10 Financial responsibility

Section 22–17–11 Performance standards for new underground storage tanks

Section 22–17–12 Confidentiality, except § 22–17–12.(b)

Section 22–17–14 Corrective action for underground petroleum storage tanks

Section 22–17–22 Underground storage tank insurance fund

(b) The regulatory provisions include:

(1) West Virginia Code of State Regulations, Title 33: Waste Management Rule, Series 30: Underground Storage Tanks

Section 33–30–1 General

Section 33–30–2 Adoption of Federal Regulations

Section 33–30–3 Certification Requirements for Individuals Who Install, Repair, Retrofit, Upgrade, Perform Change-in-Service, Close or Tightness Test Underground Storage Tank Systems or Install, Repair, Upgrade or Test Corrosion Protection on Underground Storage Tank Systems (as to Individuals Who Install)

Section 33–30–4 Notification Requirements Notification for Underground Storage Tanks, revised 2/2018

[FR Doc. 2020–17345 Filed 9–10–20; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 200–903–0233]

RIN 0648–BH73

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Regional Fishery Management Council Membership; Financial Disclosure and Recusal

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS is taking final action to amend the regulations that address disclosure of financial interests by, and voting recusal of, council members appointed by the Secretary of Commerce (Secretary) to the regional fishery management councils established under the Magnuson-Stevens Fishery Conservation and Management Act. The regulatory changes will provide guidance to (1) ensure consistency and transparency in the calculation of a

Council member's financial interests; (2) determine whether a close causal link exists between a Council decision and a benefit to a Council member's financial interest; and (3) establish regional procedures for preparing and issuing recusal determinations. This final rule will improve implementation of the statutory requirements governing disclosure of financial interests and voting recusal at section 302(j) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: The final rule will be effective October 13, 2020.

FOR FURTHER INFORMATION CONTACT: Brian Fredieu, National Marine Fisheries Service, Headquarters: 301-427-8578 or Brian.fredieu@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

In November 2018, NMFS published a proposed rule to amend the financial disclosure and recusal regulations. See 83 FR 57705 (November 16, 2018). The proposed rule sought to modify the regulations at 50 CFR 600.235 to provide guidance to (1) ensure consistency and transparency in the calculation of an affected individual's financial interests; (2) determine whether a close causal link exists between a Council decision and a benefit to an affected individual's financial interest; and (3) establish regional procedures for preparing and issuing recusal determinations. The proposed rule also sought to make several minor modifications to the regulations governing financial disclosure. The preamble of the proposed rule provided substantial detailed information on the background and application of the recusal regulations, the issues that have arisen given the lack of regulations addressing certain aspects of recusal, and a detailed description and rationale of the regulatory changes being proposed to determine when a voting recusal is required and the process for issuing recusal determinations. See 83 FR 57705-57713 (November 16, 2018).

NMFS invited public comment on whether the changes in the proposed rule were sufficient and effective in distinguishing the calculation of direct ownership, indirect ownership and employment interests; whether the proposed language appropriately defines when a close causal link exists between a Council decision and a benefit; and whether the establishment of regional procedures provides consistency and transparency in the preparation and issuance of recusal

determinations. Specifically, NMFS invited public comment on whether partial attribution should extend to cases where the affected individual is an employee, a member of an association or organization, a spouse, partner, or minor child of a council member, or in cases of parent ownership; on whether there are additional circumstances that merit an exception from the standard that a close causal link exists for all Council decisions that require implementing regulations and that affect a fishery or sector of a fishery in which an affected individual has a financial interest; whether partial attribution appropriately reflects the attenuated nature of indirect ownership. NMFS also invited comment on whether a 50 percent ownership threshold captures the nature of direct ownership, including whether an interest of less than 50 percent might in some cases be controlling, and noted that any subjective control test would likely require council members to submit additional financial information and would require NMFS to develop a process and expertise to analyze control.

Changes From the Proposed Rule

NMFS modifies the proposed regulations at 50 CFR 600.235(c)(6)(ii)(A) and at § 600.235(c)(6)(ii)(E)(1) to remove the 50 percent ownership threshold for full attribution and apply the partial attribution principle for direct ownership regardless of the percentage ownership held by an affected individual or an affected individual's spouse, partner, or minor child. NMFS' rationale for these changes is provided in the response to Comment 3.

Responses to Public Comments

NMFS received four public comments during the comment period on the proposed rule. Three of those were from the New England, North Pacific, and Western Pacific Regional Fishery Management Councils and one was from a private citizen. Most commenters made multiple comments in one document. Comments were generally in favor of the changes made in the proposed rule but some expressed concerns over certain provisions. The specific comments and our responses are as follows.

