



August 7, 2023

Ms. Phoebe W. Brown  
Secretary  
Public Company Accounting Oversight Board  
1666 K Street, N.W.  
Washington, D.C. 20006-2803

Submitted via email to comments@pcaobus.org

***Re: Amendments to PCAOB Auditing Standards related to a Company's Noncompliance with Laws and Regulations (PCAOB Release No 2023-003, June 6, 2023, PCAOB Rulemaking Docket Matter No. 051).***

Dear Ms. Brown:

The Association of Corporate Counsel (ACC) appreciates this opportunity to submit comments on *Amendments to PCAOB Auditing Standards related to a Company's Noncompliance with Laws and Regulations* (Proposal).

ACC has significant concerns with the Proposal's impact on in-house counsel and the organizations they serve. First, the Proposal threatens the ability of in-house counsel to ensure that legal advice and communications remain appropriately protected under attorney-client privilege. Second, the Proposal impairs the role of the in-house lawyer to oversee and direct legal compliance matters. Third, ACC is concerned about the unanswered logistical questions created by the Proposal that further erode the ability of in-house counsel to represent their clients in accordance with the rules and standards of professional conduct.

ACC endorses those portions of comments submitted by the U.S. Chamber of Commerce and American Bar Association that address the risks the Proposal poses to the above-described concerns.<sup>1</sup>

#### *About ACC*

ACC is the leading global bar association that promotes the common professional and business interests of in-house counsel. ACC has over 45,000 members who are in-house lawyers employed by over 10,000 corporations, associations, and other organizations in more than 80 countries. Founded as the American Corporate Counsel Association in 1981, ACC has grown from a small organization of in-house counsel to a worldwide network of legal professionals, focused on delivering a mix of relevant and timely services, including information, education,

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<sup>1</sup> U.S. Chamber of Commerce Comments, Docket 051, No. 22; American Bar Association Comments have not yet been published in the docket. Should the ABA change position in its final submitted comments, ACC will submit additional comments to clarify its position as needed.

networking opportunities, and advocacy. ACC has long sought to aid courts, legislatures, regulators, and other law or policy-making bodies in understanding the role and concerns of in-house counsel.

### *Attorney-Client Privilege*

Despite numerous references to the legal information that auditors would need to access and disclose, there is only one mention of attorney-client privilege in the more than 140-page document. Attorney-client privilege is a centuries-old bedrock legal principle. *See, e.g., Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981). The privilege allows lawyers and clients to engage in full and frank discussions, which lead to the best possible legal representation, furthering the rule of law and administration of the legal system. The Proposal requires auditors to identify an unspecified universe of laws and regulations “with which noncompliance could reasonably have a material effect on the financial statements;” assess the risks of material misstatement caused by the identified noncompliance; and identify whether there is information indicating that noncompliance occurred or may have occurred. PCAOB Proposal, 20.

Because of the breadth of the information contemplated by the Proposal, organizations will likely be asked to turn over legally sensitive materials, including attorney-client privileged advice. If enacted, the Proposal would have a chilling effect on legal communications, hindering the in-house counsels’ ability to proactively identify and address instances of potential noncompliance at the earliest possible stages.

### *In-House Counsel’s Role in Determining Legal Compliance*

In-house counsel are experts on the laws that govern their industries and hold significant expertise and understanding of the industries themselves. Their focus is necessarily proactive as they seek to prevent compliance issues from arising in the first place. Part of their role is to identify areas of compliance weakness – which is assisted mightily by the full and frank discussions that can occur because of attorney-client privilege – and to correct the situation before noncompliance occurs.

The Proposal’s requirement for auditors to “obtain an understanding” of potential noncompliance and “determine whether it is likely that any such noncompliance occurred,” Proposed AS 2405.07, shifts the in-house counsel’s role to the auditor, a non-lawyer who may or may not have significant experience with the industry. Suggesting that the auditor “consider whether specialized skill or knowledge” is needed to perform this analysis does not ameliorate this situation. *See* Proposed AS 2405.07, Note 1.

The Proposal weakens the in-house counsel’s role by seeking to shift their expert judgment outside the company to auditors (and likely their attorneys) who do not have industry-specific knowledge or expertise, and who cannot assume the proactive role the in-house counsel plays in preventing noncompliance from occurring.


*Logistical Uncertainties*

Third, the Proposal fails to address the many logistical questions it creates. For example, the Proposal appears to contemplate that auditors will need to retain legal counsel to identify and assess instances of potential noncompliance. *Id.* But no mention is made of whether the communications that occur between auditor and lawyer would be privileged or available to the business being audited. Nor is there guidance on how auditors and their lawyers, and companies and their lawyers, should navigate the inevitable conflicts in opinions that will arise as they consider the often-gray area of assessing potential noncompliance.

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ACC urges the PCAOB to rethink its proposal and address the impacts on attorney-client privilege. Significant revisions to the Proposal are necessary to ensure that in-house lawyers can adequately protect their internal clients' legal confidences and continue their critical role in proactively preventing legal noncompliance.

Sincerely,

DocuSigned by:  
  
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Susanna McDonald  
VP and Chief Legal Officer