

VIA FEDERAL EXPRESS OVERNIGHT & EMAIL

May 16, 2025

Board of Trustees of the UFCW Unions and Employers Pension Fund
5200 W. Loomis Road
Greendale, WI 53129

Re: Denial of application for special financial assistance

Dear Trustees:

PBGC hereby denies the revised application of the United Food and Commercial Workers Unions and Employers Pension Plan (“**Plan**,” EIN/PN 39-6069053/001) for special financial assistance (“**SFA**”). The Plan has not demonstrated that it meets any of the eligibility tests that Congress specified when it enacted the SFA program under the American Rescue Plan Act of 2021 (“**ARP**”).¹

The Plan asserts in the revised application that it is eligible for SFA because it is in critical and declining status. The Plan’s asserted eligibility, however, is based on an unreasonable change in actuarial assumptions and an impermissible retroactive revocation of a funding election, both done in an attempt to correct the Plan’s failure to demonstrate eligibility in its initial application.

Statutory Background

ARP amended Title IV of ERISA to provide SFA to severely underfunded multiemployer plans. Plans eligible for SFA receive an amount necessary to pay benefits through 2051 and have no obligation to repay the funds.²

Eligibility for SFA

Congress specified strict eligibility requirements to ensure that only plans in severe financial distress receive SFA. Under ERISA § 4262(b)(1), a plan is eligible for SFA only if it meets one of four criteria including, as relevant here, that “the plan is in critical and declining status [see below] . . . in any plan year beginning in 2020 through 2022.”³

Critical Status

ERISA § 305(b)(2) describes four tests for whether a plan must be categorized as being in critical status (the “**Critical Status Entry Tests**”). Most relevant in this case, ERISA

¹ Pub. L. No. 117-2, 135 Stat. 4 § 9704 (2021).

² ERISA §§ 4262(a)(2), (j)(1); 29 U.S.C. §§ 1432(a)(2), (j)(1).

³ The Plan did not and could not demonstrate eligibility on any other grounds under ERISA §§ 4262(b)(1)(B-D); 29 U.S.C. §§ 1432(b)(1)(B-D).

§ 305(b)(2)(B) provides that a plan is in critical status if it “has an accumulated funding deficiency for the current plan year” or is “projected to have an accumulated funding deficiency for any of the 3 succeeding plan years” both “not taking into account any extension of amortization periods under section [ERISA § 304(d)]” (“**Critical Status Entry Test B**”).

Critical and Declining Status

ERISA § 305(b)(6) provides that “a plan in critical status shall be treated as in critical and declining status if . . . “[it meets] one or more of the [Critical Status Entry Tests] and . . . is projected to become insolvent . . . during the current plan year or any of the . . . 19 succeeding plan years if the plan has a ratio of inactive participants to active participants that exceeds 2 to 1.”

Factual Background

The Plan first entered critical status in the 2009 plan year (“**PY 2009**”) based on the actuary’s projection of an accumulated funding deficiency in PY 2012, meaning the Plan met Critical Status Entry Test B.⁴ A multiemployer plan in critical status remains there until it meets the test for emergence. To emerge from critical status, a plan must 1) no longer meet any of the Critical Status Entry Tests, 2) not be projected to have an accumulated funding deficiency for the current plan year or any of the 9 succeeding plan years, and 3) not be projected to become insolvent in any of the 30 succeeding plan years.⁵

If a plan in critical status faces projected insolvency, the plan’s actuary can certify that the plan is in critical and declining status. The plain meaning of the statutory definition of “critical and declining status” for a plan year requires that the plan both be “in critical status” *and* be “described in one or more of” the Critical Status Entry Tests.⁶ Thus, if a plan no longer meets any of the Critical Status Entry Tests but remains in critical status because it does not meet the other emergence requirements, it does not meet the standard for critical and declining status.⁷

⁴ See 2009 Form 5500 at PDF pp. 138-39 (Doc. No. 1 of Appendix A) (certification of critical status in PY 2009 based on ERISA § 305(b)(2)(B)(ii), 29 U.S.C. § 1085(b)(2)(B)(ii)). All actuarial certifications and Forms 5500 referenced herein are defined in Appendix A.

