

资本市场法律热点问题

上海期货交易所修改实际控制账户认定及报备的相关规则

4月27日,上海期货交易所(以下简称“上期所”)发布了《上海期货交易所异常交易行为管理办法》、《上海期货交易所实际控制关系账户管理办法》(以下简称“《新办法》”),分别取代了《上海期货交易所异常交易监控暂行规定》(上期发

(2012)94号)以及上期所有关期货市场实际控制关系账户的认定标准的通知(以下简称“旧规”)。下面我们简单列举就有关实际控制账户的认定和报备,以及违规情形下的处理措施的修改要点。

	《新办法》主要条款	与旧规相比的主要修改
实际控制关系的认定	<ul style="list-style-type: none">● 实际控制是指行为人(包括个人、单位)对他人(包括个人、单位)期货账户具有管理、使用、收益或者处分等权限,从而对他人交易决策拥有决定权或者重大影响的行为或事实。● 《新办法》列举了八种具体情形,具有任何一种情形的,应当根据实质重于形式的原则认定为行为人对他人期货账户的交易具有实际控制关系。	新旧规定基本一致。略有细节不同: <ol style="list-style-type: none">1. 《新办法》对“实际控制”定义加入了“重大影响”,由此,不需要对交易决策有决定权,只要对他人的交易决策有重大影响就构成实际控制。2. 兜底条款的认定主体在交易所的基础上增加了证监会。
实际控制账户的报备	<ul style="list-style-type: none">● 具有实际控制关系的控制人和被控制人,均应当通过各自开户的期货公司会员主动向监控中心报备相关信息。● 交易所与监控中心建立实际控制关系账户信息共享机制,按照规定使用实际控制关系账户信息。● 符合实际控制关系账户认定标准的客户应当在签署期货经纪合同后10个交易日内完成实际控制关系账户报备。实际控制关系发生变更后,客户、非期货公司会员应当在10个交易日内通过相应的实际控制关系报备机构主动向监控中心报备变更情况。● 交易所在日常自律管理中发现客户具有疑似实际控制关系但尚未报备的账户,可以通过期货公司会员书面进行询问。相关客户应以书面形式及时回复交易所询问,并提供相关材	总体来说,报备分为实际控制关系的账户的开户人主动申报和监管机构询问检查并责令申报两种方式。 主要修改有: <ol style="list-style-type: none">1. 《新办法》新增要求通过交易所最终报备至中国期货市场监控中心。交易所与监控中心实行信息共享。2. 具有实际控制关系的控制人和被控制人,都有报备的义务。3. 主动报备的期限从5个工作日变更为10个交易日。

	《新办法》主要条款	与旧规相比的主要修改
	<p>料。期货公司会员应当及时做好书面说明材料的转递工作。</p> <ul style="list-style-type: none"> ● 对于具有实际控制关系但不如实报备相关信息、不如实回复交易所询问、隐瞒事实真相、故意回避等不协助报备和不协助调查工作的客户、非期货公司会员，交易所可以采取谈话提醒、书面警示、限制开仓等措施。情节严重的，交易所将依据《上海期货交易所违规处理办法》进行处理。 	<p>4. 流程细节更加明确。</p> <p>5. 增加了期货公司的责任。</p>

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Capital Market

SHFE Amends Relevant Rules On Determination and Report Filing of De Facto Controlled Accounts

On April 27, 2018, the Shanghai Futures Exchange (“**SHFE**”) published the *Administrative Measures of the Shanghai Futures Exchange on Abnormal Trading Activities* and the *Administrative Measures of the Shanghai Futures Exchange on De facto Controlled Accounts* (“**New Measures**”), respectively replacing the *Interim Provisions of the Shanghai Futures Exchange for Monitoring Abnormal Trading* (Shang Qi Fa [2012]

No.94) and other relevant notices of the SHFE relating to the determination standards for accounts with a de facto control relationship (“**De Facto Controlled Account**”) (“**Old Provisions**”). Below we have briefly set out the key amendments that relate to the determination and report filing of a De Facto Controlled Account and the relevant disciplinary measures in the event of any violation.

