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FCPA Compliance Should Not 'Cost an Arm and a Leg': Assessing the Potential for Enhanced Cost-Efficiency and Effectiveness for an Anti-Corruption Compliance Program with the Implementation of an Enterprise Legal Risk Management Framework

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FCPA COMPLIANCE SHOULD NOT 'COST AN ARM AND A LEG': ASSESSING THE POTENTIAL FOR ENHANCED COST-EFFICIENCY AND EFFECTIVENESS FOR AN ANTI-CORRUPTION COMPLIANCE PROGRAM WITH THE IMPLEMENTATION OF AN ENTERPRISE LEGAL RISK MANAGEMENT FRAMEWORK.

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TABLE OF CONTENTS

I. INTRODUCTION

This article presents an overview of the benefits of an enterprise legal risk management ("ELRM") Framework when deployed as a tool by multinational companies ("MNCs") to strengthen their corporate U.S. *Foreign Corrupt Practices Act* ("FCPA") compliance programs.[1] The article identifies and discusses important benefits of the Framework, including improved effectiveness and efficiency in in-house and related outside legal costs.[2] According to Forbes magazine, legal services costs associated with FCPA

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[1] R. Walker, *International Corporate Compliance Programs*, 3 INT'L J. OF DISCLOSURE AND GOVERNANCE 70, 70-81 (2006) (explaining the increased importance of compliance and ethics programs both outside and within the United States). *See also* Evan Peterson, *Compliance And Ethics Programs: Competitive Advantage Through The Law*, 17 J. OF MGMT. & GOVERNANCE 1027, 1027–1045 (2013) (advocating that corporate compliance programs offer a sustainable competitive advantage from the law by assisting organizations in achieving a better understanding of the law, a cost-effective approach for coping with an organization's legal issues, as well as aiding organizations by preventing these legal issues from occurring in the future and by supporting organizations in reframing legal issues as business opportunities.). *See also* Shaun Cassin, *The Best Offense Is a Good Defense: How the Adoption of An FCPA Compliance Defense Could Decrease Foreign Bribery*, 36 HOUS. J. INT'L L. 19, 19-58 (2014) (providing a brief historical overview of FCPA, arguments for and against adding a compliance defense to the FCPA, a five-part compliance defense proposed by the former assistant chief of FCPA enforcement at the U.S Department of Justice (DOJ) William Jacobson and options available to a company for designing of a compliance program).

[2] Garrick Apollon, *The Intersection between Legal Risk Management and Dispute Resolution in the Commercial Context*, 15 PEPP. DISP. RESOL. L.J. 284, 284-285 (2015) [Hereinafter Garrick Apollon, The intersection between LRM & DR] *available at* http://digitalcommons.pepperdine.edu/drlj/vol15/iss2/2 (last visited Jan. 28, 2017) (explaining that the implementation of an ELRM Framework promotes: strong corporate governance for the client organization by reducing the negative impacts of legal risk across the organization; gives access to better insurance; enables the client to make informed decisions and avoid surprises; accomplishes its corporate policies and objectives using more objective and reliable information; improves client's engagement and intake management vis-à-vis legal issues for a better working relationship between lawyer-client; reduces monetary and other possible impacts of litigation; improves cost control and cost effectiveness of legal fees; assists in taking "calculated" or smart risks that are balanced against possible benefits; fosters necessary controls and due diligence; promotes better business planning; and generally enhances decision making from an organization-wide perspective.).

compliance incurred by MNCs run to several million dollars every year without necessarily achieving the desired legal compliance results. [3] FCPA compliance is a very lucrative business for law firms because MNCs are paying several million dollars in legal fees while often still paying several million dollars in fines to U.S. regulators.[4] Forbes magazine also went so far as to label the FCPA as the "milk cow" for the Department of Justice ("DOJ").[5] In light of the foregoing, this article presents ELRM Framework as the solution for MNCs looking to prioritize their FCPA legal services efforts in a risk-based approach and as a means of keeping a tighter rein on their in-house and outside legal costs.[6] After all, a Chief Legal Officer ("CLO") or General Counsel ("GC") in the legal department of a MNC is responsible not just for supervising the delivery of excellent legal services, but also for justifying and controlling the cost of legal

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[3] Lisa Prager, *FCPA Compliance: Don't Blow Your Budget Just Yet,* FORBES MAGAZINE, Mar. 27, 2012, available at http://digitalcommons.pepperdine.edu/drlj/vol15/iss2/2 (last visited Jan. 28, 2017) http://www.forbes.com/sites/insider/2012/03/27/fcpa-compliance-dont-blow-your-budget-just-yet/#3e88127c7e89

[4] *The anti-bribery business*, THE ECONOMIST, May 9, 2015, available at http://www.economist.com/news/business/21650557-enforcement-laws-against-corporate-bribery-increases-there-are-risks-it-may-go (last visited Jan. 28, 2017). See also Nathan Vardi, *The FCPA Fiasco: Pressure Tactics In Corruption Cases Backfiring*, Forbes Magazine, Jan. 17, 2012, available at http://www.forbes.com/sites/nathanvardi/2012/01/17/the-fcpa-fiasco/#454e7e55be45 (stating that the Government's track record on FCPA cases in court has been terrible. For many years the FCPA, which prohibits bribery of foreign government officials, was hardly been enforced. But for the last decade the federal government has greatly increased its FCPA enforcement, threatening to bring an indictment against any company that does not cooperate and act harshly if companies don't voluntarily report any potential sins. This game has been cheered on by lawyers and accountants, even journalists, who benefit immensely from the expensive internal investigations companies initiate to deal with this new reality).

[5] Forbes, *supra* note 3 (explaining that FCPA enforcement has long been considered a cash cow for the Department of Justice. It should not be a surprise, therefore, that complying with the FCPA and other anti-corruption laws comes with its own hefty price tag.).

[6] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 284-285 (discussing the key advantages and challenges of using legal risk management to help lawyers manage substantive matters related to commercial negotiations and disputes).

fees for the MNC.[7] In practice, GC get fired not only for poor delivery of legal services but also over excessive legal billing against the MNC.[8]

As Susskin's best-selling book *The Future of the Law* mentions, the next generation of lawyers will have to embrace a proactive perspective focused on dispute prevention rather than just dispute resolution, as well as legal risk management rather than just legal problem-solving.[9] Susskind's message in the *Future of the Law* remains a stark one: in order to guarantee a stake in the legal and regulatory system of the future, lawyers must adapt their work practices or die.[10] A recent article in the Harvard Business Review went as far as to say that "Technology Will Replace Many Doctors, Lawyers, and Other Professionals" by asserting that "within decades the traditional professions will be dismantled, leaving most, but not all, professionals to be replaced by less-expert people, new types of experts, and high-performing systems."[11] As an illustration, Thomson Reuters, the world's leading source of intelligent information for businesses and professionals, and Blue J Legal (company owned by University of Toronto tax law professor Benjamin Alarie) are launching Tax Foresight, a new suite of artificial intelligence-based

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[7] E. NORMAN VEASEY AND CHRISTINE T. DI GUGLIELMO, INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY 56 (Oxford University Press, 2012). (discussing the challenges of budget constraints and the financial dependence of GC on a single client).

[8] This statement is based on conventional wisdom, *but see* Frederic S. Ury, Jordan Furlong, *What The Future Legal Market Means For Lawyers And Bar Associations*, ABA JOURNAL, Vol. 37 No. 6 (2013), available at http://www.americanbar.org/publications/bar_leader/2012_13/july_august/what_future_legal_market_means_lawyers_bar_associations.html (last visited Jan. 28, 2017) (asserting that too many clients, both consumer and corporate, believe that attorneys drive up the cost of legal transactions without adding commensurate value).

[9] RICHARD E. SUSSKIND, THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY (Oxford: Clarendon Press, 1996) (theorizing on the future of the law in the face of the technological evolution of the world).

[10] *Id.*

[11] Richard Susskind and Daniel Susskind, *Technology Will Replace Many Doctors, Lawyers, and Other Professionals*, HARV. BUS. REV. (Oct. 11, 2016), available at https://hbr.org/2016/10/robots-will-replace-doctors-lawyers-and-other-professionals.

tax case outcome predictors, to Canadian corporate tax professionals; tax preparers; accountants; and tax lawyers. Tax Foresight leverages the power of machine learning and artificial intelligence ("AI"), enabling practitioners to rapidly receive a legal risk assessment to predict how courts will rule in new tax decisions, based on facts provided by users and analysis of prior judicial decisions.[12] In other words, we can expect in the future that routine work can be taken on by machines with AI or "robot lawyers"[13], and that human experts will only be needed for the tricky stuff that calls for judgment, creativity, and empathy.[14]

It is in this context that the implementation of ELRM Framework has risen to the top of the list of priorities of companies' in-house legal departments.[15] CLO or GC are now directed by the Chief Risk Officer ("CRO") and/or Chief Compliance Officer ("CCO") to supervise the implementation of mandatory ELRM Framework in their companies.[16] Accordingly, the idea behind this article is based on the fact that the largest in-house public legal department in Canada (the Department of Justice Canada) has recently established a mandatory ELRM Framework with a business analytics software called iCase to modernize the delivery of legal services for all litigation, legislative and advisory legal files for the Government of Canada.[17] This framework is mandatory and supports the day-to-day practice of law in all federal departments and agencies

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[12] *Thomson Reuters and Blue J Legal Deliver Artificial Intelligence-Based Tax Foresight*, THOMSON REUTERS, Nov. 15, 2016, available at http://thomsonreuters.com/en/press-releases/2016/november/thomson-reuters-and-blue-j-legal-deliver-artificial-intelligence-based-tax-foresight.html

[13] Chris Sorensen, *Big Law is having its Uber Moments*, Maclean's Magazine, Jan. 16, 2017, available at http://www.macleans.ca/economy/business/big-law-is-having-its-uber-moment/ (last visited Feb 7, 2017).

[14] *Supra* note 11.

[15] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 271.

[16] *Id.*

[17] *Legal Risk Management in the Department of Justice*, CANADA DEPARTMENT OF JUSTICE, http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/08/lrm-grj/p2.html (last modified Jan. 7, 2015) (presenting the legal risk management initiative and an overview of legal risk management today within the Government of Canada).

of the Government of Canada.[18] The International Organization for Standardization ("ISO") is currently working on the development of international standards named the ISO/AWI 31022 Guidelines for Implementation of Enterprise Legal Risk Management to respond to the shift in public and corporate sector accountability.[19] These ISO standards aim to strengthen and modernize the practice of legal risk management in private and public organizations around the world and as a result improve the rule of law and anti-corruption and regulatory compliance.[20]

The FCPA is now the top legal risk facing American multinational companies.[21] The FCPA is a United States ("U.S.") federal criminal law known primarily for two of its main provisions; one that addresses accounting transparency requirements under the U.S. *Securities Exchange Act* ("SEC") and the other concerning bribery of foreign officials.[22] The FCPA applies to any person who has a

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[18] *Id.*

[19] *See* ISO/AWI 31022, Guidelines for Implementation of Enterprise Legal Risk Management, available at http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=69295

[20] Lalonde, C., & Boiral, O., *Managing risks through ISO 31000: A critical analysis*, 14 RISK MGMT. 4, 272-300 (explaining that the ISO 31000 standard is intended to help organizations to manage in a systematic and comprehensive manner diverse types of risk, by offering a universal framework to assist the organization to integrate risk management into its overall management system).

