

For discussion

**Bills Committee on
Mandatory Provident Fund Schemes (Amendment) Bill 2007**

Improvement of Arrears Recovery Mechanism

PURPOSE

A major legislative proposal in the Mandatory Provident Fund Schemes (Amendment) Bill 2007 (“the Bill”) is to improve the arrears recovery mechanism by streamlining procedures and requirements in order to facilitate the Mandatory Provident Fund Schemes Authority (“MPFA”) in taking timely and effective enforcement actions against defaulting employers. This note is prepared to facilitate Members’ consideration of the Bill with regard to this legislative proposal.

BACKGROUND

Employers’ obligation of making contributions

2. Under section 7A of the Mandatory Provident Fund Schemes Ordinance (“the Ordinance”), an employer is required to pay both the employer and employee portions of mandatory contributions in respect of an employee to the trustee of an Mandatory Provident Fund (“MPF”) scheme by the contribution day. The determination of contribution day differs depending on the status of the employee. For example, for a relevant employee (other than a casual employee), the contribution day for making mandatory contributions is the 10th day after the last day of the relevant calendar month.

Current mechanism of recovery of arrears

3. The current arrears recovery mechanism is mainly prescribed in section 18 of the Ordinance and sections 132-136 of the Mandatory Provident Fund Schemes (General) Regulation (“General Regulation”).

4. Section 18 of the Ordinance states in very broad and general terms that the MPFA is empowered to impose a contribution surcharge on the defaulter, and to recover the default contributions and contribution surcharges from the defaulter. Sections 132-136 of the General Regulation, however, prescribe the arrears recovery mechanism in detail with step-by-step procedures. The key sections that can illustrate the recovery mechanism in brief are set out in the ensuing paragraphs.

Section 133 of the General Regulation

5. After the trustee becomes aware that an employer has failed to pay mandatory contributions for a scheme member by the contribution day, the trustee must by written notice require the employer to settle the default contributions before the end of the settlement period (which is a 30-day period immediately following the contribution day).

Section 135 of the General Regulation

6. If the employer fails to settle the default contributions by the end of the settlement period, the trustee must make a first report to the MPFA informing it of the fact within 7 days after the end of the settlement period.

Section 136 of the General Regulation

7. On receipt of the trustee’s report, the MPFA would send a payment notice to the employer requiring it to rectify the situation. The employer is then required to pay the default contributions and surcharges to the trustee within the

payment period specified in the notice. A copy of the notice is given to the trustee concerned. If the employer fails to rectify the situation within the payment period, the trustee would make a second report to the MPFA within 10 days after the end of the payment period informing it of that fact.

8. On receipt of the trustees' second report, the MPFA may institute legal action to recover from the employer the default contributions and surcharges.

Problems with the current recovery mechanism

9. Sections 132-136 of the General Regulation prescribe a relatively long rectification period which may delay the recovery process. Besides, a strict interpretation of section 136 would mean that the MPFA is not relieved from the obligation of issuing the payment notice even in cases such as those where it is clear that the employer cannot be contacted at the address on record. Moreover, section 18 of the Ordinance reading together with sections 132-136 of the General Regulation, arguably, may infer that the MPFA could impose contribution surcharges and institute civil proceedings against the employers to recover the default contributions and surcharges under the Ordinance only after each and every step prescribed under sections 132-136 has been complied with. However, not all default contributions cases can be handled in accordance with sections 132-136. As an example, as sections 132-136 contain a sequence of inter-related due dates, once any of those due dates is slipped, this will fall foul of these sections.

PROPOSALS

10. To improve the efficiency and effectiveness of the current recovery mechanism, we propose to streamline the recovery process by legislative

amendments which form part of the Bill. The major proposals with the relevant clauses of the Bill are set out below (legislative changes are to the General Regulation unless otherwise indicated):

