

August 3, 2020

The Honorable Walter Joseph "Jay" Clayton  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, D.C. 20549

Dear Chairman Clayton:

I write to request that the U.S. Securities and Exchange Commission (SEC) investigate potential incidents of insider trading prior to the July 28, 2020, public announcement of the Trump administration's \$765 million loan to Eastman Kodak Co. (Kodak) to support the production of generic drug ingredients in response to the coronavirus disease 2019 (COVID-19) pandemic.<sup>1</sup> There were several instances of unusual trading activity prior to the announcement of this deal, raising questions about whether one or more individuals may have engaged in insider trading or in the unauthorized disclosure of material, nonpublic information regarding the forthcoming loan awarded under the *Defense Production Act*.<sup>2</sup>

This is just the latest example of unusual trading activity involving a major Trump administration decision. I have previously written to you regarding potential insider trading related to defense industry stocks or commodities in advance of the administration's attacks in Iran,<sup>3</sup> Navient Corporation stock trades in advance of Department of Education announcements,<sup>4</sup> potential insider trading by Commerce Secretary Wilbur Ross,<sup>5</sup> and several other incidents. This

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<sup>1</sup> U.S. International Development Finance Corporation, DFC to Sign Letter of Interest for Investment in Kodak's Expansion Into Pharmaceuticals, July 28, 2020, <https://www.dfc.gov/media/press-releases/dfc-sign-letter-interest-investment-kodaks-expansion-pharmaceuticals?CID=exit&idhbx=dfcrelease>.

<sup>2</sup> *Id.*

<sup>3</sup> Letter to the Honorable Jay Clayton and the Honorable Heath Tarbert, from Sen. Elizabeth Warren, January 13, 2020, <https://assets.documentcloud.org/documents/6641867/Sen-Warrenletter.pdf>; Daily Beast, "Trump Told Mar-a-Lago Pals to Expect 'Big' Iran Action Soon," Spencer Ackerman, Asawin Suebsaeng, Erin Banco, and Betsy Swan, January 4, 2020, <https://www.thedailybeast.com/trump-told-mar-a-lagopals-to-expect-big-iran-action-days-before-soleimanis-death>.

<sup>4</sup> Letter to the Honorable Jay Clayton from Sen. Elizabeth Warren, October 23, 2017, [https://www.warren.senate.gov/files/documents/2017\\_10\\_23\\_Letter\\_to\\_Navient.pdf](https://www.warren.senate.gov/files/documents/2017_10_23_Letter_to_Navient.pdf); Nasiripour, S. "SEC asked to probe trades of student loan firm Navient." Bloomberg (October 10, 2017). Online at: <https://www.bloomberg.com/news/articles/2017-10-10-sec-asked-to-probe-trades-of-student-loan-firm-navient>.

<sup>5</sup> Letter to the Honorable Jay Clayton from Sen. Elizabeth Warren, June 27, 2018, [https://www.warren.senate.gov/imo/media/doc/2018-6-27\\_Letter\\_to\\_SEC\\_about\\_Wilbur\\_Ross\\_and\\_Navigator\\_Holdings1.pdf](https://www.warren.senate.gov/imo/media/doc/2018-6-27_Letter_to_SEC_about_Wilbur_Ross_and_Navigator_Holdings1.pdf); New York Times, Commerce Department Secretary Shorted Stock as Negative Coverage Loomed, June 19, 2018, <https://www.nytimes.com/2018/06/19/us/politics/wilbur-ross-shorter-stock.html>.

series of examples of questionable trading activity related to Trump administration actions has become a pattern that deserves further scrutiny from the SEC.

With regard to Kodak, analysts have observed an unusual trading pattern in company stock that began prior to the public announcement. Over the last year, the average trading volume of Kodak's stock has been 236,479 shares per day.<sup>6</sup> On Monday, July 27, however, a day before the public announcement, 1,645,719 shares, almost eight times the daily average, were traded.<sup>7</sup> That day, prior to the official public announcement, the company's stock rose approximately 20 percent.<sup>8</sup> The next day, when the deal was officially announced, the stock rose by over 200 percent, and on the following day, Wednesday, July 29, "the stock at one point surg[ed] more than 500 percent."<sup>9</sup> Individuals who purchased the stock immediately prior to the announcement earned an extraordinary return.

News reports indicate that there may be an explanation for the unusual trading behavior prior to the official announcement of the deal. According to a recent report, news sources in Rochester, New York, the location of the Kodak headquarters,<sup>10</sup> shared information about the loan on Monday, July 27, via Twitter and in online publications that was supposed to embargoed until Tuesday, July 28.<sup>11</sup> The report stated that Kodak failed to indicate to news outlets that the announcement was not meant to be released publicly.<sup>12</sup>

While the report may resolve questions about the individuals who purchased the stock after seeing those public disclosures, it also opens up new questions about how Kodak handled what appears to be "non-intentional disclosure of material nonpublic information."<sup>13</sup> According to Rule 100 of SEC Regulation FD, in the event of such disclosure, "the issuer must publicly disclose the information promptly after it knows (or is reckless in not knowing) that the information selectively disclosed was both material and nonpublic."<sup>14</sup> Kodak, however, made no such full disclosure the day that the information was inadvertently disclosed. Instead, "the company asked the reporters to remove the information after they posted it."<sup>15</sup>

