

NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 01-116-01
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Fisheries Management
Fishery Management Council Financial Disclosures and Recusal, NMFSPD 01-116

PROCEDURES FOR REVIEW OF FISHERY MANAGEMENT COUNCIL
FINANCIAL DISCLOSURES AND RECUSAL DETERMINATIONS

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SUMMARY OF REVISIONS:

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 procedures.

Signed: _____ Date _____

Alan Risenhoover
Director of Office of Sustainable Fisheries

Table of Contents

1.	Introduction.....	1
2.	Financial Disclosure Form Review.....	
2.1	Financial Disclosure Form Vetting for Nominees for Council Membership.....	
2.2	Financial Disclosure Form Vetting for Appointed Council Members.....	
3.	Recusal Determinations	
3.1	National Guidance on Calculating a Council Member’s Financial Interests for Comparison to the Regulatory Recusal Thresholds.....	
3.1.1	Information to be Used.....	
3.1.2	Attribution Principles to be Applied.....	
3.1.2.1	Companies owned by, or that employ, a Council member.....	
3.1.2.2	Companies owned by a Council member’s company or employer.....	
3.1.2.3	Companies owning fifty percent or more of a Council member’s..... company or employer	
3.1.2.4	Associations and Organizations.....	
3.1.2.5	Financial interests of a spouse, partner or minor child.....	
3.2	Development and Contents of Regional Recusal Determination Procedures.....	
3.3	Process for Issuing and Modifying Regional Recusal Determination Procedures.....	
3.3.1	Issuance of Regional Recusal Determination Procedures.....	
3.3.2	Modifications to Regional Recusal Determination Procedures.....	
3.4	Post-Council Meeting Action.....	
4.	Briefing of Councils on Financial Disclosure and Recusal Requirements.....	
5.	Public Online Access to Regional Recusal Determination Procedures and Recusal Determinations	

Attachments

- A. NOAA’s Statement of Financial Interest Form
- B. 50 CFR 600.235
- C. 16 U.S.C. 1852(j)
- D. Letter dated December 18, 2012, to David T. Goethel from David Maggi, Chief, Ethics Law and Programs Division, Office of the Assistant General Counsel for Administration, U.S. Department of Commerce

1. **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 the disclosure of any financial interest in harvesting, processing, lobbying, advocacy, or marketing activity that is being, or will be, undertaken within any fishery over which the Fishery Management Council (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 consistency and transparency in the calculation of a Council member's financial interests relative to the regulatory thresholds for recusal; and (3) establish regional procedures for preparing and issuing recusal determinations.

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 GC Ethics Law and Programs Division, reviewed its existing policies and procedures regarding financial disclosure by Council members and nominees 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 Section 3 of this procedural directive to include additional guidance on preparing recusal determinations, thereby increasing the predictability and transparency of the recusal determination process and further advancing the OIG report's third recommendation.

2. **Financial Disclosure Form Review**

NMFS has established a vetting process to review the completeness and accuracy of information in nominees' and members' financial disclosure forms. The procedures outlined in Sections 2.1 and 2.2 serve to document the vetting process and ensure consistency in the process for each NMFS Region and Council.

2.1 **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 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.

2.2 **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 maintain a file of submitted financial disclosure forms for the region's Council(s), keeping each form for at least 5 years after the expiration of the Council member's last term, and make the forms available to the Regional Administrator and NOAA GC to aid in any conflict of interest or recusal determination.

3. **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. Among other things, these regulations establish recusal thresholds, provide for voluntary recusal, describe what a Council member may do if recused from voting, identify who may request or initiate a recusal determination and when this should be done, and provide a procedural framework for appealing a recusal determination. However, certain aspects of making a recusal determination, such as how the agency calculates a Council member's financial interests for comparison to the recusal thresholds, are not addressed in the regulations. Additionally, some of the regulations, such as those concerning requests for recusal determinations, provide a large degree of flexibility.

NMFS and NOAA GC determined that national guidance on calculating a Council member's financial interests for comparison to the recusal thresholds is necessary to ensure consistent application across the regions and Councils. Section 3.1 sets forth the national guidance for calculating a Council member's financial interests that is applicable to all regions in the preparation of recusal determinations. NMFS and NOAA GC also determined that the Councils and the public should be aware of the process and procedures that are typically followed by each region in making recusal determinations. Section 3.2 sets forth the national guidance for developing regional guidance documents that describe the region's recusal determination process and procedures (i.e., Regional

Recusal Determination Procedures). Section 3.3 sets forth national guidance for issuing and updating Regional Recusal Determination Procedures.