[21] GORDON E. KAISER, CORPORATE CRIME AND CIVIL LIABILITY 587 (Lexis Nexis, 2012) (stating that for the past 50 years, the greatest threat to multinational corporations in terms of criminal liabilities fell under the competition and anti-trust laws. Serious enforcement of the U.S. FCPA by U.S. prosecutors have led to fines to the tune of 3.6 billion from 2012-2009 alone, and U.S. prosecutors continue to aggressively enforce the FCPA.). *See also* R. Christopher Cook & Stephanie Conner, Jones Day LLP, *The Foreign Corrupt Practices Act: Recent Enforcement Trends*, THOMSON REUTERS (2010), http://us.practicallaw.com/ (explaining recent trends in actions against individuals, sector-wide investigations, record fines that include large amounts of disgorged profits, anti-corruption enforcement outside the US because jurisdictions like the U.K., Germany and Canada have strengthened their own anti-corruption legislation and activities, increasing mutual enforcement and legal assistance, impact on cross-border transactions such as M&As and increase in civil actions (while civil actions are rare, they present an expensive risk of additional litigation)).

[22] *A Resource Guide to The U.S. Foreign Corrupt Practices Act*, THE CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE AND THE ENFORCEMENT

certain degree of connection to the United States and engages in foreign corrupt practices.[23] The Act also applies to any act by foreign corporations trading securities in the U.S.[24] Therefore, the FCPA has strong extraterritorial reach[25] and, like most anti-corruption legislation based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, can apply to foreign companies and individuals.[26] FCPA enforcement in the recent years by DOJ and SEC has been marked by record prosecutions against companies, often resulting in multi-million dollar financial penalties and a greater prosecutorial effort leading to fines and imprisonment against individuals.[27] By focusing on prosecution against individuals, DOJ and SEC attract more

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DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, 2 (2012), available http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf (last visited July 19, 2015).

[23] *Id.*

[24] *Id.*

[25] Nicholas M. McLean, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970 (2012). (providing an empirical examination of U.S. enforcement actions under the Foreign Corrupt Practices Act (FCPA) in order to explore the cross-national patterns associated with United States' international antibribery enforcement).

[26] Robert D. Tronnes, *Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 33 GEO. WASH. INT'L L. REV. 97, 97-130 (2001) (discussing that since the passage of the Foreign Corrupt Practices Act (FCPA) in 1977, the United States has worked to persuade other nations to forbid bribery of foreign public officials in an effort to secure business abroad. As a result of pressure from the United States and the increased costs associated with corruption, the international tide is turning against transnational bribery. 3 In order to capitalize on this global shift towards condemnation of corruption, twenty-nine Organization for Economic Cooperation and Development (OECD) member countries and five non-member countries signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) on December 17, 1997. The Convention is an effort to cut off transnational bribery at its source. Consequently, in signing the Convention all signatory countries made the commitment to "pass legislation necessary for [the Convention's] ratification and implementation into national law.").

[27] Kaiser, *supra* note 21, at 587-588 (discussing bribery and anti-corruption).

cooperating witnesses and generate even more investigations.[28] The Dodd-Frank *Wall Street and Consumer Protection Act* ("Dodd-Act") grants significant protections and rewards to whistleblowers.[29] Whistleblowers who provide original information that leads to the assessment of monetary sanctions in excess of $1 million are entitled to receive between 10% and 30% of the sanction amount as a reward.[30] For instance, a record award of $30M was recently obtained by a foreign whistleblower pursuant to the Dodd-Act.[31]

An ELRM Framework serves as a continuous, proactive and systematic or integrated process to understand, manage and communicate legal risk from an organization-wide or enterprise-wide perspective in a cohesive, consistent and cost-efficient manner.[32] It is about supporting strategic decision-making that contributes to the achievement of an organization's overall objectives.[33] Legal risks cannot be managed effectively in silos; hence an ELRM Framework must be part of an Integrated or Enterprise Risk Management Framework (IRM or ERM).[34] It requires an ongoing assessment of all risks such as financial, corporate and reputational at every level and in every sector of the organization, and aggregating these results at the

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[28] Murdock, Charles W., *The Dodd-Frank Wall Street Reform and Consumer Protection Act*: *What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises*, 64 S.M.U. L. REV. 1243 (2010).

[29] *Id.*

[30] *See* Rachel Louise Ensign, SEC to Pay $30 Million Whistleblower Award, Its Largest Yet, WALL STREET J., Sept. 22, 2014, available at http://www.wsj.com/articles/sec-to-pay-30-million-whistleblower-award-its-largest-yet-1411406612 (last visited July 19 2015).

[31] *Supra* note 24.

[32] Garrick Apollon, the intersection between LRM & DR, *supra* note 2, at 283-287 (explaining that based on international standards (ISO 31 000) a risk management framework serves as a set of components that provide the foundations and organizational arrangements for designing, implementing, monitoring, reviewing and continually improving risk management through the organization).

[33] *Id.*

[34] *Integrated Risk Management Framework*, TREASURY BOARD OF CANADA SECRETARIAT, http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=12254#appA (last modified Apr. 1, 2001) (discussing shared leadership-suggested roles and responsibilities in risk management).

corporate level, communicating them and ensuring adequate monitoring and review.[35]

ELRM Framework has four main objectives: 1) identifying issues early and assessing potential legal risks; 2) avoiding and mitigating legal risks; 3) managing legal risks as they occur for an organization in consistent; enterprise-wide and cost-efficient manner; and 4) using business analytics software to modernize the ELRM practices and ensuring the use of data and business analytics as a means to improve organizational performance.[36] In this current context, this article encourages MNCs to strengthen their anti-corruption and anti-bribery ("ABC") compliance program with an ELRM Framework.[37] The main goal is to further "prevent FCPA violations prior to their occurrence, quickly detect any violations and mitigate penalties if violations occur."[38] "The DOJ and SEC have indicated that the existence of an ABC compliance program is a significant factor taken into account in deciding whether to bring charges, what charges to bring and what penalties to impose".[39] As observed, "despite increased FCPA enforcement, U.S. corporations continue to pay bribes out of business necessity because of the leniency of other countries".[40] For instance, President Donald Trump in a national television interview with CNBC in 2015 made the controversial comment that "this country is absolutely crazy" to

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[35] *Id.*

[36] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 284-285.

[37] *See* Daniel L. Goelzer, *Designing an FCPA Compliance Program: Minimizing the Risks of Improper Foreign Payments*, 18 NW. J. INT'L L. & BUS. 282 (1998) (explaining the importance of a FCPA compliance program), available at http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1474&context=njilb (last visited Feb. 7, 2017) (this article asserts that a FCPA compliance program must be complemented by an ELRM Framework).

[38] Kaiser, *supra* note 21, at 593 (explaining the goals of an anti-corruption compliance program).

[39] *Id.*

[40] *Id.* See also the academic work of Professor Eugene Soltes, Jakurski Family Associate Professor of Business Administration at Harvard Business School, author of the celebrated book *Why They Do It: Inside the Mind of the White-Collar Criminal* (Hachette, 2016). Professor Soltes research focuses on corporate misconduct and fraud, and how organizations design cultures and compliance systems to confront these challenges.

prosecute alleged FCPA violations in places like Mexico and China.[41] Moreover, President Trump said that the FCPA is a "horrible law and it should be changed" and that it puts U.S. business at a "huge disadvantage."[42] As pointed out by Professor Koehler (founder and editor of the FCPA Professor website[43]), the FCPA is here to stay because "the FCPA's legislative history makes clear that in passing the FCPA Congress intended to capture only a narrow category of payments and chose not to capture so-called facilitating payments given the difficult and complex business conditions encountered in many foreign countries".[44]

Legal scholarship emphasizes the power of reframing and the manner in which a legal practitioner frames or describes legal problems to help create a new dynamic and achieve better results.[45] In a similar vein, this article presents the implementation of an ELRM Framework as a necessary additional step for MNCs to ensure effective and cost-efficient anti-corruption compliance program for the MNC. This article argues that MNCs should reframe their problems with FCPA and anti-corruption compliance as not just a compliance risk but also a legal risk that needs to be managed with an ELRM Framework.

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[41] CNBC SquawkBox interview (beginning at the 14-minute mark) http://video.cnbc.com/gallery/?video=3000089630&play=1 and FCPA Professor (FCPA Professor website is the website of Professor Koehler, respected authority in the field of FCPA), see Donald Trump: The FCPA Is a "Horrible Law and It Should Be Changed", August 6, 2015, available at http://fcpaprofessor.com/donald-trump-the-fcpa-is-a-horrible-law-and-it-should-be-changed/ (last visited Feb. 7, 2017).

[42] *Id.*

[43] *Id. See also* F. Joseph Warin, Michael Diamant, Patrick Doris, Mark Handley and Melissa Farrar,
Gibson Dunn Offers Update on Non-Prosecution and Deferred Prosecution Agreements, Columbia Law School's Blog on Corporations and the Capital Markets, Jan. 16, 2017 (explaining Donald J. Trump assumes the Presidency on January 20, 2017, and his inauguration will bring inevitable changes to the composition and mandate of DOJ).

[44] *Id.*

[45] Ran Kuttner, The *Wave/Particle Tension in Negotiation*, 16 HARV. NEGOT. L. REV. 331, 359-60 (2011) (discussing the power of reframing in scholarship for the practice of law).

This article explains the general steps and benefits to a GC and its legal department in MNCs in implementing an ELRM Framework specifically designed for FCPA compliance and risk management. An ELRM Framework helps in-house and outside legal counsel to move away from a specific and narrow legal analysis focused on problem-solving to a more preventative style. This allows them to better select which FCPA risk management strategy to apply to better prevent FCPA liability and help their clients to achieve better decision-making in their international business transactions.[46]

ELRM is also all about linking the practice of the law with technology.[47] For instance, an ELRM should incorporate business analytics software to assist the GC and senior management of the MNC with monitoring the number of hours and lawyers involved in a FCPA files based on their legal risk and complexity level.[48] This means in practice that in-house lawyers, and most importantly outside lawyers, will be accountable for the legal risk and complexity level of the FCPA file and the numbers of hours they spend on it based on objective criteria.[49] Therefore, "an ELRM Framework presents as its main advantage the prevention of lawyers who score highly on Machiavellianism and who are process-oriented from manipulating legal risk communication and assessments to get their client to perceive what they want them to perceive, and for the benefit of their own unethical agendas, such as overbilling or from raising their profiles by ranking legal risks high when in reality the level of complexity and risk is medium or low."[50]

Above all, the implementation of an ELRM Framework is designed to avoid making the ABC compliance program a "paper

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[46] *Supra* note 7, at 56 (explaining that the GC and in-house counsel are the managers of legal and reputational risk and educators for the company. They need to perform the increasingly important function of assessing legal risks and translating those risks into business terms in order to facilitate decision-making considering those risks).

[47] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 285-286.