⁵ ERISA § 305(e)(4)(B), 29 U.S.C. § 1085(e)(4)(B); *accord* 26 U.S.C. § 432(e)(4)(B).

⁶ The Treasury Department and IRS confirmed to PBGC the plain meaning of the definition, which Congress placed under Treasury’s interpretive jurisdiction, along with other minimum funding and zone status provisions paralleled in ERISA and the Internal Revenue Code. See Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978), *reprinted in* 5 U.S.C. app. at § 101(a) (1978); Pub. L. 98–532, 98 Stat. 2705 (1984); ERISA § 3002(c), 29 U.S.C. § 1202(c); 26 U.S.C. § 7803(a)(2).

⁷ See ERISA § 305(e)(9), 29 U.S.C. § 1085(e)(9); *accord* 26 USC § 432(e)(9).

The Plan actuary certified in PY 2020 that the Plan remained in critical status because it did not meet two of the requirements for emergence.⁸ For purposes of its SFA application, the Plan actuary relied on its prior certification of the Plan's critical status to conclude that the Plan was in critical and declining status for PY 2020. This was incorrect, as the Plan did not meet any of the Critical Status Entry Tests.

On October 23, 2023, the Plan applied for \$74.4 million in SFA, claiming eligibility as a plan in critical and declining status in PY 2020. In January 2024, PBGC staff advised the Plan that they would recommend the application be denied because the Plan did not meet any of the Critical Status Entry Tests for PY 2020 and thus was not in critical and declining status, and therefore ineligible for SFA.⁹ The Plan withdrew its application on February 6, 2024.

Following the withdrawal of the Plan's initial application, Plan professionals met with PBGC on several occasions to discuss their strategies for a path toward SFA eligibility. The Plan proposed to retroactively revoke an amortization extension made in 2010.¹⁰ PBGC discussed this with Treasury staff, who advised the agency that such a retroactive revocation was not permissible based on its own guidance.¹¹ PBGC communicated this guidance to the Plan. Contrary to this guidance, the Plan submitted a revised SFA application reflecting the impermissible revocation.

The Revised Application

On January 17, 2025, the Plan submitted a revised application for \$54.3 million in SFA, again asserting eligibility based on being in critical and declining status in PY 2020.

On January 14, 2025, the Plan actuary issued a revised certification for PY 2020 that the Plan was in critical and declining status because the Plan now claimed to have an accumulated funding deficiency for that year and therefore met Critical Status Entry Test

⁸ PY 2020 Certification of Zone Status (Jan. 22, 2021) (Doc. No. 9 of Appendix A). The Plan actuary originally certified that the Plan emerged from critical status in PY 2021. See 2021 zone status certification (Jan. 28, 2022) (Doc. No. 10 of Appendix A). In 2025, the Plan actuary revised both certifications based on a retroactive change of assumption, discussed below.

⁹ Under ARP, to be eligible based on zone status, a plan must, in any PY beginning in 2020 through 2022, either (1) have been in critical and declining status, and thus in one of the grave situations described in the Critical Status Entry Tests, and declining, or (2) have been in critical status, had a modified funded percentage less than 40%, and had a ratio of active to inactive participants less than 2 to 3. ERISA § 4262(b)(1)(A) and (C) 29 U.S.C. § 1432(b)(1)(A) and (C); *accord* 26 U.S.C. § § 432(k)(3)(A)(i), (iii). The plan has not demonstrated eligibility for SFA under either of the zone status test nor under any other eligibility criterion.

¹⁰ The retroactive revocation was the first step in the Plan's process for revising the PY 2020 Certification of Zone Status used to attempt to demonstrate eligibility for SFA, as explained below.

¹¹ Treasury Notice 2010-83, Q&A D-3 (which allows a plan to prospectively revoke an amortization extension but notes the "annual charges or credits to the funding standard account with respect to any amortization base previously established are unaffected").

B.¹² The Plan's actuary revised the certification in a way that is not permissible under the statute. It was a manipulation of the eligibility criteria Congress established. As discussed below, the application failed in two distinct ways.

