

# **Annual Briefing on Magnuson-Stevens Act Financial Disclosure and Recusal Requirements**

Presented by

NOAA Office of General Counsel, Northeast

# **Government Ethics**

## **...it's not an oxymoron**

## **...it's an ideal and a practice**

- Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
- Government ethics rules help ensure government decisions are made free from personal financial bias.
- Employees shall not hold financial interests that conflict with the conscientious performance of duty.

# Trust, but verify

## Government Ethics Rules

- ▶ 18 U.S.C. § 208 – prohibits personal and substantial participation in a matter in which one has a financial interest.
- ▶ Criminal and civil penalties at 18 U.S.C. § 216 – Up to 1 year in prison (up to 5 years for willful violations) and up to \$50k or the value of any compensation received or offered for the conduct.
- ▶ 50 C.F.R. § 600.225(a)--Council members, as Federal office holders, and Council employees are subject to most Federal criminal statutes covering bribery, conflict-of-interest, disclosure of confidential information, and lobbying with appropriated funds.

# **The Magnuson-Stevens Act Exception ---Overriding Considerations**

Section 302(b)(2)(A) --

Council members must be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest of fishery resources.

# The Magnuson-Stevens Act Balance

Section 302(j) of the Magnuson-Stevens Act requires *anyone nominated by a Governor to be appointed a voting Council member or appointed by the Secretary to be a voting member (i.e., an “affected individual”)* to do the following:

- ▶ 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.
- ▶ *NMFS representatives, CG representatives and State Officials are not “affected individuals.”*

# Financial Disclosure: Effectuating the balance (The Carrot)

- ▶ Financial disclosure provides important information for the public, other Council members, and the Secretary on your background and financial interests in the fisheries managed by the 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.

# Financial Disclosure: Effectuating the disclosure requirement (The Stick)

- ▶ Remember 18 U.S.C. §§ 208 and 216 on slide 3?
- ▶ Magnuson-Stevens Act civil penalties or permit sanctions for violations of § 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).

# What financial interests must be disclosed?

- ▶ In general, you must disclose:
  - Ownership in, or employment with, any company or of any vessel 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 harvest, process, lobby, advocate, or engage in marketing and that own, or are owned by, your employer or your company
- ▶ The regulations and financial disclosure form provide specific details 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 the time any financial interest is acquired or substantially changed by the affected individual or the affected individual's spouse, minor child, partner, or any organization; and
- ▶ Annually by February 1<sup>st</sup> regardless of whether an affected individual's financial interests have changed.

# Changes to financial disclosure in the final rule

The final rule focuses 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:
  - The presumption relies on compliance with the MSA prohibition against submitting false information
  - The presumption does not preclude consideration of additional information
- 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.

# When are recusals required?

- ▶ When a *Council decision* would have a *significant and predictable effect* on a financial interest that is required to be disclosed. MSA § 302(j)(7)(A).
- ▶ 50 C.F.R. § 600.235(d) *Voluntary recusal*. An affected individual who believes that a Council decision would have a significant and predictable effect on that individual's financial interest disclosed under paragraph (b) of this section may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision and identify the financial interest that would be affected.

# 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.

# “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 § 302(j)(7)(A).

# “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.”
- ▶ A close causal link exists for Council decisions that *require* implementing regulations unless (A) the chain of causation is attenuated or contingent on the occurrence of events that are speculative or unrelated, or (B) there is no real, as opposed to speculative, possibility that the Council decision will affect the Council member’s financial interests.
- ▶ A close causal link does not exist for Council decisions that *do not require* implementing regulations unless there is a real, as opposed to speculative, possibility that the Council’s decision will affect the Council member’s financial interests.

# “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*.”

# “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.

# Brief overview of attribution principles

- ▶ **Direct Ownership (change from past practice and from proposed rule)**
  - “proportional attribution” (according to ownership %, instead of using a 50% ownership threshold)
- ▶ **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” (e.g., 50% ownership of Co. A, which owns 50% of Co. B, then affected individual’s interest is 50% of 50%, which is 25%)
- ▶ **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 (i.e., compensation contingent on company performance)

# Who initiates recusal determinations?

- ▶ An affected individual can request a determination from NOAA General Counsel, or
- ▶ NOAA General Counsel can initiate a determination.
  - NEFMC Executive Director, Assistant Regional Administrator, and I meet before each Council meeting to discuss upcoming actions and whether any recusals may be required.

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.

# How are the Council and public made aware of recusal determinations?

- ▶ To date, Council members have announced individual decisions, and the agency has provided Congress with an annual update of recusal decisions.
- ▶ The Handbook will outline the process for making the public aware of determinations and how the public may access them.

# One more potential conflict: Particular Matters Primarily of Individual Concern

- ▶ “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.” 50 C.F.R. § 600.225(b)(9).
  - For example, if one has prospective employment contingent on a motion; or if a proposed alternative would be specific and significantly focused on one’s financial interest.
  - In this instance, one is barred from any participation in the matter as a Council member, including even stating how one would vote or any part of the deliberation process.

# 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. 57705 (November 16, 2018).
- ▶ Final rule can be found at: 85 Fed. Reg. 56177 (September 11, 2020).
- ▶ Completed NEFMC member disclosure forms can be found at the NEFMC web-site.