

Department of Commerce · National Oceanic & Atmospheric Administration · National Marine Fisheries Service

<i>NATIONAL MARINE FISHERIES SERVICE PROCEDURE 01-116-01</i> Effective on: [effective date]	
To be reviewed on: [review date]	
<i>Fisheries Management Fishery Management Council Financial Disclosures and Recusal, NMFSPD 01-116-01</i>	
<i>PROCEDURES FOR REVIEW OF FISHERY MANAGEMENT COUNCIL FINANCIAL DISCLOSURES AND RECUSAL DETERMINATIONS</i>	
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<i>SUMMARY OF REVISIONS:</i> NMFSI 01-116-01, initially effective on September 25, 2014, is revised to provide additional guidance on preparing recusal determinations and the development of regional recusal determination procedure handbooks.	
Signed _____ Kelly Denit Director, Office of Sustainable Fisheries	
Date _____	

I. Introduction

As outlined in Policy Directive 01-116, it is the policy of the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS) to provide an effective and transparent process to carry out the responsibilities of the Secretary pursuant to Section 302(j) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and implementing regulations at 50 CFR 600.235. Section 302(j) (16 U.S.C. 1852(j)) and implementing regulations require nominees and appointed Fishery Management Council (Council) members to disclose any financial interest in harvesting, processing, lobbying, advocacy, or marketing activity that is being, or will be, undertaken within any fishery over which the Council concerned has jurisdiction. Section 302(j) and implementing regulations also require the voting recusal of an appointed Council member when a Council decision would have a significant and predictable effect on the member's financial interests. This procedural directive provides the guidance necessary to:

- (1) ensure a successful and thorough vetting process to review the completeness and accuracy of information in financial disclosure forms submitted by Council nominees and members;
- (2) provide formulas for partially attributing fishing activity in the calculation of a Council member's financial interests relative to the regulatory thresholds for recusal; and
- (3) establish a process for issuing and modifying regional recusal determination procedure handbooks.

This procedural directive initially was prepared in consideration of the Department of Commerce (DOC) Office of Inspector General (OIG) January 16, 2013, audit report (OIG report). The OIG report, in part, provided three recommendations for NOAA that would assist in strengthening agency guidance on financial disclosures by Council voting members, with an emphasis on how NOAA intends to handle specific consequences for conflicts of interest or potential conflicts of interest it identifies. The OIG report recommended that NOAA:

- (1) strengthen policy guidance on financial disclosure by Council voting members;
- (2) strengthen processes for formal reviews of financial interest disclosures; and
- (3) strengthen criteria for identifying conflicts of interest and processes to follow up on any conflicts that are identified.

NMFS, in consultation with the NOAA Office of General Counsel (GC), the Council Coordination Committee (16 U.S.C. 1852(l)), and the DOC General Counsel (GC) Ethics Law and Programs Division, reviewed its existing policies and procedures regarding financial disclosure by nominees and Council members and recusal of Council members due to a conflict of interest in light of the OIG's recommendations. To address the OIG

report's recommendations, NMFS revised NOAA's Statement of Financial Interest Form (NOAA Form 88-195) to more closely follow the regulatory disclosure requirements and to provide a question and answer format to assist Council members in identifying all of the financial interests that must be disclosed. NMFS also developed this procedural directive, initially issued in September 2014, to strengthen processes for formal reviews of financial disclosures, increase the transparency provided by financial disclosures, and assist Council members in avoiding conflicts between their personal financial interests and the official work of the Councils.

In August 2015, the Councils requested that NMFS provide additional guidance on the process followed by the agency in preparing and issuing recusal determinations, including guidance on how the agency calculates financial interests for comparison with the regulatory recusal thresholds. NMFS agreed and modified regulations at 50 CFR 600.235 to address various aspects of recusal determinations, thereby increasing the predictability and transparency of the recusal determination process and further advancing the OIG report's third recommendation. The final rule implementing the new regulations was published in the *Federal Register* on September 11, 2020 (85 Fed. Reg. 56,177). Section 3 of this procedural directive has been modified to include formulas for partially attributing fishing activity and additional guidance on the process for issuing and modifying regional recusal determination procedure handbooks.

