

# The Power of a Speak Up Culture

by Thomas Fox, "The Compliance Evangelist"



While the government expects companies to have an internal reporting system, there are benefits far beyond putting you in the government's good graces. Companies with a robust culture of speak up generate more reports. Conversely, companies with more limited use of their whistleblower reporting systems are seen to have poor governance. They are more prone to financial accounting issues, such as discretionary accruals, which could prove problematic. These tend to be smaller and less mature firms, and their compliance programs are not seen as robust or as effective as those in larger, more mature organizations. Finally, these firms are more prone to extreme growth and the problems associated with trying to scale up quickly.

## I. Why a Culture of Speak Up Matters

Obviously CCOs can use this type of information to demonstrate the efficacy of a culture of speak up going forward. It also provides the CCO actionable information to prevent, detect and remediate issues before they become full-blown legal violations. Conversely, the lack of information can lead to compliance related inquiries.

Moreover, a robust culture of speak up has positive impact right up to the Board of Directors. First, “a more active engagement and more reporting is a good thing for the signal it sends to senior management about corporate culture.” The second thing is the direct, unfiltered information that it can provide to Boards of Directors. One of the key corporate governance failures over a wide casting of recent corporate scandals has been the withholding of information to Boards by senior management. Just think about how this could have changed the calculus at Wells Fargo if its Board of Directors had been made aware of the whistleblower

reports of fraudulently created accounts up to five years before the scandal broke publicly and the Board finally got the full picture. Remember the Volkswagen Board who found about the emissions-testing scandal when reading about the company’s admissions in the newspaper. Now the Board can have an internal report, with direct information.

Finally, a robust culture of speak up clearly delineates a functioning and ethical corporate culture. Such a culture retains and also attracts employees, not an inconsequential consideration in this age of the gig economy.

Lastly, and from the accounting perspective, a culture of speak up can aid to prevent accruals in financial statements. The more accruals there are going forward, the greater chance there is for financial statement manipulation or fraud. Companies that did not have at least average whistleblower reporting systems were more likely to have such

issues. It may be due to the firm’s maturity or simply a commitment to do things the right way, but if a company does not have a robust whistleblower reporting system, there is such a correlation.

All of this points to one unmistakable conclusion, a robust whistleblower reporting system facilitates a company’s resolution of problems before they become major problems or legal violations bringing the SEC or DOJ calling.

## II: Institutional Justice and Institutional Fairness

Companies have finally come to realize that institutional justice and fairness are perhaps the most basic tenets of any successful workplace culture. If employees believe they will be treated fairly, it will engender a level of trust that can not only motivate them, but also lead to a more successful workplace and, at the end of the day, a more profitable company. This encompasses the entire lifecycle of the employment relationship, from hiring through separation. It works in areas as seemingly disparate as compensation and incentives, discipline, promotion, and internal reporting. Not only has the DOJ has made clear that the corporate compliance function must take the lead in this endeavor, but the Monaco Memo enshrined that the DOJ will evaluate corporate culture as a part of any FCPA investigation or enforcement action.

On this point, Kyle Welch and Stephen Stubben, in their 2019 paper, entitled, *Evidence on the Use and Efficacy of Internal Whistleblowing Systems*, noted

that a robust culture of speak up leads to a functioning and ethical corporate culture. Employees who can report issues in a fair manner without fear of retaliation are more empowered to make the company run more efficiently and more profitably. Yet, an equally interesting finding was that, when there is a robust culture of speak up, employees are more likely to speak up to improve overall business processes, thereby making the company more profitable.

The issue of institutional justice is most clearly seen in discipline. Critical to an effective compliance program is the consistent application of discipline for proven compliance violations, regardless of whether the violations were committed by front-line employees, Board members, or senior managers.



As noted in the 2020 FCPA Resources Guide, 2<sup>nd</sup> edition, Hallmarks of an Effective Compliance Program: “A compliance program should apply from the board room to the supply room—no one should be beyond its reach. DOJ and SEC will thus consider whether, when enforcing a compliance program, a company has **appropriate** and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation.”