This procedural directive and the Regional Recusal Determination Procedures supplement the recusal regulations at 50 CFR 600.235. The recusal regulations at 50 CFR 600.235, together with the guidance in this procedural directive and the Regional Recusal Determination Procedures, 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.

3.1 National Guidance on Calculating a Council Member's Financial Interests for Comparison to the Regulatory Recusal Thresholds

3.1.1 Information to be Used

- NOAA GC will use the information reported on a Council member's financial interest form and any other reliable and probative information provided in writing to NOAA GC.
- NOAA GC may contact the Council member to better understand the reported financial interest or any information provided in writing to NOAA GC.
- NOAA GC may use the internet to locate publicly available information relevant to a Council member's reported financial interests. Before relying on such information, NOAA GC should review with the Council member any relevant information located on the internet to ensure reliability.
- Regardless of whether a Council member's financial interest form has gone through the vetting process described in Section 2.2, there is a presumption that the information reported by a Council member on the submitted financial disclosure form is true and correct and NOAA GC is not responsible for determining the veracity of the reported information when preparing a recusal determination.

3.1.2 Attribution Principles to be Applied

The following provides guidance on how regional NOAA GC Sections should attribute fishing activity or vessel ownership to a Council member when calculating the member's financial interests in a fishery or sector of a fishery affected by the Council decision for comparison to the regulatory recusal thresholds. While this guidance addresses basic attribution principles, NOAA GC Regional Sections may encounter new aspects of calculating financial interests that are not addressed in the regulations or guidance

provided below. In such situations, regional NOAA GC Sections may consult with the DOC GC Ethics Law and Programs Division and other attorneys within NOAA GC. A NOAA GC Regional Section should avoid consulting with any attorney in NOAA GC who may be assigned to assist the NOAA General Counsel in deciding a request for review, or appeal, of a recusal determination.

3.1.2.1 Companies owned by, or that employ, a Council member.

- NOAA GC Regional Sections should attribute to a Council member all harvesting, processing, and marketing activity of, and all vessels owned by, a company that is wholly or partially owned by the Council member.
- NOAA GC Regional Sections should attribute to a Council member all harvesting, processing, and marketing activity of, and all vessels owned by, a company that employs the Council member.

3.1.2.2 Companies owned by a Council member's company or employer.

- NOAA GC Regional Sections should attribute to a Council member all harvesting, processing, and marketing activity of, and all vessels owned by, a company that is wholly or partially owned by the Council member's company.
- NOAA GC Regional Sections should attribute to a Council member all harvesting, processing, and marketing activity of, and all vessels owned by, a company that is wholly or partially owned by the Council member's employer.

3.1.2.3 Companies owning fifty percent or more of a Council member's company or employer.

- NOAA GC Regional Sections should attribute to a Council member all harvesting, processing, and marketing activity of, and all vessels owned by, a company that owns fifty percent or more of a company owned by the Council member.
- NOAA GC Regional Sections should attribute to a Council member all harvesting, processing, and marketing activity of, and all vessels owned by, a company that owns fifty percent or more of the company that employs the Council member.
- NOAA GC Regional Sections should not attribute to a Council member 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 either owned by or that employs the Council member.

3.1.2.4 Associations and Organizations.

A Council member may be employed by or serve, either compensated or unpaid, as an officer, director, board member or trustee of an association or organization. NOAA GC Regional Sections should not attribute to the Council member 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 an allocation of harvesting or processing privileges, owns vessels, or is directly engaged in harvesting, processing or marketing, NOAA GC Regional Sections should attribute to the Council member the vessels owned by, and all harvesting, processing, and marketing activity of, that association or organization. Additional information on this guidance can be found in Attachment D.

3.1.2.5 Financial interests of a spouse, partner or minor child.

- NOAA GC Regional Sections should attribute to a Council member all harvesting, processing, and marketing activity of, or any vessels owned by, a company that is wholly or partially owned by the Council member's spouse, partner or minor child.
- NOAA GC Regional Sections should not attribute to a Council member the harvesting, processing, or marketing activity of, or any vessels owned by, a company that employs the Council member's spouse, partner or minor child when the spouse, partner or minor child is a salaried or hourly wage employee and does not have any direct or indirect ownership interest in the company. Conversely, NOAA GC Regional Sections should attribute to a Council member all harvesting, processing, and marketing activity of, or any vessels owned by, a company that employs the Council member's spouse, partner or minor child when the spouse, partner or minor child has earnings that are influenced by, or fluctuate with, the success of the company or has a direct or indirect ownership interest in the company.