Comment 1: The New England Fishery Management Council (NEFMC) requested that NMFS provide guidance on when a financial interest in a lobbying or advocacy organization should lead to a voting recusal. The NEFMC noted that because "significant financial interest" is defined solely on the basis of harvesting, processing,

marketing, and vessel ownership, an affected individual with a financial interest in a lobbying or advocacy organization is unlikely to ever have a significant financial interest that leads to recusal. The Magnuson-Stevens Act does not exempt lobbying and advocacy organizations from the possibility of recusal and gives NMFS the authority to develop appropriate regulations to define such conduct.

Response: Section 302(j)(7) states that an affected individual required to disclose a financial interest under section 302(j)(2) must not vote on a Council decision that would have a significant and predictable effect on such financial interest. Section 302(j)(7) also states that a Council decision will be considered to have a significant and predictable effect on a financial interest if there is a close causal link between the Council decision and an expected and substantially disproportionate benefit to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery affected by the Council decision.

Section 302(j)(7) was originally added to the Magnuson-Stevens Act with the Sustainable Fisheries Act of 1996 (SFA) (Pub. L. 104-297). Section 302(j)(7)(F) directed NMFS to promulgate regulations which prohibit an affected individual from voting on Council decisions that would have a significant and predictable effect on the affected individual's financial interests. NMFS published a proposed rule in August 1997 (62 FR 42474; August 7, 1997) and a final rule in November 1998 (63 FR 64182; November 19, 1998).

At the time NMFS was developing the 1997 proposed rule, section 302(j)(2) did not include the terms "lobbying" or "advocacy" as types of financial interests that must be disclosed. However, NMFS required, and still requires, disclosure of a financial interest in an association that provides representational services (such as lobbying and advocacy) for those involved with the fishery, such as fishermen and processors. NMFS recognized that many affected individuals had these types of financial interests and that NMFS would have to determine whether the significant and predictable effect standard for voting recusal applied to these affected individuals.

As NMFS explained in the preamble of the 1997 proposed rule, "Affected individuals who have financial interests in businesses or not-for-profit organizations closely related to harvesting, processing, or marketing activities are covered by section 302(j)

of the Magnuson-Stevens Act and must disclose those interests. Examples are . . . business or economic consultants to the fishing industry Because the effects of Council decisions on this type of financial interest are unlikely to be ‘significant or predictable,’ we do not foresee recusals by such individuals under § 600.235(c)” (see 42476 at 62 FR 42474; August 7, 1997). The preamble went on to specifically address affected individuals who are employed by or represent associations of fishermen, processors, or dealers stating, “[These affected individuals] would be required to disclose, in addition to his/her own interests, the financial interests of the association in harvesting, processing, or marketing activities that are or will be undertaken within any fishery under the jurisdiction of his or her Council.” Most importantly, NMFS then stated the following: “The financial interests of the association *would be considered as separate from* the financial interests of its individual members. A vote taken on a Council decision that might have a significant and predictable effect on the members of the association would not be considered to have a significant and predictable effect on the financial interests of the representative.” (Emphasis added.)

In the preamble to the 1998 final rule, NMFS further explained its rationale in its responses to Comments 3 and 4 (see 63 FR 64182, 64183; November 19, 1998). Comment 3 stated that the 1997 proposed rule was overly broad in that it required affected individuals to disclose financial interests in industries related to, but not directly involved in, fishing, processing or marketing. NMFS disagreed with the comment, stating, “NMFS has long interpreted section 302(j)(2) to require affected individuals to disclose financial interests in activities *related* to harvesting, processing, or marketing. If NMFS had read the financial-disclosure provision as narrowly as [the commenter] suggests, many Council members such as fisheries association officers would have been subject to criminal liability under 18 U.S.C. 208. They would have been unable to even participate in Council deliberations on issues affecting their employment or other fiduciary interests. NMFS believes Congress intended . . . to allow persons with financial interest in activities related to harvesting, processing, or marketing to continue serving on Councils on the same footing as persons with more direct interests. The ‘price’ of this participation was the disclosure of those interests, so that the public could be

informed of possible biases by members affiliated with certain sectors of the fishing industry.” (Emphasis in original.) Comment 4 perceived an inconsistency in the 1997 proposed rule between the broad scope of disclosure and the narrow scope of financial interests that would disqualify an affected individual from voting. The commenter stated that the disqualifying interests should be broadened to match the disclosed interests so that representatives of fishing industry associations would be subject to the recusal provisions at 302(j)(7). NMFS disagreed with the comment, stating, “The legislative history . . . indicates that Congress was concerned about members who votes on Council actions might result in direct gain or loss to themselves or their companies. The SFA disqualifies members from voting on decisions that would have a ‘significant and predictable effect’ on their financial interests. That phrase was defined as ‘a close causal link between the Council decision and an expected and substantially disproportionate benefit to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery.’ In developing the [1997] proposed rule, and again in considering the final rule, NMFS focused on the comparative aspect of the defined term. The disqualifying effect is not that the Council action will have a significant impact on the member’s financial interest; the action must have a disproportionate impact as compared with that of other participants in the fishery sector. Therefore, the criteria for recusal are limited to persons whose financial interests are directly linked to harvesting, processing, or marketing activities.”

