



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Delaware Solid Waste Authority

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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(GASB 34 amended GASB 14, ¶9, 11, ¶12, ¶19, ¶42, ¶44, ¶50 –¶52, ¶54, ¶58, ¶60, ¶63, ¶65, ¶73, ¶74, ¶78, and¶131 and superseded GASB 14, ¶45–47, 49, 56, and ¶57)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
- *June 30, 2012 State of Delaware Comprehensive Annual Financial Report (CAFR)*
- *June 30, 2012 Annual Report – Delaware Solid Waste Authority (DSWA)*
- *7 Del C. c.64, Subchapter I – DSWA: General Provisions*
- Delaware Administrative Code, Title 1 Section 501 – *Regulations of the Delaware Solid Waste Authority*
- 2010 DSWA Revenue Bonds, Official Statement
- 2006 DSWA Revenue Bonds, Official Statement
- DSWA Adopted FY2012 Budget and Fees Schedule

*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 legally separate. (¶ 15)<sup>1</sup>**

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.

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



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Delaware Solid Waste Authority

Not an FSF User

Related Organization

## Application to DSWA (or the Authority)

DSWA is legally separate from the State of Delaware. The organization is established as a body politic and corporate, constituting a public instrumentality of the State (7 Del. C. §6403(a)). The Authority shall also have the right to sue and be sued (7 Del. C. §6406 (a)(5)) as well as the right to buy, sell, lease, and mortgage property in its own name (7 Del. C. §6406 (a)(12)).

Code excerpts as follows:

### **7 Del. C. §6403. Establishment, composition, etc., of Authority.**

- (a) There is hereby established and created a statewide solid waste authority, a body politic and corporate constituting a public instrumentality of the State established and created for the performance of an essential public and governmental function, to be known as the Delaware Solid Waste Authority. The Authority shall consist of 7 directors, all of whom shall be residents of and qualified to vote in the State. The Governor shall appoint the directors with the advice and consent of the Senate. The Governor shall designate a director as chairperson, and such director shall serve at the pleasure of the Governor. There shall be at least 1 director from each of 3 counties and the City of Wilmington. Authority directors registered in either major political party shall not exceed the other major political party by more than 1. The terms of the original directors, excluding the chairperson, shall be as follows: Two directors shall serve for 1 year; 2 directors shall serve for 2 years; and 2 directors shall serve for 3 years. Upon the expiration of the terms of the original directors, excluding the chairperson, the term of each director appointed thereafter shall be 3 years.

### **7 Del. C. §6406. Powers of Authority.**

- (a) The Authority shall have the power to:
- (1) Approve and adopt an organizational structure to implement this chapter.
  - (2) Employ a staff to carry out the functions of the Authority.
  - (3) Establish offices where necessary in the State.
  - (4) Retain by contract legal counsel, auditors, engineers, private consultants, advisors or other contractual services required by the Authority.
  - (5) Sue and be sued.
  - (6) Have a seal and alter it at pleasure.
  - (7) Conduct such hearings, examinations and investigations as may be necessary and appropriate to the conduct of its operations and the fulfillment of its responsibilities.
  - (8) To procure and keep in force adequate insurance or otherwise provide for the adequate protection of its property, as well as to indemnify and save harmless it and its officers,



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Delaware Solid Waste Authority

Not an FSF User

Related Organization

agents or employees against loss or liability with respect to any risk to which it or they may be exposed in carrying out any function of the Authority.

