

Financial Disclosure and Recusal Provisions

A Closer Examination

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Financial Disclosure Examples

Fictional Council and SSC members

The handout describes **four** fictional public members of the hypothetical Central Fishery Management Council:

Mr. Sparrow, Ms. Swann,
Mr. Turner, and Mr. Barbossa

And **one** fictional SSC member – Dr. Ricketts

For Mr. Sparrow:

1. Should Sparrow disclose Ocean Bounty Seafoods on his financial disclosure form?
Yes.
2. In response to which questions?
Question 1.1.1 (because he has partial ownership of Ocean Bounty) and
Question 1.2.1 (because he is employed by Ocean Bounty)
Maybe also Question 1.2.2 (because he is employed on one of Ocean Bounty's fishing vessels)
3. Should Sparrow disclose Deep Sea on his financial disclosure form?
It would be very helpful if he did, but I'm not sure there is a problem if he doesn't.
Deep Sea is affiliated with Ocean Bounty (as a subsidiary of Ocean Bounty) and Sparrow has disclosed Ocean Bounty.
4. In response to which question would Sparrow disclose Deep Sea?
None are a perfect fit, but he could disclose it under Questions 1.1.1 and 1.1.2
or under Question 1.1.5 (Sparrow partially owns Ocean Bounty which partially owns Deep Sea)

For Ms. Swann:

1. Should Swann disclose Swann Consultants on her financial disclosure form?

Yes, in response to Questions 1.1.4 (because she has partial ownership in a lobbying company) and 1.2.4 (because she is employed with a lobbying company).

2. Should Swann disclose Acme Seafoods on her financial disclosure form?

It would be very helpful if she did, but I'm not sure there is a problem if she doesn't.

Acme Seafoods is affiliated with Swann Consultants (as a parent of Swann Consultants) and she has disclosed Swann Consultants.

If Swann discloses Acme Seafoods, she could disclose it in response to Questions 1.1.5 and 1.2.5, because she partially owns, and is employed by, an entity that is partially owned by a company that processes and markets fish managed by the Central Council.

3. Should Swann disclose her husband's financial interests?

Yes, in response to Questions 2.1.4, 2.2.4, and 2.2.5 for the same reasons provided above.

For Mr. Turner:

1. Should Turner disclose his employment with the city of Seaside?

Maybe. He should, in response to Question 1.2.3, if the city of Seaside engages in marketing activities or provides support services for its local seafood businesses; or, in response to Question 1.2.4, if elected officials or city employees advocate on fisheries issues before the Central Council.

2. Should Turner disclose his service as a board member with the fishermen's association?

Yes, in response to Question 1.3.1

3. Should Turner disclose his older son's interests in the fisheries?

No, because Turner's older son is not a minor child and therefore there is no obligation for Turner to disclose that information.

4. Should Turner disclose his younger son's employment?

Yes, in response to Question 2.2.1



For Mr. Barbossa:

1. Should Barbossa disclose his employment with the fishermen's association?

Yes, in response to Question 1.2.6

2. How about his board membership with the cooperative harvesting organization?

Yes, in response to Question 1.3.1

For Dr. Ricketts:

1. Should Ricketts disclose his employment with Seaside University?

No; under 50 C.F.R. 600.235(a), employment with an entity engaging in scientific fisheries research in any fishery under the jurisdiction of the Council concerned is excluded from the types of financial interests that must be disclosed.

2. Should Ricketts disclose his service on the Audubon Board?

It would be wise to disclose this interest, in response to Question 1.3.1, because the National Audubon Society may lobby the Central Council.

Recusal Provisions

When is a council member recused from voting?

When a *Council decision* would have a *significant and predictable effect* on a Council member's financial interests.

16 U.S.C. 1852(j)(7)

“Council decision” is defined as:

- Approval of an FMP or FMP amendment;
- 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.

50 C.F.R. 600.235(a)

MSA defines “*significant and predictable effect*” as:

A close causal link between the Council decision and an “expected and substantially disproportionate benefit” to the Council member’s financial interest relative to the financial interests of other participants in the same gear type or sector of the fishery.

16 U.S.C. 1852(j)(7)

NMFS defined “*expected and substantially disproportionate benefit*” as
a:

- A greater than 10% interest in the total harvest of the fishery or sector of the fishery in question;
- A greater than 10% interest in the marketing or processing of the total harvest of the fishery or sector of the fishery in question; 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 in question

50 C.F.R. 600.235(c)(3)



How is the fishery or sector of the fishery determined?

The fishery or sector of the fishery is determined by the action before the Council.

How are financial interests calculated under the 10% thresholds?

- For members who are owners, we attribute all harvesting, processing, and marketing activity of a wholly- or partially-owned company to the Council member.
- For members who are employed or serve on a board of directors, we attribute all harvesting, processing, and marketing activity of the employer or organization to the Council member.

What about parent and subsidiary companies?

