



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Other Post-Employment Benefits (OPEB) Fund

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Part of Primary Government

To complete our entity determination analysis, the Office of Auditor of Accounts (AOA) reviewed the following:

- GASB 14, *The Financial Reporting Entity*
- GASB 34, *Basic Financial Statements – and Management’s Discussion and Analysis – for State and Local Governments* (GASB 34 amended GASB 14, ¶9, 11, ¶12, ¶19, ¶42, ¶44, ¶50 –¶52, ¶54, ¶58, ¶60, ¶63, ¶65, ¶73, ¶74, ¶78, and¶131 and superseded GASB 14, ¶45–47, 49, 56, and ¶57)
- GASB 39, *Determining Whether Certain Organizations Are Component Units*
- GASB 61, *The Financial Reporting Entity: Omnibus an amendment of GASB Statements No. 14 and No. 34*
- *AICPA Audit and Accounting Guide – State and Local Governments*, Chapter 3: The Financial Reporting Entity
- *GASB 2011-2012 Comprehensive Implementation Guide*, Chapter 4: The Financial Reporting Entity
- *29 Del. C. c. 52– Other Post – Employment Benefits Fund*

*NOTE: The analysis below is based on the documents/guidance reviewed, as detailed above. Additional information or legal interpretations of the portions of the Delaware Code reviewed could impact the analysis and impact a decision on the proper accounting treatment for the entity. The decision of what the appropriate accounting treatment is for the entity, based on a review of all applicable guidance/information, is solely the responsibility of management. As such, AOA does not make such conclusions herein.*

1. *The PCU is not legally separate. (¶ 15)<sup>1</sup>*
2. *The PG holds the PCU’s corporate powers. (¶ 15)*

According to GASB, an organization has separate legal standing if it is created as a body corporate or a body corporate and politic, or if it otherwise possesses the corporate powers that would distinguish it as being legally separate from the primary government.

Generally, corporate powers give an organization the capacity to have a name; the right to sue and be sued in its own name without recourse to a state or local governmental unit; and the right to buy, sell, lease, and mortgage property in its own name.

The corporate powers granted to a separate organization are enumerated in its corporate charter or in the legislation authorizing its creation. A special purpose government (or any other organization) that is *not* legally separate should be considered, for financial reporting purposes, part of the primary government that holds the corporate powers.

## **Application to Other Post-Employment Benefits (OPEB) Fund**

The Other Post-Employment Benefits (OPEB) Fund is not legally separate from the State of Delaware because it is not established as a body corporate or a body corporate and politic (29 Del. C. §5281).

<sup>1</sup> Paragraph references are from GASB 14, as amended by GASB 61.



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The OPEB Fund also does not possess the corporate powers that would distinguish it as being legally separate from the State of Delaware. The Delaware Code is silent on the OPEB Fund's ability to sue and be sued; although it does specify that Board members are not liable for any act or omission made during the member's tenure on the Board or for any loss incurred by any person as a result of the participation by any Board member in the Plan (29 Del. C. §5282 (c)).

The OPEB Fund has the ability to make and enter into any and all contracts, agreements, or arrangements and to retain, employ and contract for the services of private and public financial institutions, depositories, consultants, investment advisors or managers, etc. for purposes of carrying out its mission (29 Del. C. §8308 (c)(12)). However, these powers are not compelling enough to conclude that the OPEB Fund is legally separate from the State of Delaware.

Code excerpts are as follows:

## **29 Del. C. §5281. Establishment of Fund.**

- (a) There shall be established an OPEB Fund, a trust fund, separate and distinct from the funds established under §§5541 and 5601 of this title and §8393 of Title 11, to which state appropriations and other employer contributions shall be deposited, and to which earnings on investments, refunds and reimbursements shall be deposited upon receipt, and from which the State's premiums as defined in §5202(b) of this title shall be paid, and any fees and expenses authorized by the Board shall be paid. No money shall be disbursed from this fund except for the purpose of payment of the State's premiums for post-retirement health insurance for employees retired under Chapters 55 and 56 of this title and Chapter 83 of Title 11.
- (b) The amounts remaining in the trust, if any, after all premiums, fees, and expenses have been paid for any year shall be retained in such trust for future payments until all state liabilities for post-retirement health insurance premium benefits have been satisfied.
- (c) This chapter is replacing §5550 of this title in its entirety.
- (d) The trust shall be an irrevocable trust exempt from federal income tax under §115 of the Internal Revenue Code [26 U.S.C §115] and subject to the financial reporting, disclosure and actuarial requirements of Government Accounting Standards Board Statements 43 and 45 or any subsequent Government Accounting Standards Board updates or statements that may be applicable.

## **29 Del. C. §5282. Management of the OPEB Fund.**

- (c) The state shall indemnify a board member in the additional duties contained in this chapter pertaining to the administration and management of the OPEB Fund or to sit on a committee of the Board who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative by reason of the fact that the board member is or was a board member against expenses (including attorney's fees if the Attorney General determines that the Attorney General may not provide representation), judgments, fines, and amounts paid in settlement actually and reasonably



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incurred by that board member in connection with such action, suit or proceeding, if the board member acted in good faith and in a manner the board member reasonably believed to be in the best interest of the State and with respect to any criminal action of proceeding had no reasonable cause to believe that board member's own conduct was unlawful. Expenses incurred in defending a civil, administrative or investigative action, suit or proceeding shall be paid by the State in advance of final disposition of such action, suit or proceeding if:

- (1) Initially authorized by a majority vote of the Board exclusive of the member or members to be indemnified unless more than a majority of the Board shall also be parties to the same action, suit or proceeding, in which instance, such authorization shall be by the Governor of the State; and
- (2) Such board member agrees to repay such amount if it is ultimately determined by the Board or the Governor, as the case may be, pursuant to paragraph (c)(1) of this section that such member is not entitled to indemnification under this section.