*Part 1: Retroactively Discredit Extended Amortization of PY 2007 Losses by
Retroactively Assuming Higher Inflation in Administrative Expenses*

For purposes of the funding standard account, the Pension Relief Act of 2010 (**"PRA-2010"**)¹³ permitted a plan to extend the amortization of net investment losses incurred in either or both of the first two plan years ending after August 31, 2008, over 30 years (rather than the usual 15 years¹⁴).¹⁵ Congress limited eligibility for this extended amortization to plans that first certified that the plan would have sufficient assets to timely pay expected benefits and anticipated expenses during the extended amortization period.¹⁶

In October 2010, the Plan elected to extend amortization of its investment losses in PY 2007 under PRA-2010.¹⁷ The Plan actuary certified that the Plan would remain solvent first in a certification dated December 14, 2010, and again in a revised certification dated May 3, 2011 (the **"2011 PRA-2010 Certification"**).¹⁸

Fourteen years later, on January 9, 2025, the Plan actuary revoked the 2011 PRA-2010 Certification by issuing a replacement (the **"2025 PRA-2010 Decertification"**) stating, "[w]e have determined that the assumptions used for the [2011 PRA-2010 Certification] were erroneous" because "[n]o inflation assumption was originally applied to the projection of future operational expenses."¹⁹ This new certification changed the projection so that the Plan would no longer have sufficient assets to pay all benefits and expenses

¹² See ERISA § 305(b)(2)(B), 29 U.S.C. § 1085(b)(2)(B); 26 U.S.C. § 432(b)(2)(B) (Critical Status Test B, under which a plan enters critical status if it has an accumulated funding deficiency); 2022 Form 5500 at PDF p. 140 (Doc. No. 12 of Appendix A) (showing the \$60.3 million credit balance on Plan's 2020 Schedule MB retroactively revised to an accumulated funding deficiency of -\$11.1 million).

¹³ Pub. L. No. 111-192, § 211, 124 Stat. 1280, 1302-06.

¹⁴ See ERISA § 304(b)(2)(B)(iii), 29 U.S.C. § 1084(b)(2)(B)(iii), *accord* 26 U.S.C. § 431(b)(2)(B)(iii).

¹⁵ See ERISA § 304(b)(8), 29 U.S.C. § 1084(b)(8), *accord* 26 U.S.C. § 431(b)(8).

¹⁶ ERISA §§ 304(b)(8)(A), (C), 29 U.S.C. §§ 1084(b)(8)(A), (C); 26 U.S.C. §§ 431(b)(8)(A), (C); *accord* IRS Notice 2010-83, 2010-51 I.R.B. 862 (Dec. 20, 2010), at Q&A S-2 (explaining that "[t]he solvency certification must be made before a formal decision is made to apply . . . the special funding rules . . .").

¹⁷ See Minutes of meeting of Plan's trustees on Oct. 19, 2010; Email from Kathy Garrity to PBGC attorney John Ginsberg (Mar. 31, 2025, 1:39 p.m.); 2012 Form 5500 at PDF p. 139 (Doc. No. 5 of Appendix A); 2010 Form 5500 Schedule MB line 6 (Doc. No. 3 of Appendix A).

¹⁸ Actuary had to revise first certification to comply with the requirement that the projection be based on assumptions consistent with the Plan's zone status certification. IRS Notice 2010-83, 2010-51 I.R.B. 862 (Dec. 20, 2010), at Q&A S-3. See Doc. Nos. 2 and 4 of Appendix A).

¹⁹ 2025 PRA-2010 Decertification (Doc. No. 11 of Appendix A).

through the extended amortization period. Since making the amortization election in 2010, the Plan benefited from extending amortization of investment losses, allowing the Plan to avoid benefit cuts and contribution increases. We find no other purpose for retroactively revoking that benefit now than to engineer the Plan's eligibility for SFA.

