

# Kodak pharmaceutical deal was on shaky footing even before the insider trading controversy

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Maybe the marriage could have worked.

On one side, there was a presidential administration, under siege for a laggard response to a surging pandemic, and searching for solutions to combat the disease — solutions that could also serve as a public relations boost in an election year.

The other half of the expected union was a once-iconic American company, headquartered in Rochester, that has spent the last three decades in a downward swoon — a company that, much like the administration, was eager for a success that could also be hailed as a reversal of fortunes.

Unfortunately, the marriage between the Trump administration and Eastman Kodak Co. didn't reach the honeymoon phase. Allegations of possible insider trading by Kodak's chief executive officer prompted the federal government to, at least temporarily, back away from a \$765 million loan for Kodak designed to significantly increase the domestic production of pharmaceuticals.

But a *Democrat and Chronicle* review of the history of the proposed loan shows it was on unsure footing even before the insider trading controversy.

As records and interviews show, the agreement was the offspring of a frenzied push by the Trump administration for more domestically-produced pharmaceuticals, a dash that even had Kodak officials thinking the deal could fall apart at the last minute.

For the Kodak agreement, the Trump administration invoked the Defense Production Act, which allows a president to require manufacturers to prioritize work deemed vital during a national emergency.

During a pandemic, such hurried decision-making can be expected and perhaps necessary. But it can also be problematic, with what would be major questions in normal times receiving minor attention.

One significant question was whether Kodak was even up to the task, given its current focus on the commercial printing market.

"I really would love to see Kodak thrive again," said Todd Moss, a Rochester native and former senior fellow at the Center for Global Development, which often monitored DFC activities. "But my initial reaction was (the deal) was a little kooky and it did not make much sense.

"I definitely worried about some individual personalities handing out these big deals to grab headlines and not going through the normal due diligence process that you would have when you're handing out public funds to private companies," said Moss, who is now executive director of the Energy for Growth Hub.

Now, months after the deal collapsed, an internal report commissioned by Kodak has found no evidence of insider trading, while a federal Inspector General's report cleared the agency that would have been responsible for the loan — the U.S. International Development Finance Corp., or DFC — of impropriety.

This story relies on interviews, information from the internal Kodak report, and documents received by the *Democrat and Chronicle* under the federal Freedom of Information Act, as well as Kodak information provided to shareholders through meetings and mandated filings. Kodak officials responded to some questions, while referring to the reports and documentation reviewed by the *Democrat and Chronicle* for others.

Kodak shares jumped again on the recent news about the report that appeared to clear the DFC, but thoughts that the Kodak-DFC union can be resuscitated are far from answered, especially with a new presidential administration stepping in next month.

"The new administration will absolutely be replacing the leadership of the DFC," Moss said. "I would expect the new administration to review the use of the Defense Production Act and that would mean that they would take another look at the proposed Kodak loan."

In July, President Trump proclaimed the pact with Kodak as "one of the most important deals in the history of U.S. pharmaceutical industries."

"My administration has reached a historic agreement with a great American company," Trump said.

## **The evolution of the deal**

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In early July, excitement within Eastman Kodak was growing at the possibility of securing the major DFC loan. A visit to Kodak's business park was scheduled for July 15, and Kodak expected "several high-level DFC representatives, and perhaps representatives from other government agencies" to make the trip to Rochester.

Instead, the visit was pushed off a week and Kodak officials learned that a career government employee on loan to the DFC would be the sole administration attendee. Kodak CEO Jim Continenza was unsure whether it was even worth his time to travel from his Minneapolis home for the visit.

Ultimately, Kodak officials "decided that, if Kodak wanted to continue to put its best foot forward, then Continenza would need to attend," according to the internal Kodak report from the New York City law firm, Akin Gump Strauss Hauer & Feld.

This was not the first time Kodak management found itself on a different page than Trump administration officials.

In a May 22 phone call between Continenza and other Kodak management and administration officials, including federal trade advisor Peter Navarro, the Kodak leadership said it would need \$27 million to ready the business park for the necessary changes for manufacturing active pharmaceutical ingredients, or APIs. (An API is the biologically active ingredient in a medication.)

"Think bigger," Navarro said, and asked for a "well fleshed out proposal" for a follow-up May 28 discussion.

"Kodak employees recalled working around the clock in order to meet the May 28, 2020 deadline," the Akin Gump report states.

By May 28, the Kodak proposal had ballooned to between \$435 million and \$575 million. Were the loan to be approved, Kodak would be home to the "U.S. Center of Excellence for the Production of Key Starting Materials and Active Pharmaceutical Ingredients for Essential Medicines."

Navarro then asked for a timeline for the loan application and project, as well as more definition. He gave Kodak six days for an answer.

