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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 180212158-8158-01]

RIN 0648-BH73

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Regional Fishery Management Council Membership; Financial Disclosure and Recusal

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes changes to the regulations that address disclosure of financial interests by, and voting recusal of, council members appointed by the Secretary of Commerce (Secretary) to the regional fishery management councils established under the Magnuson-Stevens Fishery Conservation and Management Act. The regulatory changes are needed to provide guidance to ensure consistency and transparency in the calculation of a Council member's financial interests; determine whether a close causal link exists between a Council decision and a benefit to a Council member's financial interest; and establish regional procedures for preparing and issuing recusal determinations. This proposed rule is intended to improve regulations implementing the statutory requirements governing disclosure of financial interests and voting recusal at section 302(j) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Written comments must be received on or before March 6, 2019.

ADDRESSES: You may submit comments on this document, identified by FDMS Docket Number NOAA–NMFS–2018-0092, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov#!/docketDetail;D=NOAA-NMFS-2018-0092*, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- *Fax:* 301-713-1175
- *Mail:* Submit written comments to Alan Risenhoover, Director, Office of Sustainable Fisheries, National Marine Fisheries Service, 1315 East-West Highway, SSMC3, Silver Spring, MD 20910. Please mark the outside of the envelope “Financial Disclosure/Recusal.”

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.) submitted voluntarily by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

Electronic copies of NMFS Policy Directive 01-116 Fishery Management Council Financial Disclosures and NMFS Procedural Directive 01-116-01 Procedures for Review of Fishery Management Council Financial Disclosures may be obtained at

<https://www.fisheries.noaa.gov/national/laws-and-policies/fisheries-management-policy-directives>.

FOR FURTHER INFORMATION CONTACT: Brian Fredieu, 301-427-8505.

SUPPLEMENTARY INFORMATION: Section 302 of the Magnuson-Stevens Act (16 U.S.C. 1852) includes provisions for the establishment and administration of the regional fishery management councils (Councils). Section 302(j) (16 U.S.C. 1852(j)) sets forth the statutory requirements for the disclosure of financial interests, and the circumstances under which a Council member is prohibited, or recused, from voting on a matter before a Council. These requirements apply to “affected individuals.” The Magnuson-Stevens Act defines “affected individual” at section 302(j)(1)(A) as individuals who are nominated by the Governor of a State for appointment as a voting member of a Council under section 302(b)(2), and voting members of a Council appointed under section 302(b)(2), or (b)(5) if the individual is not subject to disclosure and recusal requirements under the laws of an Indian tribal government. An affected individual is required to disclose any financial interest in any harvesting, processing, lobbying, advocacy, or marketing activity that is being, or will be, undertaken within a fishery over which the Council concerned has jurisdiction or with respect to an individual or organization with a financial interest in such activity (16 U.S.C. 1852(j)(2)). See also 50 CFR 600.235(a) (further defining “financial interest in harvesting, processing, lobbying, advocacy, or marketing activity”). Disclosure is required for the above types of financial interests held by that individual; the individual’s spouse, minor child or partner; or any organization in which the individual is serving as an officer, director, trustee, partner or employee (16 U.S.C. 1852(j)(2)).

Regulations implementing the provisions at section 302(j) appear at 50 CFR 600.235. NMFS also has issued policy and procedural directives (see **ADDRESSES**) to provide additional guidance on the disclosure of financial interests and recusal.

Pursuant to section 305(d) of the Magnuson-Stevens Act (16 U.S.C. 1855(d)), this proposed rule would modify the regulations at 50 CFR 600.235 to provide guidance to (1) ensure consistency and transparency in the calculation of an affected individual's financial interests; (2) determine whether a close causal link exists between a Council decision and a benefit to an affected individual's financial interest; and (3) establish regional procedures for preparing and issuing recusal determinations. This proposed rule also makes several minor modifications to the regulations governing financial disclosure. The remainder of this preamble provides detailed information on the background and application of the recusal regulations, the issues that have arisen given the lack of regulations addressing certain aspects of recusal, and a detailed description of the regulatory changes being proposed to determine when a voting recusal is required and the process for issuing recusal determinations.

Background on the financial disclosure and recusal regulations at 50 CFR 600.235

In 1986, the Magnuson-Stevens Act, originally called the Fishery Conservation and Management Act, was amended by Public Law 99-659 to require voting members and Executive Directors of each Council to disclose any financial interest they held in harvesting, processing, or marketing of fishery resources under the jurisdiction of their respective Council. With passage of the Sustainable Fisheries Act in 1996 (Public Law 104-297), Congress amended the Magnuson-Stevens Act to include provisions that prohibit an affected individual from voting on Council decisions that would have a significant and predictable effect on the individual's disclosed financial interests. Section 302(j)(7) of the Magnuson-Stevens Act (16 U.S.C.