3.2 **Development and Contents of Regional Recusal Determination Procedures**

- Each NOAA GC Regional Section should develop a regional guidance document known as Regional Recusal Determinations Procedures. Regional Recusal Determinations Procedures are intended to provide an explanation of the process and procedures that are typically followed by the region in preparing and issuing recusal determinations. Regional Recusal Determination Procedures should be consistent

with the MSA, regulations at 50 CFR 600.235, NMFS Policy Directive 01-116, and this procedural directive. If requested by the NOAA GC Regional Section, the NMFS Regional Office should assist with the development of, or modifications to, the Regional Recusal Determinations Procedures.

- Regional Recusal Determination Procedures should include the following:
 - a) A statement that the Regional Recusal Determination Procedures is in addition to the regulations at 50 CFR 600.235 and the guidance in NMFSPD 01-116 and NMFSI 01-116-01 addressing Council member recusal.
 - b) A statement that although the process and procedures described in the Regional Recusal Determination Procedures represent the typical process followed for recusal determinations, deviation from the typical process may be required at times to address special situations.
 - c) Identification of the Council(s) to which the Regional Recusal Determination Procedures applies. If the Regional Recusal Determination Procedures 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.
 - d) A description of the process for identifying the fishery or sector of the fishery affected by the action before the Council.
 - e) A description of the process for preparing and issuing a recusal determination relative to the timing of a Council decision.
 - f) A description of the process by which the Council, Council members, and the public will be made aware of recusal determinations.
 - g) A description of the process for identifying the designated official(s) who will prepare recusal determinations and attend Council meetings.
- Regional Recusal Determination Procedures may include additional material related to the region's process and procedures for recusal determinations not specifically identified by this procedural directive.

3.3 **Process for Issuing and Modifying Regional Recusal Determination Procedures**

3.3.1 **Issuance of Regional Recusal Determination Procedures**

- After proposed Regional Recusal Determination Procedures have been developed in accordance with Section 3.2, each NOAA GC Regional Section should provide NMFS OSF and its NMFS Regional Office with an opportunity to review and comment on the proposed Regional Recusal Determination Procedures. Agency review should be completed before the proposed Regional Recusal Determination Procedures are provided to the Council(s) for review.
- Proposed Regional Recusal Determinations Procedures 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 Procedures are ready for Council review, each NOAA GC Regional Section should provide a copy of the proposed Regional Recusal Determination Procedures 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 Procedures should include at least one Council meeting at which discussion of the proposed Regional Recusal Determination Procedures 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 Procedures, 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 Procedures.
- When finalized, each NOAA GC Regional Section will provide NMFS OSF, the NMFS Regional Office, and the Executive Director(s) of the Council(s) with copies of the final Regional Recusal Determination Procedures.

3.3.2 **Modifications to Regional Recusal Determination Procedures**

- Regional Recusal Determination Procedures 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 and its NMFS Regional Office with an opportunity to review and comment on all proposed

modifications to the Regional Recusal Determination Procedures 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 Procedures 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 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 Procedures. Otherwise, each NOAA GC Regional Section will provide the NMFS OSF, NMFS Regional Office, and Executive Director(s) of the Council(s) with copies of the final Regional Recusal Determination Procedures as modified.

3.4 **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.

4. **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. This includes a briefing on the policy and procedural guidance developed to respond to the OIG recommendations. Any briefings or trainings, either coordinated by NOAA GC or OSF, will address completing financial disclosure forms, the recusal process, and discuss penalties.

5. **Public Online Access to Regional Recusal Determination Procedures and Recusal Determinations**

In coordination with each NOAA GC Regional Section, each NMFS Regional Office will create a place on its regional website where the public can access the region's Regional Recusal Determination Procedures, any written recusal determinations, and any appeals of recusal determinations. Starting on the effective date of this procedural directive, each NOAA GC Regional Section should provide its NMFS Regional Office website administrator with electronic copies of the Regional Recusal Determination Procedures and all written recusal determinations and appeal decisions 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 website. All written recusal determinations and appeal decisions made publicly available will protect from disclosure all confidential and protected information.

OSF will maintain a place on its website that provides links to all of the NMFS Regional Office websites and serves as a central source for locating all Regional Recusal Determination Procedures, any written recusal determinations, and any appeal decisions.