II. Objective

It is the policy of NMFS, in order to carry out the responsibilities of the Secretary pursuant to Sections 302(g) and (j) of the MSA and implementing regulations, to provide an effective and transparent process for submission and review of financial disclosure forms and for identifying and resolving any conflicts of interest by Council members. The process should ensure Council appointments are made using complete and accurate financial information from nominees, and financial disclosure forms submitted by SSC and Council members are complete and available to the public. The process also should ensure Council members and the public are aware of the information and methods used in determining whether recusal of a Council member is required due to a conflict of interest, and the procedures followed in issuing recusal determinations. In accordance with the MSA and 50 CFR 600.235(i), it is unlawful for an affected individual to knowingly and willfully fail to disclose, or to falsely disclose, any financial interest as required by the MSA, or to knowingly vote on a Council decision in violation of the MSA.

III. Guidance

NMFS has established a vetting process to review the completeness and accuracy of information in Council nominees' and members' financial disclosure forms. The procedures outlined in Sections 3.1 and 3.2 serve to document the vetting process and ensure consistency in the process for each NMFS Region and Council.

Financial Disclosure Form Vetting for Nominees for Council Membership

- Regulations at 50 CFR 600.235 require each nominee for Council membership (including current members nominated for re-appointment) to submit a completed financial disclosure form with the NMFS Assistant Administrator by April 15 or, if nominated after March 15, within one month after nomination by a Governor.
- NMFS Office of Sustainable Fisheries (OSF) will perform an initial review of the submitted forms for completeness as a part of the nomination process. NMFS OSF will provide NMFS Regional Offices with copies of the submitted forms for all nominees under their jurisdiction and NMFS Regional Offices will have the opportunity to review these forms and provide comments on the submitted forms to NMFS OSF. During its review, NMFS OSF may ask nominees to revise and re-submit their financial disclosure forms.
- After completing its review, NMFS OSF will forward the submitted forms from nominees with reported financial interests to the NMFS Office of Law Enforcement (OLE) for review, to determine and verify any connections to fishing vessels or other interests (per 50 CFR 600 et. seq.). During this review, nominees may be asked to revise and re-submit their financial disclosure forms.
- When the submitted forms have been vetted by NMFS OSF and NMFS OLE, they will be considered properly reviewed. No further revisions to information in the forms will be required unless the nominee notifies NMFS of a change in his or her financial interests.
- For each nominee appointed by the Secretary to serve as a Council member, NMFS OSF will forward the vetted financial disclosure form to the Executive Director of the corresponding Council.
- Each Council Executive Director will make these forms publicly available and post them to the corresponding Council's website in a prominent manner.

Financial Disclosure Form Vetting for Appointed Council Members

- Regulations at 50 C.F.R. 600.235 require appointed Council members to submit a completed financial disclosure form with their Council Executive Directors: (1) within 45 days of taking office (including re-appointed members); (2) within 30 days of the time any such financial interest is acquired or substantially changed; and (3) by February 1 of each year regardless of whether any financial information has changed.
- For the annual financial disclosure requirement, Council Executive Directors should distribute new financial disclosure forms to Council members and collect completed forms in a timely manner.

- Council Executive Directors should review annual and supplemental financial disclosure forms submitted by Council members to ensure each includes complete information to the Executive Director's knowledge and is signed and dated, following up with the member as necessary. During this review, Council members may be asked to revise and re-submit their financial disclosure forms.
- Council Executive Directors will then forward the submitted forms to the appropriate NMFS Regional Office, copying NMFS OSF.
- Upon receipt, NMFS Regional Offices should review and verify the information on the submitted forms against readily available information, checking back with the Council Executive Director and member as necessary to confirm the information. The NMFS Regional Office should consult with its NOAA GC Regional Section on any legal questions that may arise with a submitted form. During this review, Council members may be asked to revise and re-submit their financial disclosure forms.
- When the submitted forms have been vetted by the NMFS Regional Office, they will be considered properly reviewed. The NMFS Regional Office should notify its corresponding Council Executive Director(s) that it has completed the vetting process, coordinate with Council Executive Directors on any financial information changes or clarifications made during the vetting process, and ensure that the Council has copies of the submitted forms that have been vetted.
- Each Council Executive Director will post these forms to the Council's website and make them available to the public at Council meetings and at the Council's office.
- NMFS Regional Offices are to: (1) maintain a file of submitted financial disclosure forms for the region's Council(s), keeping each form for a Council member in accordance with the regulations at 50 CFR 600.235(b)(5) and (2) make the forms available to the Regional Administrator and NOAA GC to aid in any conflict of interest or recusal determination.