1852(j)(7)) includes a substantive threshold that requires a voting recusal when met, and procedural provisions that apply if an affected individual is prohibited from voting on a Council decision. The substantive threshold requires a voting recusal when a Council decision would have a “significant and predictable effect” on an affected individual’s disclosed financial interests. Section 302(j)(7)(A) states that a council decision is considered to have a “significant and predictable effect” on a financial interest if there is “a close causal link between the Council decision and an expected and substantially disproportionate benefit to the financial interests of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery.” The procedural provisions (1) identify a designated official as the person making determinations on whether a Council decision would have a significant and predictable effect on an affected individual’s financial interest (recusal determination), (2) allow a Council member to request the Secretary of Commerce’s (Secretary’s) review of a recusal determination, (3) permit an affected individual who is recused from voting to state how he or she would have voted, and (4) state that any reversal of a recusal determination may not be cause for the invalidation or reconsideration of the Council decision. Section 302(j)(7)(F) requires NMFS to promulgate regulations implementing the provisions of section 302(j)(7).

In August 1997, NMFS published a proposed rule to implement the new voting restriction and procedural provisions at section 302(j)(7) (62 FR 42474; August 7, 1997). Most relevant to this proposed rulemaking, NMFS proposed regulations that implemented the Magnuson-Stevens Act’s substantive threshold for recusal and defined the phrase “expected and substantially disproportionate benefit”. This definition established a 10 percent interest threshold in either the total harvest, marketing or processing, or ownership of vessels as an indicator of whether an affected individual’s interest in the fishery was significant enough to constitute an expected and

substantially disproportionate benefit for purposes of recusal determinations. In the proposed rule preamble, NMFS explained that it interpreted the statutory term “benefit” to include both positive and negative impacts on the affected individual’s financial interests, noting that, “Avoiding a negative is as advantageous as gaining a positive.” NMFS also explained that the choice of a particular percentage as “indicative of a ‘significant’ interest” was a difficult one. NMFS stated that it was considering “a tiered approach, with different percentage indicators for different-sized sectors of the fishing industry,” but that it had been unable to develop a workable model and invited suggestions from the public on dealing with the issue.

The proposed regulations also defined the term “designated official” as “an attorney designated by the NOAA General Counsel” and included a process for the issuance and review of recusal determinations. The proposed regulations did not define the term “Council decision,” provide any formula for calculating harvesting, processing, and marketing activity of an affected individual’s financial interests relative to the 10 percent thresholds, or provide any regulatory guidance on how to determine the existence of “close causal link.”

NMFS received a number of comments on the proposed rule and published a final rule implementing the voting recusal provisions in November 1998 (63 FR 64182; November 19, 1998). In response to one comment, NMFS added a regulatory definition for the term “Council decision.” Several comments addressed the proposed definition of “expected and substantially disproportionate benefit.” In response to one comment, NMFS explained that the agency had focused on the comparative aspect of the defined term and emphasized that, “The disqualifying effect is not that the Council action will have a significant impact on the member’s financial interest; the action must have a disproportionate impact as compared with that of other participants in the fishery sector.” Additionally, some commenters said the 10 percent thresholds

were too high for any fishery; other commenters said the 10 percent thresholds were too low for small fisheries. NMFS maintained the 10 percent thresholds, and responded “While NMFS has no quantitative data on which to base the selection of 10 percent as the disqualifying industry share, qualitative information available from existing disclosure forms and other sources indicates that this value would accomplish the Congressional intent of disqualifying from voting only those current Council members whose financial interests would be disproportionately affected by Council actions, in comparison with the financial interests of other participants in the fishery sector.” NMFS received no comments on, and made no changes in the final rule to address, the calculation of harvesting, processing and marketing activity relative to the 10 percent thresholds or regulatory guidance on determining the existence of “close causal link.” The recusal regulations, located at 50 CFR 600.235, became effective on February 17, 1999.

No changes were made to the statutory or regulatory provisions governing financial disclosure and recusal until January 2007, when the Magnuson-Stevens Act was reauthorized (Public Law 109-479). The Magnuson-Stevens Reauthorization Act amended section 302(j) to include advocacy and lobbying as types of activities that must be disclosed by affected individuals and to require members of each Council’s Scientific and Statistical Committee to disclose their financial interests. NMFS modified the regulations governing disclosure of financial interests and recusal to address these changes in 2010 (75 FR 59143, September 27, 2010). No further amendments to section 302(j) have occurred since the Magnuson-Stevens Reauthorization Act and NMFS has made no modifications to the financial disclosure and recusal regulations since 2010.

Agency application of the recusal regulations

Since the effective date of the recusal regulations in February 1999, designated officials within the regional offices of the NOAA Office of General Counsel have followed and applied the recusal regulations and have prepared and issued recusal determinations when requested and as necessary for affected individuals within each of the Councils. However, because the regulations lack guidance on several key aspects of reaching a recusal determination, and provide little guidance on the procedures to be followed when preparing and issuing a recusal determination, designated officials have developed practice principles and interpretations over time to fill in these regulatory gaps and to address new factual circumstances that have arisen. The following describes the current practice, principles, and interpretations that have been used in preparing and issuing recusal determinations, which are being either modified or supplemented through this rulemaking.