- (9) To design, construct, own and operate facilities.
- (10) Obtain access to public records and apply for the process of subpoena if necessary to produce books, papers, records and other data.
- (11) Charge reasonable fees for services it performs and waive, suspend, reduce or otherwise modify such fees when it is deemed appropriate to do so.
- (12) Purchase, manage, lease or rent such real and personal property as it may deem necessary, convenient or desirable.
- (13) Otherwise, do all things necessary for the performance of its duties, the fulfillment of its obligations, the conduct of its operations and the conduct of a comprehensive program for solid waste disposal and resources recovery, and for solid waste management services, in accordance with the state solid waste management plan, applicable statutes and regulations and the requirements of this chapter.
- (14) Assume through contract or otherwise, any existing contract, grant or property right, or interest held by any person, partnership, corporation, municipality, county, state agency, federal agency or other legal entity, pertaining to solid waste storage, collection, transportation, treatment, processing, disposal, recycling, reuse or any other use.
- (15) Determine the location and character of any project to be developed under this chapter, subject to the requirements of the statewide solid waste management plan, including the location of recycling centers, without the need to obtain land use approval.
- (16) Purchase, receive by gift or otherwise, lease, exchange or otherwise acquire and construct, reconstruct, improve, maintain, equip and furnish such waste management projects as are called for by the state solid waste management plan.
- (17) Sell or lease to any person, all or any portion of a waste management project, for such consideration and upon such terms as the Authority may determine to be reasonable.
- (18) Mortgage or otherwise encumber all or any portion of a project whenever, in the opinion of the Authority, such action is deemed to be in furtherance of the purposes of this chapter.
- (19) Grant options to purchase, or to renew a lease for, any Authority waste management project on such terms as the Authority may determine to be reasonable.
- (20) Acquire, by purchase, gift, transfer or by condemnation for public purposes, and manage and operate, hold and dispose of real property and, subject to agreements with lessors or lessees, develop or alter such property by making improvements and betterments with the purpose of enhancing the value and the usefulness of such property.



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Delaware Solid Waste Authority

Not an FSF User

Related Organization

- (21) Make plans, surveys, studies and investigations necessary or desirable, in conformity with the state plan and with due consideration for local or regional plans, to carry out authority functions with respect to the acquisition, use and development of real property and the design and construction of systems and facilities.
- (22) Make short and long range plans, consistent with the state solid waste management plan, for the storage, collection, transportation or processing and disposal of solid wastes and recovered resources by the authority-owned facilities.
- (23) Design or provide for the design of solid waste management facilities including design for the alteration, reconstruction, improvement, enlargement or extension of existing facilities.
- (24) Construct, erect, build, acquire, alter, reconstruct, improve, enlarge or extend waste management projects including provision for the inspection and supervision thereof and the engineering, architectural, legal, fiscal and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures and any other actions incidental thereto.
- (25) Own, operate and maintain solid waste management projects and make provision for their management and for the manufacturing, processing and transportation operations necessary to derive recovered resources from solid waste, and contracting for the sale of such.
- (26) Enter upon lands and waters, as may be necessary, to make surveys, soundings, borings and examinations in order to accomplish the purposes of this chapter.
- (27) Contract with municipal, county and regional authorities, state agencies and persons to provide waste management services in accordance with this chapter and to plan, design, construct, manage, operate and maintain solid waste disposal and processing facilities on their behalf.
- (28) Design and construct improvements or alterations on properties which it owns or which it operates by contract on behalf of municipal or regional authorities.
- (29) Contract for services in the performance of architectural and engineering design, the supervision of design and construction, system management and facility management, for such professional or technical services as are required, and for such other professional or technical services as may require either prequalification of a contractor or the submission by any person, firm or consortium or association of persons or firms of a proposal in response to an official request for proposal or similar written communication of the Authority, whenever such services are, in the discretion of the Authority, deemed necessary, desirable or convenient in carrying out the purposes of the Authority.
- (30) Contract for the construction of solid waste facilities with individuals or firms, or consortiums of such individuals or firms, pursuant to applicable provisions of this chapter, the requirements of applicable regulations and the state plan and in accordance with such specifications, terms and conditions as the Authority may deem necessary or advisable.



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Delaware Solid Waste Authority

Not an FSF User

Related Organization

- (31) Control, through regulation or otherwise, the collection, transportation, storage and disposal of solid waste, including the diversion of solid waste within specified geographic areas to facilities owned, operated or controlled by the Authority; provided, however, that such power shall not extend to the collection, transportation, transfer and storage of hazardous wastes as defined in §6302(8) of this title, except to the extent that the Authority engages in activities authorized under §6452(8) of this title.
- (32) Issue bonds or notes in anticipation of the issuance of bonds, or otherwise, to finance any of the purposes of this chapter, lend the proceeds of such obligations to any person to effectuate any of the purposes of this chapter, contract with any person in any manner deemed advisable by the Authority to secure the payment of such obligations and to pledge such contracts as security for the payment of such obligations.

### ***3. The PG appoints the majority of the PCU's board. (§22-24)***

According to GASB, if a primary government appoints a simple majority of the organization's governing board, it usually has a voting majority. However, if financial decisions require the approval of more than a simple majority, the primary government is not accountable for the organization.