Although the Magnuson-Stevens Act was amended in 2006 by the Magnuson-Stevens Reauthorization Act (Pub. L. 109–479) to add the terms “lobbying” and “advocacy” to section 302(j)(2), the recusal standard set forth in section 302(j)(7) remained the same. Therefore, NMFS continues to adhere to its originally stated positions: (1) That the financial interests of the association are separate from the financial interests of its individual members, and a vote taken on a Council decision that might have a significant and predictable effect on the members of the association is not considered to have a significant and predictable effect on the financial interests of the representative; and (2) that because the significant and predictable effect standard requires a disproportionate impact as compared

with that of other participants in the fishery sector, the criteria for recusal continue to be limited to persons whose financial interests are directly linked to harvesting, processing, or marketing activities. This final rule amends the regulations at 50 CFR 600.235(c) to add a new paragraph § 600.235(c)(6)(D), which provides guidance on calculating a significant financial interest for an affected individual who is employed by, or who may serve as an officer, director, board member, or trustee of, an association or organization related to harvesting, processing, or marketing.

Comment 2: The North Pacific Fishery Management Council (NPFMC) requested that NMFS provide additional clarification as to how indirect employment (such as consultants) is considered in the determination of significant financial interest. The NPFMC contended that there is an apparent inconsistency in NMFS attributing all fishing activity to the affected individual when he or she is an employee of a company, but not attributing to an affected individual who is a director of an association or organization any of the fishing activity of the association’s or organization’s members, particularly when that association or organization may have been explicitly formed to influence council decisions and whose director’s annual compensation may be directly related to council decisions.

Response: The proposed and final rules do not use the term “indirect employment.” An affected individual who has employment with a business that provides representational services for clients who are involved in the harvesting, processing, or marketing of fisheries under the jurisdiction of the Council, such as a consultant, must disclose that financial interest under the Magnuson-Stevens Act and the regulations. This final rule amends § 600.235(c) to add a new paragraph § 600.235(c)(6)(D), which provides guidance on calculating a significant financial interest for an affected individual who is employed by a business or organization that provides consulting services for persons directly involved in harvesting, processing, or marketing. New paragraph § 600.235(c)(6)(D) reflects NMFS’ long-held position that an affected individual’s financial interest in an association, or a consulting business, are separate from the financial interests of its individual members or clients, and that the significant and predictable standard set forth in section 302(j)(7), which requires a disproportionate impact as compared with that of other participants in the fishery sector for

voting disqualification, dictates that the criteria for recusal must be limited to persons whose financial interests are directly linked to harvesting, processing, or marketing activities in the fishery affected by the Council decision. With respect to the concern about the director or other employee of an association or organization whose compensation may be directly related to Council decisions, a detailed explanation of NMFS's position as it relates to this regulation is provided in the response to Comment 4. However, we note that a director or other employee of such an association or organization who serves as a Council member and compensation may be directly linked to certain Council outcomes may be subject to the restrictions set forth in 50 CFR 600.225(b)(9). This provision provides that "no Council member may participate personally and substantially as a member . . . in a particular matter in which the member . . . has a financial interest." This provision implements the prohibitions contained in the criminal conflict of interest statute found at 18 U.S.C. 208. Council members who may have a financial interest in a particular matter should consult with the appropriate designated official to determine whether their participation in that matter would raise concerns under 50 CFR 600.225.

Comment 3: The NPFMC disagreed with the provision in the proposed rule that would attribute all (*i.e.*, 100 percent) of a company's fishing activity to a Council member when the Council member directly owns 50 percent or more of that company. The NPFMC stated that this provision ignores complex ownership and management arrangements of many Alaska fishing companies (*e.g.*, CDQ and family owned companies), and incorrectly equates a majority ownership with having a different level of financial interest than a minority ownership (*i.e.*, a direct ownership interest in a company that is less than 50 percent). As an alternative, the NPFMC recommended that NMFS proportionately attribute fishing activity to a Council member based on his or her percentage of direct ownership in a company.

