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Why GCs Will Appreciate the Governance Recommendations in Kodak Independent Counsel Report

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By Michael W. Peregrine

The recently released **Eastman Kodak independent counsel report** has broad corporate governance relevance, well beyond the specific circumstances that confronted this company and subsequently prompted the internal review process.

Indeed, many of the report's **conclusions and recommendations** emphasize the importance of robust governance policies and practices that are relevant to companies across the commercial spectrum. In that regard, the report serves to support the oft-referenced link between effective governance practices and legal compliance. As a result, it is worthwhile reading for the corporate general counsel.

The genesis of the report was a highly public controversy surrounding Kodak and its senior leadership, arising from events surrounding the midsummer announcement by the U.S. International Development Finance Corp. (DFC) that it intended to sign a letter of interest (LOI) to proceed with consideration of a loan application to extend a $765 million loan to Kodak. The purpose of the loan was to support the company's production of critical pharmaceutical components, in connection with the national response to the ongoing COVID-19 pandemic.

Following the DFC announcement, Kodak was subjected to intense media scrutiny, as well as a number of governmental inquiries, focusing primarily on (a) stock trading activity, stock option grants and charitable contributions involving certain officers, directors and management team members; and (b) the early public release of certain LOI information the day before the DFC announcement.

The report concluded that none of Kodak's officers, directors and/or senior management violated the securities regulations or other relevant laws, engaged in a breach of fiduciary duty, or violated any of Kodak's internal policies and procedures. It also supported the integrity and good faith of the general counsel. While all that is, of course, positive news to the Kodak team, it is not the reason why the report is of broader interest to the general counsel community.

Rather, that reason can be found in the report's many findings and recommendations on

Kodak logo

topics of general corporate governance interest. These relate to issues regarding risk management reporting; the pace of board decision-making; the size of the legal department; coordination between the general counsel and the compliance officer; and maintaining up-to-date organizational policies and procedures. For example:

- **Risk reporting**. In the aftermath of the *Marchand v. Barnhill* Delaware Supreme Court decision in 2019 and its progeny, much has been written about the importance of a management-to-board reporting process and the board's accountability for failing to assure the effectiveness of such a process. Notably, the report is critical of the efforts of a high-ranking officer to identify the case law indicating that certain grants could be perceived as spring loaded options, and failing to adequately notify a key committee of the related legal risks. These observations speak to the benefit of energetic efforts by corporate officers to inform the board and key committees concerning risks associated with matters on the board agenda.

- **Rushed processes.** Of particular importance to boards and general counsel alike is the report's observations on decision-making processes that may be unduly rushed. While Kodak appropriately "made every effort to respond as quickly and thoroughly" to government information requests, the report noted the surprise of many of those interviewed "at the rapid decision-making and the abrupt turn of events." General counsel are likely to appreciate the report's seeming warning about the distraction caused by an unduly harried boardroom atmosphere.
- **Value of in-house counsel.** The Kodak general counsel commented that legal department resources were "thin" and that he personally "felt overwhelmed by his responsibilities and unable to effectively manage the many active work streams for which he was responsible." As a result, the report recommended expanding the scope of the legal department with "additional hires." It is significant that the report acknowledged in this manner the board's core duty for oversight of management's efforts to maintain an effective and well-staffed corporate legal function.
- **The legal/compliance relationship.** Along the same lines, the report makes the important recommendation that "the [Kodak] legal department should coordinate with the compliance function to make sure there is clear and complete ownership over all Kodak internal policies and procedures." While there is not much elaboration on this point, it is nevertheless consistent with a growing recognition that the corporate legal and compliance functions must be more coordinated, in order to assure clarity of their respective roles and responsibilities; identify areas of fruitful cooperation; and reduce the risk of legal, regulatory or procedural issues "falling between the cracks."
- **Update governance policies**. Significant emphasis was made in the report on the need to maintain updated corporate governance policies and assure that both the board and key committees were kept aware of their provisions. The risks associated with reliance on old and outdated governance policies was cited in detail. The report also noted that Kodak's compensation, nominating and governance committee was not fully advised of relevant Kodak internal policies regarding options grants, and that the board received minimal training on Kodak's internal policies regarding insider trading.

As a result, it was recommended that the Kodak legal department review and update all Kodak policies and procedures to assure a current and clear understanding of and ownership over these policies and to ensure that all policies were effectively implemented. New board and key committee members should be provided with copies of relevant policies and receive ongoing training. The legal department was also encouraged to review and update its own procedures on certain key areas.

Summary

The report's ultimate conclusion is that Kodak's actions during the relevant time period "could have significantly benefited from adherence to more robust corporate governance standards." From that core statement comes a series of significant recommendations that are very supportive of the efforts of general counsel across industry sectors to recommend upgrades to the governance practices of their internal clients.

These recommendations help support the connection—supported by regulators and governance observers alike—between vigorous governance policies and sound corporate operation and legal compliance. The report is, in that regard, a true "Hey, I need you to look at this" moment from a corporate governance perspective.

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