[48] *Id.*

[49] *Id.*

[50] *Id.*

program".[51] This is achieved through the implementation of a strong legal risk assessment process for the delivery of day-to-day FCPA legal services that will help the lawyers to play their role as gatekeepers of corporate integrity and as problem solvers in the execution of international business transactions for the MNC.[52]

I. WHAT IS AN ELRM FRAMEWORK?

The author defines an ELRM Framework as a compliance management system for the effective and cost-efficient delivery of legal services in an organization.[53] The ISO 19 600 international standard broadly defines a compliance management system such as an ELRM Framework as a set of interrelated or interacting elements of an organization to establish policies, objectives, processes and tools to achieve legal (regulatory) compliance requirement that an organization must comply with and chooses to voluntary comply with.[54] Therefore, an ELRM Framework aims to go beyond the

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[51] Patrick Head, *The development of compliance programs: one company's experience*, 18 NW. J. INT'L L. & BUS. 535 (1997) (explaining that companies have run into the difficulty for having a FCPA compliance program fully conceived on paper, but no real compliance or financial controls. A "paper program" means a failure to implement a culture of legal compliance and ethics).

[52] David Nersessian, *Business Lawyers as Worldwide Moral Gatekeepers: Legal Ethics and Human Rights in Global Corporate Practice*, 28 GEO. J. LEGAL ETHICS 1135, 1135-1188 (2015). *See also*, Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the Culture of Compliance,* WIS. L. REV. 689 (2012) (explaining that though cooperation generally remains the prerequisite to obtaining a DPA or NPA, regulators also stress that they are more likely to offer leniency to firms with a strong "culture of compliance." Like before, this follows from the use of the OSG as a framework for settlement negotiations. The OSG was amended in 2004 in response to the *Sarbanes-Oxley Act* of 2002 to allow for lower sanctions for firms that have "effective compliance and ethics programs" in place. Programs that meet this requirement will be found in firms that "exercise due diligence to prevent and detect criminal conduct" and "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.)

[53] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 306-307.

[54] *See* ISO 19600:2014 Compliance management systems – Guidelines, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO), available at http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=62342 (last visited Feb. 7, 2017).

required legal compliance by building an organization's approach to legal compliance that is ideally shaped by objective standards and an ethical leadership and corporate culture that apply core anti-corruption values and the highest corporate governance standards in decision-making.[55] The long term goal of an ELRM Framework is to contribute to building an exemplary "compliance culture"[56] in an organization. As a result, an ELRM Framework should never be perceived as unnecessary red tape or a burdensome internal administrative process, but instead an organizational design built to promote a real dialogue and partnership between lawyer-client towards ethical leadership.

The need to implement objective standards with an ELRM Framework for the day-to-day practice of FCPA risk communication in an organization arises from the fact that risk is emotionally, socially, culturally, economically and politically constructed and is therefore subjective by nature.[57] For instance, an international VP of sales might prefer to see an international business transaction as low risk for corruption because the business benefit outweighs the legal threat for him and his unit. However, this same international business transaction might be assessed as high risk by his compliance officer and in-house counsel. The goal of an ELRM Framework in practice is to improve the legal risk communication between the VP of sales and counsel so that they can share the responsibly to manage the FCPA risk in order for a sound legal and ethical decision risk response commensurate to the corruption risk level that the MNC is facing. FCPA risk management is not only the business of compliance officers or lawyers but this is a shared responsibility for all employees in an organization.[58] However, we live in an

[55] Barbara Mescher & Bryan Howieson, 1 *Beyond Compliance: Promoting Ethical Conduct by Directors and Corporations,* CORP. GOVERNANCE L. REV., 93-114 (2005) (examining the relationship between legal and moral perspectives of directors' behaviour and corporate governance).

[56] Sow Wei Wong, *A Culture, Not a Programme*, INT'L FIN. L. REV. (2010) (explaining that a compliance culture is where the management and all the employees share the common belief, value or goal that doing the right thing, even when no one is looking is an important part of what defines the organization.).

[57] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 275.

[58] *Id.*

individualist culture where the collective interests of the organization do not always come first.[59] An ELRM Framework serves to standardize and objectify the organizational ELRM practices in order to mitigate the risk that the self-interest of the individuals involved in the compliance process supersede the collective interests of the organization.[60] The author also argues that the implementation of an ELRM Framework specific to FCPA risk is the first step for a MNC to later develop a more comprehensive ELRM Framework that will be applied to all their advisory and litigation files and covers all the legal risks facing the MNC every day.

An ELRM Framework also helps to deal with the inherent complexity of FCPA risks.[61] FCPA is a complex legal risk that is influenced by many factors such as foreign legal, economic, cultural and political environments.[62] For instance, the MNC must take into consideration that the vast majority of anti-corruption laws such as U.K. *Bribery Act* or Canada's *Corruption of Foreign Public Officials Act* ("CFPOA") have an extraterritorial reach just like the FCPA.[63] This means a FCPA risk assessment must also assess the likelihood of adverse outcomes with other anti-corruption foreign laws such as the U.K. *Bribery Act* and CFPOA. For instance, an American company registered and trading stocks on the London Stock Exchange is also

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[59] GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS (2nd ed., Thousand Oaks, CA: SAGE Publications, 2010).

[60] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 309-310 (explaining that lawyers who score highly on Machiavellianism and who are process-oriented can manipulate communications and assessments to get their client to perceive what they want them to perceive for the benefit of their own unethical agendas, such as overbilling or raising their profiles by ranking legal risks high when they are in reality medium or low).

[61] Adam Seligman, *Role Complexity, Risk, and the Emergence of Trust*, 81 B.U. L. REV. 619, 619-634 (2001) (theorizing that trust emerged as a dimension of social relations in modern society along with risk. Risk became inherent in behaviours when, with the segmentation of social roles, there developed an in-built limit to systemically based expectations. Potential dissonance between the different aspects of roles increased, revealing these two new phenomena characteristic of modern forms of social relations: risk and decided trust).

[62] *See* McLean, *supra* note 21.

[63] Anna Simonova, *Extraterritorial Reach of the Foreign Corrupt Practices Act*, 8 J. COMP. L. 211, 211-231 (2013) (discussing the Extraterritorial Reach of the FCPA).

subject to the U.K. *Bribery Act*.[64] The U.K. *Bribery Act* sets out in Section 7 the corporate offence of failure to prevent bribery in the course of business; the section legally obligates companies to maintain an effective ABC compliance program, as the only statutory defence to this offence is to prove the existence of adequate systems and controls.[65] This strict liability corporate offence (Section 7 - failure of commercial organizations to prevent bribery) is unique to the U.K. *Bribery Act*.[66] The U.K. *Bribery Act* also prohibits facilitation payments that are somewhat permitted under the FCPA.[67] Therefore, the breadth of the application of the new U.K. *Bribery Act* is generally seen as part of a global trend of requiring higher ethical standards and is broader in scope than the FCPA in a number of respects.[68]

II. ADVANTAGES TO AN MNC OF HAVING AN ELRM FRAMEWORK SPECIFIC TO FCPA RISK

If MNCs are spending millions on FCPA compliance, they are not spending enough money and resources on developing an ELRM Framework to ensure the effective and cost-efficient delivery

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[64] Jessica Lordi, *The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violators*, 44 CASE W. RES. J. INT'L L. 955, 955-998 (2012), available at http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1139&context=jil (last visited Feb. 7, 2017); *see also* Sharifa G. Hunter, *Article & Essay: A Comparative Analysis Of The Foreign Corrupt Practices Act And The U.K. Bribery Act, And The Practical Implications Of Both On International Business*, 18 ILSA J. INT'L & COMP. L. 89 (2011).

[65] *The Bribery Act*, TRANSPARENCY INTERNATIONAL UK, available at http://www.transparency.org.uk/our-work/business-integrity/bribery-act (last visited Feb. 7, 2017).

[66] *Id.*; *See also* Kaiser, *supra* note 21, at 627 (explaining the U.K. Bribery Act).

[67] Kaiser, *supra* note 21, at 637 (explaining that FCPA accepts as a defence the grating of facilitation payments but these payments are not allowed under U.K. Bribery Act).

[68] *See* Natalie Shu Ying Wee, *The OECD Convention on Combating Bribery of Foreign Public Officials and the Impact of the United Kingdom's Bribery Act 2010 on Corporations: Is the Act Too Harsh*, 17 INT'L TRADE & BUS. L. REV. 126 (2014). *See also* Dominic Saglibene, *U.K. Bribery Act: A Benchmark for Anti-Corruption Reform in the United States*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 119, 119-146 (2014).

of day-to-day FCPA legal services in their organization.[69] As evidence, the United Nations ("UN") Global Compact published in 2013 a Guide for Anti-Corruption Risk Assessment, where it noted that the principal weakness of ABC compliance programs is often the absence of process to establish robust measures and practices for day-to-day anti-corruption legal risk assessment.[70] It specifically observed that "The Global Corporate Sustainability Report 2013 shows that only 25% of UN Global Compact business participants conduct anti-corruption risk assessments, and there are substantial differences in implementation levels among large and small companies."[71]

Risk management principles and frameworks are nothing new to other professionals such as actuaries, accountants, engineers or medical doctors, but they are a new discipline for lawyers.[72] In practice, a ELRM Framework that brings objective standards and guidelines into decision-making in international business transactions is needed because anti-corruption legal risk assessments are dependent on three basic determinants: 1) lack of information and knowledge; 2) lack of power and control; and 3) lack of time and resources in relation to the execution of international business transactions for all companies operating globally.[73]

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[69] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 271

[70] United Nations Global Compact, *A Guide for Anti-Corruption Risk Assessment* (2013) (explaining that the Global Corporate Sustainability Report 2013 shows that only 25% of UN Global Compact business participants conduct anti-corruption risk assessments, and there are substantial differences in implementation levels among large and small companies), available at https://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/RiskAssessmentGuide.pdf (last visited Feb. 7, 2017).

[71] This article focuses on the implementation of LRM Framework for large companies such as MNCs.

[72] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 287 (explaining that ELRM is relatively new in the legal profession—as with anything new, a period of adjustment is expected, and senior management of law firms and legal departments must support the implementation of an ELRM Framework in their organizations. This means change management is required, especially since lawyers usually do not like to be managed and told what to do).

[73] *Id.* at 306 (explaining that social-psychological measures are also important because lawyers do not have the information necessary to accurately

As part of the advantages already discussed, an ELRM Framework provides technological, financial and corporate compliance value to an organization by offering the following strategic and monetary benefits to an organization.[74] It:

- promotes ethical leadership and an integrity-based corporate compliance culture where unethical and illegal bribery and corruption activities and other white-collar crimes such as fraud, insider trading, money laundering are anticipated, detected and prevented;

- allows the CRO and/or CCO to implement a ELRM Framework in accordance with the IRM or ERM Framework of the organization to ensure more cost-certainty, efficiency and business value for corporate decision-making in the management of legal risks (i.e. deter a culture of risk taking or risk aversion to encourage a culture of smart risk-taking based on an integrity-based corporate compliance culture);

- the main driving force for organizations to implement a legal risk management framework is to ensure more cost-certainty, efficiency and business value for corporate decision-making (i.e. deter a culture of risk aversion to encourage a culture of smart risk-taking);

- allows the GC to generate customized timekeeping legal risk reports (in real-time) for senior management and the Board of Directors (i.e. the GC is in a better position to explain the legal risks that the company is facing (risk profile of the company) and justify its budget and the legal expenses/legal costs for the organization);

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judge the legal risks of the bargaining or dispute resolution situation. A lawyer's ability to complete an accurate legal assessment may be dampened by several factors, such as lack of information, lack of time, situational constraints based on resources or power, and self-selection processes. The lawyer and the client's judgments are biased, and biases are associated with inefficient performance.)