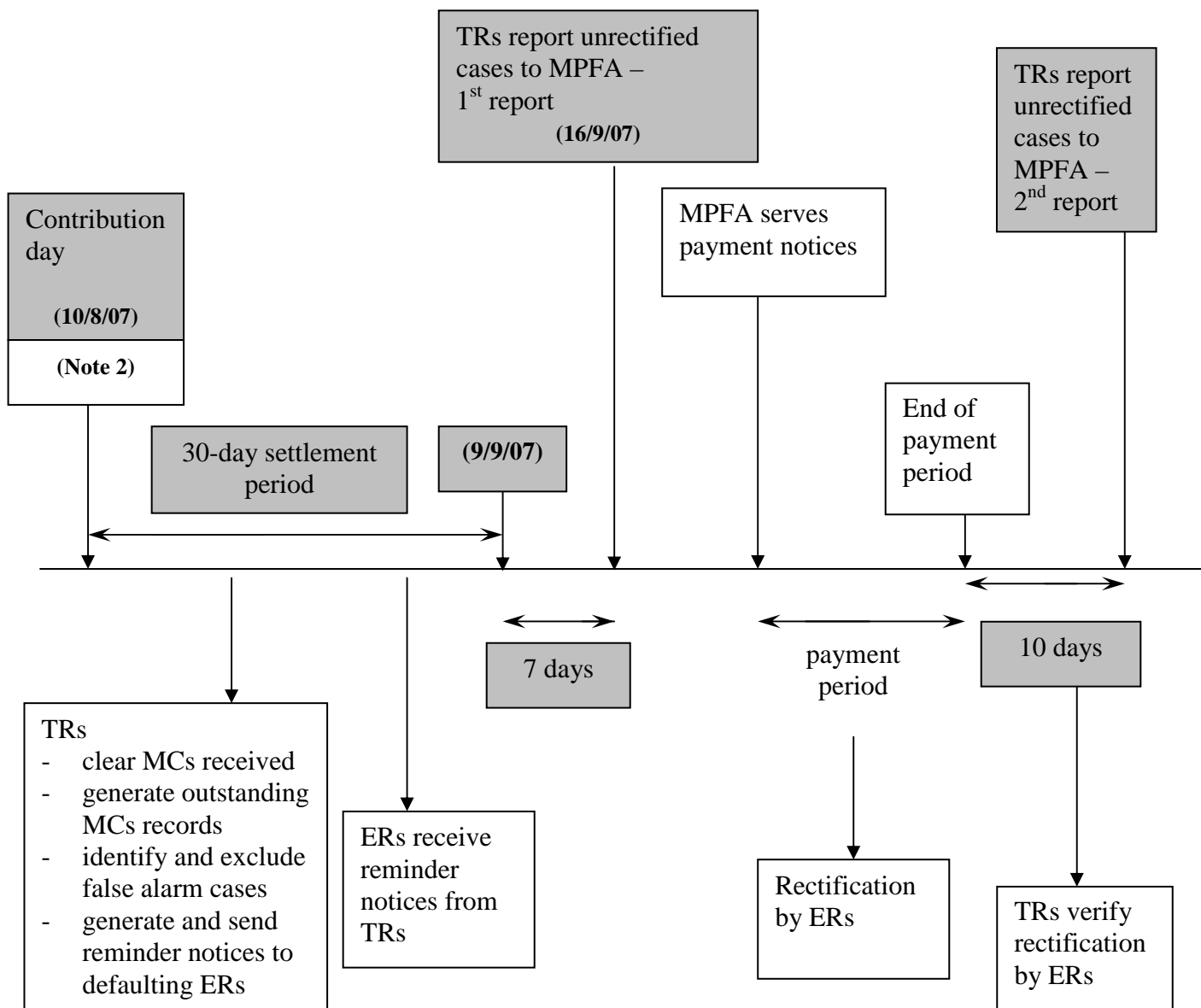
- (a) remove the 30-day settlement period and relieve trustees from the duty of issuing reminder notices to employers requiring rectification before the end of the settlement period – repeal section 132(3), 133 and 134(1) (*Clauses 66 to 68 of the Bill*);
- (b) change the date by which trustees need to make a first report to the MPFA to an earlier date while requiring them to take actions to facilitate the MPFA to recover default contributions and surcharges – amend section 135(1) and move section 133(2) to section 135 as section 135(3) and insert a new section 135A (*Clauses 69 and 70 of the Bill*);
- (c) allow the MPFA, after receiving the first report from the trustee, not to issue notices to the employers in specified circumstances – replace section 136(1) with sections 136(1) and (1A) (*Clause 71 of the Bill*); and
- (d) clarify that the MPFA can recover default contributions even if some statutory recovery steps could not be complied with – amend section 18 of the Ordinance (*Clause 63 of the Bill*).

11. The proposals will speed up the recovery process by about 30 days due to the removal of the 30-day settlement period as illustrated in Timeline I and Timeline II in the Annex which show the current and the proposed arrears recovery mechanism before and after enactment of the proposals respectively.

