TROUBLES MOUNT FOR EMBATTLED EASTMAN KODAK

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A proposed class action has been filed against Eastman Kodak alleging securities fraud in connection with certain events surrounding the government's possible $765 million pharmaceutical development loan to Kodak. The plaintiff seeks to represent a class of shareholders who may have purchased Kodak stock between July 27 – when early word of a possible government-Kodak initiative was released – and August 7 – when the company announced the formation of an independent committee of the board of directors to conduct an internal investigation of the events surrounding the possible government loan.

Between those dates, the company released a flurry of information, Senator Elizabeth Warren sent a letter to the SEC seeking an SEC investigation, the U.S. government tweeted that the loan would be halted pending resolution of wrongdoing allegations and there was extraordinary stock activity. During that time, Kodak stock rose as high as $60 per share, up from about $2 per share the prior week.

The troubles seem to stem from an advisory sent by Kodak to media outlets in Rochester, New York, Kodak's hometown, on Monday, July 27. According to media reports, local reporters tweeted information on July 27 about an initiative between Kodak and the U.S. government in response to the coronavirus pandemic. Those were followed by posted news stories on the websites of the local ABC and CBS affiliates. Some of those tweets and stories were deleted when Kodak reached out to advise them that the advisory information was only for "background" and not publication. The Wall Street Journal reported that a copy of the advisory obtained by the Journal revealed that there was no embargo or other limitation reflected on the advisory, and a Kodak spokesman was quoted as saying that the internal communications team "did not intend for the news to be published." No further statement was made by the company on July 27 but volume soared to more than 20 times its normal trading levels on modestly increased prices.

The formal joint announcement came on Tuesday, July 28, when the parties disclosed that they had signed a "letter of interest" contemplating a $765 million loan to Kodak by the U.S. International Development Finance Corp. ("DFC"), pursuant to President Trump's executive order under the Defense Production Act to support the domestic response to COVID-19. The loan would enable Kodak to initiate production of pharmaceutical ingredients for an array of generic drugs in an effort to bring such manufacturing into the United States. The loan was subject to additional diligence of Kodak by the DFC. In a television interview the following morning concerning the possible loan, Kodak CEO James Continenza stated that he was "very comfortable" that investors could "bank on it" getting funded, disclosed that they had been working on this loan "for a couple of months" and that Kodak knew of the decision to proceed with the letter of interest "for over a week."

On Wednesday, July 29, executives filed a series of Form 4s with the SEC revealing option grants made by the company on July 27. This, coupled with previously filed Form 4s reflecting open market purchases by the CEO and one director in June, possibly during the time that Kodak was allegedly pursuing this loan, raise questions relating to possible insider trading violations.

It has now been reported that the SEC is investigating these, and possibly other, matters relating to the DFC loan. Senator Warren's letter urged the SEC to investigate whether Kodak may have violated Regulation FD in connection with what appears to have been a "non-intentional disclosure of material nonpublic information" on July 27, in addition to whether Kodak employees may have been trading based on the information in advance of the July 28 announcement. Press reports about the option grants on July 27 raise further questions related to the propriety of those grants at pre-public announcement exercise prices.

We can expect to hear much more on this saga as more information becomes publicly available, and there will likely be additional shareholder actions filed. The facts surrounding the early release of incomplete information to Rochester media outlets, trading in advance of the July 28 formal announcement, option grants on July 27, and the June open market purchases by insiders are unclear at best. What seems clear, however, is that the convergence of these matters and the negative publicity that flowed from them make the $765 million DFC loan not something investors should bank on.

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