[74] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 285.

- improves the overall quality and objectivity of lawyers' legal services (the risk and complexity level must be assessed on the basis of objective criteria based on the universally accepted risk management principles of ISO 31000);

- contributes to mitigating the risk of lawyers overbilling by manipulating the risk level or complexity of a legal file (the subjective elements of risk perception and treatment are mitigated);

- improves information sharing and eliminates the duplication of work through enhanced information governance by the use of business analytics software;

- enables the use of a common language in communicating FCPA risks;

- enhances the ability of lawyers to manage legal risks from an IRM or ERM perspective, where they can see the 'big picture' (all legal and non-legal consequences are assessed such as the operational/corporate, financial, values and ethics, and reputational) and concentrate energy and attention to areas of highest legal risk facing the organization (risk-based approach);

- increases the respect of governmental regulators and helps to attract shareholders, investors and stakeholders by showing that the company has a strong corporate compliance program for the management of legal risks; and

- helps the organization to attract investors and secure better rates and/or prices from lenders and insurance companies by showing that it has a strong corporate compliance program for the management of its legal risks.

III. BENEFITS OF ELRM FRAMEWORK FOR LAWYERS AND LAW FIRMS

Legal risk management has been identified by the Canadian Bar Association (sister organization of the American Bar Association in Canada) as the future of the law for lawyers.[75] While an ELRM Framework helps MNCs to manage FCPA risk and keep legal services providers accountable, ELRM Framework also helps lawyers and law firms to highlight their good work and justify their legal fees billed to their clients (or the legal costs associated with an in-house legal department). Therefore, ELRM Framework should not be perceived as a threat for law firms and lawyers (providers of outside legal services to MNCs) because an ELRM framework aims to improve the lawyer-client relationship and is equally beneficial for lawyers and law firms by doing the following:

- improves the overall quality and objectivity of lawyers' legal services (the risk and complexity level must be assessed on the basis of objective criteria based on the universally accepted risk management principles of ISO 31 000). It contributes to mitigating the risk of clients questioning the risk level or complexity of a legal file to avoid paying a legal bill (the subjective elements of risk perception and treatment for the client is mitigated). Therefore, this reduces the time lawyers spend to explain or justify invoices to their clients. It also prevents against disputes and complaints at the Law Society (bar) for overbilling, thus preserving the integrity reputation of the law firm and its lawyers;

- the general practice of ELRM for lawyers is legal work and therefore billable time. For instance, lawyers have a financial incentive to insert all the ELRM information such as timekeeping, risk and complexity level in ELRM business

[75] *The Future of Legal Services in Canada: Trends and Issues*, Canadian Bar Association, 6 (2013) (explaining that emerging fields of competency may include legal risk management, legal project management, legal process analysis, and legal knowledge engineering), available at http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/trends-isssues-eng.pdf (last visited Feb. 7, 2017).

analytics software. This is because tasks completed in relation to ELRM should always be considered as billable legal work and not administrative work (since ELRM is the main responsibility of a lawyer to his client and ELRM information such as legal risk assessments should always be shared with his client);

- ISO 31 000 standards help to protect lawyers and law firms by ensuring that all key legal risks are documented and communicated (also increase efficiency, save time and effort by eliminating duplication);

- enables the use of a common language in communicating risks among colleagues from the same law firm or legal department; and consistency among clients and other stakeholders;

- improves reliability, consistency and timeliness of organizational legal risk information, thus providing more accurate and reliable contingent liability reports, and standardized and effective ELRM services to clients. It ensures effective reporting to clients, improves cost-control and cost-effectiveness, assists in the allocation of financial and human resources, and attention and effort to each file; improves capacity to plan, forecast and manage high-risk and high-profile files in a risk-based management approach (i.e. priority to high risk files is guaranteed); and improves the communication of legal risk and leadership of files;

- leads to better working lawyer-client relationships because the ELRM framework facilitates communication between lawyer and client and legal risks are managed from an IRM or ERM standpoint (in other words counsel would always consider not just the legal consequences but also the non-legal consequences such as operational, financial, ethical and reputational impacts when they assesse a legal risk – this generates more relevant and practical legal advice for senior management and corporate decision-makers);

- provides a competitive advantage for a law firm by helping to standardize the delivery of their legal services and using technology such as business analytic software;

- allows access to business analytics for benchmarking and performance management (allows the law firm to improve internal processes and rank its effectiveness and efficiency in delivering solutions compared to other market competitors); and

- reduces the costs of professional liability assurance (or insurance).

IV. HOW AN ELRM FRAMEWORK IS IMPLEMENTED IN A MNC?

Overall, just like a house alarm system detects security risks, an ELRM Framework or system helps the MNC to detect, deter, and prevent the occurrence of FCPA risk.[76]

The full implementation of an ELRM Framework can be estimated to take up to 1-2 years because this requires a change of corporate culture. However, the implementation time is always dependent on the personal endorsement and commitment of senior management (Tone at the Top)[77] along with an appropriate allocation of financial and human resources.[78] For optimal results, it is recommended that implementation plan be based on the Transparency International ("TI") Business Integrity Toolkit[79] for

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[76] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 285 (using the analogy that a LRM and compliance system for a company should be viewed as an alarm system for your house. Just like your house alarm system detects security risks, your LRM system will works to detect, deter, and prevent the occurrence of legal risks in an organization.)

[77] ISO 19600:2014 Compliance management systems—Guidelines, *supra* note 54.

[78] *Id.*

[79] *Business Integrity Toolkit*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/whatwedo/tools/business_integrity_toolkit/0/ (last accessed Dec. 6, 2015).

building an effective ABC program.[80] The complete six steps and their sequence are summarized below:

Commit 'Tone at the top' to a strong corporate compliance agenda in managing FCPA legal risks and the implementation of the ELRM framework.[81] The 'buy-in' and full participation of senior management, board of directors and other stakeholders is critical to success. The "Tone from the Top"[82] is often the greatest challenge

[80] *Id.*

[81] ISO 19600:2014 Compliance management systems – Guidelines, *supra* note 54, at 8-10 (explaining the importance of senior management support in the development of a corporate compliance system). Mark S. Schwartz, Thomas W. Dunfee & Michael J. Kline, *Tone at the Top: An Ethics Code for Directors?*, 58 J. BUS. ETHICS 79 (2005) (explaining that legal reforms without proper attention to ethical obligations will likely prove ineffective. The ethical role of directors is critical. Directors have overall responsibility for the ethics and compliance programs of the corporation. The tone at the top that they set by example and action is central to the overall ethical environment of their firms).

[82] *Id.*

for the implementation of an ELRM Framework in practice because the CEO is often more focussed on profit and strategic planning than risk management. However, with the example of corruption scandals such as Siemens[83], Wal-Mart[84], SNC Lavalin[85], etc., this article argues that in this new era where "reputation rules"[86] CEOs should be equally concerned by managing, not just the legal risk, but the reputational and financial risk that FCPA poses to their MNC rather than just focusing on making profit. These corruption scandals also reinforce that an ELRM Framework is even more necessary in time of crisis management. For instance, Wal-Mart, reported that it spent $439 million in FCPA compliance (i.e. legal fees, forensic and investigative fees) only in the first two years of the scandal (2012

[83] Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 20, 2008, available at http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html (covering the largest corruption scandal in the corporate world. Siemens, one of the world's biggest companies, ended up paying $1.6 billion in the largest fine for bribery in modern corporate history).

[84] Tom Schoenberg & Matt Robinson, *Wal-Mart Balks at Paying $600-Million-Plus in Bribery Case*, BLOOMBERG, Oct. 6, 2016, available at https://www.bloomberg.com/news/articles/2016-10-06/wal-mart-said-to-balk-at-paying-600-million-plus-in-bribe-case (last visited Feb. 10, 2017) (discussing the possibility that officials have proposed that the world's biggest retailer pay at least $600 million to resolve probes by the Justice Department and the Securities and Exchange Commission into whether it bribed government officials in markets from Mexico to India and China. Such a settlement would rank among the largest in four decades under a U.S. law against bribing foreign officials to obtain business. The Justice Department and the SEC have spent half a decade investigating allegations that Wal-Mart representatives paid government officials over the course of 10 years to fast-track store openings). *See also* Ben W. Heineman, Jr, *Who's Responsible for the Walmart Mexico Scandal?*, HARV. BUS. REV., May 15, 2014, available at https://hbr.org/2014/05/whos-responsible-for-the-walmart-mexico-scandal (last visited Feb. 10, 2017) (discussing that the Walmart bribery scandal is one of the most closely-watched cases of alleged malfeasance by a global company. It broke into the open in April, 2012, when the New York Times published a lengthy investigative piece alleging Walmart bribery in a Mexican subsidiary and a cover-up in its Bentonville, Arkansas, global headquarters).

[85] *See* Snc Lavalin Corruption, HUFFINGTON POST, available at http://www.huffingtonpost.ca/news/snc-lavalin-corruption/ (last visited Feb. 10, 2017).

[86] DANIEL DIERMEIER, REPUTATION RULES: STRATEGIES FOR BUILDING YOUR COMPANY'S MOST VALUABLE ASSET (2011)

2013), making it one of the most expensive probes in U.S. history.[87] The Economist, reported that "by the time bribe-busters at America's Department of Justice (DOJ) are done with their own investigation, which began in 2012, Walmart's bill for lawyers' and forensic accountants' fees will be well above $1 billion—and perhaps closer to $2 billion".[88]

Assess the organization's current risk environment and risk exposure using ELRM Framework to detect areas of the greatest inherent risk in order to prioritize and allocate resources (financial and human) appropriately to these areas.[89] *Assess* also refers to benchmarking the current ELRM practices of the organization to identify its strengths and weaknesses.[90]

Plan the scope and activities that the organization will undertake to prevent, detect, avoid, transfer/shift if possible, mitigate and in general strategically manage legal risks by using ELRM framework.[91]

Act by implementing internal checks and balances, as well as documenting with business analytics software and communicating legal risks, to promote an integrity-based corporate compliance culture where unethical and illegal activities are prevented and detected and FCPA risks are mitigated in a risk-based approach.[92]

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[87] David Voreacos & Renee Dudley, *Wal-Mart Says Bribe Probe Cost $439 Million in Two Years*, BLOOMBERG, Mar. 26, 2014, available at https://www.bloomberg.com/news/articles/2014-03-26/wal-mart-says-bribery-probe-cost-439-million-in-past-two-years (last visited Feb. 10, 2017).

[88] The Economist, *supra* note 4.

[89] ISO 19600:2014 Compliance management systems – Guidelines, *supra* note 54, at 11 (explaining that senior management should allocate adequate and appropriate resources to establish, develop, implement, evaluate, maintain and improve the compliance management system and performance outcomes).

[90] *Id.* at 24-25 (asserting the importance of report-keeping for compliance management).

[91] *Id.* at 7 (asserting the importance of identification, analysis and evaluation of compliance risks for compliance management).

[92] *Id.* at 24-25 (asserting the importance of report-keeping for compliance management). *See also Id.* at 16-17 (discussing the concept of compliance culture or integrity-based compliance that aims to establish a culture of ethical leadership and goes beyond required legal compliance).