Recusal Determinations

Section 302(j) of the MSA prohibits an appointed Council member from voting on a Council decision that would have a significant and predictable effect on the Council member's financial interests. Regulations implementing this recusal requirement are located at 50 CFR 600.235. Many aspects of recusal determinations are now addressed in the regulations (see 85 FR 56177; September 11, 2020).

NMFS and NOAA GC determined that additional guidance on the formulas for partially

attributing fishing activity and vessel ownership, and the process for issuing and modifying regional recusal determination procedure handbooks is necessary to ensure consistent application across the regions and Councils. Section 3.1 sets forth guidance on the formulas for partially attributing fishing activity and vessel ownership for directly and indirectly owned financial interests. Section 3.2 provides guidance on the process for issuing and modifying regional recusal determination procedure handbooks.

NMFS policy directive 01-116, this procedural directive, and the Regional Recusal Determination Procedure Handbooks supplement the recusal regulations at 50 CFR 600.235. The recusal regulations at 50 CFR 600.235, together with the guidance in the policy and procedural directives and the Regional Recusal Determination Procedure Handbooks, will provide NMFS, NOAA GC, the Councils, and the public with a thorough understanding of, and process for, the preparation and issuance of recusal determinations, thereby improving the transparency and predictability of recusal determinations.

Guidance on Partially Attributing Financial Interests

For certain financial interests, regulations at 50 CFR 600.235(c)(6) require designated officials to attribute to an appointed Council member fishery harvesting, processing, and marketing activity, and vessel ownership, commensurate with the percentage of ownership of the financial interest. This attribution is necessary to determine whether the appointed Council member has a significant financial interest in the fishery or sector of the fishery affected by the Council decision. Designated officials will attribute all financial interests of an appointed Council member.

The following hypothetical situations demonstrate how financial interests are to be partially attributed:

In 2021, a Regional Fishery Management Council is considering an action that would change the regulations governing a commercial fishery managed by the Council. In 2020, thirty vessels participated in this commercial fishery and the total harvest was 100,000 pounds of fish. Given these facts and applying the regulations at 50 CFR 600.235, harvest greater than 10,000 pounds represents a significant financial interest and recusal would be required. Additionally, vessel ownership greater than 3 vessels represents a significant financial interest and recusal would be required.

Situation #1: Council member Jones owns 75% of Fishing Company A, which owns and operates three catcher vessels in the commercial fishery under consideration. In 2020, Fishing Company A's vessels together harvested a combined 7% of the total harvest (7,000 pounds).

Situation #2: Same as #1, but additionally, Fishing Company A owns 50% of Fishing Company B, a fishing company that owns and operates two catcher

vessels in the same commercial fishery. In 2020, Fishing Company B's vessels together harvested a combined 5% of the total harvest (5,000 pounds).

Situation #3: Same as #2, but additionally, Fishing Company B owns 60% of Fishing Company C, a fishing company that owns and operates one catcher vessel in the same commercial fishery. In 2020, Fishing Company C's vessel harvested 8% of the total harvest (8,000 pounds).

In all of these Situations, Council member Jones has direct ownership of Fishing Company A; in Situations #2 and #3, Council member Jones also has indirect ownership of both Fishing Company B and C.

Partially Attributing Fishing Activity

In Situation #1, a total of 5,250 pounds of fish would be attributed to Council member Jones as follows:

$$75\% \times 7,000 \text{ pounds} = 5,250 \text{ pounds attributable to Council member Jones}$$

In Situation #2, a total of 7,125 pounds of fish would be attributable to Council member Jones as follows:

$$\begin{aligned} 50\% \times 5,000 \text{ pounds} &= 2,500 \text{ pounds of Fishing Company B harvest attributable to Fishing Company A} \\ 2,500 \text{ pounds} + 7,000 \text{ pounds} &= 9,500 \text{ pounds of harvest attributable to Fishing Company A} \\ 75\% \times 9,500 \text{ pounds} &= 7,125 \text{ pounds attributable to Council member Jones} \end{aligned}$$