This mandate was brought forward in the 2017 FCPA Corporate Enforcement Policy that stated, “**Appropriate** discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred.” [emphasis supplied]

All of these concepts were continued in the 2023 Evaluation of Corporate

Compliance Programs (ECCP), which stated, “Another hallmark of effective implementation of a compliance program is the establishment of incentives for compliance and disincentives for non-compliance. Prosecutors should assess whether the company has clear disciplinary procedures in place, enforces them **consistently** across the organization, and ensures that the procedures are commensurate with the violations.”

The ECCP then laid out the following mandates:

**Human Resources Process** —  
*Who participates in making disciplinary decisions, including for the type of misconduct at issue? Is the same process followed for each instance of misconduct, and if not, why? Are the actual reasons for discipline communicated to employees? If not, why not? Are there legal or investigation-related reasons for restricting information, or have pre-textual reasons been provided to*

*protect the company from whistleblowing or outside scrutiny?*

**Consistent Application** —

*Have disciplinary actions and incentives been fairly and consistently applied across the organization? Are there similar instances of misconduct that were treated disparately, and if so, why?*

To operationalize your compliance program, HR should ensure that discipline is handed out appropriately and consistently across the organization and reward employees who integrate ethical and compliant behavior into their individual work practices. In addition to providing a financial incentive for ethical behavior, it also provides a sense of institutional justice. Institutional justice comes from procedural fairness and is one area that will bring credibility to your compliance program.

The Fair Process Doctrine recognizes that there are fair procedures, not arbitrary ones, in processes involving rights.

Considerable research has shown that people are more willing to accept negative, unfavorable, and non-preferred outcomes when they are arrived at by processes and procedures that are perceived as fair. As you incorporate the Fair Process Doctrine in your compliance program, there are three key areas to focus on.

#### **Administration of discipline.**

One area where the Fair Process Doctrine is paramount is in the administration of discipline after any compliance-related incident. Discipline must not only be administered fairly, but also consistently across the company for the violation of any compliance policy. Failure to administer discipline uniformly will destroy any vestige of credibility that you may have developed.

Likewise, there must be real consequences for an employee who violates your compliance program. If the regulators come knocking and you have not disciplined employees for code of conduct or compliance program violations in multiple years, the DOJ and SEC will conclude quickly you are not serious about compliance. Fair process means that you must discipline those who engage in compliance violations no matter what their position is within the organization.

#### **Employee promotions.**

In addition to the area of discipline which may be administered after the completion of any compliance investigation, you must also place compliance firmly as a part of ongoing employee evaluations and promotions. If your company is seen to only advance and reward employees who achieve their numbers by whatever means necessary, other employees will certainly take note. It will be understood what management evaluates and rewards employees on.

### Internal investigations.

The third area of the Fair Process Doctrine is around internal company investigations. If your employees do not believe that the investigation is fair and impartial, then it is not fair and impartial. Further, those involved must have confidence that any internal investigation is treated seriously and objectively. One of the key reasons that employees will go outside of a company's internal hotline process is because they do not believe that the investigation process will be fair.

An often-overlooked role of any CCO or compliance professional is to help provide employees with institutional justice. If your compliance function is seen to be fair in the way it treats employees—in areas ranging from financial incentives, to promotions, to appropriate and consistent discipline—then employees are more likely to inform the compliance department when something goes awry.

### III. The ROI of a Speak Up Culture

Instilling in your employees the belief that they will be treated fairly will go a long way to more fully operationalizing your compliance program.

Dr. Welch found a group of companies he termed “power users,” which were high-level users of whistleblower reporting systems that had more activity than the average entity. These “power user” companies have several interesting characteristics. First, they are typically firms with a higher-quality earnings reporting. They are more profitable entities. Finally, these “power user” companies were firms with higher-quality governance, as rated by the Entrenchment Index (E-Index), which is used measure how entrenched management is in a company.