Monitor processes to ensure that strengths and weaknesses are identified and that the ELRM framework is continuously improved to remain effective and up to date.[93]

Report on the sincerity of the organization's commitment to an effective FCPA compliance program to raise awareness among employees and positively influence the organization's reputation in the marketplace.[94] ELRM Framework presents a performance management plan for continuous monitoring and improvement designed on the basis of ISO 19600:2014 - Compliance Management Systems.[95] This performance management plan provides guidance for establishing, implementing, evaluating, monitoring, maintaining and improving an effective and responsive compliance management system within an organization.[96]

V. CHALLENGES TO IMPLEMENTING AN ELRM FRAMEWORK IN AN ORGANIZATION

First, like any corporate compliance program the "Tone from the Top" is crucial and senior management must support the ELRM Framework implementation.[97]

Second, lawyers must remain vigilant and not provide legal risk assessment on a corporate decision that is illegal or immoral like in the case of the infamous Ford Pinto case.[98] Law and morality cannot be separated and a strong commitment to business ethics and integrity must remain present at all times when legal risk assessments

[93] *Id.* at 21-22 (discussing monitoring to ensure performance management).

[94] *Id.* at 22-23 (discussing information analysis and classification).

[95] *Id.* at 22 (discussing the sources of feedback on compliance performance).

[96] *Id.* at 23 (discussing compliance reporting and that the compliance function should ensure that they are effectively informed on the organization's compliance performance).

[97] *Id.* at 8-10. (explaining the importance of senior management support in the development of a corporate compliance system).

[98] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 286 (disusing Pinto case in the context of legal risk management)

are conducted by lawyers for corporate decision-makers.[99] Lawyers must have strong legal advisory and legal advocacy skills to facilitate corporate decisions that are based on integrity.[100] In other words, the role of the lawyers is not to find legal "loopholes" but to help their client to manage their legal risks in a spirit that promotes ethical leadership and an integrity-based corporate compliance culture where unethical and illegal activities are prevented and detected by the lawyer to the benefit of its client's reputation.[101]

Third, while it assists in objectifying and standardizing legal practice, ELRM is not a science (a decision of a court can never be predicted with complete certainty).[102] The ELRM approach must be a flexible one that relies on the legal virtuosity of the lawyer, but also the honesty, business judgment and conventional wisdom of each participant.[103] This means risk reports and risk profiles based on business analytics software rely on the accuracy of the FCPA risk assessments conducted by lawyers when human errors are frequent, and also all information are not always shared with the lawyer.

Fourth, change management is required.[104] The ELRM Framework like any corporate compliance program is mandatory and professionals (especially lawyers) don't like to be told what to do.[105]

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[99] M.E. Stucke, *In search of effective ethics & compliance programs*, 39 J. CORP. L. 769, 769-832 (2014) (explaining that the US Sentencing Commission's Organizational Guidelines provided firms strong financial incentives to have effective ethics and compliance programs ("ethics programs"). Since then, compliance has become big business. To incentivize compliance, some statutes require public firms to disclose their compliance efforts. Directors of Delaware corporations owe a duty "to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists." Companies listed on the New York Stock Exchange and NASDAQ must have an ethics code. But unethical and illegal corporate conduct is still pervasive. The economic crisis heightened concerns of widespread unethical and illegal conduct among financial institutions, ineffectual compliance, and corporate crime).

[100] *Id.*

[101] *Id.*

[102] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 286.

[103] *Id.*

[104] *Id* at 287.

[105] *Id.*

As with any new initiative within an organization, a period of adjustment is expected.[106]

Finally, an ELRM Framework must be developed by ELRM experts working in close collaboration with the compliance and legal departments of the MNC to benchmark their current practices. A consultation committee chaired by the CRO or CCO with as many representatives of the legal team led by the CLO or GC and his senior counsel, senior and middle management of the MNC should be created to ensure the buy-in of all organizational players for the implementation of the ELRM framework, while also consulting with external stakeholders.[107]

VI. FOUR MAIN COMPONENTS OF THE ELRM FRAMEWORK

The ELRM Framework applies international risk management standards to FCPA risk such as ISO 31 000 Risk Management[108] and ISO 19600:2014 Compliance Management Systems[109] The utilization of the ISO 37 001 Anti-Bribery Management System should also be considered.[110] The implementation of an ELRM Framework should include the following four elements:

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106 *Id.*

107 *See* Mark Bandsuch, Larry Pate, Jeff Thies, *Rebuilding Stakeholder Trust in Business: An Examination of Principle-Centered Leadership and Organizational Transparency in Corporate Governance*, 113 BUS. & SOC. REV. 99, 99-127 (2008).

108 *See* ISO 31000 - Risk Management, International Organization for Standardization (ISO), http://www.iso.org/iso/home/standards/iso31000.htm (last visited Feb. 10, 2017).

109 ISO 19600:2014 Compliance management systems – Guidelines, *supra* note 54.

110 *Id.*

A. FCPA risk assessment process or how the FCPA legal services are delivered to assist the day-to-day execution of international business transactions for the MNC;[111]

B. ELRM Toolbox;[112]

C. Business analytics software utilized by the MNC for FCPA risk management and reporting;[113] and

D. Implementation of a performance measurement plan for the ELRM Framework.[114]

A. FCPA risk assessment process or how the FCPA legal services are delivered in the day-to-day execution of international business transactions for the MNC

First, the MNC needs to benchmark and compare their approach to FCPA risk assessment against the well-tested ISO 31 000 LRM process[115] and the anti-risk management guidelines developed by the UN Global Compact[116], while highlighting any gaps in their anti-corruption legal risk assessment process approach. For instance, the ISO 31 000 process is used by the Department of Justice Canada for the Government of Canada Legal Risk Management (LRM) Framework.[117]

Based on the ISO 31 000 model and the LRM Framework at the Department of Justice Canada, the LRM Framework for FCPA

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[111] ISO 31000, *supra* note 108, at 2 (explaining that a risk management policy is a statement of the overall intentions and direction of an organization related to the daily practice of risk management).

[112] *Id.*

[113] *Id.*

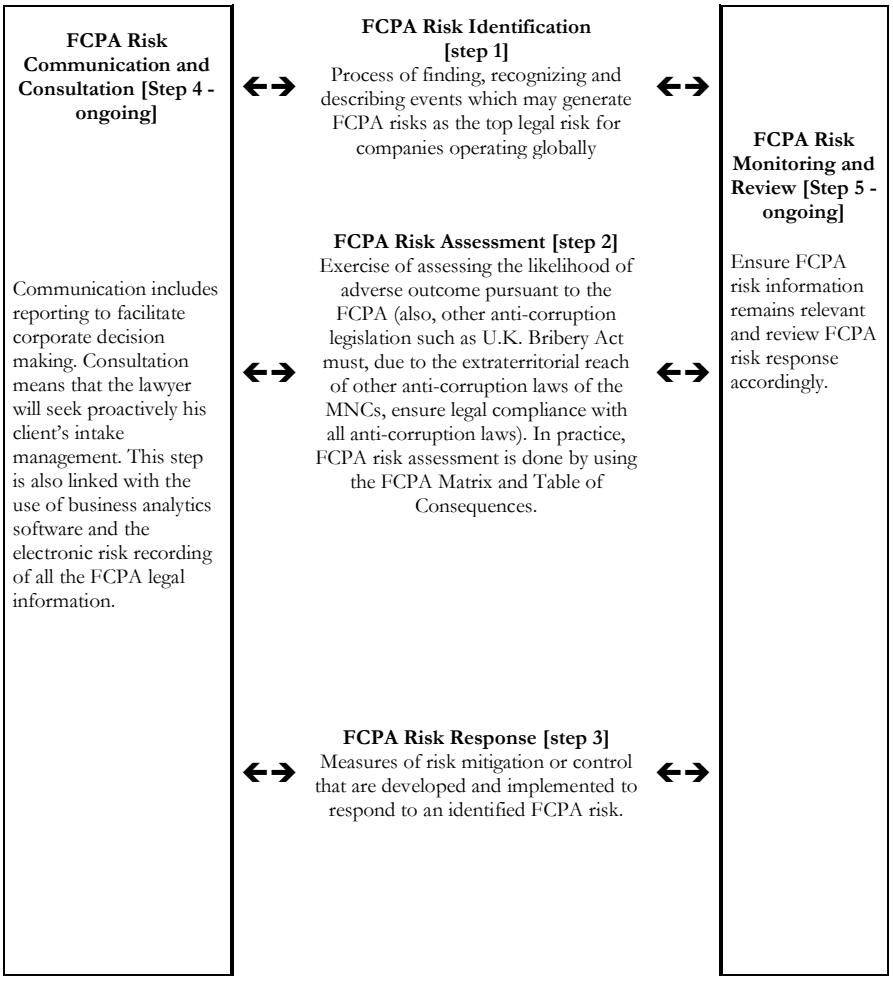
[114] ISO 19600:2014 Compliance management systems – Guidelines, *supra* note 54.

[115] ISO 31000, *supra* note 108, at 13 (explaining risk management process).

[116] United Nations Global Compact, A Guide for Anti-Corruption Risk Assessment, *supra* note 70.

[117] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 288-290.

risks should be based on a five- step approach that can be illustrated by the following graphic:[118]



1. *FCPA Risk Identification [step 1]*

The employee needs to identify FCPA risk by using the e-library of pre-identified and pre-assessed FCPA risks.[119] In practice, these pre-identified and pre-assessed FCPA risks are called "red

[118] *Id.*

[119] ISO 31 000, *supra* note 108, at 11 (explaining the need to be creative in developing resources for risk management).

flags".[120] ISO 31 000 recommends using tools to identify the risk.[121] The tools need to address the particular foreign bribery risks faced by the MNC, including but not limited to, the following:[122]

(i) Tools and Sources for Analyzing the Risk of Corruption by Country

The UN Global compact anti-corruption risk assessment guide provides an appendix with a list of tools and their brief description for analyzing the risk of corruption by country such as the well-known Corruption Perceptions Index from Transparency International[123] or the Governance Indicators from the World Bank.[124]

(ii) Nature of the International Business Contract being Negotiated

As MNCs are often involved in cross-border strategic alliances, due diligence is crucial for these transactions.[125] As noted,

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[120] Charles Kenny & Maria Musatova, *Red Flags Of Corruption' In World Bank Projects: An Analysis Of Infrastructure Contracts*, WORLD BANK E-LIBRARY, (2010), available at http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5243 (last visited Feb. 10, 2017).(discussing "Red flags" are indicators of potential issues regarding governance failure, collusion or corruption in projects).

[121] ISO 31 000, *supra* note 108.

[122] Transcript of Proceedings Taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary Alberta, Her Majesty the Queen v. Niko Resources Ltd., E-File No.: CCQ11NIKORESOURCES (June 24, 2011). This this list is based on Niko Probation Order, Appendix A par. C., available at https://www.scribd.com/document/61566823/Niko-Resorces-Probation-Order (last visited Feb. 10, 2017). *See Canada's Corruption of Foreign Public Officials Act: Niko Resources Ltd. Receives a $9.5 Million Fine for Bribery*, MILLER THOMSON (Oct. 2011), available at http://www.millerthomson.com/en/publications/communiques-and-updates/criminal-law-regulation-enforcement/october-2011-criminal-law-regulation-enforcement/canadas-corruption-of-foreign-public/ (last visited Feb. 10, 2017).