For purposes of determining whether accountability exists, a primary government's appointment authority should be substantive. In some cases the appointment authority of a primary government's officials may be limited by a nomination process. For example, state statutes or local ordinances may require a primary government to select its appointees from a slate of candidates provided by one or more individuals or groups other than the primary government's officials or appointees. A primary government's appointment authority is not substantive if the number of candidates is severely limited by the nominating process, for example, if a primary government must select three appointees from a single slate of five candidates. Additionally, a primary government's appointment authority may not be substantive if its responsibility is limited to confirming appointments made by individuals or groups other than the primary government's officials or appointees.

In most instances, legal provisions for appointment of an organization's officials also provide for continuing appointment authority. However, in the absence of continuing appointment authority, the ability of a primary government to unilaterally abolish an organization also provides the basis for ongoing accountability. Thus, a primary government that creates an organization (creation is tantamount to the initial appointment of the governing body) is accountable for the organization if the primary government can unilaterally abolish it. A primary government is considered to be accountable for an organization as long as continuing appointments are made by the primary government, even if those appointments are made by a subsequent administration.

#### **Application to DSWA**

The Governor appoints all seven directors of the DSWA board with the advice and consent of the Senate (7 Del. C. §6403(a)).



Delaware Auditor of Accounts  
GASB Entity Determination Analysis Memo  
Delaware Solid Waste Authority

Not an FSF User

Related Organization

Code excerpts as follows:

**7 Del. C. §6403. Establishment, composition, etc., of Authority.**

- (a) There is hereby established and created a statewide solid waste authority, a body politic and corporate constituting a public instrumentality of the State established and created for the performance of an essential public and governmental function, to be known as the Delaware Solid Waste Authority. The Authority shall consist of 7 directors, all of whom shall be residents of and qualified to vote in the State. The Governor shall appoint the directors with the advice and consent of the Senate. The Governor shall designate a director as chairperson, and such director shall serve at the pleasure of the Governor. There shall be at least 1 director from each of 3 counties and the City of Wilmington. Authority directors registered in either major political party shall not exceed the other major political party by more than 1. The terms of the original directors, excluding the chairperson, shall be as follows: Two directors shall serve for 1 year; 2 directors shall serve for 2 years; and 2 directors shall serve for 3 years. Upon the expiration of the terms of the original directors, excluding the chairperson, the term of each director appointed thereafter shall be 3 years.

**6. *There is not a financial benefit/burden relationship (§ 27-33) OR  
The PG cannot impose its will on the PCU. (§25-26)***

***Financial Benefit to or Burden on a Primary Government***

According to GASB, *an organization can provide a financial benefit to, or impose a financial burden on, a primary government in a variety of ways.* The benefit or burden may result from legal entitlements or obligations, or it may be less formalized and exist because of decisions made by the primary government or agreements between the primary government and a component unit. If a primary government appoints a voting majority of an organization's officials or if the organization is fiscally dependent on the primary government *and* there is a potential for those organizations either to provide specific financial benefits to, or to impose specific financial burdens on, the primary government, the primary government is financially accountable for those organizations. An organization has a financial benefit or burden relationship with the primary government if, for example, *any one* of these conditions exists:

- a. The primary government is legally entitled to or can otherwise access the organization's resources.
- b. The primary government is legally obligated or has otherwise assumed the obligation to finance the deficits of, or provide financial support to, the organization.
- c. The primary government is obligated in some manner for the debt of the organization.

Exchange transactions between organizations and the primary government should not be considered manifestations of a financial benefit or burden relationship. In an exchange transaction, such as a purchase or sale of goods or services, each participant (the government or its employees rather than the citizenry) directly receives and sacrifices value. For example, funding by a primary government for higher education is not equivalent to purchasing educational services and would be considered a manifestation of a financial burden on the primary government.



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Delaware Solid Waste Authority

Not an FSF User

Related Organization

*The effect of the financial benefits or burdens on the primary government can be either direct or indirect.* A direct financial benefit or burden occurs when the primary government itself is entitled to the resources or is obligated for the deficits or debts of the organization. An indirect benefit or burden exists if one or more of the primary government's component units is entitled to the resources or is obligated for the deficits or debts of the organization. For purposes of this Statement, a financial benefit or burden relationship exists if the primary government is either directly or indirectly entitled to the resources or is either directly or indirectly obligated for the deficits or debts of an organization.