Response: NMFS considered the comment and agrees that the regulations should proportionately attribute fishing activity to an affected individual based on his or her percentage of direct ownership in a company. With this final rule, NMFS modifies the proposed regulations at 50 CFR 600.235(c)(6)(ii)(A) and § 600.235(c)(6)(ii)(E)(1) to remove the 50 percent ownership threshold for full

attribution and apply the partial attribution principle for direct ownership regardless of the percentage ownership held by an affected individual or an affected individual's spouse, partner or minor child. As a result of this change, an affected individual will only be attributed 100 percent of a company's harvesting, processing and marketing activity if the affected individual or his or her spouse, partner or minor child directly owns 100 percent of that company. If an affected individual or his or her spouse, partner or minor child directly owns something less than 100 percent of a company, NMFS will attribute harvesting, processing and marketing activity to the affected individual commensurate with the percentage of direct ownership.

As was explained in the proposed rule preamble, individual NPFMC members and the NPFMC as a whole have objected to NMFS's practice of fully attributing all fishing activity of a company to an affected individual when the affected individual directly owns something less than 100 percent of that fishing company. The arguments against full attribution and for partial attribution in a partial ownership situation have focused on consistency with common business practices, promoting fairness, and avoiding unintended results that can increase the likelihood of voting recusals. The NPFMC and some of its members have explained that common business practices support using a proportional share, or partial attribution, approach because an affected individual who owns five percent of a fishing company only receives five percent of the company's distributions. If an affected individual owns only five percent of the company, attribution of all of the company's fishing activity unreasonably and unfairly credits the affected individual with a greater financial interest in the company than is actually owned. Crediting an affected individual with a greater financial interest than is actually owned increases the chance of determining a voting recusal is required even though the affected individual's actual financial interest in the fishery may not represent a significant interest in the affected fishery if the individual's true ownership and activity level is considered. The NPFMC has argued that use of the full attribution approach is an "unfair and illogical interpretation of the recusal regulations, and results in unintended recusals of Council members."

NMFS was aware of the NPFMC's arguments for partial attribution when it proposed continuing full attribution for

an affected individual who directly owns 50 percent or more of a company. NMFS proposed the 50 percent threshold for full versus partial attribution as a mid-point on the attribution continuum, with full attribution regardless of percentage ownership at one end and attribution based on actual percentage of direct ownership at the other end. NMFS specifically asked the public for comments on this aspect of the proposed rule and purposely described the NPFMC's position on this aspect of the proposed rule in the preamble to indicate to, and inform, the public that the NPFMC and some of its members had strongly held opinions on this aspect of the proposed rule. However, NMFS did not receive any comments (1) supporting the proposed 50 percent direct ownership threshold for partial versus full attribution; (2) requesting that NMFS continue its past practice of full attribution regardless of percentage ownership; or (3) criticizing the attribution approach advocated by the NPFMC or advocating for a different attribution approach than the one proposed by NMFS.

In the proposed rule preamble, NMFS stated that the proposed 50 percent threshold for full versus partial attribution stemmed from the agency's concern that an affected individual who owns 50 percent or more of a company would have more control over the actions of the company, and therefore should be attributed with all of the company's harvesting, processing, and marketing activity. However, NMFS recognizes that "control" of a company is an elusive factor on which to base recusal determinations. Additionally, NMFS recognizes that "control" of a company can come in ways other than percentage of direct ownership and is not necessarily tied solely to an ownership percentage. NMFS also recognizes that it does not have the tools or the time to conduct investigations of an affected individual's possible "control" over a company in preparing recusal determinations. NMFS also re-examined its proposed attribution position for direct ownership relative to its proposed attribution position for indirect, or subsidiary, ownership. While "control" could exist with a high percentage ownership of a subsidiary company, NMFS proposed partial attribution regardless of percentage owned for indirect ownership.

NMFS agrees that partial attribution proportional to a Council member's percentage of direct and indirect company ownership more closely reflects common business practices, promotes fairness, and avoids

unintended results that can increase the likelihood of voting recusals. For the reasons stated above, NMFS agrees with the comment and has modified proposed regulations at 50 CFR 600.235(c)(6)(ii)(A) with this final rule.

Although the NPFMC's comment focused on direct ownership by an affected individual, NMFS' decision to make changes based upon that comment also has applicability to the proposed attribution principle for direct ownership by a spouse, partner or minor child at 50 CFR 600.235(c)(6)(ii)(E)(1). In developing the proposed rule, NMFS determined that the attribution principle applicable to direct ownership by an affected individual should be the same as the attribution principle applicable to direct ownership by an affected individual's spouse, partner or minor child. Therefore, the proposed regulatory text at § 600.235(c)(6)(ii)(E)(1) mirrored the proposed regulatory text at § 600.235(c)(6)(ii)(A).

