Reference: 29 CFR 2648 - Redetermination on Mass Withdrawal
29 CFR 2648.3 - Liability on Mass Withdrawal
29 CFR 2648.3(c) - Reallocation Liability
29 CFR 2648.6(b) - Amount of UVBs to be Reallocated
29 CFR 2648.6(c)(2) - Amount of Reallocation

Opinion:

This is in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") regarding the powers of trustees of a multiemployer pension plan under the Employee Retirement Income Security Act of 1974 ("ERISA") and the PBGC's regulation on Redetermination of Withdrawal Liability upon Mass Withdrawal (29 CFR Part 2648) (the "reallocation regulation").

The plan in question has been terminated by the withdrawal of all of its contributing employers. For such a plan, section 4209(c) of ERISA provides that certain withdrawn employers lose the benefit of the de minimis reduction that would otherwise apply to their withdrawal liabilities. Also, section 4219(c)(1)(D) of ERISA requires that the liabilities of withdrawn employers be determined without regard to the 20-year limitation on annual payments under section 4219(c)(1)(B) of ERISA and that the plan's total unfunded vested benefits be fully allocated among the withdrawn employers. The reallocation regulation implements these provisions.

Under the reallocation regulation, the withdrawal liability that is assessed without regard to the fact that there has been a mass withdrawal termination is called "initial withdrawal liability." The term for the additional withdrawal liability that arises from the fact that the de minimis reduction and the 20-year payment limitation do not apply is "redetermination liability." Finally, the liability arising from the requirement for full allocation is referred to in the reallocation regulation as "reallocation liability."

In general, the regulation contemplates that reallocation liability will be based on the plan's unfunded vested benefits as of the "mass withdrawal valuation date," which is the last day of the plan year in which the mass withdrawal termination occurs. The employers to be assessed reallocation liability are identified as of the "reallocation record date," set by the trustees, which may not be later than one year after the mass withdrawal valuation date. The deadline for determining reallocation liability is ordinarily one year after the reallocation record date but may be extended, as it has been for the plan in question. Demand for payment of reallocation liability is to be made within 30 days after the deadline for determining the amount of the liability. (The regulation permits plans to adopt different rules for determining reallocation liability, but your request makes no mention of such rules for the plan in question.)

You ask whether the trustees, in computing the reallocation liabilities of all withdrawing employers under the reallocation regulation, may consider certain events occurring after the plan's reallocation record date. The two types of events you mention are (1) a change in a withdrawing employer's financial condition (including the liquidation, dissolution or bankruptcy of the employer) and (2) an arbitration award with respect to a challenge to an employer's initial withdrawal or redetermination liability.

In considering these questions, it is important to distinguish between the time when an event or condition affecting reallocation liability occurs or exists and the time when the trustees, having learned of the event or condition, take it into account in computing the liability. In general, the trustees may make decisions about which withdrawing employers are to be assessed reallocation liability, and the amount of reallocation liability to be assessed to those employers, at any time before payment of the liability is demanded (whether or not the deadline for determining the liability has been extended); however, the trustees may not base those decisions on events that occur, or conditions that come into being, after the times specified in the reallocation regulation and ERISA.

An employer's financial condition may affect reallocation liability in various ways. For example, under § 2648.3(c)(1) and (c)(2) of the reallocation regulation, an employer is excluded from reallocation liability if, as of the
reallocate the plan's assets, and thus its unfunded vested benefits. Under § 2648.6(b), the amount of "unfunded vested benefits to be reallocated" for a plan, upon which the reallocation liability depends, is the amount of the plan's unfunded vested benefits, determined as of the mass withdrawal valuation date, with certain adjustments. Unless an arbitration award respecting an employer's initial withdrawal or redetermination liability is based on facts occurring or existing after the mass withdrawal valuation date (which would be unlikely), the trustees may consider it in determining the "amount of unfunded vested benefits to be reallocated" and thus the withdrawing employers' reallocation liability.

If you have any further questions about this matter, you may call Deborah C. Murphy at 202-778-8820.

Gary M. Ford
General Counsel