Attribution Principles

Without a regulatory formula for calculating harvesting, processing or marketing activity (*i.e.*, covered activity) and vessel ownership relative to the 10 percent thresholds, designated officials have applied a “full attribution” principle. Under the full attribution principle, all covered activity of, and all vessels owned by, a financial interest that is wholly or partially owned by an affected individual are fully attributed to the affected individual. Percentage of ownership has not been a relevant factor under the full attribution principle; the determining factor has been that there is some percentage of ownership in the financial interest. The full attribution principle has also been applied to employment; and to all covered activity of, including all vessels owned by, a financial interest that employs an affected individual. The full

attribution principle also extends to financial interests that are wholly or partially owned by an affected individual's financial interests.

A slightly different attribution principle has been applied for financial interests that wholly or partially own an affected individual's financial interests. A designated official will apply the full attribution principle when a financial interest owns fifty percent or more of an affected individual's financial interest. However, if a financial interest owns less than fifty percent of an affected individual's financial interest, then the designated official has not attributed to an affected individual any covered activity of, or vessels owned by, the financial interest.

Finally, designated officials have followed certain guidelines in applying attribution principles when the financial interest is an association or organization, or when a spouse, partner, or minor child holds the financial interest. For associations and organizations, designated officials have applied the full attribution principle when the affected individual's association or organization receives from NMFS an allocation of harvesting or processing privileges, owns vessels, or is directly engaged in a covered activity. However, if the association or organization, as an entity separate from its members, does not own any vessels and is not directly engaged in any covered activity, designated officials have not attributed to the affected individual the covered activity of, or vessel ownership by, the members of the association or organization. For spouses, partners, and minor children, application of the attribution principle depends on whether there is ownership of, or employment with, the financial interest. Designated officials apply the full attribution principle and attribute to an affected individual all covered activity of, and vessels owned by, a financial interest that is wholly or partially owned by a spouse, partner, or minor child. Similarly, designated officials have applied the full attribution principle and attributed to

an affected individual all covered activity of, and vessels owned by, a financial interest that employs a spouse, partner or minor child when the spouse's, partner's, or minor child's compensation is influenced by, or fluctuates with, the financial performance of the company. Conversely, designated officials have not attributed to an affected individual any covered activity of, or vessels owned by, a financial interest that employs a spouse, partner or minor child when the spouse's, partner's, or minor child's compensation is not influenced by, or fluctuates with, the financial performance of the company.

Close causal link

Since implementation of the recusal regulations in 1999, designated officials have understood that the Magnuson-Stevens Act and the regulations require a voting recusal when there is a close causal link between the Council decision and an expected and substantially disproportionate benefit to an affected individual's financial interest in the fishery or sector of the fishery affected by the Council decision relative to other participants and using the most recent fishing year for which information is available. However, without any regulatory guidance concerning the close causal link requirement, the issue has sometimes been subsumed in the determination of whether there is an expected and substantially disproportionate benefit.

Process and procedure for preparing and issuing recusal determinations

Regulations at 50 CFR 600.235(f) set forth two paths for initiating a recusal determination. First, an affected individual may request a recusal determination by notifying the designated official either within a reasonable time before the Council meeting at which the Council decision will be made or during a Council meeting before a Council vote on the decision. Second, a designated official may initiate a recusal determination. The designated official may initiate based on his or her knowledge of the fishery and the financial interests

disclosed by an affected individual or based on written and signed information received either within a reasonable time before a Council meeting or, if the issue could not have been anticipated before the meeting, during a Council meeting before a Council vote on the decision. Regulations at § 600.235(f) also state that the recusal determination will be based upon a review of the information contained in the affected individual's financial interest form and any other reliable and probative information provided in writing and that all information considered will be made part of the public record for the decision.

While the regulations at § 600.235(f) provide some structure for the initiation, development, and issuance of a recusal determination, they are silent on other important procedural aspects of preparing and issuing a recusal determination. For example, the regulations do not address: (1) the process by which the designated official will make the affected individual, the Council, and the public aware of recusal determinations, (2) how and when designated officials are identified, or (3) the timing of issuing a recusal determination relative to the start of a Council meeting and the request for review process. Without additional regulatory guidance concerning the procedure for preparing and issuing recusal determinations, regional practices have developed to address these gaps.

Concerns with the recusal regulations and need for action

Several recent determinations resulting in voting recusals have raised concerns among the Regional Fishery Management Councils. In April 2015, the NOAA General Counsel received a request for review (*i.e.*, appeal) of a recusal determination issued in March 2015 that concluded that a voting recusal was required for an affected individual on the North Pacific Council. The appeal challenged the use of the full attribution approach and argued that the regulations and common business practices support using a proportional share, or partial attribution, approach to

calculating financial interests. Under such an approach, an affected individual would be attributed with covered activity and vessel ownership commensurate with the affected individual's percentage of ownership in the company. The appeal noted that the language of the regulations refers to the interests of the affected individual and explained that if an affected individual owns five percent of a fishing company, then the affected individual only receives five percent of the company distributions because the affected individual does not have a financial interest in more than five percent of the company. According to the appeal, to attribute all activity of a partially-owned company unreasonably credits the affected individual with more of the financial interest than is actually owned. The appeal also argued that in an employment situation, the affected individual should only be attributed with a proportional share of the harvesting and processing activity of companies that are partially-owned subsidiary companies of the affected individual's employer.

