



August 7, 2023

Ms. Phoebe W. Brown  
Secretary  
Public Company Accounting Oversight Board  
1666 K Street, NW  
Washington, DC 20006-2803

Re: PCAOB Release No. 2023-003 (PCAOB Rulemaking Docket Matter No. 051) – Proposing Release: Amendments to PCAOB Auditing Standards related to a Company’s Noncompliance with Laws and Regulations

Dear Ms. Brown:

Fortive Corporation (“Fortive”) appreciates the opportunity to submit this comment letter to the Public Company Accounting Oversight Board (the “PCAOB” or “Board”) in response to the Board’s rulemaking proposal, “Amendments to PCAOB Auditing Standards related to a Company’s Noncompliance with Laws and Regulations” (the “Proposing Release”).<sup>1</sup>

Fortive is a provider of essential technologies for connected workflow solutions across a range of attractive industrial technology end-markets. Our businesses design, develop, manufacture, and service professional and engineered products, software, and services, building upon leading brand names, innovative technologies, and significant market positions. We are an NYSE-listed company headquartered in Everett, Washington with approximately \$6 billion in annual revenues, over 18,000 employees, and operations in more than 50 countries around the world.

Fortive commends the Board’s goal of attempting to identify ways to strengthen and enhance its auditing standards. However, we are concerned that the Proposing Release and the rules contemplated therein (the “Proposed Rules,” and together with the Proposing Release, the “Proposal”) and the implications thereof will not accomplish this goal. If adopted, we believe that the Proposed Rules would, among other things, (i) expand the role of auditors considerably, mandating them to undertake analyses and make judgments that require knowledge, skills and expertise outside of their core competencies; (ii) require companies to share certain information with their auditors that could risk compromising the attorney-client privilege; and (iii) substantially increase the costs of audits for both auditors and the companies they audit.

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<sup>1</sup> PCAOB Release No. 2023-003 – Proposing Release: Amendments to PCAOB Auditing Standards related to a Company’s Noncompliance with Laws and Regulations; PCAOB Rulemaking Docket Matter No. 051 (June 6, 2023).

**I. The Role of Auditors Would be Expanded Considerably, Mandating Them to Undertake Analyses and Make Judgments that Require Knowledge, Skills and Expertise Outside of Their Core Competencies**

Under the Proposal, auditors would be required to, among other things:

- identify laws and regulations with which noncompliance could reasonably have a material effect on the financial statements;
- assess and respond to risks of material misstatement of financial statements due to noncompliance with those laws and regulations;
- identify whether there are instances of noncompliance with laws and regulations that have or may have occurred; and
- evaluate and communicate to senior management and the audit committee identified instances of noncompliance that have or may have occurred, regardless of whether the effect of the noncompliance is perceived as material.

As a result, the Proposal would require auditors to make judgements and take actions with respect to legal and compliance matters that require knowledge, skills and expertise outside of auditors' core competencies. Indeed, the Board notes in the Proposal that an auditor may determine specialized skill or knowledge outside of accounting and auditing is needed to assist the auditor in conducting such noncompliance evaluations, and that in such circumstances, the auditor should look to the appropriate requirements for using the work of specialists in an audit.<sup>2</sup>

The laws and regulations applicable to public companies are extensive, diverse and complex and vary from company to company, and from jurisdiction to jurisdiction. Identifying laws and regulations in each applicable jurisdiction with which noncompliance could reasonably have a material effect on a company's financial statements, and assessing whether noncompliance has occurred, requires years of training and specialization that auditors generally do not possess, and requires deep knowledge of applicable facts, circumstances and precedents that can be time consuming, costly and impractical to acquire.

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<sup>2</sup> See the Proposing Release at A1-4.

Even within the legal profession, identification and analysis of the vast scope of applicable laws and regulations requires years of extended training and specialization that would not be practical for auditors of financial statements to assume. We are concerned that imposing such responsibilities on auditors who are not trained in the practice of law could have unintended consequences. For example, expanding the auditor's responsibilities in this manner could divert the auditor's attention and resources and thereby diminish the quality of the audit with respect to the credibility of the financial statements. Furthermore, expanding the auditor's responsibilities in this manner would require the auditor to make legal determination and provide legal assessment. The Proposal would also effectively convert the role of a company's auditors to that of an investigator and, potentially and indirectly, legal advisors that may duplicate and conflict with existing legal services provided by internal and external legal counsel and may impair the auditor's independence. We agree with Board Member Christina Ho that this "breathtaking expansion of the auditors' responsibilities" could hurt investors and "undermine the long-established accountability framework whereby management prepares and discloses financial information, auditors provide an independent certification on the disclosures, and regulators provide oversight of the public companies and auditors."<sup>3</sup>

The Proposal would also cause overlaps with respect to legal and operational oversight. This could place undue burdens on auditors and senior management to duplicate certain internal compliance functions and impair the ability of the board of directors or management to discharge their duties where auditors provide legal assessments that conflict with the assessments of internal or external legal counsel.

## **II. Requiring Certain Information to be Shared with Auditors Could Risk Compromising the Attorney-Client Privilege, Undermining the Purpose of the Proposal**

In connection with fulfilling the expanded responsibilities that would be required under the Proposal, auditors would be more likely to request from companies information that is subject to the attorney-client privilege. Disclosure of such information to an independent auditor could constitute a waiver of the privilege in certain jurisdictions. The destruction of privilege in this manner may undermine the Proposal's purpose by chilling open communications between companies and their legal counsel, including with respect to obtaining legal advice to help ensure compliance with applicable laws and regulations. Also, waiver of the attorney-client privilege could expose would-be privileged materials to review by third parties, which could have a material adverse effect on companies.

## **III. The Proposal would Substantially Increase the Costs of Audits for Both Auditors and the Companies they Audit**

The Board recognizes in the Proposal that implementing the Proposed Rules could result in substantial additional costs to auditors and the companies they audit, but does not provide

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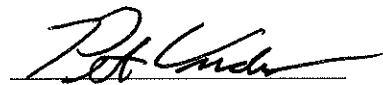
<sup>3</sup> See Statement on Proposed Amendments to PCAOB Auditing Standards related to a Company's Noncompliance with Laws and Regulations by Christina Ho (June 6, 2023).

quantitative data.<sup>4</sup> These costs would include both implementation costs and ongoing costs. For example, due to the significant expansion of the auditor's responsibilities, expenses would be incurred in connection with updating audit methodologies and tools, hiring and training staff, retaining legal professionals and other specialists, and conducting legal analysis. Likewise, companies would likely be forced to pay significantly higher audit fees, and also may need to incur additional costs in connection with hiring additional staff necessary solely to respond to additional requests from auditors to align with the new procedures auditors would perform under the Proposal that, in many facets, would duplicate in a less informed and less efficient manner, existing compliance activities conducted by internal and external legal counsel and compliance personnel. In light of our concerns described in Sections I and II above, we believe that the Proposed Rules would subject auditors and companies to substantial administrative and financial burdens that are not commensurate with the purported benefits that the Proposal would provide.

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We appreciate the opportunity to comment on this important proposal. We respectfully recommend that the Board not adopt the Proposed Rules, and instead engage with auditors, companies and other market participants to determine if revised standards are needed. If the Board has any questions with respect to this comment letter, please do not hesitate to contact the undersigned at (425) 446-5000.

Sincerely,



Peter Underwood  
SVP & General Counsel

CC: Christopher Mulhall  
Chief Accounting Officer

Daniel B. Kim  
Vice President – Associate General Counsel and Secretary

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<sup>4</sup> See the Proposing Release at 77 and 81.