Mandatory Provident Fund Schemes Authority
September 2007

**Timeline I - Current Arrears Recovery Mechanism (Note 1)
(ss.132-136 of the General Regulation)**

Timeline illustration – July 2007 contribution period
(Ignore any public holiday, gale warning day, black rainstorm warning day)



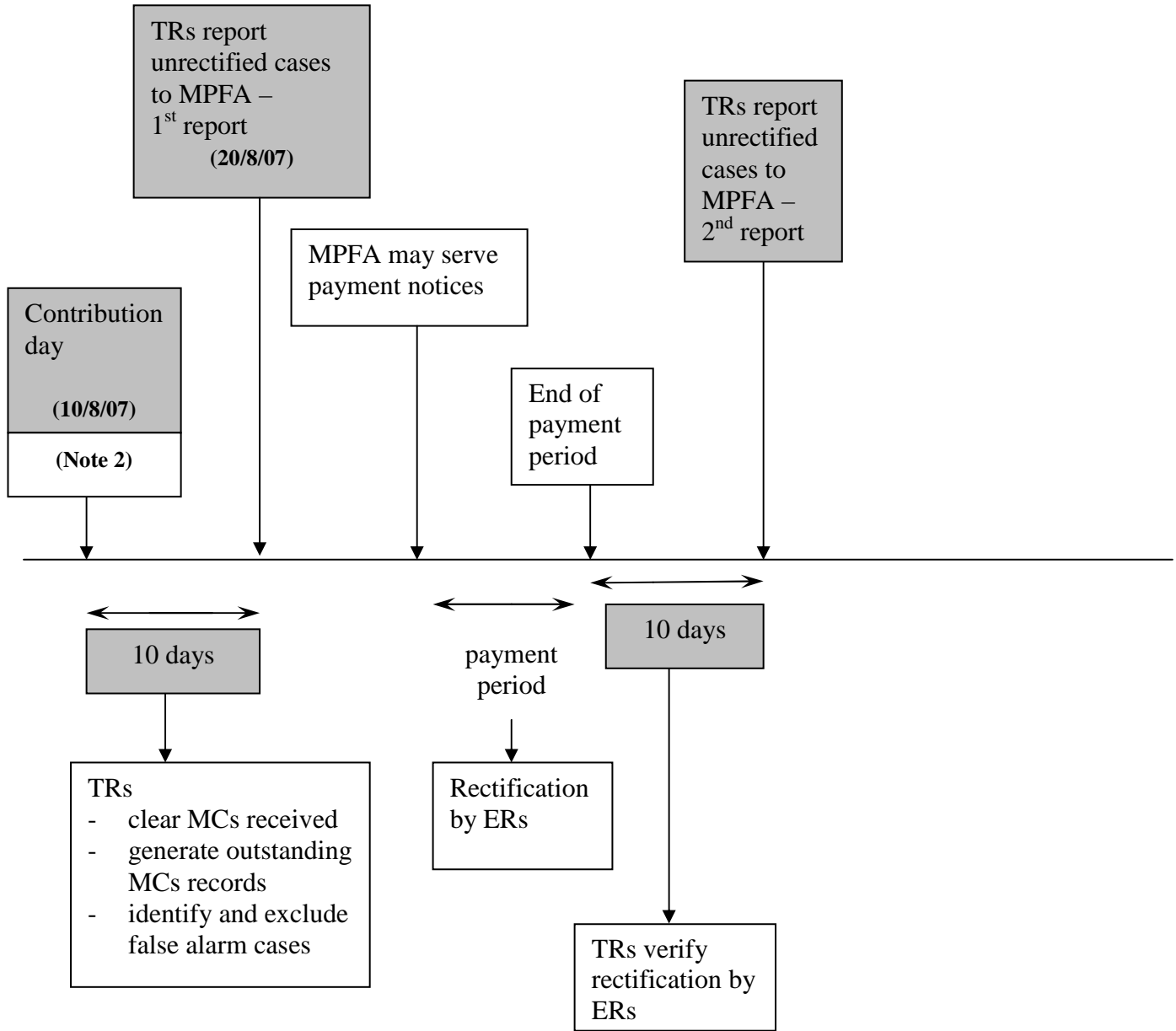
EEs = employees ERs = employers MCs = mandatory contributions TRs = trustees

Note 1. Shaded boxes are the statutory periods/ due dates in section 132-136 of the General Regulation.

2. Assume that the employee is a relevant employee (other than a casual employee). The contribution day is therefore the 10th day after the last day of the relevant calendar month.

Timeline II - Proposed Arrears Recovery Mechanism (Note 3)
 (ss.132-136 of the General Regulation (as amended))

Timeline illustration – July 2007 contribution period
 (Ignore any public holiday, gale warning day, black rainstorm warning day)



Note 3. Shaded boxes are the statutory periods/ due dates in section 132-136 of the General Regulation (as amended).