After reviewing the appeal, the NOAA General Counsel upheld the use of the full attribution approach, concluding that (1) the term "interest" as used in the recusal regulations is broad and not limited solely to direct financial benefit from harvest; (2) that the full attribution approach is more consistent with the purpose of the Magnuson-Stevens Act and the regulations; and (3) while past practice is not necessarily binding, consistency and predictability are important for all stakeholders in the fisheries management process.

After receiving another recusal determination in May 2015 that used the full attribution approach, the North Pacific Council submitted a letter to NMFS in August 2015, asking NMFS to consider changes to the way in which covered activity is calculated. Specifically, the North Pacific Council asked NMFS to consider using a proportional share approach similar to the approach described in the appeal. Under the approach, the designated official would attribute to

the affected individual the percentage of the company's covered activity that is commensurate with the affected individual's ownership percentage. The North Pacific Council argued that use of the full attribution approach is an "unfair and illogical interpretation of the recusal regulations, and results in unintended recusals of Council members." The North Pacific Council also stated that it had general concerns with the lack of transparency and predictability of the recusal process and asked that NMFS provide more clarity and predictability to the process of issuing recusal determinations.

While NMFS was considering the North Pacific Council's requests, another determination requiring a voting recusal of an affected individual of the North Pacific Council was issued in March 2017. The recusal determination applied the full attribution approach and determined that a voting recusal was required because the action before the North Pacific Council was a Council decision and the affected individual's financial interests harvested more than ten percent of the total harvest in the affected fishery during the previous fishing year. However, the Council decision was a fishery management plan amendment that required no implementing regulations. The North Pacific Council argued that because the action had no real possibility of affecting the affected individual's financial interests, there was no close causal link between the Council decision and the expected and substantially disproportionate benefit to the affected individual's financial interests and no voting recusal should have been required. Around this same time, the Western Pacific Council raised similar concerns with regard to "close causal link" between a benefit and a Council decision, and what constituted an "expected and substantially disproportionate benefit" regarding an affected individual's financial interest, especially when the affected individual is an employee of a fishing company versus an owner of a fishing company.

NMFS discussed these concerns with the Council Coordination Committee and decided to initiate this rulemaking to address the concerns. NMFS tasked a recusal working group, comprised of experts in both NMFS and the NOAA Office of General Counsel, to consider whether the agency should take any action regarding how the recusal provisions should be applied in such circumstances in the future. The group considered the attribution principles for recusal determinations and sought solutions to clarify the application of the close causal link requirement in the Magnuson-Stevens Act. The group also discussed ways in which to improve the transparency of regional procedures employed in preparing and issuing recusal determinations.

Proposed Changes to the financial disclosure and recusal regulations

NMFS proposes to make the following changes to the financial disclosure and recusal regulations at § 600.235.

Decision-making process for recusal determinations

NMFS proposes regulations that explain the steps to be followed in determining whether an affected individual is required to be recused from voting. Regulations at 50 CFR 600.235(c) (3) would be modified to clarify the multi-part test that is used in making this determination. First, the designated official would need to determine if the action being taken by a Council is a “Council decision” and whether an affected individual (*i.e.* member, spouse, partner, minor child) had an interest in the fishery affected by the Council decision. If the action before the Council is not a “Council decision” or no affected individuals have any financial interests in the fishery affected by the decision, the designated official’s inquiry would end. But if the answer to these factors is yes, the designated official would then need to examine the next two factors: whether there is an expected and substantially disproportionate benefit to the affected

individual's financial interests and whether there is a close causal link between the Council decision and the expected and substantially disproportionate benefit. Under the proposed rule, a designated official would be able to decide the order in which these factors are examined. If the answer to either of these factors is no, then the designated official's inquiry would end and a voting recusal would not be required. But if the answer to both of these factors is yes, then a voting recusal would be required.

Expected and substantially disproportionate benefit

NMFS proposes to make minor adjustments to the current regulatory definition of "expected and substantially disproportionate benefit." One of these changes would be to remove the ten percent recusal thresholds from the definition of "expected and substantially disproportionate benefit" and use them to define the term "significant financial interest."

NMFS also proposes to add § 600.235(c)(5) to provide guidance on determining whether an expected and substantially disproportionate benefit exists. This proposed regulation clarifies that an expected and substantially disproportionate benefit will be determined to exist if an affected individual has a significant financial interest in the fishery that is likely to be positively or negatively impacted by the Council decision. An affected individual's significant financial interest in a fishery indicates that the affected individual will experience an expected and substantially disproportionate impact, either positive or negative, relative to the financial interests of other participants in the fishery. The magnitude of the positive or negative impact is not determinative of whether there is an expected and substantially disproportionate benefit.

NMFS also proposes regulatory guidance on how to calculate an affected individual's financial interests in order to determine whether the affected individual has a significant financial interest, which is described later in the preamble.