[123] *Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL, available at http://www.transparency.org/research/cpi/overview (last visited Feb. 10, 2017).

[124] *Worldwide Governance Indicators*, WORLD BANK, available at http://data.worldbank.org/data-catalog/worldwide-governance-indicators (last visited Feb. 10, 2017).

[125] Niko Probabtion Order, *supra* note 122.

"the U.S. regulatory authorities have made it clear through their FCPA enforcement activity that extensive FCPA due diligence is expected in connection with any merger, acquisition, joint venture or other cross-border business transactions involving entities subject to the FCPA." [126] In the case of cross-border M&As due diligence serves not only to avoid unwanted FCPA liability but also to avoid the risk of overpaying for the target's business.[127] This is particularly important if the country and industrial sector have a reputation for corrupt practices, "which the DOJ views, in and of itself, as potential "red flag" from a compliance standpoint".[128]

The DOJ has instituted an FCPA opinion procedure to assist MNC in their legal risk assessment and due diligence prior to the execution of their cross-border business transaction, particularly M&A, because of successor liability.[129] The request must be related to a real (not hypothetical) transaction and creates a rebuttable presumption applicable in a subsequent enforcement action.[130] However, requests for an opinion have not been frequent and the reluctance may be partly due to a concern that the request for an opinion may open a Pandora's box and trigger a DOJ investigation, as the opinion does not in any way limit the enforcement intentions or the litigating positions of the U.S. authorities. [131]

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[126] *Id.*

[127] *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, DEPARTMENT OF JUSTICE AND SECURITIES AND EXCHANGE COMMISSION (Nov. 2012), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (last visited Feb. 10, 2017) (discussing Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration).

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

(iii) Third Parties or Intermediaries are Involved in the International Business Transaction

In accordance with an OECD report, intermediaries were involved in 3 out of 4 foreign bribery cases.[132] 75% of cases were agents, such as local sales and marketing agents, distributors and brokers, in 41% of cases.[133] Another 35% of intermediaries were corporate vehicles, such as subsidiary companies, local consulting firms, companies located in offshore financial centres or tax havens, or companies established under the beneficial ownership of the public official who received the bribes.[134] It is important to also consider local foreign accountants and lawyers as agents.[135] A foreign agent is a "red flag" and the overwhelming use of intermediaries in foreign bribery cases demonstrates the need for enhanced and effective legal due diligence and risk assessment.[136] ELRM Framework should obligate an individual/separate FCPA risk assessment to be conducted on all foreign agents.[137]

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[132] OECD Foreign Bribery Report, *An Analysis of the Crime of Bribery of Foreign Public Officials*, OECD (2014), available at http://www.oecd.org/newsroom/scale-of-international-bribery-laid-bare-by-new-oecd-report.htm (last visited Feb. 10, 2017).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, *supra* note 127.

[137] *Id.* at 34.

(iv) The Perceived Legal Culture of the Counterpart: American Universalism Versus Particularism (Rules Versus Relationships): American Universalism is based on Rule of Law, while Particularism is based on Rule of Men[138]

The need to identify if the legal culture of the foreign counterpart is Universalist or Particularistic is a highly practical one.[139] Despite the influence of culture and cultural factors which are controversial to measure corruption in specific countries.[140] This

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[138] Nicole Hines, *Cultural Due Diligence: The Lost Diligence That Must Be Found by U.S. Corporations Conducting M&A Deals in China to Prevent Foreign Corrupt Practices Act Violations Duquesne Business Law,* DUQ. BUS. L.J. BLOG, 9-19 (May 16, 2007) (discussing the importance of cultural due diligence to prevent FCPA liability).

[139] CHARLES HAMPDEN-TURNER & FONS TROMPENAARS, RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS 252-64 (2d ed. 1998). Trompernaars and Hampden-Turner's statistical approach and empirical results are explained in detail in Appendix 2 of their book. For instance, the data for the Universalist/Particularist dimension were collected from the results of a hypothetical dilemma presented to approximately 70,000 managers across 65 countries. *See also* Garrick Apollon, *Sino-American Contract Bargaining and Dispute Resolution*, 13 PEPP. DISP. RESOL. L.J. Iss. 3, 396-397 (2013) (discussing the application of this theory for comparative law and management with foreign cultures).

[140] Kathleen A Getz & Roger J. Volkema*, Culture, Perceived Corruption, and Economics A Model of Predictors and Outcomes*, 40 BUS. & SOC. 7, 7-30 (2001) (asserting that corruption can impede commerce and economic development, yet it seems to be tolerated in many countries. The purpose of this study was to develop and test a model that integrates socioeconomic factors related to corruption. The analysis revealed that a negative relationship between economic adversity and wealth was mediated by corruption. Economic adversity was positively related to corruption, and corruption was inversely related to wealth. Uncertainty avoidance moderated the relationship between economic adversity and corruption, whereas power distance and uncertainty avoidance were positively associated with corruption. The implications of these results for enhancing the effectiveness of international agreements are discussed). *See also* Abigail Barr and Danila Serra, *Corruption and culture: An experimental analysis*, 94 J. OF PUB. ECON., 862-869 (2010) (discussing: why do some people choose corruption over honesty and others not? Do the social norms and values prevailing in the societies in which they grew up affect their decisions? In 2005, we conducted a bribery experiment and found that, among undergraduates, we could predict who would act corruptly with reference to the level of corruption in their home country. Among graduate students we could not. In 2007, we replicated our result and also found that time spent in the UK was

article argues that based on Montesquieu's Spirit of the Laws the "*state of law is a state of mind (l'état de droit est un état d'esprit)*"[141] that a wise lawyer should first conduct anti-corruption legal risk assessment that aims to uncover not just the "*law-in-book" and "law-in-action*" of its foreign counterparts, but most importantly their "*law-in-minds.*"[142] To achieve this lawyers should use the well-tested empirical comparative management tool by Trompenaars-Hampden-Turner called the Seven Cultural Dimension with the Universalism Versus Particularism dimension. [143] The empirical data for this cultural dimension where collected from "Did the Pedestrian Die?" as an accumulation of a decade of research into cultural diversity across the globe[144]:

> The title is taken from a hypothetical dilemma Trompenaars presents to managers - so far to about 70,000 managers in over 65 countries. He asks them to consider the situation in which they are a passenger

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associated with a decline in the propensity to bribe, although this does not explain our inability to predict graduate behaviour. We conclude that, while corruption may, in part, be a cultural phenomenon, individuals should not be prejudged with reference to their country of origin). See also Eugene Soltes, *Why they do it: inside the mind of white-collar criminals* (PublicAffairs, 2016) at 133-135 (discussing the immunity from parking violations in New York City for United Nations diplomats. Explaining that a study found that the numbers of tickets received from diplomats was the highest from high-perceived corruption countries such as Chad, Sudan, Pakistan, Mozambique, and Bulgaria. Diplomats from low-perceived corruption countries like Norway and Canada received the least). See also, John Bruner, Forbes Magazine, *The World's Most Corrupt Diplomats, As Told Through Parking Tickets* (Jul. 2011), available at https://www.forbes.com/sites/jonbruner/2011/07/12/the-worlds-most-corrupt-diplomats-as-told-through-parking-tickets-map/#c8395c82a3b7 (last visited June 21 2017).

[141] *See also* Garrick Apollon, *Sino-American Contract Bargaining and Dispute Resolution*, *supra* note 138, at 393-394 (arguing with inspiration from Montesquieu's Spirits of the Laws, that *"l'état de droit est est un état d'esprit"* (the rule of law is a rule of mind) that Montesquieu's mirror theory has some practical relevance. Yet to truly understand a foreign negotiator, a skilled negotiator should not just aim to superficially enter the mind of the foreign negotiator, but rather aim to uncover the deeper multilayers of their minds).

[142] *Id.* at 394.

[143] FONS TROMPENAARS, DID THE PEDESTRIAN DIE?: INSIGHTS FROM THE GREATEST CULTURE GURU (Capstone 2003) (explaining an accumulation of a decade of research into cultural diversity across the globe with a wide range of client organizations).

[144] *Id.*

> in a car driven by a close friend. That friend knocks down a pedestrian. The friend was travelling well above the speed limit - say 35 miles an hour in a 20-mile-an-hour-zone. There are no witnesses. The friend's lawyer suggests that testifying under oath on the friend's behalf that he was only doing 20 miles an hour may save him from serious consequences. Trompenaars asks whether the friend has a definite right, some right or no right at all to expect someone (the manager being as asked the question) to testify to the lower figure. He also asks whether - irrespective of such right - the manager would testify to the lower figure. The answers received have varied around the world and, to some extent, comply with existing stereotypes. The American and Swiss almost unanimously feel that the friend has no right to expect his friend to perjure him/herself, and that in no circumstances should this be considered. However, in Venezuela and, interestingly, in China, less than 35 per cent of people agree with this line.[145]

In sum, for particularistic cultures the application of the Rule of Law is influenced by societal or relational ethical considerations at the expense of the application of the universal legal principles of the Rule of Law. [146] Therefore, while Americans, Canadians or the British follow the rule of law, in contrast Asian, Africans, Arabs or Latin Americans tend to follow the *Rule of Men*.[147] It is important to note that certain European cultures like the French or Italians are more oriented towards Particularism.[148] This cultural orientation does not necessarily explain the propensity for a particularistic party to be corrupted but if corruption is defined as complying with the rule of law and honoring the terms and conditions of a contract that can be enforced by a court-of-law, as the Governance Indicators also known

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[145] *Id.*

[146] *See also* Garrick Apollon, *Sino-American Contract Bargaining and Dispute Resolution*, *supra* note 138, at 393-396-398 (discussing the principle of Rule of Law vs. Rule of Men).

[147] *Id.* at 396.

[148] *Id.*

as the Rule of Law Ranking from the World Bank[149] defines it, it is conventional wisdom to assert that particularistic cultures could present a higher risk of engaging in corrupt practices. However, "the *Rule-of-Law* and *Rule of Men* distinction should not be based on a philosophy of law comparison that is too moralistic and too black–and–white in order to keep its practical "analytic utility."[150] It is important to remember that "sometimes culture matters a lot, sometimes not at all".[151] Also, a legal ethnocentric approach that will see all foreign Particularistic counterparts as corrupt will "foreclose the possibility of meaningful cross-cultural relationship between American' and its foreign Particularistic counterparts".[152]

(v) Due Diligence or Audit on the Foreign Counterpart by the American Party (MNC must acquire intelligence on the field about their foreign business partners or third parties)

MNCs are starting to conduct active, often intrusive, due diligence or ethical audits not just on their prospective foreign business partners, but also on the foreign third parties they do business with.[153] The goal is to avoid corporate scandals like the case of Nike with child labor.[154]

A good example of ethical due diligence is presented in the documentary "The Factory" showing an ethical audit conducted by Nokia on the labor practices of their suppliers in China.[155] U.S.

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[149] Worldwide Governance Indicators, WORLD BANK, available at http://databank.worldbank.org/data/databases/rule-of-law (last visited Feb. 10, 2017).