- We attribute all harvesting, processing, and marketing activity of a parent company to the Council member if the parent company owns a controlling interest in the member's company or employer (50% or greater)
- We attribute all harvesting, processing, and marketing activity of wholly- or partially-owned subsidiary companies to the Council member.

Recusal Examples

Recusal Question #1

The Central Council is considering a catch share program for the redfish fishery, which would require an FMP amendment and implementing regulations. At its November 2015 meeting, the Central Council will be voting on the suite of alternatives and options it would like to have analyzed for a catch share program.

Do the regulations prohibit any of our Council members (Sparrow, Swann, Turner, or Barbossa) from voting on this agenda item?



No.

The action before the Central Council at its November meeting (i.e., selecting alternatives and options for analysis) is not a “council decision.”

Recusals will have to be determined for the meeting at which the Central Council is scheduled to take final action on a catch share program for the redfish fishery.

Recusal Question #2

The Central Council will decide whether to adopt a catch share program for the redfish fishery at its March 2016 meeting.

Given the financial interests of our council members, will any members be recused from voting on that council decision under the regulations?

For Mr. Sparrow:

All of the redfish harvested by Ocean Bounty Seafoods (3%) would be attributed to Mr. Sparrow because he is a partial owner of, and employed by, that company.

Also, all of the redfish harvested by Deep Sea, LLC (2%) would be attributed to Mr. Sparrow because Deep Sea is a subsidiary of Ocean Bounty.

Although the level of redfish harvest attributable to Mr. Sparrow does not exceed 10% of the total harvest, the level of vessel ownership attributable to Mr. Sparrow (4 vessels) exceeds the 10% threshold of 3.2 vessels, and Mr. Sparrow would be recused from voting under the regulations.

For Ms. Swann:

Although her consulting company includes clients who harvest redfish, Ms. Swann and her husband are not directly involved in the harvesting, processing, or marketing of redfish and their clients' activity in the redfish fishery would not be attributed to her.

Additionally, the redfish processing and marketing activity of Acme Seafoods would not be attributed to Ms. Swann because Acme Seafoods does not have a controlling interest in Ms. Swann's consulting company.

Because Ms. Swann's financial interests do not exceed any of the thresholds, she is not recused from voting under the regulations.

For Mr. Turner:

Like Ms. Swann, although the association for which Mr. Turner serves as a board member includes members directly involved in the harvesting of redfish, the association itself is not directly involved in the harvesting of redfish and its members' activity would not be attributed to Mr. Turner.

Although his minor child is an employee of a company directly involved in the harvesting of redfish, his younger son's earnings are not influenced by or fluctuate with the success of the company and as such, the redfish harvesting activity of the Star of the Sea is not attributable to Mr. Turner through his minor child.

Finally, Mr. Turner's older son's activity in the redfish fishery is not a reportable financial interest.

Mr. Turner continued ...

Because Turner's financial interests do not exceed any of the thresholds, he is not recused from voting under the regulations.

Although Mr. Turner is not required to be recused under the regulations, he may choose to voluntarily recuse himself if he believes that the Council's decision would have a significant and predictable effect on his financial interests.




For Mr. Barbossa:

Mr. Barbossa has no financial interests in the redfish fishery so he is free to vote under the regulations.

Recusal Question #3

At its March 2016 meeting, the Central Council also will be taking a final vote on whether to prohibit the use of trawl net gear in the bluefish fishery.

Given the financial interests of Mr. Barbossa, will he be recused from voting on this council decision under the regulations?



Like Swann and Turner, although the association of bluefish fishermen that employs Mr. Barbossa includes members directly involved in the harvesting of bluefish, the association itself is not directly involved in the harvesting of bluefish and its members' harvesting activity in the bluefish fishery would not be attributed to Mr. Barbossa.

However, the harvesting activity of Bluefish Forever would be attributed to Mr. Barbossa. NMFS allocates a specific amount of bluefish directly to Bluefish Forever for harvest by its members, and Bluefish Forever is directly involved in the harvesting of bluefish. Therefore, the amount of bluefish allocated to Bluefish Forever and harvested by its members would be attributable to Mr. Barbossa because of his service on the board of directors for Bluefish Forever.

Because Bluefish Forever receives an allocation that exceeds the 10% harvesting threshold, Mr. Barbossa would be recused from voting on the action under the regulations.

Who initiates recusal determinations?

- A Council member can request a determination from NOAA General Counsel, or
- NOAA General Counsel can initiate a determination

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

50 C.F.R. 600.235(f)

What happens if I am recused from voting?

- Under 50 CFR 600.235(e), 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.
- Under 50 CFR 600.235(f)(4), you may state for the record how you would have voted on the Council decision.

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.
- Reversal of a determination may not be treated as cause for the invalidation or reconsideration by the Secretary of a Council's decision.

50 C.F.R. 600.235(g)

Parting thoughts:

- Recusal determinations are very fact-dependent.
- If you think you may have a recusal situation, consult with your NOAA GC attorneys as early as possible.