Close Causal Link

NMFS proposes to create a definition of close causal link to better guide the application of the requirement for causation between a Council decision and an expected and substantially disproportionate benefit to the financial interests of an affected individual. The proposed definition would state that a close causal link means that “a Council decision would reasonably be expected to directly impact or affect the financial interests of an affected individual.”

NMFS also proposes regulatory guidance on determining whether a close causal link exists. Due to the nature of Council decisions, NMFS concluded that it generally is likely that a close causal link between a benefit and a Council decision exists for all Council decisions, especially those with implementing regulations, as regulations typically impact the public directly in some way. However, NMFS also recognizes that there may be instances where no impact would occur or where the chain of causation is attenuated. Therefore, NMFS proposes exceptions under which a designated official may determine that a close causal link does not exist. One proposed exception would be for a Council decision affecting a fishery or sector of a fishery in which an affected individual has a financial interest but the chain of causation between the Council decision and the affected individual’s financial interest is attenuated or is contingent on the occurrence of events that are speculative or that are independent and unrelated to the Council decision. The other proposed exception would be for a Council decision affecting a fishery or sector of a fishery in which an affected individual has a financial interest but there is no real, as opposed to speculative, possibility that the Council decision will affect the affected individual’s financial interest. This proposed language provides guidance on how to determine an element of causation in those instances where a Council decision is not reasonably expected to directly impact or affect the financial interest of an affected individual.

Calculating Significant Financial Interest

In response to the requests for increased transparency and predictability, NMFS proposes to amend the regulations to provide guidance on the attribution principles to be applied when calculating whether an affected individual has a significant financial interest in a fishery. The proposed attribution principles address (1) direct ownership and employment, (2) indirect ownership, (3) parent ownership, (4) financial interests in associations and organizations, and (5) financial interests of a spouse, partner, or minor child. The proposed attribution principles for parent ownership, associations and organizations, and financial interests of a spouse, partner, or minor child represent the approach NMFS has been following and would continue to follow if this proposed rule is finalized. However, NMFS proposes to adopt a partial attribution approach when calculating direct and indirect ownership.

NMFS recognizes a distinction between two different types of partial interest: (1) direct ownership, and (2) indirect ownership (*i.e.* a subsidiary relationship). A direct ownership interest exists where a council member (or the member's employer) directly owns some interest – whether full ownership or some share – in a particular company. An indirect or subsidiary ownership interest exists where a company in which the council member (or the member's employer) has a direct interest owns a share of another company. NMFS believes the direct and indirect ownership situations should be distinguished because an individual has a direct interest in, and more control over, a company that he or she owns, even if the interest represents a partial interest in the company. On the other hand, an individual's indirect ownership interest in a subsidiary company is more attenuated. Note also that in some cases employees are treated differently than owners because an employee cannot be “partially” employed by a company.

An affected individual would be considered to have a direct ownership interest when the affected individual wholly or partially owns, or is employed by, a business, vessel, or other entity (*i.e.*, company) reported on the individual's financial interest form. For direct ownership, NMFS proposes that a designated official fully attribute to an affected individual all covered activity and vessel ownership of a company when the affected individual is employed by, or owns 50 percent or more of, the company. If the affected individual owns less than 50 percent of the company, NMFS proposes that a designated official attribute covered activity and vessel ownership commensurate with the affected individual's percentage of ownership.

In the case of direct ownership, NMFS determined that affected individuals owning 50 percent or more of a company should continue to be attributed with 100 percent of the covered activity and vessel ownership of that company because an individual has a direct interest in, and more control over, a company that he or she owns, even if the interest represents less than a 100 percent interest in the company. NMFS believes that when a Council member owns a controlling interest in a company, the member can also control a company's response to any particular council decision and the potential for a conflict of interest is heightened. Additionally, NMFS determined that an employee of a company should continue to be attributed with 100 percent of the covered activity and vessel ownership of that company because an employee cannot be "partially" employed and thus the employee's interest is always fully attributed to a company through the nature of their employment. However, NMFS determined that a partial attribution approach for less than 50 percent direct ownership would more closely align the owner's actual ownership interest in a company and better reflect the ability to control the company's activities. Therefore NMFS proposes to only attribute the proportional level of interest to the owner.

In the case of indirect (or subsidiary) ownership, an affected individual would be considered to have an indirect ownership interest when the affected individual's company or employer wholly or partially owns a company that must be reported on the individual's financial interest form. For subsidiary ownership, NMFS proposes to apply a partial attribution approach and attribute to the affected individual the harvesting, processing, and marketing activity of, and vessels owned by, a company that is owned by an affected individual's company or employer commensurate with the member's percentage ownership in the directly owned company, and the directly owned company's ownership in the indirectly owned company. For example, if Jones owns 25 percent of Acme, and Acme owns 50 percent of Zenith, then Jones should be attributed 12.5 percent of Zenith's activity in an affected fishery. NMFS determined that this partial attribution approach better captures the attenuated nature of indirect ownership and reflects that an affected individual has less control or a more partial interest in the activities of a company indirectly owned by the affected individual's directly owned company or employer. In any of these cases, the burden would be on the Council member to provide reliable information concerning partial ownership interests. In the absence of such information, a 100 percent interest would be assumed.