*Legally Entitled to or Can Otherwise Access the Organization's Resources.* The ability to access the resources of an organization—not necessarily whether there was an actual transaction during the period—is the important factor for determining when a primary government is entitled to an organization's resources. However, the ability to access the resources of an organization should be judged in light of the organization as a going concern; that is, a residual interest in the net assets of an organization in the event of dissolution is not equivalent to being entitled to its resources. If a primary government appoints a voting majority of an organization's officials *and* is legally entitled to or can otherwise access the organization's resources, the primary government is financially accountable for that organization.

*Resources may flow from a component unit to a primary government for several reasons.* Some organizations may operate activities, such as off-track betting or lotteries, for the principal purpose of generating net revenues that are accessible to the primary government. These organizations provide financial benefits to the primary government. Other organizations may operate activities (for example, public utilities) for the purpose of providing basic public services and charge rates sufficiently high to also provide a financial benefit to the primary government. These benefits may be characterized as "payments in lieu of taxes" or "contributions," or they may simply be amounts remitted on request of the primary government. These organizations also provide financial benefits to the primary government.

*Legally Obligated or Has Otherwise Assumed the Obligation to Finance the Deficits of, or Provide Financial Support to, the Organization.* A primary government may be obligated to finance the deficits of, or provide financial support to, an organization in different ways. It could be legally obligated to do so, or it may choose to do so for a variety of reasons. If a primary government appoints a voting majority of an organization's officials *and* is legally obligated or has otherwise assumed the obligation to finance the deficits of, or provide financial support to, that organization, the primary government is financially accountable for that organization. The following are examples of financial burdens assumed by a primary government in support of certain organizations:

- a. Some organizations provide public services financed by user charges that are not expected to be sufficient to sustain their operations. This situation often results from providing services such as mass transit, higher education, and healthcare. In these cases, public policy may dictate that a state or local government provide financial support to the organization to increase the availability and affordability of the service to a broader segment of the citizenry. Examples of support include annual appropriations to help meet operating expenditures/expenses, periodic capital grants, and direct payment of capital expenditures or debt service.
- b. A primary government may assume an obligation to finance the deficits of an organization. These deficits may or may not be expected to recur annually. A financial burden exists if the primary government is obligated to finance an organization's deficits even though there has not been, and may never be, a deficit to subsidize.



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Delaware Solid Waste Authority

Not an FSF User

Related Organization

Some organizations' operations are fully or partially funded by revenues generated through tax increment financing. Legally separate development or redevelopment authorities sometimes receive the incremental taxes that result from a tax increment financing arrangement. When this is done, *a taxing government temporarily waives its right to receive the incremental taxes from its own levy*. The incremental taxes instead are remitted to the separate organization. For purposes of this Statement, this type of tax increment financing should be considered evidence of an obligation to provide financial support to an organization (a financial burden), regardless of whether the primary government collects the taxes and remits them to the organization or the incremental taxes are paid directly to the organization.

*Obligated in Some Manner for the Debt of an Organization.* An obligation for the debt of an organization is similar to the notion that a primary government may be obligated for future operating deficits. The obligation can be either expressed or implied. A primary government is obligated in some manner for the debt of an organization if (a) it is legally obligated to assume all or part of the debt in the event of default or (b) it *may* take certain actions to assume secondary liability for all or part of the debt, *and* the government takes, or has given indications that it will take, those actions. Conditions that indicate that a primary government is obligated in some manner include:

- a. The primary government is *legally obligated* to honor deficiencies to the extent that proceeds from other default remedies are insufficient.
- b. The primary government is *required* to temporarily cover deficiencies with its own resources until funds from the primary repayment source or other default remedies are available.
- c. The primary government is *required* to provide funding for reserves maintained by the debtor organization, or to establish its own reserve or guarantee fund for the debt.
- d. The primary government is *authorized* to provide funding for reserves maintained by the debtor organization or to establish its own reserve or guarantee fund *and* the primary government *establishes* such a fund. (If a fund is not established, the considerations in subparagraphs f and g may nevertheless provide evidence that the primary government is obligated in some manner.)
- e. The primary government is *authorized* to provide financing for a fund maintained by the debtor organization for the purpose of purchasing or redeeming the organization's debt, or to establish a similar fund of its own, *and* the primary government *establishes* such a fund. (If a fund is not established, the considerations in subparagraphs f and g may nevertheless provide evidence that the primary government is obligated in some manner.)
- f. The debtor government explicitly indicates by contract, such as the bond agreement or offering statement that, in the event of default, the primary government *may* cover deficiencies although it has no legal obligation to do so. That is, the bond offering statement may specifically refer to a law that authorizes the primary government to include an appropriation in its budget to provide funds, if necessary, to honor the debt of the organization.
- g. Legal decisions within the state or previous actions by the primary government related to actual or potential defaults on another organization's debt make it *probable* that the primary government will assume responsibility for the debt in the event of default.



# Delaware Auditor of Accounts GASB Entity Determination Analysis Memo Delaware Solid Waste Authority

Not an FSF User

Related Organization

If a primary government appoints a voting majority of an organization's officials *and* is obligated in some manner for the debt of that organization, the primary government is financially accountable for that organization.

## ***Imposition of Will***

A primary government that is accountable for an organization because it appoints a voting majority of that organization's governing body frequently has the ability to affect that organization's operations. Sometimes, however, based on the provisions of law or contract, the primary government has little influence over the organization's operations. Certain conditions indicate the primary government's ability to affect the day-to-day operations of an organization. These conditions are referred to in this Statement as a government's ability to impose its will on an organization. If a primary government appoints a voting majority of an organization's officials *and* has the ability to impose its will on the organization, the primary government is financially accountable for that organization.

*A primary government has the ability to impose its will on an organization if it can significantly influence the programs, projects, activities, or level of services performed or provided by the organization. The existence of any one of the following conditions clearly indicates that a primary government has the ability to impose its will on an organization:*

- a. The ability to remove appointed members of the organization's governing board at will.
- b. The ability to modify or approve the budget of the organization.
- c. The ability to modify or approve rate or fee changes affecting revenues, such as water usage rate increases.

## **Application to DSWA**

There is not a financial relationship between the State of Delaware and DSWA. The most recently audited DSWA financial statements show that DSWA did not receive any funds from the State of Delaware in Fiscal Year 2012. A review of the Fiscal Year 2014 Budget and Bond Bills do not show any funding distribution to DSWA either. There is also no indication that the State is legally entitled to DSWA's resources, especially since they are legally separate. Finally, 7 Del. C. §6413 states that the Authority shall have no power to pledge the credit of the State or to create any debt or liability of the State.

Further review of the Delaware Code demonstrates that the State cannot impose its will on DSWA. The following conditions illustrate the State's inability to impose its will on DSWA:

- a. The Governor may only appoint an interim director in the event of death, permanent disability, resignation, or failure of a director to perform his or her duties (7 Del. C. §6403 (b)). Thus, appointed members may not be removed from their position at will.
- b. The State does not have the ability to modify or approve DSWA's budget because (1) DSWA is legally separate, (2) DSWA does not have a financial relationship with the State, and (3) the Delaware Code is silent on the matter.



Delaware Auditor of Accounts  
GASB Entity Determination Analysis Memo  
Delaware Solid Waste Authority

Not an FSF User

Related Organization

- c. In addition, the Authority has the power to charge reasonable fees for services it performs and may wave, suspend, reduce or otherwise modify such fees when it is deemed appropriate to do so (7 Del. C. §6406 (11)).

Code excerpts as follows:

**7 Del. C. §6413. No pledge of credit; exception.**

The Authority shall have no power to pledge the credit or to create any debt or liability of the State, or of any other agency or of any political subdivision, except that bonds, loan agreements or service agreements, all of which may be supported by the full faith and credit of a municipality, may be pledged as security for bonds or other obligations of the Authority.

**7 Del. C. §6403. Establishment, composition, etc., of Authority.**

- (b) In the event of the death of a director, permanent disability of a director, resignation of a director or failure of a director to perform his or her duties, the Governor shall appoint an interim director to serve for a period not to exceed 6 months, unless such interim director shall be confirmed by the Senate, in which case the interim director shall complete the term of the replaced director. If an interim director is not confirmed by the Senate within 6 months of the date of appointment, the position of director shall remain vacant until such time that an interim director is confirmed by the Senate, or a director is selected to serve a new term. Except as otherwise set forth herein the appointment of interim directors shall be subject to all other requirements regarding appointments of directors.