[150] Garrick Apollon, *Sino-American Contract Bargaining and Dispute Resolution*, *supra* note 138, at 397.

[151] Garrick Apollon, *Cross-Cultural Deal Mediation as a New ADR Method for International*, 20 L. & BUS. REV. AM. 255, 283 (2014).

[152] *Id.*

[153] Kristen Bell DeTienne & Lee W. Lewis, *The pragmatic and ethical barriers to corporate social responsibility disclosure: The Nike case*, 60 J. OF BUS. ETHICS, 359-376 (2005) (discussing the benefits of CSR audits). See also World Economic Forum, Third party audits to prevent bribery by agents or third parties, available at http://www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf (last visited Feb. 10, 2017).

[154] *Id.*

[155] A DECENT FACTORY (2004).

Department of State with their American embassies and consulates abroad also provide useful information about the foreign party. However, it is crucial for the MNC in practice to conduct their own ground "ethical audits or investigations" by hiring a lawyer for the investigation or audit to remain confidential (preserve the attorney-client privilege). The MNC should also make sure to send representatives on international business trips in the field in order to interview third parties and various stakeholders (e.g. local chambers of commerce or local authorities). This approach can be related to Sun Tzu's concept of "foreknowledge".[156] According to Sun Tzu, such knowledge "cannot be gotten from ghosts and spirits, cannot be had by analogy, and cannot be found out by calculation. It must be obtained from people, people who know the conditions of the enemy."[157] Experienced international business people know that because of the complexity of cross-cultural communication and relationship-building there is so much that can be accomplished in the home office without actually going to the "field" and meeting people "face-to-face".[158]

2. *FCPA Risk Assessment [Step 2], FCPA Risk Assessment Comprises Two Fundamental Components: Likelihood and Consequences*

Following the international standard ISO 31 000, Risk Assessment [Step 2], risk assessment is defined by two components of a risk: 1) likelihood adverse outcome[159] or strength of legal position;[160] and 2)

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[156] Garrick Apollon, *Sino-American Contract Bargaining and Dispute Resolution*, *supra* note 138, at 402.

[157] *Id.*

[158] *Id.*

[159] The "likelihood of adverse outcome" means the likelihood that a point of law in accordance with the FCPA, should it be litigated, would yield an unfavorable result for the MNC. This means the likelihood of adverse outcome needs to be conceptualized on the basis that the FCPA investigation or legal challenge (prosecution) is already taking place. The likelihood of being challenged (odds of being investigated or sued/prosecuted), however, is a practical and relevant consideration that influences the level of detail for the legal risk assessment (step #2) and the proposed legal risk response (step #3) by the counsel. When counsel is privy to information that helps them to predict the likelihood of being

consequences or impacts.[161] If these two components are not assessed, then it is not a comprehensive legal risk assessment.[162] Therefore, for the purpose of the proposed ELRM process in this article, FCPA risk assessment is the exercise of assessing the likelihood of adverse outcome (FCPA liability) in the international business transaction and the negative potential consequences (such as legal, corporate, financial, ethical and reputational) of noncompliance with the FCPA.[163] The legal risk assessment is conducted with the assistance of tools, methods, and principles developed by the international standard ISO 31 000 and customized by the MNC for their own specific needs, such as the FCPA Matrix:

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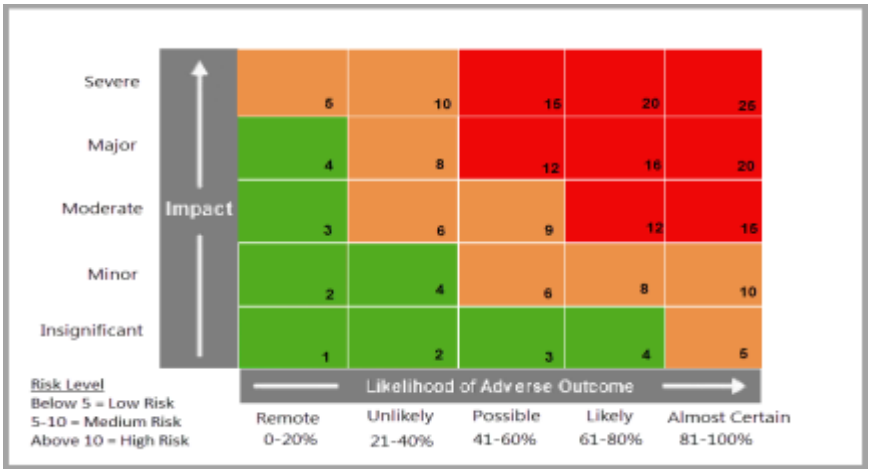
investigated or challenged pursuant to the FCPA before a court and communicates this information to his client, the legal risk assessment should clearly indicate that the likelihood of being investigated or prosecuted does not influence the risk ratings that result from using the FCPA risk assessment grid. In other, this is a separate information practical to determine the level of efforts that should be invested to manage the FCPA risk.

[160] Counsel may alternately use the "strength of legal position" when assessing the likelihood of an adverse outcome occurring in commercial advisory context. This alternative way to define likelihood of an adverse outcome reinforce the communication of the legal risk and prevent the confusion that the legal risk will be conceptualized in terms of the likelihood of being challenged. The strength of a legal position will be inversely proportional to the likelihood of an adverse outcome. This means in accordance with the FCPA Grid if the likelihood is remote (0-20%) the legal position will be very sound, if the likelihood is unlikely (21-40%) the legal position will be sound but may have some vulnerabilities, if the likelihood is possible (41-60%) the legal position is vulnerable, if the likelihood is likely (61-80%) the legal position is very vulnerable and if the likelihood is almost certain (81-100%), the legal position is extremely vulnerable. This alternative wording also help to avoid to prevent confusion by avoiding that decision-makers understand the FCPA risk in terms of the odds of the company facing an FCPA investigation or prosecution.

[161] ISO 31 000, *supra* note 108.

[162] *Id.*

[163] ISO 19600:2014 Compliance management systems – Guidelines, *supra* note 54.



Graph 1: FCPA Legal Risk Assessment Grid

LEGAL CONSEQUENCES					
Criminal liability for the corporation or directors or officers	Severe	Major	Moderate	Minor	Insignificant
Contractual liability for the corporation (breach of anti-corruption representations and warranties made)	Severe	Major	Moderate	Minor	Insignificant
Tort liability for the corporation or directors or officers (e.g. negligence)	Severe	Major	Moderate	Minor	Insignificant
Debarment of the company from public contracts	Severe	Major	Moderate	Minor	Insignificant
Liability pursuant to foreign laws anti-corruption laws (e.g. U.K. *Bribery Act* or Canada's *Corruption of Foreign Public Officials Act* (CFPOA)) that could lead to an anti-corruption	Severe	Major	Moderate	Minor	Insignificant

investigation and prosecution from a foreign regulator.					

CORPORATE/OPERATIONAL CONSEQUENCES					
Damage to viability of corporate policies	Severe	Major	Moderate	Minor	Insignificant
Business planning, resources and operations affected	Severe	Major	Moderate	Minor	Insignificant
Horizontal consequence on the operations of the organization (e.g. the subsidiaries of a multinational corporation will be affected).	Severe	Major	Moderate	Minor	Insignificant
Damage to the viability of the corporate programs, projects or initiatives affected	Severe	Major	Moderate	Minor	Insignificant

FINANCIAL CONSEQUENCES					
Stock devaluation	Severe	Major	Moderate	Minor	Insignificant
Fine, award or penalty to be paid	Severe	Major	Moderate	Minor	Insignificant
Legal and forensic accounting cost incurred	Severe	Major	Moderate	Minor	Insignificant
Loss of business customers and investors	Severe	Major	Moderate	Minor	Insignificant

Overall profitability and productivity reduced	Severe	Major	Moderate	Minor	Insignificant

ETHICAL CONSEQUENCES (CONSEQUENCES ON VALUES AND ETHICS FOR THE ORGANIZATION)					
Breach of the company's anti-corruption program	Severe	Major	Moderate	Minor	Insignificant
Breach of the company's ethical code of conduct or code on conflict of interests	Severe	Major	Moderate	Minor	Insignificant
Corporate social responsibility practices questioned internally and externally	Severe	Major	Moderate	Minor	Insignificant
Damage on the tone-at-the-top or exemplary ethical leadership to be showed by senior management	Severe	Major	Moderate	Minor	Insignificant
Damage to the organizational ethical leadership climate affecting the compliance culture that may cause the recurrence of illegal and unethical behaviors in the organization	Severe	Major	Moderate	Minor	Insignificant
Damage to the organizational ethical leadership climate affecting the compliance culture that may cause the recurrence of illegal and unethical behaviors in the organization	Severe	Major	Moderate	Minor	Insignificant

REPUTATIONAL CONSEQUENCES					
Loss of respect of the stakeholders, investors and public through negative media coverage.	Severe	Major	Moderate	Minor	Insignificant
Loss of trust of employees and other stakeholders	Severe	Major	Moderate	Minor	Insignificant
Reputation or brand affected	Severe	Major	Moderate	Minor	Insignificant
External relations with U.S. government enforcement agencies affected	Severe	Major	Moderate	Minor	Insignificant
Stockholders affected	Severe	Major	Moderate	Minor	Insignificant
Potential partners or buyers for mergers and acquisitions or strategic alliances are scared away.	Severe	Major	Moderate	Minor	Insignificant

In conclusion, it is important to understand that the level of effort and detail for each FCPA risk assessment will vary and is primarily based on the judgment of the lawyer.[164] This will also depend on many other factors such as FCPA risk and complexity level (more effort and detail will be put in a high risk or complex file), importance of the file for senior management or the client department in order to meet client's expectations, what is possible within the time and resources allowed by the client to the lawyer,

[164] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 308.

information available, and complexity or novelty of the corruption-related legal issue in question.[165]

3. *FCPA Risk Treatment and Response [step 3]*

Following the international standard ISO 31 000, Risk Treatment Risk Response [step 3], is the process of selecting and implementing measures to determine the appropriate course of action to follow in responding to the identified FCPA risk and managing its potential negative consequences.[166] Usually, a legal risk management strategy is proposed by the lawyer and it is the responsibility of the corporate client as the decision maker to select the best risk response option (FCPA risk management is a shared responsibility).[167] The four common risk treatments or responses are: 1) risk avoidance, this means to avoid or cancel the transaction because the likelihood of adverse outcome is too high and the MNC was unable to mitigate the FCPA risk to an acceptable risk tolerance level;[168] 2) risk mitigation means improving the legal position of the MNC to a risk tolerance level that is acceptable;[169] 3) risk shifting/transferring is a usual risk response in ELRM but this is not a valid option with FCPA risk because of third party liability and successor liability;[170] 4) risk acceptance (status quo) is not a valid option unless the FCPA risk has been identified as insignificant by the lawyer. A FCPA risk is a serious risk that should always be mitigated to an acceptable risk tolerance level for the MNC.[171]

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165 *Id.* at 306 (discussing that a lawyer's ability to complete an accurate legal assessment may be dampened by several factors, such as lack of information; lack of time; situational constraints based on resources or power; and self-selection processes. etc.).

166 *Id.* at 289.

167 *Id.* at 275 (discussing that legal risk management is shared responsibility between lawyer-client).

168 *Id.* at 289.

169 *Id.* at 289.