	Main Provisions	Key Amendments to the Old Provisions
Determination Standards of the De Facto Controlled Account	<ul style="list-style-type: none"> ● In this context, the term “de facto control” refers to the act of having or the fact that an actor (including an individual or an entity) has the authority to manage, use, obtain earnings from or dispose of the futures account of another person (including an individual or an entity) and thus has decision making power or material impact upon another person’s trading decisions. ● The New Measures set out eight detailed circumstances in which an actor may be deemed as having a de facto control relationship with the futures account of another person, on the basis of the principle 	<p>The relevant provisions under the New Measures are almost the same as those of the Old Provisions, though the following amendments should be noted:</p> <ol style="list-style-type: none"> 1. The term “material impact” is added as a factor of determining the De Facto Controlled Account, which means that a de facto control relationship can be established based on the fact that an actor has a material impact on another person’s trading decisions, even

	Main Provisions	Key Amendments to the Old Provisions
	of “substance over form”.	<p>without exercising the decision making power on the futures trading activities of that person.</p> <p>2. The catch-all clause under the Article 5 of the New Measures stipulates that in addition to the SHFE, the China Securities Regulatory Commission also has the discretionary power to determine the De Facto Controlled Account.</p>
<p>Report Filing of the De Facto Controlled Account</p>	<ul style="list-style-type: none"> ● Both the party controlling another person’s futures account and the party whose futures account is controlled by another party shall proactively file information relating to the De Facto Controlled Account with the China Futures Market Monitoring Center (“CFMMC”) through the futures company member in which they opened the futures accounts. ● The SHFE shall establish a sharing mechanism with the CFMMC for information relating to the De Facto Controlled Account, both of which shall only use such information in accordance with the relevant regulations. ● Any client satisfying the determination standards of the De Facto Controlled Account shall complete the filing of such de facto control relationship within ten trading days after executing a futures brokerage agreement. In case of any change to the de facto control relationship, the client or the non-futures company member shall proactively file such change to the CFMMC through the applicable filing agencies within 	<p>Generally speaking, there are two methods for filing the report of a De Facto Controlled Account: the account openers filing to the SHFE on their own initiative; or the regulatory agencies initiating a written inquiry and order for such filing.</p> <p>Key amendments to the Old Provisions include:</p> <ol style="list-style-type: none"> 1. The New Measures require information about the De Facto Controlled Account to be ultimately filed to the CFMMC via the futures company member or the exchange, and the CFMMC shall establish an information sharing mechanism with the SHFE. 2. Both the person controlling another person’s futures account and the person whose futures account is controlled by another person are obliged

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	<p>ten trading days of the change.</p> <ul style="list-style-type: none"> ● The SHFE is entitled to make inquiries in writing to a client, through a futures company member, about an account which is discovered during the self-disciplinary administration as suspected as having a de facto control relationship that has not been filed. The relevant client shall provide a timely response in writing to such inquiry and submit appropriate materials accordingly. The futures company member shall be responsible for forwarding such written explanation materials to the SHFE. ● If a client or a non-futures company member which holds a De Facto Controlled Account but fails to provide assistance in report filing or during the exchange's investigation, for example not being truthful when filing the relevant information or replying to the exchange's enquiry, concealing facts or intentionally evading the exchange's investigation, the SHFE shall take disciplinary measures such as holding a cautionary conversation, issuing a written warning, restricting opening of new positions or any other measures. In case of serious circumstances, the SHFE shall take further disciplinary measures pursuant to the <i>Measures of the Shanghai Futures Exchange on Dealing with Violations and Breaches</i>. 	<p>to file the information about the De Facto Controlled Account.</p> <ol style="list-style-type: none"> 3. The timeframe for the proactive filing is extended from five (5) working days to ten (10) trading days. 4. The filing procedures are clarified in further details. 5. The futures company members shall take additional responsibilities in relation to their clients' filing obligations.

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