NMFS recognizes that the proposed revisions to the direct and indirect attribution principles may not address every situation in which an affected individual's interest may seem attenuated. However, under the proposed multi-part test for determining whether recusal is required, a designated official must specifically determine whether there is a close causal link between a council decision and an expected and substantially disproportionate benefit to an affected individual's financial interests. The proposed guidance on close causal link will further address situations where an affected individual's interest is attenuated from a Council decision.

Process for Development and Issuance of Recusal Determinations

In order to increase transparency and to add clarity to the process for development and issuance of recusal determinations, NMFS intends to require that each NMFS Regional Office, in conjunction with NOAA Office of General Counsel, will publish and make available to the public a Regional Recusal Determination Procedure Handbook, which explains the process and procedure typically followed by the region in preparing and issuing recusal determinations. The handbook would include: a statement that the Regional Recusal Determination Procedure Handbook is intended as guidance to describe the recusal determination process and procedure typically followed within the region; identification of the Council(s) to which the Regional Recusal Determination Procedure Handbook applies; a description of the process for identifying the fishery or sector of the fishery affected by the action before the Council; a description of the process for preparing and issuing a recusal determination relative to the timing of a Council decision; a description of the process by which the Council, Council members, and the public will be made aware of recusal determinations; and a description of the process for identifying the designated official(s) who will prepare recusal determinations and attend Council meetings.

Other proposed changes

In addition to the proposed changes described above, NMFS proposes to make several minor changes to section 600.235 to provide additional clarity to the financial disclosure regulations and guidance concerning the length of time Regional Administrators and NMFS Regional Offices must retain financial disclosure forms submitted by Council and Scientific and Statistical Committee (SSC) members. First, NMFS proposes to amend the heading for section 600.235 to include reference to recusal. The current heading for section 600.235 only refers to financial disclosure but this section has included the recusal regulations since 1998. The

addition of “recusal” to the heading would provide clarity as to the subject of the regulations at section 600.235.

Second, the proposed rule would modify regulations at 600.235(h) to change “financial disclosure report” to “Financial Interest Form” to provide the accurate title of the financial disclosure form when it is referenced in the regulations. The proposed modifications would provide clarity and consistency in the financial disclosure regulations by including an accurate reference to the financial disclosure form.

Third, the proposed rule would add a new paragraph 600.235(b)(5), which would require a Regional Administrator to retain a Council member’s financial disclosure forms for 20 years from the date the form is signed by the Council member, or in accordance with the records retention schedule published by the National Archives and Records Administration (NARA), and as implemented by NOAA, if the schedule requires retention of such forms for longer than 20 years. Currently, the financial disclosure regulations do not provide Regional Administrators or NMFS Regional Offices with any guidance on the length of time a Council member’s financial disclosure forms should be retained by NMFS. NMFS has determined that financial disclosure forms submitted by Council members are important documents worthy of retention for 20 years after their submission, or for as long as required by NARA. The proposed change would ensure that a Council member’s financial disclosure forms are available for public inspection and agency examination for a sufficient period of time during and following the Council member’s tenure on a regional fishery management council.

Finally, the proposed rule would make minor clarifying changes through proposed § 600.235(b)(8) by changing the phrase “shall maintain on file” to “must retain.”

Classification

The NMFS Assistant Administrator has determined that the proposed rule is consistent with the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed action is significant for the purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This rule regulates only those Council members who have voting privileges and are appointed to their position by the Secretary of Commerce.

This proposed rule would modify regulations at 50 CFR 600.235 to provide guidance to: (1) ensure consistency and transparency in the calculation of an affected individual's financial interests; (2) determine whether a close causal link exists between a Council decision and a benefit to an affected individual's financial interest; and (3) establish regional procedures for preparing and issuing recusal determinations. NMFS invites public comment on whether the changes proposed are sufficient and effective in distinguishing the calculation of direct ownership, indirect ownership and employment interests; whether the proposed language appropriately defines when a close causal link exists between a Council decision and a benefit; and whether the establishment of regional procedures provides consistency and transparency in the preparation and issuance of recusal determinations. Specifically, NMFS invites public comment on whether partial attribution should extend to cases where the affected individual is an employee, a member of an association or organization, a spouse, partner, or minor child of a council member, or in cases of parent ownership; on whether there are additional circumstances that merit an exception from the standard that a close causal link exists for all Council decision

that require implementing regulations and that affect a fishery or sector of a fishery in which an affect individual has a financial interest; whether partial attribution appropriately reflects the attenuated nature of indirect ownership. NMFS also invites comment on whether a 50 percent ownership threshold captures the nature of direct ownership, including whether an interest of less than 50 percent might in some cases be controlling, but also notes that any subjective control test would likely require council members to submit additional financial information and would require NMFS to develop a process and expertise to analyze control. In accordance with 50 CFR 600.235, Council members may be required to recuse themselves from voting on a Council decision that would have a significant and predictable effect on a disclosed financial interest. This proposed rule would have no effect on any small entities, as defined under the Regulatory Flexibility Act, 5 U.S.C. § 601. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and Recordkeeping requirements, Statistics.