*Part 2: Retroactively Alter Funding Standard Accounting by
Removing Extended Amortization of PY 2007 Losses*

To meet Critical Status Entry Test B and be certified as a critical and declining status plan, the Plan had to demonstrate a near term or current accumulated funding deficiency.²⁰ On January 10, 2025, the day after the 2025 PRA-2010 Decertification was signed, the Schedule MB to the Plan's 2022 Form 5500 was signed and submitted. In the Schedule MB, the Plan explained that it now had an accumulated funding deficiency for PY 2020 of \$11.1 million.²¹ The altered accounting negated the Plan's previous certification which had a \$60.3 million credit balance for that year²² with no accumulated funding deficiency in the six succeeding plan years.²³

Relying on the 2025 PRA-2010 Decertification and the accumulated funding deficiency expressed in the 2022 Form 5500 to meet the zone status requirements, on January 14, 2025, the Plan actuary signed and submitted the revised certification for PY 2020, which classified the Plan as being in critical and declining status.²⁴ Three days later, using these new documents, the Plan submitted its revised SFA application.

*Part 3: The Plan's claimed eligibility is based on
a prohibited assumption change and prohibited unwinding of extended amortization.*

When Congress enacted the SFA program in March 2021, it included provisions to hinder plans from engineering eligibility by changing actuarial assumptions. For zone status certifications completed after 2020 (like the Plan's recently revised certification for PY 2020) Congress required that "critical or critical and declining status for purposes of [SFA] eligibility" be determined "using the assumptions . . . used in [the] most recently completed certification of plan status before January 1, 2021, unless such assumptions

²⁰ See *supra* p. 2.

²¹ 2022 Form 5500 at PDF p. 140 (Doc. No. 12 of Appendix A). The signing actuary explained that based on the 2025 PRA-2010 Decertification, "this plan was never eligible for relief under PRA" so "amortizations have been restated back to 2008," and amortization of PY 2007 investment losses were redone over 15 years which results in changes in the Plan's funding standard account for every year since PY 2008. *Id.* at PDF p. 125.

²² See original 2020 Form 5500 at PDF p. 11, Schedule MB line 9m, signed and certified by the Plan actuary on June 23, 2022 (Doc. No. 8 of Appendix A).

²³ See original PY 2020 Certification of Zone Status (Jan. 22, 2021) (Doc. No. 9 of Appendix A).

²⁴ Revised PY 2020 Certification of Zone Status (Doc. No. 13 of Appendix A).

(excluding the plan's interest rate) are unreasonable.”²⁵ There is a range of reasonable actuarial assumptions.²⁶ Congress sought to prohibit selection of a new assumption within the range of reasonable assumptions when the pre-2021 assumption was already within the reasonable range for purposes of eligibility.

The Plan's most recent zone status certification completed before 2021 is for PY 2019, dated January 29, 2020 (the “**Pre-ARP Zone Certification**”).²⁷ In it, the Plan is certified as 88.8% funded and projected to have no accumulated funding deficiency until PY 2027, remaining solvent until PY 2038. The certification and projection were based on the Plan having elected and implemented the extended amortization period under PRA-2010 in October 2010. The Pre-ARP Zone Certification thus depended on the assumption at the time that expenses would annually increase by 0% as stated in the 2011 PRA-2010 Certification being reasonable.

If the Plan determines that one or more assumptions in its Pre-ARP Zone Certification is unreasonable for its SFA application, it “may propose in its application to change such assumptions” if it “discloses such changes in its application and describes why such assumptions are no longer reasonable,” and PBGC must “accept such changed assumptions unless it determines the changes are unreasonable, individually or in the aggregate,”²⁸ after consulting with the Treasury Secretary.²⁹ Under 29 C.F.R. § 4262.5(c), a plan must demonstrate why it believes an original assumption from its zone status certification is unreasonable and the proposed change to that assumption is reasonable. The Plan's application includes no such demonstration of why it is no longer reasonable to assume, from the perspective of PY 2009, that expenses would annually increase by 0%.³⁰ The Plan's statement that the assumptions were unreasonable is conclusory. The statement does not point to facts, law, changes in circumstances, or new information that would support a determination that the earlier assumptions were unreasonable. As the statute and the implementing regulations make clear, an application may include a proposed change in the assumptions, but (among other requirements) the application must “describe[] **why** such assumptions are no longer reasonable.” ERISA § 4262(e)(4)

²⁵ ERISA § 4262(e)(1), 29 U.S.C. § 1432(e)(1); accord 29 C.F.R. § 4262.3(d)(2).