In Situation #3, a total of 8,925 pounds of fish would be attributable to Council member Jones as follows:

$$\begin{aligned} 60\% \times 8,000 \text{ pounds} &= 4,800 \text{ pounds of Fishing Company C harvest attributable to Fishing Company B} \\ 4,800 \text{ pounds} + 5,000 \text{ pounds} &= 9,800 \text{ pounds of harvest attributable to Fishing Company B} \\ 50\% \times 9,800 \text{ pounds} &= 4,900 \text{ pounds of Fishing Company B harvest attributable to Fishing Company A} \\ 4,900 \text{ pounds} + 7,000 \text{ pounds} &= 11,900 \text{ pounds of harvest attributable to Fishing Company A} \\ 75\% \times 11,900 \text{ pounds} &= 8,925 \text{ pounds attributable to Council member Jones} \end{aligned}$$

Council member Jones would not be required to recuse herself in any Situation based on the harvest threshold because the amount of the total harvest attributable to her is not greater than 10,000 pounds and; therefore, does not represent a significant financial interest.

Partially Attributing Fishing Vessels

In Situation #1, a total of 2.25 vessels would be attributed to Council member Jones as follows:

$$\begin{aligned} &0.75 \text{ vessel (75\% x Fishing Company A vessel \#1)} \\ &0.75 \text{ vessel (75\% x Fishing Company A vessel \#2)} \\ &+ 0.75 \text{ vessel (75\% x Fishing Company A vessel \#3)} \\ &\hline &2.25 \text{ vessels attributable to Council member Jones} \end{aligned}$$

In Situation #2, a total of 3 vessels would be attributable to Council member Jones as follows:

0.75 vessel (75% of Fishing Company A vessel #1)
0.75 vessel (75% of Fishing Company A vessel #2)
0.75 vessel (75% of Fishing Company A vessel #3)
0.375 vessel (75% of 50% (or 37.5%) of Fishing Company B vessel #1)
+ 0.375 vessel (75% of 50% (or 37.5%) of Fishing Company B vessel #2)
3.00 vessels attributable to Council member Jones

In Situation #3, a total of 3.225 vessels would be attributable to Council member Jones as follows:

0.75 vessel (75% of Fishing Company A vessel #1)
0.75 vessel (75% of Fishing Company A vessel #2)
0.75 vessel (75% of Fishing Company A vessel #3)
0.375 vessel (75% of 50% (or 37.5%) of Fishing Company B vessel #1)
0.375 vessel (75% of 50% (or 37.5%) of Fishing Company B vessel #2)
+ 0.225 vessel (75% of 50% of 60% (or 22.5%) of Fishing Company C vessel #1)
3.225 vessels attributable to Council member Jones

In Situations #1 and #2, Council member Jones would not be required to recuse herself based on the vessel ownership threshold because the number of vessels attributable to her is not greater than 3 vessels and therefore does not represent a significant financial interest. However, in Situation #3, Council member Jones would be required to recuse herself based on the vessel ownership threshold because the number of vessels attributable to her is greater than 3 vessels and; therefore, does represent a significant financial interest.

Regional Recusal Determination Procedure Handbooks

Regulations at 50 CFR 600.235(f) require each NMFS Regional Office, in conjunction with the NOAA General Counsel Regional Section, to develop a Regional Recusal Determination Procedure Handbook(s). Regional Recusal Determination Procedure Handbooks explain the process and procedure typically followed by the region in preparing and issuing recusal determinations. The regulations at 50 CFR 600.235(f) state what must be included in the Handbook(s), but this procedural directive provides the process to be followed for issuing and modifying the Handbooks.

Issuance of Regional Recusal Determination Procedure Handbooks

- After the NMFS Regional Office and the NOAA GC Regional Section develop a proposed Regional Recusal Determination Procedure Handbook in accordance with 50 CFR 600.235(f), each NOAA GC Regional Section should provide NMFS OSF and NOAA GC Fisheries and Protected Resources Section with an opportunity to review and comment on the proposed Regional Recusal Determination Procedure Handbook. Agency review should be completed before the proposed Regional Recusal Determination Procedure Handbooks are provided to the Council(s) for review.

- Proposed Regional Recusal Determinations Procedure Handbooks should be ready for Council review within two years from the effective date of this procedural directive and as soon as possible during this period of time.
- When the proposed Regional Recusal Determination Procedure Handbook is ready for Council review, each NOAA GC Regional Section should provide a copy of the proposed Regional Recusal Determination Procedure Handbook to the Executive Director(s) of the Council(s) in the region for Council review and comment. The period of time provided to a Council to review and comment on the proposed Regional Recusal Determination Procedure Handbook should include at least one Council meeting at which discussion of the proposed Regional Recusal Determination Procedure Handbook could be included on the Council's agenda.
- After providing the Council(s) in the region with a reasonable period of time to review and comment on the proposed Regional Recusal Determination Procedure Handbook, the NOAA GC Regional Section, NMFS Regional Office, and NMFS OSF should consider the comments received from the Council(s) and prepare the final Regional Recusal Determination Procedure Handbook.
- When finalized, each NOAA GC Regional Section will provide NMFS OSF, the NMFS Regional Office, NOAA GC Fisheries and Protected Resources Section, and the Executive Director(s) of the Council(s) with copies of the final Regional Recusal Determination Procedure Handbook(s).