Dated: November 8, 2018

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For reasons set out in the preamble, NMFS proposes to amend 50 CFR part 600 as follows:

PART 600—MAGNUSON-STEVENSON ACT PROVISIONS

1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

2. In § 600.235:

a. Revise the section heading;

b. In paragraph (a) add in alphabetical order the definitions for “Close causal link,” “Expected and substantially disproportionate benefit,” and “Significant financial interest;”

c. Redesignate paragraphs (b)(5) through (b)(7) as paragraphs (b)(6) through (b)(8), respectively, add new paragraph (b)(5), and revise newly redesignated paragraph (b)(8);

d. Revise paragraph (c)(3), redesignate paragraph (c)(4) as (c)(7), and add new paragraphs (c)(4), (c)(5), and (c)(6);

e. Revise the heading of paragraph (f), (f)(1), and add paragraph (f)(6);

f. Revise paragraphs (g)(2) and (h).

The additions and revisions to read as follows:

§ 600.235 Financial disclosure and recusal.

(a) * * *

Close causal link means that a Council decision would reasonably be expected to directly impact or affect the financial interests of an affected individual.

* * * **

Expected and substantially disproportionate benefit means 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 means:

(1) A greater than 10-percent interest in the total harvest of the fishery or sector of the fishery affected by the Council decision;

(2) A greater than 10-percent interest in the marketing or processing of the total harvest of the fishery or sector of the fishery affected by the Council decision; or

(3) Full or partial ownership of more than 10 percent of the vessels using the same gear type within the fishery or sector of the fishery affected by the Council decision.

(b) * * *

(5) The Regional Administrator must retain the Financial Interest Form for a Council member for 20 years from the date the form is signed by the Council member or in accordance with the current NOAA records schedule.

* * * * *

(8) The Regional Administrator must retain the Financial Interest Forms of all SSC members for at least five years after the expiration of that individual's term on the SSC. Such forms are not subject to sections 302(j)(5)(B) and (C) of the Magnuson-Stevens Act.

(c) * * *

(3) In making a determination under paragraph (f) of this section as to whether a Council decision will have a significant and predictable effect on an affected individual's financial interests, the designated official will:

(i) Initially determine whether the action before the Council is a Council decision, and whether the affected individual has any financial interest in the fishery or sector of the fishery affected by the action.

(ii) If the designated official determines that the action is not a Council decision or that the affected individual does not have any financial interest in the fishery or sector of the fishery affected by the action, the designated official's inquiry ends and the designated official will determine that a voting recusal is not required under 50 CFR 600.235.

(iii) However, if the designated official determines that the action is a Council decision and that the affected individual has a financial interest in the fishery or sector of the fishery affected by the Council decision, a voting recusal is required under 50 CFR 600.235 if there is:

(A) An expected and substantially disproportionate benefit to the affected individual's financial interest (see paragraph (c)(5) of this section), and

(B) A close causal link (see paragraph (c)(4) of this section) between the Council decision and the expected and substantially disproportionate benefit to the affected individual's financial interest.

(4) *Determining close causal link.* (i) For all Council decisions that require implementing regulations and that affect a fishery or sector of a fishery in which an affected individual has a financial interest, a close causal link exists unless:

(A) The chain of causation between the Council decision and the affected individual's financial interest is attenuated or is contingent on the occurrence of events that are speculative or that are independent of and unrelated to the Council decision; or

(B) There is no real, as opposed to speculative, possibility that the Council decision will affect the affected individual's financial interest.

(ii) For Council decisions that do not require implementing regulations, a close causal link exists if there is a real, as opposed to speculative, possibility that the Council decision will affect the affected individual's financial interest.

(5) *Determining expected and substantially disproportionate benefit.* A designated official will determine that an expected and substantially disproportionate benefit exists if an affected individual has a significant financial interest (see paragraph (c)(6) of this section) in the fishery or sector of the fishery that is likely to be positively or negatively affected by the Council decision. The magnitude of the positive or negative impact is not determinative of whether there is an expected and substantially disproportionate benefit. The determining factor is the affected individual's significant financial interest in the fishery or sector of the fishery affected by the Council decision.

(6) *Calculating significant financial interest – (i) Information to be used.* (A) The designated official will use the information included in the Financial Interest Form and any other reliable and probative information provided in writing.

(B) The designated official may contact an affected individual to better understand the reported financial interest or any information provided in writing.

(C) The designated official will presume that the information reported on the Financial Interest Form is true and correct and the designated official is not responsible for determining the veracity of the reported information when preparing a determination under paragraph (f) of this section.

(D) 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.

(ii) *Attribution principles to be applied when calculating an affected individual's financial interests relative to the significant financial interest thresholds.* The designated official will apply the following principles when calculating an affected individual's financial interests relative to the significant financial interest thresholds for the fishery or sector of the fishery affected by the action. For purposes of this paragraph, use of the term "company" includes any business, vessel, or other entity.