²⁶ See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal*, 508 U.S. 602, 635 (1993).

²⁷ See PY 2019 Certification of Zone Status (Doc. No. 7 of Appendix A).

²⁸ ERISA § 4262(e)(4), 29 U.S.C. § 1432(e)(4); see also 29 C.F.R. §§ 4262.3(d)(3), 4262.5 (describing procedures for proposing a change from a pre-2021 assumption).

²⁹ See ERISA § 4262(n)(2), 29 U.S.C. § 1432(n)(2); accord 29 C.F.R. §§ 4262.3(d)(3), 4262.5.

³⁰ The revised application falsely states that “eligibility is based on the 2019 PPA certification, completed in January 2020” rather than the revised certification completed on January 14, 2025, and that “there are no . . . assumption changes.” Revised application at PDF p. 12.

(emphasis added); 29 C.F.R. § 4262.5(c)(1)(i) (“Describe **why** the original assumption is no longer reasonable”) (emphasis added). A single statement that the original assumptions are unreasonable is insufficient. The plan’s statement does not satisfy the requirement that plans provide a description as to why earlier assumptions are no longer reasonable. The application also fails to explain why the new assumption is reasonable. See 29 C.F.R. § 4262.5(c)(1)(iii) (“Demonstrate that the changed assumption is reasonable.”). The Plan failed to demonstrate why the new assumption is reasonable, offering no explanation beyond a conclusory statement. This change of assumption is exactly the kind of engineering of zone status-based eligibility that Congress intended to avoid, as evidenced by the text of the statute, the surest guide to legislative intent³¹ and further supported by the implementing regulations.

To the contrary, the evidence shows the assumption is reasonable and consistent with the history of the actuaries’ expense assumption and in contemporaneous certifications of assumptions. The 2011 PRA-2010 Certification uses assumptions from the PY 2010 zone status certification (generally using the assumptions in the PY 2009 actuarial valuation report).

Subsequent changes to the expense assumption after October 2010 (as shown in Table 1 of Appendix A) indicate that it was annually re-examined to ensure it still met the necessary requirements. PY 2016 was the first year where the Plan actuary assumed annual inflation above 0% at 2.5%, explaining that the new assumption was the “best estimate of future expenses based on recent plan experience.”³² There was no demonstration in the Plan’s revised application for SFA that the assumption used by the Plan for the prior 14 years was not reasonable (*i.e.*, fell outside the range of reasonableness).

Because the Plan has not demonstrated that the 0% expense inflation assumption was unreasonable, from the perspective of PY 2009, nor has the Plan demonstrated that the new assumption was reasonable as required, the assumption change is prohibited under ARP.³³ The proposed retroactive assumption change is therefore unreasonable. PBGC denies the Plan’s revised SFA application on grounds of the unreasonable change of assumption.³⁴

³¹ See, e.g., *Patagonia Corp. v. Bd. of Governors of Fed. Rsrv. Sys.*, 517 F.2d 803, 813 (9th Cir. 1975)

³² See PY 2016 Form 5500 at PDF p. 147 (Doc. 6 of Appendix A); See ERISA § 304(c)(3), 29 U.S.C. § 1084(c)(3); 26 U.S.C. § 431(c)(3); see also ERISA § 305(b)(3)(B)(i), 29 U.S.C. § 1085(b)(3)(B)(i); 26 U.S.C. § 432(b)(3)(B)(i).

³³ See *supra* note 25 and accompanying text.

³⁴ See ERISA § 4262(g), 29 U.S.C. § 1432(g); 29 C.F.R. § 4262.11(a)(2)(ii) (specifying unreasonableness of a change in assumption as grounds for denial).

