

# **Magnuson-Stevens Act Financial Disclosure and Recusal Requirements**

Presented by

NOAA Office of General Counsel, Northeast

# Government Ethics

## ...an ideal and a practice

- Public service is a public trust.
- Your work involves balancing sensitive economic, social, and ecological factors to achieve the greatest overall benefits to the Nation, which encompasses a broad variety of interests.
- This trust should compel employees to place loyalty to the Constitution, laws, and ethical principles above private gain.
- Thus, government ethics rules help ensure government decisions are made free from personal financial bias by prohibiting employees from holding financial interests that conflict with the conscientious performance of duty.

# Government Ethics Rules and Penalties

- ▶ **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.

# Overriding Considerations in the Magnuson-Stevens Act

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 Recusal Requirements

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 Council decisions 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.”*

# **MSA Disclosure Bias Part 1: Disclose and Vote...most of the time**

- ▶ 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 some fishery matters that would otherwise present a conflict of interest as long as the financial interest is not too large.

# 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 prior to 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.



# MSA Disclosure Bias Part 2:

## Don't hold back or lie

- ▶ In addition to 16 U.S.C. § 208 and 216
- ▶ 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).
- ▶ (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 this section, or to knowingly vote on a Council decision in violation of this section. In addition to the penalties applicable under §600.735, a violation of this provision may result in removal of the affected individual from Council or SSC membership.

# 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.

# How is the disclosed information used?

- ▶ The disclosed information is used to determine whether there is a conflict of interest that requires recusal.
- ▶ Recusal is removing oneself from the voting process to avoid a conflict of interest.

# What are the effects of recusals?

- ▶ A Council Chair may not allow any affected individual determined to have a conflict of interest to cast a vote.
- ▶ If an affected individual may not vote, the individual may state for the record how he or she would have voted.
- ▶ 50 C.F.R. § 600.235(d) *Voluntary recusal*. An affected individual who believes they have a conflict of interest due to a disclosed financial interest 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.
- ▶ An affected individual who is recused from voting 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.

# Who makes recusal determinations?

- ▶ *Designated official* means an attorney designated by the NOAA General Counsel.
- ▶ The designated official will use the information disclosed in the financial disclosure form and presume it is true and correct. The designated official 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.
- ▶ The designated official may use any other reliable and probative information provided in writing.
- ▶ The designated official may contact an affected individual to better understand the reported financial interest or any information provided in writing.

# Who initiates recusal determinations?

- ▶ **An affected individual** can request a determination from NOAA General Counsel,
  - (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.
    - Determining whether a recusal is required can be time intensive, and late request may not be completed in time before the questioned vote is required.

You are encouraged to contact the Council's NOAA General Counsel attorney as soon as possible for a determination if you think a Council decision could have a significant and predictable effect on your financial interests.

# 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) and 50 C.F.R. § 600.235(c). Remember “significant and predictable effect.”



# 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.*”
  - The determining factor is the affected individual's significant financial interest *in the fishery or sector of the fishery affected by the Council decision.*

# “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.

# Brief overview of attribution principles

- ▶ **Direct Ownership** = Proportional attribution of harvesting, processing, and marketing activity according to ownership %
- ▶ **Direct Employment** = Full attribution of fishing activity if the Council member is employed by a company with financial interests in the affected fishery
- ▶ **Indirect Ownership** = 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 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



# Attribution principles (continued)

- ▶ 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.

# Brief overview of attribution principles (continued)

- ▶ **Employment or service with associations or organizations**
  - 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**
  - For ownership, proportional attribution
  - For employment, attribution only of compensation that is influenced by, or fluctuates with, the financial performance of the company

# Reminder: What happens when 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 vote on the Council decision.

# 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.

# 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 Office 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.

# 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.

# Where Can You 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 MAFMC member disclosure forms can be found at the MAFMC web-site.



# Litigation Challenging MAFMC Actions

- ▶ Summer Flounder State Commercial Allocation Amendment
- ▶ Recreational Harvest Control Rule
- ▶ Mackerel Amendment 14 (river herring and shad)
- ▶ Summer Flounder, Scup, Black Sea Bass Commercial/Recreational Allocation Amendment

# MSA 305(f)--Provisions for Lawsuits

- ▶ Cases are brought in Federal District Courts
- ▶ Regulations and actions taken by Secretary under regulations which implement an FMP can be subject to challenge.
- ▶ Lawsuit must be brought within 30 days from publication in Federal Register
- ▶ Preliminary injunction not available
- ▶ Court's review based on Administrative Procedure Act

# Administrative Procedure Act Litigation—Record Review

Was agency action arbitrary and capricious?

What was before the agency when it made its decision?

Administrative record—documents and materials  
considered by decision maker

# What Does This Mean For Litigation?

- ▶ “Four Corners of Record”
- ▶ No need for fact finding by court
- ▶ No need for witnesses
- ▶ No need for a trial
- ▶ Cases typically decided on summary judgment

# Start of Case—Complaint

- ▶ Formal requirement of Federal Rules of Civil Procedure
- ▶ Complaint lays out why the court has jurisdiction of the case, and sets out the facts and legal theory of the case
- ▶ Numbered paragraphs
- ▶ Must be served on agency, U.S. Attorney, and Department of Justice

# Answering Complaint

- ▶ MSA requires agency to answer complaint 45 days after service of complaint
- ▶ Answer has numbered paragraphs responding to complaint's numbered paragraphs
- ▶ Admit/deny
- ▶ Assertions of affirmative defenses (jurisdictional arguments, statute of limitations, etc)

# Motion to Dismiss

- ▶ Instead of filing Answer, can file Motion to Dismiss
- ▶ Jurisdictional arguments
- ▶ Failure to State a Claim Upon Which Relief Can Be Granted

# Administrative Record

- ▶ MSA requires filing administrative record at same time answer to complaint is filed
- ▶ Administrative record serves as the universe of facts by which court reviews the agency's action
- ▶ Documents before the agency at the time it made its decision



# What Is In Administrative Record?

- ▶ Committee and Council documents
- ▶ Scientific materials, fishery assessment documents
- ▶ NEPA, ESA documents
- ▶ Federal Register Notices
- ▶ Memoranda to Decision makers
- ▶ Public Comments/Responses to Public Comments

# Disputes over Record

- ▶ Missing documents
- ▶ Scope of record—temporal and subject matter
- ▶ Cross references to other documents
- ▶ Negotiated resolution or motion for judge

# On to the Merits!

## Summary Judgment

- ▶ Motion/Opposition/Reply
  - Plaintiff's Motion for SJ
  - Defendant's Cross Motion for SJ and Opposition to Plaintiff's Motion for SJ
  - Plaintiff's Opposition to Defendant's Motion for SJ and Reply in Support of Plaintiff's Motion for SJ
  - Defendant's Reply in Support of Motion for SJ
  - Oral Argument (not always)

# Decisions from the Court

- ▶ Written opinions explaining ruling
- ▶ Serve as basis for appeals

# Timing of Cases

- ▶ Complaint filed
- ▶ Motion to dismiss—2 months to brief, decision 6 months.
- ▶ Answer/administrative record 45 days
- ▶ Resolving disputes over record—0 days up to a year
- ▶ Summary judgment briefing—3-6 months
- ▶ Decision on Summary Judgment from Court—typically >1 year