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<sup>6</sup> CNBC, "Kodak executive chairman addresses jump in trading activity before government deal was announced" Pippa Stevens, July 29, 2020, <https://www.cnbc.com/2020/07/29/kodak-executive-chairman-addresses-jump-in-trading-activity-before-government-deal-was-announced.html>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Wall Street Journal, "Tweets and Articles Sent Kodak Shares Surging Before Official Announcement", Geoffrey Rogow, Alexander Osipovich and Rachael Levy, July 29, 2020, <https://www.wsj.com/articles/tweets-and-articles-sent-kodak-shares-surging-before-official-announcement-11596056729>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Securities and Exchange Commission, Final Rule: Selective Disclosure and Insider Trading, 2000, <https://www.sec.gov/rules/final/33-7881.htm#:~:text=For%20a%20selective%20disclosure%20that,w as%20both%20material%20and%20nonpublic.>

<sup>14</sup> *Id.*

<sup>15</sup> Wall Street Journal, "Tweets and Articles Sent Kodak Shares Surging Before Official Announcement", Geoffrey Rogow, Alexander Osipovich and Rachael Levy, July 29, 2020, <https://www.wsj.com/articles/tweets-and-articles-sent-kodak-shares-surging-before-official-announcement-11596056729>.

The Monday, July 27, trades are not the only questionable stock trade involving Kodak and the company's *Defense Production Act* deal with the Trump administration. The Kodak chairman and other members of Kodak's board of directors appear to have purchased substantial amounts of company stock last month, ahead of the public announcement, at a time when Kodak and the Trump administration were negotiating the deal in secret.

According to another recent report this week, "Filings with the Security and Exchange Commission show that on June 23 [Kodak's executive chairman, James] Continenza purchased roughly 46,700 additional shares. On the same date, board member Philippe Katz purchased 5,000 shares."<sup>16</sup> These trades raise questions about several different insider trading laws. Federal law bars individuals from "purchasing or selling a security while in possession of material nonpublic information."<sup>17</sup> Violation of these laws may subject individuals to civil penalties "three times the amount of the profit gained or loss avoided" and criminal penalties up to \$5,000,000 and 20 years imprisonment.<sup>18</sup>

The purchase of stock by Mr. Continenza and Mr. Katz while the company was involved in secret negotiations with the government over a lucrative contract raises questions about whether these executives potentially made investment decisions based on material, non-public information derived from their positions.

Additionally, the timing and scope of the trades in the days before the premature public release of information on the deal and the actual public announcement raise serious questions. If investors or Kodak employees were trading based on the unauthorized disclosure or discussion of nonpublic information, then it would appear to be a clear violation of securities law. If unauthorized disclosure occurred, it would appear to violate the *Securities Exchange Act of 1934*.<sup>19</sup> Alternatively, if any individual who traded Kodak stock was an external party to the company but had knowledge of the loan before it was public, this could violate Section 17(a) of the *Securities Act of 1933*.<sup>20</sup> To the extent that certain information was inadvertently, but not promptly fully disclosed by Kodak, the company may also be in violation of SEC Rule 100.<sup>21</sup>

Given concerns about these unusual and questionable trades and about whether Kodak appropriately disclosed relevant information in a timely fashion, I ask that you investigate this matter, including determining:

1. Which individuals or corporate entities made the large trades in Kodak stock prior to the public announcement on Tuesday, July 28, 2020?

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<sup>16</sup> CNBC, "Kodak executive chairman addresses jump in trading activity before government deal was announced" Pippa Stevens, July 29, 2020, <https://www.cnbc.com/2020/07/29/kodak-executive-chairman-addresses-jump-in-trading-activity-before-government-deal-was-announced.html>.

<sup>17</sup> Insider Trading Sanctions Act of 1984, Public Law 98-376.

<sup>18</sup> 15 U.S.C. 78u-1(a)(2); 15 U.S.C. 78ff

<sup>19</sup> Pub. L. 73-291.

<sup>20</sup> Pub. L. 73-22 §17(a)

<sup>21</sup> Securities and Exchange Commission, Final Rule: Selective Disclosure and Insider Trading, 2000,

[https://www.sec.gov/rules/final/33-](https://www.sec.gov/rules/final/33-7881.htm#:~:text=For%20a%20selective%20disclosure%20that,was%20both%20material%20and%20nonpublic.)

[7881.htm#:~:text=For%20a%20selective%20disclosure%20that,was%20both%20material%20and%20nonpublic.](https://www.sec.gov/rules/final/33-7881.htm#:~:text=For%20a%20selective%20disclosure%20that,was%20both%20material%20and%20nonpublic.)

2. Were these individuals or corporate entities aware of any disclosure of nonpublic information that could have led to possible insider trading?
3. To the extent that the individuals who traded in Kodak stock were privy to any nonpublic information, how and from whom did they obtain this information?
4. Did any individuals with knowledge of the loan deliberately or inadvertently share information with anyone inside or outside of Kodak who was not authorized to have the information?
5. Once information was selectively disclosed via early reports of the deal, did Kodak comply with all relevant requirements that the company promptly and fully disclose all information?

Thank you for your prompt attention to this matter. Please feel free to contact me or my staff if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Warren", written in a cursive style. The signature is positioned above a horizontal line.

Elizabeth Warren  
United States Senator