Already straining to meet the wants of federal officials, Kodak hired the firm Everglade Consulting to help with the proposal. The company helped Kodak with "financial modeling, selection of APIs, and other financial and technical aspects of the proposed build-out of the pharmaceutical business."

## **Seeking the loan**

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Over the following weeks, Kodak and DFC carved out a loan proposal. The process was sometimes frenetic, with Kodak officials often questioning whether it would lead to nothing. Company officials told Akin Gump that the process was "a roller coaster" that could fluctuate daily "at the drop of a hat."

In its proposal, Kodak highlighted that a chunk of its current operations involved pharmaceuticals. As well, the company had often partnered with the federal government.

"Kodak has been a supplier of a variety of films to the government during wartime, Cold War, and peacetime for use in military and U.S. security as well as films for NASA," the proposal said. "Whether it was providing aerial lenses, cameras or optics for tank periscopes during the second World War or providing sensors or cameras for several of NASA's space missions, Kodak has been serving as a strong partner of the U.S. Government for over a century."

Western New York's higher education offerings were also stressed, with the proposal saying, "According to the U.S. Department of Education, Rochester ranks third in both biological and biomedical science degrees per area among 53 of the largest metro areas."

Despite the earlier concerns of Kodak officials, the July visit by the lone federal official to Kodak park turned out to be a success, one that Kodak officials told Akin Gump was an "important and dramatic turning point in the discussions with the DFC."

As had become the norm, the negotiations moved rapidly.

On July 28, the deal was announced, with Kodak and Trump administrations touting the agreement — the loan, should it happen, was now up to \$765 million — as a significant stride toward more domestically produced medicines.

"Kodak is proud to be a part of strengthening America's self-sufficiency in producing the key pharmaceutical ingredients we need to keep our citizens safe," Continenza said. "By leveraging our vast infrastructure, deep expertise in chemicals manufacturing, and heritage of innovation and quality, Kodak will play a critical role in the return of a reliable American pharmaceutical supply chain."

## **Missteps along the way**

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Even the announcement of the agreement had its stumbles.

Kodak communications officials sent out a notice of the planned Kodak-DFC press conference the day prior, without an alert that the information was supposed to be embargoed, or held until the announcement was formal. The media release was solely for planning purposes, but the media was not initially informed of this.

Some local and national media Tweeted what limited information was in the release, including language saying that the agreement "could change the course of history for Rochester and the American people."

Kodak shares increased after the media Tweets — some which were later removed at the request of Kodak — but only slightly.

While Kodak's internal report notes the mishandling of the media release, Kodak was not the only guilty party. The *Democrat and Chronicle* received a notification from a White House staffer the day before the press conference. He followed up about an hour later saying the information was "for planning purposes only."

Similarly, the finer points of the agreement were somewhat lost in the hype and hoopla.

Kodak and federal officials had worked out a deal with the *Wall Street Journal* which allowed it to have much of the Kodak-DFC story readied for an exclusive publication hours before the press conference.

That story was supposed to go online at 11 a.m., five hours before the news conference. But DFC, without informing Kodak, instead allowed it to be published at 6 a.m. because of the earlier release of some information on social media. Kodak officials again scrambled to respond.

Also, the media coverage suggested that the loan was a done deal, when, instead, Kodak and DFC were signing what is known as a non-binding "letter of interest," or LOI. There were no assurances with the LOI that the loan would be consummated.

"Continenza, the only Kodak employee who was interviewed by the *Wall Street Journal* for the article, was consistent in his belief that he only referred to the LOI as a letter of interest — and not a loan," the Akin Gump report states.

Still, the miscommunication with media were minor missteps, and not something that could derail the agreement.

That was to come soon thereafter.



## Insider trading concerns

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Kodak shares exploded after the announcement, to an extreme that few expected.

"When Akin Gump asked the (Kodak employee) witnesses — several of whom were experienced investment professionals — to describe their reaction when they saw the increase in Kodak's share price after the announcement, the uniform response was one of surprise and, in some cases, outright incredulity," the Akin Gump report says.

At one point in the day after the announcement, Kodak shares reached \$60 per share; the cost had been \$2.62 the day before the announcement.

On July 28 and July 29, there were combined trades of 560 million shares. "By way of comparison, on Friday, July 24, 2020, before any news of the DFC Announcement was made public, Kodak's trading volume was just under 74,000 shares," the Akin Gump report states.

What became of particular interest to skeptics of the deal, as well as federal regulators, was the fact that Kodak awarded Continenza 1.75 million stock options shortly before the deal was announced. Unsurprisingly, that revelation cast a pall over the Kodak deal.

"You have high stock prices and high-profile individuals," said Eric Chaffee, a business and commercial law expert and professor at the University of Toledo College of Law. "It raises alarm bells."