NMFS received no comments suggesting that different attribution principles for direct ownership should apply to an affected individual versus the affected individual's spouse, partner or minor child, and determined that its proposed policy of applying the same attribution principle should continue. In keeping with that policy, NMFS modifies 50 CFR 600.235(c)(6)(ii)(E)(1) to remove the 50 percent ownership threshold for full attribution and apply the partial attribution principle for direct ownership regardless of the percentage ownership held by an affected individual's spouse, partner, or minor child.

Comment 4: One comment noted that a Council member can own up to 49 percent of a company without meeting the threshold for recusal. The commenter noted, however, an employee of that same company would be attributed 100 percent ownership and be subject to recusal. The commenter wrote that an employee does not have legal control over a company and should not be held to a higher standard than that of a minority owner and if attribution is to be applied to employees, the proposed rule must further define categories of employment (officer, director, *etc.*) and compensation (commission, bonus, shareholder, *etc.*) that would lead to significant and direct financial benefit to employees as a result of management actions.

Response: NMFS recognizes that there is a range of employee-employer relationships and compensation models. For example, employees may be officers or directors with significant financial interest in the employer, or they may be hourly wage employees, with no other

financial interest. NMFS also recognizes that employees do not necessarily have control over their employers' interests or actions. However, NMFS does not have the discretion to consider only situations where there would be a significant and direct financial benefit to employees as a result of a fishery management council action. In the case of an employee, the Act requires disclosure of any financial interest held by both the individual and any organization in which the individual is serving as an employee. The recusal requirement specifically relates to both of those financial interests—that is, an affected individual may not vote on a Council decision that would have a significant and predictable effect on the financial interest of either the employer or the employee. The Act does not allow us to consider the nature of employment or the type of compensation when making recusal determinations.

Comment 5: The NEFMC commented that there should be guidance specifying when recusal determinations will be made and how quickly action will be taken on a request for review. Additionally, the NEFMC commented that the recusal process and the regional handbook should be developed and modified in consultation with the Council.

Response: NMFS agrees that there should be specific guidance on when recusal determinations are made and the timeline for review of those determinations. The NMFS Policy Directive 01–116 states that it is the policy of NMFS to carry out the responsibilities of the Secretary pursuant to section 302(j) of the MSA and implementing regulations to provide an effective process for submission and review of financial disclosures and for resolving any conflicts of interest by Council members. That policy includes implementing the process in this final rule. NMFS will require that each NMFS Regional Office, in conjunction with the NOAA Office of General Counsel, publish and make publicly available a Regional Recusal Determination Procedure Handbook. As reflected in the final rule, the handbook would include, among other items: A description of the process for preparing and issuing a recusal determination relative to the timing of a Council decision; a description of the process by which the Council, Council members, and the public will be made aware of recusal determinations; and a description of the process for identifying the designated official(s) who will prepare recusal determinations and attend Council meetings.

As referenced in the NMFS Policy Directive 01–116, the Councils, specifically the Council Executive Directors, are responsible for reviewing the submission of financial disclosures, advising the NMFS Regional Administrator and NOAA General Counsel Regional Section if there are discrepancies, and reviewing disclosures prior to meetings as well as recording any incidences of recusals for reporting purposes. The Councils are integral in assisting NMFS in the implementation of section 302(j) of the MSA. NMFS intends to include the Councils in reviewing the Regional Recusal Determination Procedure Handbooks prior to final publication and in any subsequent review of those Handbooks.

Comment 6: The NEFMC commented that the proposed rule language updating the “close causal link” definition is very subjective and provides little guidance to Council members or the designated official preparing the determination. They commented that this will lead to endless debates over whether a relationship is real or speculative. They recommended the inclusion of examples as is done in some regulations (*e.g.*, 5 CFR 2635.402(b)(1)) may help clarify this issue. Another commenter noted that the proposed rule states that there is no close causal link where the affected individuals' financial interest is attenuated or is contingent on the occurrence of events that are speculative. This commenter noted that these terms are ambiguous, and if construed broadly, problematic, thus leaving room for non-recusal based on no more than a plausible claim that there is some speculative, contingent event standing between a council regulation and its effect on an affected individuals' financial interest.