170 *Id.* at 289.

171 ISO 31 000, *supra* note 108.

4. *FCPA Risk Communication and Consultation [Step 4-ongoing]*

Following the international standard ISO 31 000, Risk Communication and Consultation is an integral and on-going part of the decision-making process because legal risk management is a shared responsibility between lawyer-client.[172] It refers to the efficient communication and consultation of the FCPA risk between the lawyer-client, to ensure that the client as the decision-maker is aware of the identified FCPA risks and will respond to it appropriately.[173] Lawyer-client risk communication and consultation is on-going.[174] Risk communication and consultation is challenging because this is not just a technical task but also a human one.[175] Risk communication and consultation is intrinsically linked with negotiation and dispute resolution because it aims to resolve issues that the company is facing due to FCPA risk.[176] Therefore, there is not just the objective to deal with substantive issues such as legal compliance issues that are subject to legal interpretation, but also crucially the non-substantives issues such as issues in relation to the organizational culture and conflicts that can cause bad emotions.[177] For instance, it is obvious that when a huge bonus, promotion or performance appraisal is at stake for an employee, such employee might be biased in his or her perception and assessment of the FCPA risk.[178]

The effectiveness of the ELRM communication and consultation process is based on good negotiation and dispute

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[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 298 (explaining that LRM is primordial because negotiations and disputes are formed by rational arguments based on the law and facts. However, in negotiation and dispute resolution, there is always more than rational argument based on what the law and facts present because human beings are not computers or robots that can be programmed. Even though LRM exists to objectify and rationalize the practice of law, we cannot stop having emotions any more than we can avoid all risks at all times).

[176] *Id.* at 276.

[177] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 297-303 (discussing the importance for the legal to manage emotions in relation to the legal risk).

[178] *Id.* at 309-310.

resolution skills.[179] Therefore, this article also invites MNCs to reframe FCPA compliance as a negotiation and dispute resolution issue and provide training in this field to their employees.[180] First, this will help employees to resolve internal conflicts in relation to the application of the ABC compliance program and ELRM Framework. Second, this will help the international business negotiators and deal makers for the MNC on the field to resolve FCPA compliance issues with foreign public official requesting bribes by finding creative and ethical solution to this problem. After all, corruption and bribery is as an illegal and immoral bargaining tactic occurring during the negotiation of international deals or settlement of international disputes (e.g. environmental or tax disputes with local foreign governments). Therefore, an international negotiator needs great cultural intelligence[181] and a lot of creative negotiation and dispute resolution skills to comply with the FCPA at all times while securing international deals.[182] This means that employees need training and skills in the field of cultural intelligence and negotiation ethics.[183]

Finally, this step is linked with the use of business analytics software and the electronic risk recording of all the FCPA legal information. Counsel should be mandated to enter timekeeping, complexity and risk information in the business analytics software within a determined number of days of the legal file being opened, and to select one of the option buttons in the software for risk recording such as: 1) "FCPA risk is insignificant" (i.e. the risk is so low that it is not considered negligent to not conduct a comprehensive legal risk assessment and avoid the cost/time

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[179] *Id.* at 314 (explaining that risk communication between lawyer and client, and with the other party, is key to a successful commercial mediation because it contributes to defining both the substantive and non-substantive issues and interests, generating options, and working on a more durable and efficient settlement agreement.).

[180] Garrick Apollon, *MMA Negotiation*, 15 U. DENV. SPORTS & ENT. L. J. 3, 11-12 (2013) (theorizing that MMA Negotiation should be viewed and practiced on the foundation of four core disciplines, like the four elements of nature, to allow the negotiator to reframe his reality).

[181] *Id.* at 19 (theorizing on the cross-border and cross-cultural discipline).

[182] *Id.*

[183] *Id.* (theorizing on the cross-border and cross-cultural discipline that must be aligned with the discipline the legal risk management discipline).

associated with it– e.g. an international contract is signed by a Delaware company with the Government of Canada); 2) "FCPA risk may materialize now or in a near future" (i.e. FCPA risk must be managed and monitored on an on-going basis and updated when necessary). When the FCPA risks may materialize now or in the near future should it be mandatory to conduct the legal risk assessment. It is also key to have a third option button for "Unauthorized or Illegal" (i.e. the international business transaction is unauthorized following the ABC policies of the MNC (e.g. in the context of a political contribution to a foreign political party for an act against the ABC policies or an expensive gift or lavish dinner that could be interpreted as 'illegal' in accordance with the FCPA).[184]

5. *FCPA Risk Monitoring and Review [Step 5 - ongoing]*

Following the international standard ISO 31 000 FCPA Risk Monitoring and Review, the ongoing monitoring by the lawyer and his client is essential to ensuring that FCPA risk information remains relevant and up-to-date.[185] FCPA risk-reviewing and monitoring must be based on analytic software to store the risk information "before evidence is lost and panic sets in."[186] The goal is to establish an advanced secured internet repository to insert, review and report on the FCPA risk.[187] Overall, business analytics software facilitates data acquisition and analysis by using the most up-to-date analytic software to measure and monitor the performance of the ABC

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[184] *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, *supra* note 127, at 15 (explaining that FCPA does not ban gifts and travel. It prohibits payment of bribes, including those disguised as gifts. Most companies and their employees are clear that large payment for gifts, travel and entertainment can constitute FCPA violations, if they are given to government officials or to employees of state-owned enterprises to obtain or retain business).

[185] ISO 31 000, *supra* note 108, at 20 (theorizing on risk monitoring and review).

[186] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 286 (asserting that LRM is about effective business intelligence, business analytics, and electronic file management—more generally referred to as law practice management and technology).

[187] *Id.*

compliance program and ELRM Framework in the day-to-day international business transactions of the MNC.[188]

Review can occur every five (5) days or every day for high risk international business transaction.[189] If no change, the lawyer will simply indicate and click on the business analytics software option button "no change" but at least this will protect him and his client by showing that he is diligently monitoring the FCPA file for the benefit of his client and organization.[190] This means a policy should be established for lawyers to know when to open and close their FCPA files in the business analytics software in order to ensure compliance but also avoid unnecessary workload such as monitoring inactive files that should be closed.[191]

B. ELRM tools

It is important to have a friendly ELRM user Toolbox on the organization's secured website that is translated into other languages so that all employees and third parties can easily gain access to it. ELRM Toolbox must offer flexible tools to account for distinctiveness between the legal advisory function of preventing FCPA risk and the function of reacting to a corruption risk that might cause an investigation or worse a conviction pursuant to the FCPA.[192] The ELRM Toolbox must be customized to the reality and needs of the organization.[193] The ELRM Toolbox should include but not be limited to, the following tools:

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[188] *Id.*

[189] ISO 31000, *supra* note 108, at 20 (explaining that both monitoring and review should be a planned part of risk management process and involve regular checking or surveillance. It can bed periodic or *ad hoc*. Therefore, the idea of five days is just an example).

[190] Garrick Apollon, The intersection between LRM & DR, *supra* note 186.

[191] ISO 31 000, *supra* note 108, at 21 (explaining that recording the risk management process should provide the foundation for improvement in methods and tools, as well as in the overall process).

[192] *Id.* at 20.

[193] *Id.*

1) A guide with frequently asked questions (FAQs) on the ELRM Framework;

2) A one-pager explaining the FCPA risk assessment process;

3) A guide for with the FCPA risk assessment techniques for lawyers;

4) FCPA Matrix and Table of Consequences (see Graph 1 in this article);

5) E-library of pre-identified and assessed FCPA risks by country, industrial sector of operations, legal foreign culture, interactions with various types and levels of government officials, involvement in strategic alliances (e.g. IJV, M&A, R&D, etc.), importance of licences and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration;

6) FCPA Consequences Assessment Sheet (i.e. standard E-form for legal counsel to obtain necessary factual information and intake from their clients to conduct an appropriate FCPA risk assessment with all the non-legal consequences, a good lawyer usually understands the business of their clients but clients are often best placed to know more about the corporate, financial, ethical and reputational consequences);

7) ELRM Committee (to review and approve high FCPA risk international business transactions);

8) A Guide that will serve as core training tool for the MNC similar to RESIST[194] with real-life FCPA scenarios collected over the years from the MNC corporate memory;

[194] RESIST: Resisting Extortion and Solicitation in International Transactions. A company tool for employee training, TRANSPARENCY INTERNATIONAL (Mar. 21, 2011) available at https://www.transparency.org/whatwedo/publication/resist_resisting_extortion_and_solicitation_in_international_transactions.

9) FCPA Communication Guide- provides legal counsel with practical tips on how to communicate FCPA risk to their clients in an effective manner for better results.[195]

C. Business analytics software utilized by the MNC for FCPA risk management and reporting

ELRM is all about effective business intelligence, business analytics, and electronic file management—more generally referred to as law practice management and technology.[196] The goal is to use a business analytics software to bring periodic FCPA risk reports to senior management, the Board, but also to stockholders, insurers, investors, lenders, regulators or stakeholders in order to build trust and show that the MNC is managing its FCPA risk in international business transactions in a proactive, diligent, ethical, transparent, accountable and cost-efficient manner.[197]

D. Performance measurement plan for the ELRM framework

The international standard ISO 19 600 – Compliance Management Systems provides useful guidelines for the performance evaluation of the monitoring, measurement, analysis and evaluation of a compliance system such as an ELRM Framework.[198] The monitoring of the ELRM Framework should include effectiveness of the ELRM training[199], effectiveness of the controls and inspections (audits)[200], effectiveness of the audits conducted with the FCPA reports from the analytic software on the performance of lawyers in managing their FCPA files (e.g. quantitative reports about the

195 ISO 31000, *supra* note 108, at 14-15 (discussing risk communication and consultation).

196 Garrick Apollon, The intersection between LRM & DR, *supra* note 186.

197 Evan Peterson, *supra* note 1 (explaining the strategic advantages of effective corporate compliance).

198 ISO 19600:2014 Compliance management systems – Guidelines, *supra* note 54, at 21-25.

199 *Id.* at 15-16.

200 *Id.*

compliance rate for the insertion of the FCPA risk information in the system and qualitative reports on the quality of the legal advice provided by the lawyers for their FCPA files), effective allocation of the ELRM role and responsibilities for the lawyer-client, surveys about the practicality and acceptance of the ELRM Framework in the organization, effectiveness in addressing failures of ELRM Framework previously identified, etc.[201]

VII. CONCLUSION

This article shows that it is not too difficult for a MNC to implement an ELRM Framework specific to FCPA risk. This article also demonstrates that the strategic and economic benefits of an ELRM fFramework outweigh the cost of its implementation in order for the MNCs to better control their in-house and outside legal fees and strengthen their FCPA compliance program.[202] Generally, this article shows that an ELRM Framework helps legal departments to not just improve their FCPA compliance but also modernize their legal practices.[203] This article, shows like my mother always says, that "an ounce of prevention is worth a pound of cure"!

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[201] *Id.*

[202] Garrick Apollon, The intersection between LRM & DR, *supra* note 2, at 307

[203] *Id.* at 271 (Susskind's message for lawyers remains a stark one: in order to guarantee a stake in the legal system of the future, lawyers must adapt their work practices or die. Therefore, the importance of effective legal risk management has risen to the top of the list of priorities of many law firms and in-house legal departments).