Congressional representatives pushed for scrutiny of the deal from regulators; the Securities and Exchange Commission launched an investigation; and Trump administration officials scurried away from Kodak with the same haste as it had courted the company weeks before.

Within days, the DFC Tweeted: "On July 28, we signed a Letter of Interest with Eastman Kodak. Recent allegations of wrongdoing raise serious concerns. We will not proceed any further unless these allegations are cleared."

Navarro, who had encouraged Kodak to increase its initial plans and costs more than tenfold, ripped into Kodak executives, saying, "What happened at Kodak was probably one of the dumbest decisions made by executives in corporate history."

"You can't fix stupid," Navarro said.

## **Is the air cleared?**

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In mid-September Akin Gump released the report commissioned by Kodak as an independent scrutiny of the stock transactions by Continenza and others with Kodak ties.

The decision to grant stock options was made well in advance of the Kodak-DFC announcement and even before serious discussions of an agreement, the investigation concluded. Akin Gump stressed the occasionally erratic nature of the pre-pact negotiations, and how Kodak officials often doubted the agreement would happen.

The report may not halt the investigation by the Securities and Exchange Commission, or SEC, but it may address many of the same concerns, said University of Toledo professor Chaffee.

"With this type of situation and an internal investigation, what they're trying to do is answer the types of issues that the SEC is looking at," he said.

The federal investigation of the DFC role in the agreement also has answered questions from some skeptics of the deal, but not all of them.

Gabe Lezra, policy counsel at the watchdog nonprofit Citizens for Responsibility and Ethics, has filed a public records request that he hopes will lend insight into concerns he had about the agreement.

"It appears from publicly available information that the DFC awarded the loan to Kodak without soliciting competing bids," he wrote in an email to the *Democrat and Chronicle*. "The possibility that this was a no-bid contract raises questions of whether the process was sufficient to prevent waste or abuse of taxpayer funds."

"Additionally, there are still outstanding questions related to the extent to which the White House generally, and Defense Production Act coordinator Peter Navarro specifically, were involved in the contract negotiations." Lezra wrote. "Those types of contacts would raise additional concerns of improper influence, and whether the government followed the normal due diligence procedures."

## Going forward

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In its report, Akin Gump notes that the agreement was not actually a \$765 loan, but, instead, a pledge that Kodak and the DFC would continue to collaborate toward such a loan and the creation of the pharmaceutical manufacturing center.

"Indeed, on its face, the dramatic increase in Kodak's stock price is startling when one considers that it was based on news that Kodak had signed a non-binding Letter of Interest to apply for a potential loan," the report said.

The investigation by DFC's inspector general, which found no wrongdoing by DFC, also emphasized the nature of the agreement.

"DFC noted that for the loan to be finalized, it would still have to be approved by a ... credit committee and by the DFC CEO; all due diligence items would have to be finalized, including third party verification of collateral, build timelines, and financial projections; and a finance agreement would have to be reached including performance benchmarks among other conditions precedent to funds disbursement."

That analysis and its insistence that due diligence was on the horizon glosses over a key fact: Federal officials were the ones hastily pushing for a Kodak proposal of significant magnitude, as well as for a public relations event that could be seen as a victory for both the Trump administration and Kodak.

"It's a great name when you think of it, such a great name," Trump said of Kodak after the deal was announced. "Was one of the great brands in the world. Then people went digital, and Kodak didn't follow. But now under very extraordinary leadership, they are following, and they're doing something that's a different field."

The Kodak-DFC deal is not dead, and could be revived by the administration of incoming President Joe Biden. But it's unlikely any progress can be made until the SEC investigation reaches its conclusions.

Kodak CEO Continenza has said the company will continue to build upon its existing pharmaceutical business. The company hopes to eventually expand into the manufacturing of APIs, Kodak spokeswoman Chelsea Wagner said in an email.



"The scope of that expansion will depend on our assessment of the business opportunity and availability of capital," she wrote.

Only months ago Kodak seemed on the cusp of hundreds of million in new capital through a DFC loan. Now the company is trying to navigate the remaining investigations into the insider trading allegations. The Trump-Kodak union soured quickly.

Todd Moss, of the Center for Global Development, said he can understand why there was an urgency with the negotiations.

"Some of it is probably the extraordinary times," said Moss, who worked for the State Department under President George W. Bush. "I could see if I were working in government and you're really trying to do something in an emergency situation (then) it would be reasonable to urge people to think bigger."

Nevertheless, Moss said, he had misgivings about the agreement

"I worried that the pandemic was being used as a smokescreen for a terrible deal for taxpayers," he said.

University of Toledo Professor Chaffee said, in the end, it may be discovered that the intentions of all were good.

Nonetheless, he said, "this could have been better handled."

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