Response: Section 302(j)(7)(A) of the MSA states that a Council decision is considered to have a “significant and predictable effect” on a financial interest if there is a close causal link between the Council decision and an expected and substantially disproportionate benefit to the financial interests. As noted in the proposed rule, since implementation of the recusal regulations in 1999, designated officials have understood that the Magnuson-Stevens Act and the regulations require a voting recusal when there is a close causal link between the Council decision and an expected and substantially disproportionate benefit to an affected individual's financial interest in the fishery or sector of the fishery affected by the Council decision. Without any regulatory guidance

concerning the close causal link requirement NMFS proposed to create a definition of close causal link to better guide the application of the requirement for causation between a Council decision and an expected and substantially disproportionate benefit to the financial interests of an affected individual. Contrary to the idea that there would be endless debates on whether a relationship is real or speculative, NMFS concluded that generally a close causal link between a benefit and a Council decision exists for all Council decisions, especially those with implementing regulations. However, NMFS also recognizes that there may be rare instances where no impact would occur or where the chain of causation is attenuated. The final rule acknowledges this, stating that a causal link does not exist if there is “no real, as opposed to speculative, possibility that the Council decision will affect the affected individual’s financial interest.” The concept of a financial benefit being “real, as opposed to speculative” is necessarily subjective as it is based upon the facts of the matter before a designated official, including the type and subject of a Council decision at hand and the category of interest disclosed by a voting Council member. Furthermore, interpretation of the phrase, “real, as opposed to speculative” can be found in both current federal conflict of interest law and in the concept of causation in other areas of law. For example, the primary federal conflict of interest statute, 18 U.S.C. 208, requires a disqualification of a government employee in a matter in which the employee, the employee’s family or connected organization has a financial interest and the matter in which the employee would be involved has a real possibility of affecting those interests. The regulations of the Office of Governmental Ethics explains that a matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect, further noting that the chain of causation must not be “attenuated” or “contingent upon the occurrence of events that are speculative or that are independent of . . . the matter”. See 5 CFR 2635.402. Here, the term “speculative” does not describe a type of event, as one commenter noted, but rather the probability that a link between the Council decision and whether a substantially disproportionate benefit exists. The determining official must establish that it is more likely than not that the decision causes the benefit. Therefore, the proof of a causal link

cannot be based on mere speculation or inferences drawn from other inferences; but must be a conclusion supported by direct and real information provided to the determining official. NMFS agrees that including some examples of how a determining official may reach or not reach the conclusion that a close causal link exists could be helpful both to the public, the agency, and the Councils and will advise that examples be included in the Regional Recusal Determination Procedure Handbook.

Classification

The NMFS Assistant Administrator has determined that this rule is consistent with the provisions of the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable law.

This rule has been determined to be significant for purposes of Executive Order 12866.

This rule modifies regulations at 50 CFR 600.235 to provide guidance to: (1) Ensure consistency and transparency in the calculation of an affected individual’s financial interests; (2) determine whether a close causal link exists between a Council decision and a benefit to an affected individual’s financial interest; and (3) establish regional procedures for preparing and issuing recusal determinations. Commerce certified the rule at the proposed rule stage. At the final rule stage the ownership interest has been adjusted. This rule regulates only those Council members who have voting privileges and are appointed to their position by the Secretary of Commerce. As such, this rule would have no effect on any small entities, as defined under the Regulatory Flexibility Act, 5 U.S.C. 601. As a result, a final regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

Dated: September 4, 2020.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set out in the preamble, NMFS amends 50 CFR part 600 as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

- 2. In § 600.235;
 - a. Revise the section heading;
 - b. In paragraph (a), add in alphabetical order the definitions for “Close causal link,” “Expected and substantially disproportionate benefit,” and “Significant financial interest;”
 - c. Redesignate paragraphs (b)(5) through (b)(7) as paragraphs (b)(6) through (b)(8), respectively, add new paragraph (b)(5), and revise newly redesignated paragraph (b)(8);
 - d. Revise paragraph (c)(3), redesignate paragraph (c)(4) as (c)(7), and add new paragraphs (c)(4), (c)(5), and (c)(6);
 - e. Revise (f) introductory text, (f)(1), and add paragraph (f)(6);
 - f. Revise paragraphs (g)(2) and (h) to read as follows:

§ 600.235 Financial disclosure and recusal.

(a) * * *
Close causal link means that a Council decision would reasonably be expected to directly impact or affect the financial interests of an affected individual.

* * * * *
Expected and substantially disproportionate benefit means 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.

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Significant financial interest means:
 (1) A greater than 10-percent interest in the total harvest of the fishery or sector of the fishery affected by the Council decision;

(2) A greater than 10-percent interest in the marketing or processing of the total harvest of the fishery or sector of the fishery affected by the Council decision; or

(3) Full or partial ownership of more than 10 percent of the vessels using the same gear type within the fishery or sector of the fishery affected by the Council decision.

