

## SECURITIES AND CAPITAL MARKETS

**A FEW TWEETS COST TESLA CEO ELON MUSK \$20 MILLION AND CHAIRMANSHIP**

Authors: Alexander R. McClean, Margaret K. Rhoda, and Kevin R. Pregent

The Securities and Exchange Commission (SEC) recently sued Tesla, Inc.'s CEO Elon Musk after Musk tweeted that he secured funding to take Tesla private without having obtained financial commitment or approval from Tesla's Board of Directors. Musk settled the lawsuit quickly, resulting in Musk stepping down as Chairman of Tesla's Board of Directors and paying a \$20 million fine.

**Background**

Elon Musk is Tesla's CEO and co-founder. Musk has a highly public profile as an officer of Tesla due to Tesla's prominence in the electric vehicle market and Musk's other business ventures. Musk has used his celebrity status to gain Twitter followers numbering in the tens of millions. In 2013, Tesla filed a report with the SEC stating that Musk's Twitter account would be used as an official means of announcing material information to the public. Tesla's stock is traded on the Nasdaq Global Select Market ("Nasdaq").

**SEC Legal Action Against Musk**

On August 7, 2018, Musk tweeted, "Am considering taking Tesla private at \$420. Funding secured." A series of tweets followed, indicating that Musk was going to take Tesla private at a premium of 20% per share and that the likelihood of going private was almost certain. By closing, Tesla's stock had risen about 6% from the time Musk sent the "funding secured" tweet and about 11% from the prior day, and Nasdaq had halted trading in Tesla stock due to the significant increase in trading volume.

In the SEC's view, Musk did not have "even the most fundamental terms of a proposed going-private transaction" established. For example, Musk had not spoken with the sovereign investment fund that indicated interest in the going-private transaction for several days and he had not retained any advisors to assist with a going-private process. In addition, Musk selected the \$420 figure on his own because he believed his girlfriend would find it funny due to the number's implication in marijuana culture. Finally, Tesla's Board was not involved in any specific going-private proposal.

Ultimately, on August 24, Musk publicly announced he was abandoning any plan to take Tesla private. On August 27, the next trading day, Tesla stock dropped 15% from its August 7 closing value.

The SEC alleged that Musk's tweets directly caused the volatile market for Tesla's stock. According to the SEC, Musk used Twitter to make untrue statements of material fact regarding Musk's ability to take Tesla private. Therefore, the tweets amounted to violations of the Exchange Act because Musk misled the public with reckless tweets that harmed Tesla investors.

The SEC sought to prevent Musk from making further false statements via Twitter, remove Musk as CEO and Chairman of Tesla, preclude Musk from serving as a director or officer of any publicly traded company, and fine Musk an unspecified amount. Simultaneously, the SEC sued Tesla for its failure to have adequate internal controls over public disclosures.

The SEC and Musk settled two days after the SEC filed suit and after considerable negative publicity. The settlement resulted in Musk paying a \$20 million fine and stepping down as Chairman for at least three years.

Tesla settled its own suit and must pay an additional \$20 million fine, add two independent directors, and appoint a securities lawyer to vet senior officers' social media use.

### **Key Takeaway**

Publicly traded companies must always be cautious when disseminating information to the public. The SEC's quick action against Musk and Tesla demonstrates that even in an administration focused on loosening regulatory requirements, the agency is still focused on companies' public disclosures and investor protection.

Investors may act on tweets and disrupt the market regardless of whether a company's Twitter account, or the account of a high-profile director or officer, is an official source of circulating previously non-public material information. While many may look at this as an extreme example, it is important that insiders think before they tweet information about a company.

Public company boards need to provide oversight regarding disclosure protocols by officers and directors and companies should have robust internal controls over public disclosure of material information through social media channels. Regular training on a company's social media policy is critical to ensure directors, officers, and employees understand the restrictions on their use of social media.

If you would like more information regarding using social media for your company or public disclosure policies, please contact a member of Harter Secrest & Emery LLP's [Securities and Capital Markets](#) Group at 585.232-6500 or visit [www.hselaw.com](http://www.hselaw.com).

Alexander R. McClean, 585.231.1248, [amcclean@hselaw.com](mailto:amcclean@hselaw.com)

Margaret K. Rhoda, 585.231.1267, [mrhoda@hselaw.com](mailto:mrhoda@hselaw.com)

Kevin R. Pregent, 585.231.1307, [kpregent@hselaw.com](mailto:kpregent@hselaw.com)

Attorney Advertising. Prior results do not guarantee a similar outcome. This publication is provided as a service to clients and friends of Harter Secrest & Emery LLP. It is intended for general information purposes only and should not be considered as legal advice. The contents are neither an exhaustive discussion nor do they purport to cover all developments in the area. The reader should consult with legal counsel to determine how applicable laws relate to specific situations. © 2018 Harter Secrest & Emery LLP