Modifications to Regional Recusal Determination Procedure Handbooks

- Regional Recusal Determination Procedure Handbooks should be modified as necessary to stay current with the process and procedures that are typically followed by the region in preparing and issuing recusal determinations.
- Each NOAA GC Regional Section should provide NMFS OSF its NMFS Regional Office, and NOAA GC Fisheries and Protected Resources Section with an opportunity to review and comment on all proposed modifications to the Regional Recusal Determination Procedure Handbook before the proposed modifications are provided to the Council(s).
- When agency review of the proposed modifications is completed, each NOAA GC Regional Section should provide a copy of the Regional Recusal Determination Procedure Handbook with the proposed modifications clearly identified to the Executive Director(s) of the Council(s) in the region for Council review and comment. The period of time provided to a Council to review and comment on

proposed modifications should include at least one Council meeting at which discussion of the proposed modifications could be included on the Council's agenda.

- After providing the Council(s) in the region with a reasonable period of time to review and comment on the proposed modifications, the NOAA GC Regional Section, NMFS Regional Office, and NMFS OSF should consider the comments received from the Council(s).
- If, based on comments from the Council(s) or further agency review, the agency determines that the proposed modifications are not necessary, the NOAA GC Regional Section will notify the Council(s) that no modifications will be made to the Regional Recusal Determination Procedure Handbook. Otherwise, each NOAA GC Regional Section will provide the NMFS OSF, NMFS Regional Office, NOAA GC Fisheries and Protected Resources Section, and Executive Director(s) of the Council(s) with copies of the final Regional Recusal Determination Procedure Handbook as modified.

Post-Council Meeting Action

- Council Executive Directors should record incidences of recusals or discussions surrounding conflicts of interest by members subsequent to each Council meeting. Council Executive Directors should submit these records to NMFS Regional Offices in a timely manner.
- Council Executive Directors and the NMFS Regional Offices are required to compile this data by the end of the calendar year for inclusion in the Report to Congress on the Disclosure of Financial Interest and Recusal Requirements for Councils and Scientific and Statistical Committees.

Briefing of Councils on Financial Disclosure and Recusal Requirements

Both NMFS and the Councils want to ensure that Council members are well aware of their responsibilities for financial disclosure and recusal, and that disclosure of their financial interests allows them to fully participate in Council activities unless recused. For these reasons, and in the interest of transparency and public understanding, NMFS and NOAA GC will continue to communicate the existing policies and procedures concerning financial disclosure and recusal to all NMFS employees, Council members, Council staff, and the public. Consistent with this, NOAA GC will conduct an annual briefing for the Councils on financial disclosure and recusal requirements. Any briefings or trainings, either coordinated by NOAA GC or OSF, will address completing financial disclosure forms, the recusal process, and discuss penalties.

Public Online Access to Regional Recusal Determination Procedure Handbooks and Recusal Determinations

In coordination with each NOAA GC Regional Section, each NMFS Regional Office will create a place on the NMFS Regional Office webpage where the public can access the region's Regional Recusal Determination Procedure Handbook(s), any written recusal determinations, and any appeals of recusal determinations. Following the effective date of this procedural directive, each NOAA GC Regional Section should provide its NMFS Regional Office web administrator with all written recusal determinations and appeal decisions, and electronic copies of the Regional Recusal Determination Procedure Handbook(s), as they become available. As time and resources permit, any written recusal determinations and appeal decisions issued prior to the effective date of this procedural directive should be added to the NMFS Regional Office webpage. All written recusal determinations and appeal decisions made publicly available will protect from disclosure all confidential and protected information. NMFS OSF will maintain a place on its webpage that provides links to all of the NMFS Regional Office webpages and serves as a central source for locating all Regional Recusal Determination Procedure Handbooks, any written recusal determinations, and any appeal decisions.