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(b) * * *

(5) The Regional Administrator must retain the Financial Interest Form for a Council member for 20 years from the date the form is signed by the Council member or in accordance with the current NOAA records schedule.

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(8) The Regional Administrator must retain the Financial Interest Forms of all SSC members for at least five years after the expiration of that individual's term on the SSC. Such forms are not subject to sections 302(j)(5)(B) and (C) of the Magnuson-Stevens Act.

(c) * * *

(3) In making a determination under paragraph (f) of this section as to whether a Council decision will have a significant and predictable effect on an affected individual's financial interests, the designated official will:

(i) Initially determine whether the action before the Council is a Council decision, and whether the affected individual has any financial interest in the fishery or sector of the fishery affected by the action.

(ii) If the designated official determines that the action is not a Council decision or that the affected individual does not have any financial interest in the fishery or sector of the fishery affected by the action, the designated official's inquiry ends and the designated official will determine that a voting recusal is not required under 50 CFR 600.235.

(iii) However, if the designated official determines that the action is a Council decision and that the affected individual has a financial interest in the fishery or sector of the fishery affected by the Council decision, a voting recusal is required under 50 CFR 600.235 if there is:

(A) An expected and substantially disproportionate benefit to the affected individual's financial interest (see paragraph (c)(5) of this section), and
(B) A close causal link (see paragraph (c)(4) of this section) between the Council decision and the expected and substantially disproportionate benefit to the affected individual's financial interest.

(4) A close causal link for Council decisions that either require or do not require implementing regulations is determined as follows:

(i) For all Council decisions that require implementing regulations and that affect a fishery or sector of a fishery in which an affected individual has a financial interest, a close causal link exists unless:

(A) The chain of causation between the Council decision and the affected individual's financial interest is attenuated or is contingent on the occurrence of events that are speculative or that are independent of and unrelated to the Council decision; or

(B) There is no real, as opposed to speculative, possibility that the Council decision will affect the affected individual's financial interest.

(ii) For Council decisions that do not require implementing regulations, a close causal link exists if there is a real, as opposed to speculative, possibility that the Council decision will affect the affected individual's financial interest.

(5) A designated official will determine that an expected and substantially disproportionate benefit exists if an affected individual has a significant financial interest (see paragraph (c)(6) of this section) in the fishery or sector of the fishery that is likely to be positively or negatively affected by the Council decision. The magnitude of the positive or negative impact is not determinative of whether there is an expected and substantially disproportionate benefit. The determining factor is the affected individual's significant financial interest in the fishery or sector of the fishery affected by the Council decision.

(6) When calculating significant financial interest, the designated official will rely on certain information.

(i) The information to be used is as follows:

(A) The designated official will use the information included in the Financial Interest Form and any other reliable and probative information provided in writing.

(B) The designated official may contact an affected individual to better understand the reported financial interest or any information provided in writing.

(C) The designated official will presume that the information reported on the Financial Interest Form is true and correct and the designated official is not responsible for determining the veracity of the reported information when preparing a determination under paragraph (f) of this section.

(D) If an affected individual does not provide information concerning the specific percentage of ownership of a financial interest reported on his or her Financial Interest Form, the designated official will attribute all harvesting, processing, or marketing activity of, and vessels owned by, the financial interest to the affected individual.

(ii) The designated official will apply the following principles when calculating an affected individual's financial interests relative to the significant financial interest thresholds for the fishery or sector of the fishery affected by the action. For purposes of this paragraph, use of the term "company" includes any business, vessel, or other entity.

(A) For attributions concerning direct ownership (companies owned by or that employ an affected individual) the designated official will attribute to an

affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company when the affected individual owns 100 percent of that company. If an affected individual owns less than 100 percent of a company, the designated official will attribute to the affected individual the harvesting, processing, and marketing activity of, and vessels owned by, the company commensurate with the affected individual's percentage of ownership. The designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company that employs the affected individual.

(B) For attributions concerning indirect ownership (companies owned by an affected individual's company or employer) the designated official will attribute to the affected individual the harvesting, processing, and marketing activity of, and vessels owned by, a company that is owned by that affected individual's company or employer commensurate with the affected individual's percentage ownership in the directly owned company, and the directly owned company's ownership in the indirectly owned company.

(C) For attributions concerning parent ownership (companies that own some percentage of an affected individual's company or employer) the designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company that owns fifty percent or more of a company that is owned by the affected individual or that employs the affected individual. The designated official will not attribute to an affected individual the harvesting, processing, or marketing activity of, or any vessels owned by, a company that owns less than fifty percent of a company that is owned by the affected individual or that employs the affected individual.