Moreover, internal reporting systems are clear indicators of a working, operationalized compliance program. The ECCP went on to state: “Confidential reporting mechanisms are highly

probative of whether a company has ‘established corporate governance mechanisms that can effectively detect and prevent misconduct.’” (An effectively working compliance program will have in place, and have publicized, “a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.”) It then posed the following questions:

#### **Effectiveness of the Reporting**

**Mechanism** — *Does the company have an anonymous reporting mechanism and, if not, why not? How is the reporting mechanism publicized to the company’s employees and other third parties? Has it been used? Does the company take measures to test whether employees are aware of the hotline and feel comfortable using it? How has the company assessed the seriousness of the allegations it*

*received? Has the compliance function had full access to reporting and investigative information?*





Many of the largest corporate scandals, such as Enron and WorldCom in the first decade of this century on to Wells Fargo, Airbus and others in this decade, had instances of whistleblowers who came forward. Yet for reasons still not fully clear, these companies did not investigate these allegations which would have informed both senior management and the Board of Directors that something was seriously amiss. Welch noted that while individual whistleblower reports can help on one issue, when they are aggregated you can garner insight into larger and broader issues. He stated, “what the whistleblower system does is give you a sense of your visibility to those problems. It enables managers to get a window into the problems.” Put another way, “Is this indicative of a firm that actually or just discovering more about things that they don’t know?”

It is well recognized that zero speak up reports is not necessarily a good thing or even indicative that there are no problems.

Conversely, because there are multiple or even a plethora of reports, it does not mean the company is in legal, ethical or reputational trouble. Most interestingly, Dr. Welch tied a robust culture of speak up to leadership. He stated, “There’s a huge amount of management research and gurus spending time on how to lead, how to be the right leader of an organization. There is a continual search for the silver bullet of finding the right team and finding the right manager that makes you inoculated from problems.” Yet he believes there is also another way of thinking about it, which is that your own employees can get information into the hands of an appropriate level of decision makers and this is the power of robust whistleblower reporting system.

It is incumbent to understand this is not simply about having a whistleblower phone line. It is about an entire whistleblower reporting system. This means someone must intake the call and route it to an appropriate person or



function to triage. From there, it should be given an appropriate ranking for investigation. The investigation should be concluded in timely manner and then remediated or reported if appropriate. Finally, the whistleblower should have been contacted to acknowledge the initial report, for any additional information and follow up and then if there is a resolution.

This leads to what Dr. Welch called “*visibility to problems.*” These data points can be powerful for a company in a variety of ways.

All of this leads to Welch’s key finding of a reduction in material litigation costs. Remember this is not simply civil litigation but all reportable proceedings against a company, including regulatory enforcement actions, criminal sanctions sought by the DOJ and all other court proceedings, both civil and criminal. A material proceeding would have to be five percent of a company’s gross margin, so the amount would be quite high.

Companies with robust whistleblower reporting systems also have four percent fewer pending lawsuits the year after increased hotline activity, improving to 6.9% fewer material lawsuits over three years. Finally, overall litigation settlements of non-material matters dropped almost 20% over three years as well. Clearly it demonstrates the power of a robust culture of speak up.



## IV. Conclusions

The call, email or tip comes into your office—an employee reports suspicious activity somewhere across the globe. That activity might well turn into a compliance issue for your company. As the CCO, it's up to you to begin the process which will determine how the company will respond. It is axiomatic that organizations understand the benefits of having a culture of speak up will fare much better if they get in front of the DOJ or SEC in an enforcement action.

The 2020 FCPA Resource Guide stated the following on internal reporting, “An effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation.” That was it. This simple introduction was expanded upon in the ECCP, in the section entitled, **D. Confidential Reporting Structure and Investigation Process**, with the following language:

*Another hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct. Prosecutors should assess whether the company's complaint-handling process includes pro-active measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers.*

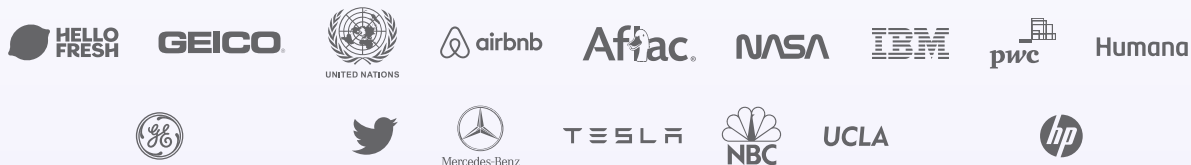
The bottom line is that by having a speak up culture, your organization will have a more robust compliance program, save money by avoiding fines and penalties, increase business efficiency and profitability, and have a key element to discuss with regulators should that need ever arise. Having a speak up culture is both good for business and an insurance policy against a FCPA enforcement action.





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