(A) *Direct ownership (companies owned by, or that employ, an affected individual).* The designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company when the affected individual owns 50 percent or more of that company. If an affected individual owns less than 50 percent of a company, the designated official will attribute to the affected individual the harvesting, processing, and marketing activity of, and vessels owned by, the company commensurate with the affected individual's percentage of ownership. The designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company that employs the affected individual.

(B) *Indirect ownership (companies owned by an affected individual's company or employer).* The designated official will attribute to the affected individual the harvesting, processing, and marketing activity of, and vessels owned by, a company that is owned by that affected individual's company or employer commensurate with the affected individual's percentage ownership in the directly owned company, and the directly owned company's ownership in the indirectly owned company.

(C) *Parent ownership (companies that own some percentage of an affected individual's company or employer).* The designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company that owns fifty percent or more of a company that is owned by the affected individual or that employs the affected individual. The designated official will not attribute to an affected individual 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 owned by the affected individual or that employs the affected individual.

(D) *Associations and Organizations.* An affected individual may be employed by or serve, either compensated or unpaid, as an officer, director, board member or trustee of an association or organization. The designated official will not attribute to the affected individual 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 from NMFS an allocation of harvesting or processing privileges, owns vessels, or is directly engaged in harvesting, processing or marketing, the designated official will attribute to the affected individual the vessels owned by, and all harvesting, processing, and marketing activity of, that association or organization.

(E) *Financial interests of a spouse, partner or minor child – (1) Ownership.* The designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company when the affected individual's spouse, partner or minor child owns 50 percent or more of that company. If an affected

individual's spouse, partner or minor child owns less than 50 percent of a company, the designated official will attribute to the affected individual the harvesting, processing, and marketing activity of, and vessels owned by, the company commensurate with the spouse's, partner's or minor child's percentage of ownership.

(2) *Employment.* The designated official will not attribute to an affected individual the harvesting, processing, or marketing activity of, or any vessels owned by, a company that employs the affected individual's spouse, partner or minor child when the spouse's, partner's or minor child's compensation are not influenced by, or fluctuate with, the financial performance of the company. The designated official will attribute to an affected individual all harvesting, processing, and marketing activity of, and all vessels owned by, a company that employs the Council member's spouse, partner or minor child when the spouse's, partner's or minor child's compensation are influenced by, or fluctuate with, the financial performance of the company.

* * * * *

(f) *Process and procedure for determination.* (1) At the request of an affected individual, and as provided under paragraphs (c)(3) through (6), the designated official shall determine for the record whether a Council decision would have a significant and predictable effect on that individual's financial interest. Unless subject to confidentiality requirements, all information considered will be made part of the public record for the decision. The affected individual may request a determination by notifying the designated official—

(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.

* * * * *

(6) *Regional Recusal Determination Procedure Handbook*. (i) Each NMFS Regional Office, in conjunction with NOAA Office of General Counsel, will publish and make available to the public its Regional Recusal Determination Procedure Handbook, which explains the process and procedure typically followed in preparing and issuing recusal determinations.

(ii) A Regional Recusal Determination Procedure Handbook must include:

(A) A statement that the Regional Recusal Determination Procedure Handbook is intended as guidance to describe the recusal determination process and procedure typically followed within the region.

(B) Identification of the Council(s) to which the Regional Recusal Determination Procedure Handbook applies. If the Regional Recusal Determination Procedure Handbook 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.

(C) A description of the process for identifying the fishery or sector of the fishery affected by the action before the Council.

(D) A description of the process for preparing and issuing a recusal determination relative to the timing of a Council decision.

(E) A description of the process by which the Council, Council members, and the public will be made aware of recusal determinations.

(F) A description of the process for identifying the designated official(s) who will prepare recusal determinations and attend Council meetings.

(iii) A Regional Recusal Determination Procedure Handbook may include additional material related to the region's process and procedure for recusal determinations not specifically identified in paragraph (f)(6)(ii) of this section. A Regional Recusal Determination Procedure

Handbook may be revised at any time upon agreement by the NMFS Regional Office and NOAA Office of General Counsel.

(g) * * *

(2) A Council member may request a review of any aspect of the recusal determination, including but not limited to, whether the action is a Council decision, the description of the fishery or sector of the fishery affected by the Council action, the calculation of an affected individual's financial interests or the finding of a significant financial interest, and the existence of a close causal link. A request for review must include a full statement in support of the review, including a concise statement as to why the Council member believes that the recusal determination is in error and why the designated official's determination should be reversed.

* * * * *

(h) The provisions of 18 U.S.C. 208 regarding conflicts of interest do not apply to an affected individual who is a voting member of a Council appointed by the Secretary, as described under section 302(j)(1)(A)(ii) of the Magnuson-Stevens Act, and who is in compliance with the requirements of this section for filing a Financial Interest Form. The provisions of 18 U.S.C. 208 do not apply to a member of an SSC, unless that individual is an officer or employee of the United States or is otherwise covered by the requirements of 18 U.S.C. 208.

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