Even if ARP permitted the assumption change, the Plan cannot retroactively revoke, nor its actuary ignore, the extended amortization schedule that the Plan elected and, for some 14 years, followed. Under IRS guidance explaining PRA-2010, a plan may stop extended amortization *prospectively*, but “the annual charges or credits to the funding standard account with respect to any amortization base previously established are unaffected.”³⁵

The Plan has not demonstrated that it met any of the tests for critical status for PY 2020, and therefore has not demonstrated eligibility for SFA as a critical and declining status plan in PY 2020. PBGC denies the Plan’s revised SFA application because the Plan is ineligible.³⁶

Conclusion

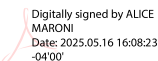
For the above reasons, PBGC denies the Plan’s application for SFA.

This is a final agency action for purposes of judicial review under the Administrative Procedure Act.³⁷

For more information, please refer to PBGC’s website at www.pbgc.gov/arp-sfa. If you have questions, please contact Erika Bode at bode.erika@pbgc.gov or 202-229-6365.

Sincerely,

ALICE
MARONI

A digital signature block showing the text "Digitally signed by ALICE MARONI" and a date "Date: 2025.05.16 16:08:23 -04'00'".

Alice C. Maroni
Acting Director

cc: [INSERT EMAIL ADDRESSEES & THEIR EMAIL ADDRESSES]

³⁵ IRS Notice 2010-83, 2010-51 I.R.B. 862, at Q&A D-3.

³⁶ See ERISA § 4262(g), 29 U.S.C. § 1432(g); 29 C.F.R. § 4262.11(a)(2)(iii) (specifying ineligibility as grounds for denial).

³⁷ See 29 C.F.R. § 4262.11(g).

APPENDIX A³⁸

List of Documents Cited Above in Chronological Order

1. Form 5500 for PY 2009 beginning Nov. 1, 2009 (dated May 25, 2011).³⁹
2. United Food and Commercial Workers Unions and Employers Pension Plan Sample Notice and Actuarial Certification of the Solvency Test from the Pension Relief Act of 2010 (dated Dec. 14, 2010).⁴⁰
3. Form 5500 for PY 2010 beginning Nov. 1, 2010 (dated July 30-31, 2012).
4. Revised Actuarial Certification of the Solvency Test from the Pension Relief Act of 2010 (dated May 3, 2011) (referenced above as the “**2011 PRA-2010 Certification**”).
5. Form 5500 for PY 2012 beginning Nov. 1, 2012 (dated Aug. 14, 2014).
6. Form 5500 for PY 2016 beginning Nov. 1, 2016 (dated June 19, 2018).
7. Certification of Zone Status completed pre-ARP for PY 2019 beginning November 1, 2019 (dated Jan. 29, 2020) (referenced above as the “**Pre-ARP Zone Certification**”).⁴¹
8. Form 5500 for PY 2020 beginning Nov. 1, 2020 (signed Aug. 12, 2022).
9. Original Certification of Zone Status used in the initial application for PY 2020 (dated Jan. 22, 2021).
10. Certification of Zone Status for PY 2021 (dated Jan. 28, 2022).
11. Second Revised Actuarial Certification of the Solvency Test from the Pension Relief Act of 2010 (dated Jan. 9, 2025) (referenced above as the “**2025 PRA-2010 Decertification**”).
12. Form 5500 for PY 2022 beginning Nov. 1, 2022 (dated Jan. 10, 2025).
13. Revised Certification of Zone Status for PY 2020 (dated Jan. 14, 2025).
14. Table 1: List of Administrative Expense Assumption used by the Plan for every PY from 2009-2022

³⁸ The Plan’s actuarial services at all periods were performed by United Actuarial Services. Kathryn Garrity and Paul Bullock alternate being the signing actuary of the certifications and other documents listed here. All terms defined in this letter are used solely for the purposes of understanding the letter and are not statutorily defined terms.

³⁹ Forms 5500 are required to be filed annually under ERISA § 104, 29 U.S.C. § 1084; 26 U.S.C. § 6059.

⁴⁰ Actuarial certification of solvency are required under ERISA § 304(d)(1), 29 U.S.C. § 1084(d)(1); 26 U.S.C. § 431(d)(1).

⁴¹ Zone Status Certifications are required to be filed annually under ERISA § 305(b)(3)(A), 29 U.S.C. § 1085(b)(3)(A); 26 U.S.C. § 432(b)(3)(A).