

[Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—Sen. Warren, House Democrats seek SEC probe and documents on Kodak stock trades, government loan program, \(Aug. 5, 2020\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

Sen. Warren (D-Mass) sent a letter to SEC Chairman Jay Clayton urging the SEC to investigate whether Kodak or others broke securities laws by trading Kodak stock as the company was negotiating a loan contract with the federal government.

Senator Elizabeth Warren (D-Mass) urged in a letter to SEC Chairman Jay Clayton that the SEC investigate the issuance of company stock, lack of Regulation FD disclosure, and other unusual trading patterns in the stock of Eastman Kodak Co. The unusual trading patterns allegedly occurred during a time period in which Kodak was about to be awarded a \$765 million loan by the Trump Administration under the Defense Production Act related to the COVID-19 pandemic. Senator Warren's [letter](#) also said the Kodak episode was one of several similar instances of suspicious trading ahead of announcements by the Trump Administration. Separately, House Democrats are seeking documents and communications regarding Kodak and other aspects of the government's loan program.

Investigation, documents sought. According to Sen. Warren, Kodak executives and directors acquired sizeable amounts of Kodak shares in late June 2020 and again in late July 2020. The senator's letter said Kodak was negotiating a contract with the federal government during this time period pursuant to the Defense Production Act under which Kodak would produce ingredients for generic drugs that may be used to treat COVID-19. Many of the stock purchases occurred one day before the government was to announce the loan agreement. Meanwhile, news outlets learned of the forthcoming announcement from Kodak, but Kodak failed to tell the reporters to embargo the information until the next day; news of the impending contract leaked on Twitter and via other means, although Kodak later attempted to persuade reporters to remove any published information about the loan agreement.

The letter also suggested that Kodak stock trading volume and price swings were unusual beginning the day before the loan agreement was announced. That day, Kodak stock rose 20 percent on unusually high trading volume. The day of the announcement, Kodak stock rose 200 percent; the day after that, Kodak stock rose up to 500 percent.

Senator Warren cautioned that Kodak and its employees could be liable under the antifraud provisions of the Exchange Act if they traded on inside information about the government loan. Likewise, she warned that persons outside of Kodak might face liability under Securities Act Section 17(a) for their trading. A [press release](#) accompanying Sen. Warren's letter, noted that the senator had asked the SEC to answer five specific questions, including who made the large trades before the loan was announced and whether any insider trading may have occurred.

The senator further noted that Kodak might be liable for violations of Rule 100 of Regulation FD, which was adopted in August 2000 and requires a company that makes selective disclosures to persons outside the company to rapidly update the marketplace about the substance of those conversations. Specifically, if a company intentionally makes disclosures to broker-dealers or to other specified market participants, it must publicly disclose such information simultaneously; if a selective disclosure is unintentional, the company must promptly make a public disclosure of the information.

House Financial Services Committee Chairwoman Maxine Waters (D-Cal) and four other House committee and subcommittee chairs also are [seeking](#) records and other communications about Kodak and the administration of the U.S. International Development Finance Corporation's Defense Production Act loan program. The letter, addressed to Adam Boehler, CEO of the U.S. International Development Finance Corporation, noted that Kodak had almost failed in 2012 and that the company was unsuccessful in its prior attempt to enter the field of pharmaceutical manufacturing.

SEC probe rumored. As of publication, Kodak had not made any recent SEC filings indicating that it was being investigated by U.S. authorities regarding the allegations in Sen. Warren's letter, although Kodak's most recent [Form 10-Q](#), filed on May 12, 2020, noted that it was the subject of significant litigation in Brazil, mostly dealing with tax matters. Several media outlets have reported, based on a story citing unnamed sources that had first appeared in *The Wall Street Journal*, that the SEC may be in the early stages of an investigation of Kodak.

Guidance issued by the SEC in March 2020 as part of a wide-ranging package of [filing relief](#) for companies affected by the COVID-19 pandemic highlights the potential risks associated with the disclosure of company news on COVID-19-related matters like the Kodak loan agreement. For one, the SEC said companies that identify material COVID-19 risks should delay engaging in securities transactions with the public and take steps to ensure that their executives and other corporate insiders also refrain from initiating securities transactions until the company makes any material information available to investors.

With respect to Regulation FD issues, the SEC's filing relief guidance said: "When companies do disclose material information related to the impacts of the coronavirus, they are reminded to take the necessary steps to avoid selective disclosures and to disseminate such information broadly."

In April 2020, Kodak temporarily [reduced](#) by 25 percent the pay of its three named executive officers due to the economic downturn resulting from the COVID-19 pandemic. In May 2020, Kodak's shareholders [re-elected](#) its board of directors and approved revisions to the company's 2013 Omnibus Incentive Plan.

Companies: Eastman Kodak Co.

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