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## New England Fishery Management Council

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DRAFT FOR EX COMM DISCUSSION

1/15/2019

Mr. Alan Risenhoover  
Director, Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway – SSMC3  
Silver Spring, MD 20910

Re: Proposed Rule, Financial Disclosure and Recusal (83 *Federal Register* 57705)

Dear Mr. Risenhoover:

Thank-you for the opportunity to comment on the proposed regulations that implement Magnuson-Stevens Act (MSA) provisions for Council member financial disclosure and recusal. The Council reviewed the proposed rule at our January, 2019 meeting. We offer the following comments.

If adopted, the rule will clarify the process used to make recusal determinations. It will also clarify who is responsible for specifying the regional approach, retaining financial disclosure statements, and publishing determinations. In addition, the rule would establish and standardize the attribution principles that are used to determine when an affected individual has a significant financial interest that leads to a determination that requires recusal. In general, the Council supports the changes and most of the specific provisions. We offer the following comments on specific elements of the proposed rule for your consideration.

The rule would require the preparation of a Regional Recusal Determination Procedure Handbook. We believe that there should be requirements included that specify when recusal determinations will be made, and how quickly action will be taken on a request for review. Council members requesting a review should know how long the review will take since the recusal determination remains in effect until changed. We also believe that this process and the regional handbook should be developed and modified in consultation with the Council. It should be clarified if this handbook will implement or replace the provisions of National Marine Fisheries Service Instruction 01-116-01 (Procedures for Review of Fishery Management Council Financial Disclosures).

In our opinion, the Proposed Rule does not adequately address lobbying or advocacy relationships. Financial interests that must be reported on the financial disclosure form include lobbying and advocacy relationships but under the current definition this appears limited to various form of ownership or employment. It does not appear to include other contractual arrangements. This may be the result of a narrow interpretation of the MSA's requirement that an affected individual must disclose any financial interest that is "held." A broader interpretation of

the statutory language might include financial arrangements other than ownership or employment. If a Council member receives financial support (outside of employment) from a lobbying or advocacy organization, in the interest of transparency shouldn't that be disclosed?

Regardless of how the holding of a financial interest is interpreted, the existing and Proposed Rule do not provide any meaningful guidance on when a financial interest in a lobbying or advocacy organization should lead to recusal. In the Proposed Rule, a "significant financial interest" is defined solely on the basis of harvesting, marketing, processing, and vessel ownership. As a result, a Council member with a financial interest in a lobbying or advocacy organization is unlikely to ever have a significant financial interest that leads to recusal. This is a shortfall in the current regulation that should be addressed in the Proposed Rule. We acknowledge that MSA Section 302(j)(7)(A) says that disproportionate benefits are evaluated "...relative to the financial interests of other participants in the same gear type or sector of the fishery." That same paragraph, however, does not exempt lobbying and advocacy organizations from the possibility of recusal and grants the Secretary the authority to develop appropriate regulations to define such conduct.

Finally, the determination of a close causal relationship needs to be clarified. The current draft language is very subjective and provides little guidance to Council members or the designated official preparing the determination. This will lead to endless debates over whether a relationship is real or speculative. Perhaps the inclusion of examples as is done in some regulations (e.g. 5 CFR 2635.402(b)(1)) may help clarify this issue.