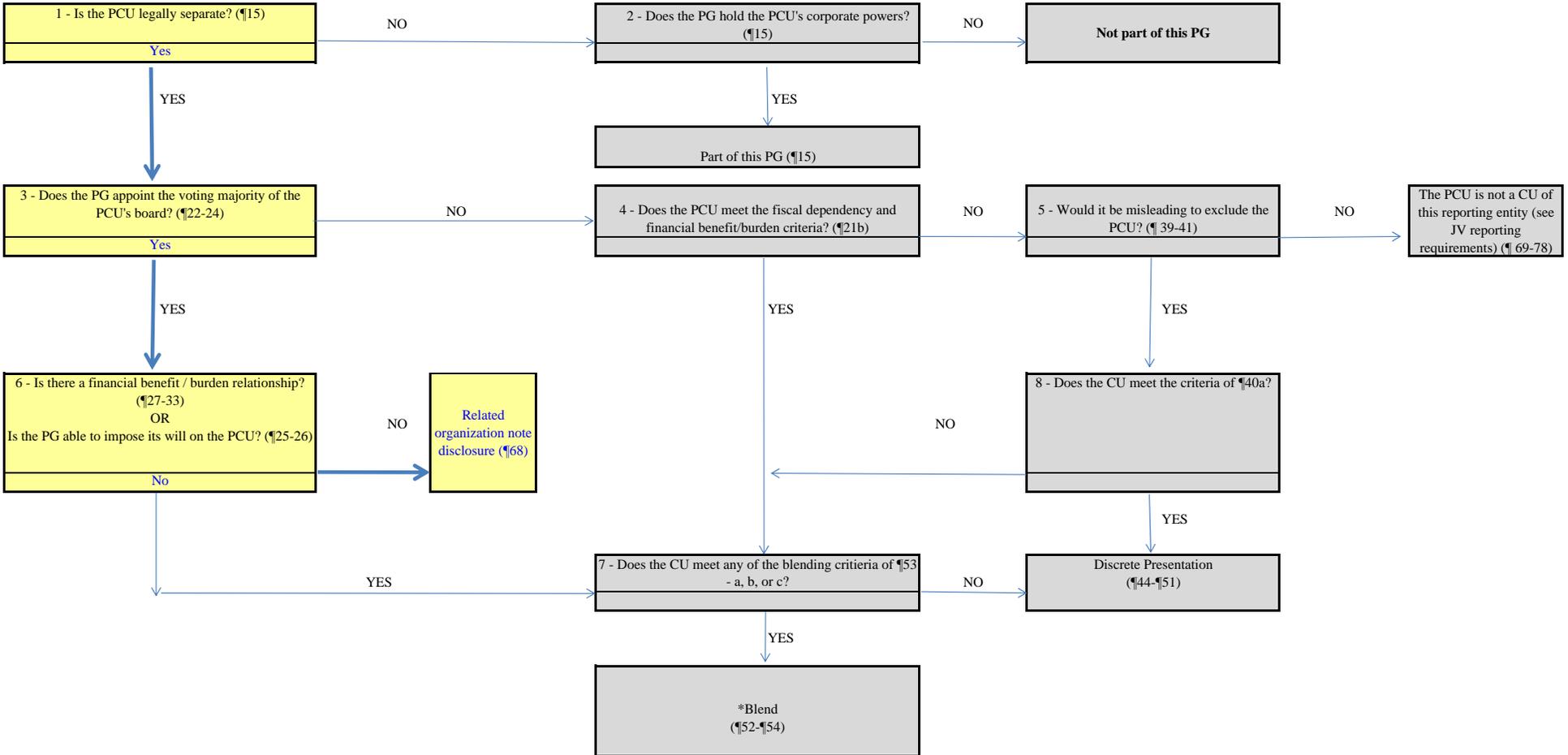
**7 Del. C. §6406. Powers of Authority.**

- (a) The Authority shall have the power to:
  - (11) Charge reasonable fees for services it performs and waive, suspend, reduce or otherwise modify such fees when it is deemed appropriate to do so.

**Delaware Auditor of Accounts  
 GASB Determination Analysis Flowchart  
 Delaware Solid Waste Authority**

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