## **29 Del. C. §8308. Board of Pension Trustees.**

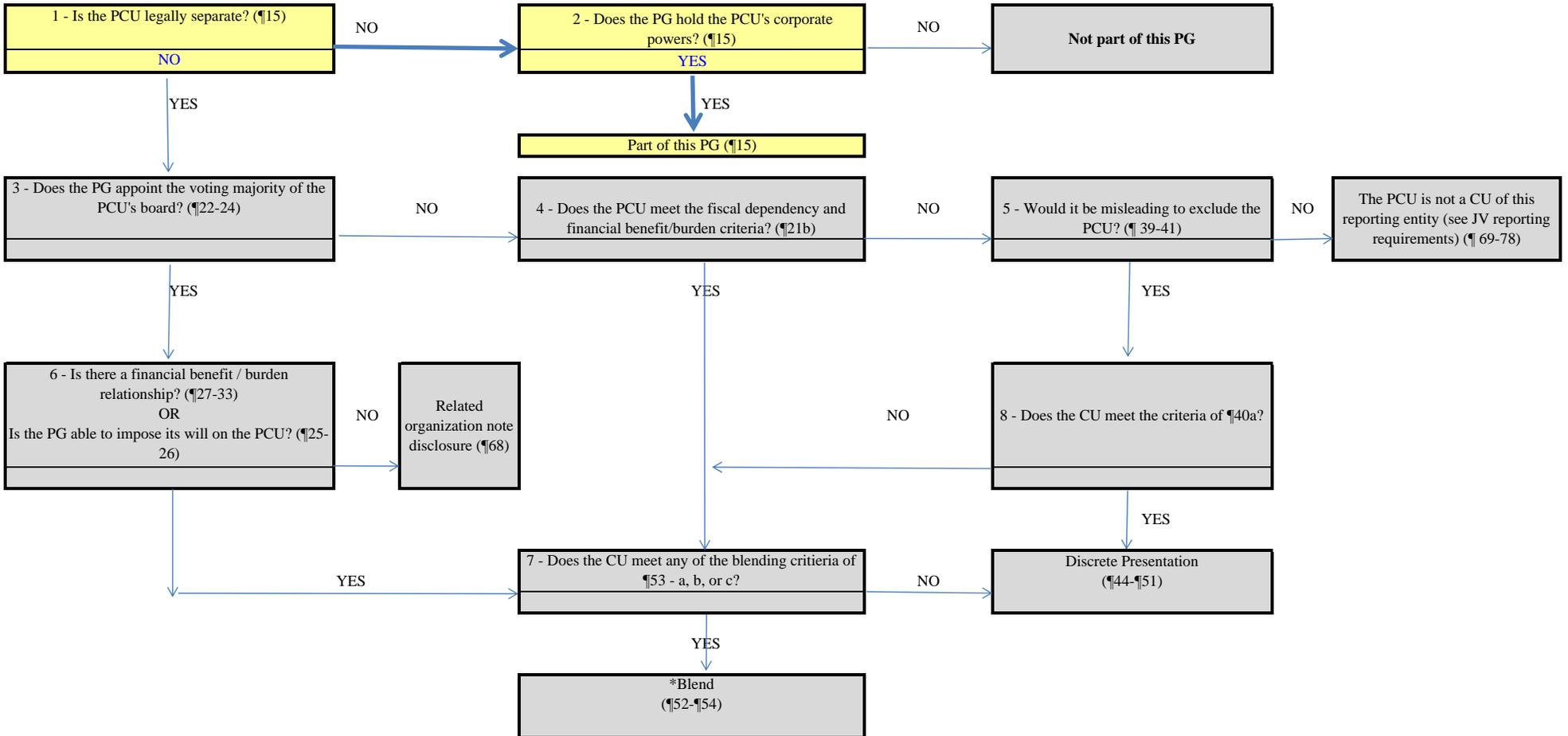
(c) In addition to the foregoing, the Board shall have the following powers, duties and functions:

- (12) To make and enter into any and all contracts with any agency of the State, or any outside agency, for the purpose of assisting in the general administration and the investing or advising as to the investment of the OPEB Funds under its control and management.

**Delaware Auditor of Accounts  
GASB Determination Analysis Flowchart  
Other Post-Employment Benefits Fund**

See below for GASB 61 flowchart analysis (refer to the entity determination analysis memo that expands of the guidance used to answer each question in the flowchart below).

*Note: Paragraph references are from GASB 14, as amended by GASB 61.*



\*Note: A potential component unit for which a primary government is financially accountable may be fiscally dependent on and have a financial benefit or burden relationship with another government. An organization should be included as a component unit of only one reporting entity. Professional judgement should be used to determine the most appropriate reporting entity (§21b and §34-§38). A primary government that appoints a voting majority of the governing board of a component unit of another government should make the disclosures required by §68 for related organizations.

PCU = Potential Component Unit  
PG = Primary Government  
CU = Component Unit  
JV = Joint Venture