(D) For attributions concerning employment or service with associations or organizations, an affected individual may be employed by or serve, either compensated or unpaid, as an officer, director, board member or trustee of an association or organization. The designated official will not attribute to the affected individual the vessels owned by, or the harvesting, processing, or marketing activity conducted by, the members of that association or organization if such 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. However, if such organization or

association receives from NMFS an allocation of harvesting or processing privileges, owns vessels, or is directly engaged in harvesting, processing or marketing, the designated official will attribute to the affected individual the vessels owned by, and all harvesting, processing, and marketing activity of, that association or organization.

(E) For the financial interests of a spouse, partner or minor child, the designated official will consider the following factors for ownership and employment.

(1) For the financial interests of a spouse, partner or minor child related to ownership, the designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company when the affected individual's spouse, partner or minor child owns 100 percent of that company. If an affected individual's spouse, partner or minor child owns less than 100 percent of a company, the designated official will attribute to the affected individual the harvesting, processing, and marketing activity of, and vessels owned by, the company commensurate with the spouse's, partner's or minor child's percentage of ownership.

(2) For the financial interests of a spouse, partner or minor child related to employment, the designated official will not attribute to an affected individual the harvesting, processing, or marketing activity of, or any vessels owned by, a company that employs the affected individual's spouse, partner or minor child when the spouse's, partner's or minor child's compensation are not influenced by, or fluctuate with, the financial performance of the company. The designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company that employs the Council member's spouse, partner or minor child when the spouse's, partner's or minor child's compensation are influenced by, or fluctuate with, the financial performance of the company.

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(f) *Process and procedure for determination.* (1) At the request of an affected individual, and as provided

under paragraphs (c)(3)–(6) of this section, the designated official shall determine for the record whether a Council decision would have a significant and predictable effect on that individual's financial interest. Unless subject to confidentiality requirements, all information considered will be made part of the public record for the decision. The affected individual may request a determination by notifying the designated official—

(i) Within a reasonable time before the Council meeting at which the Council decision will be made; or

(ii) During a Council meeting before a Council vote on the decision.

* * * * *

(6) Regional Recusal Determination Procedure Handbooks shall be developed for reach NMFS Region.

(i) Each NMFS Regional Office, in conjunction with NOAA Office of General Counsel, will publish and make available to the public its Regional Recusal Determination Procedure Handbook, which explains the process and procedure typically followed in preparing and issuing recusal determinations.

(ii) A Regional Recusal Determination Procedure Handbook must include:

(A) A statement that the Regional Recusal Determination Procedure Handbook is intended as guidance to describe the recusal determination process and procedure typically followed within the region.

(B) Identification of the Council(s) to which the Regional Recusal Determination Procedure Handbook applies. If the Regional Recusal Determination Procedure Handbook applies to multiple Councils, any procedure that applies to a subset of those Councils should clearly identify the Council(s) to which the procedure applies.

(C) A description of the process for identifying the fishery or sector of the fishery affected by the action before the Council.

(D) A description of the process for preparing and issuing a recusal determination relative to the timing of a Council decision.

(E) A description of the process by which the Council, Council members,

and the public will be made aware of recusal determinations.

(F) A description of the process for identifying the designated official(s) who will prepare recusal determinations and attend Council meetings.

(iii) A Regional Recusal Determination Procedure Handbook may include additional material related to the region's process and procedure for recusal determinations not specifically identified in paragraph (f)(6)(ii) of this section. A Regional Recusal Determination Procedure Handbook may be revised at any time upon agreement by the NMFS Regional Office and NOAA Office of General Counsel.

(g) * * *

(2) A Council member may request a review of any aspect of the recusal determination, including but not limited to, whether the action is a Council decision, the description of the fishery or sector of the fishery affected by the Council action, the calculation of an affected individual's financial interests or the finding of a significant financial interest, and the existence of a close causal link. A request for review must include a full statement in support of the review, including a concise statement as to why the Council member believes that the recusal determination is in error and why the designated official's determination should be reversed.

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(h) The provisions of 18 U.S.C. 208 regarding conflicts of interest do not apply to an affected individual who is a voting member of a Council appointed by the Secretary, as described under section 302(j)(1)(A)(ii) of the Magnuson-Stevens Act, and who is in compliance with the requirements of this section for filing a Financial Interest Form. The provisions of 18 U.S.C. 208 do not apply to a member of an SSC, unless that individual is an officer or employee of the United States or is otherwise covered by the requirements of 18 U.S.C. 208.

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