



## Key Lessons in Disclosure & Social Media from the Elon Musk and Tesla Inc. Settlement

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*\*The settlement between Musk/Tesla and the SEC was approved by a U.S. District Judge on October 16, 2018. This article was updated accordingly on that date.*

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Elon Musk and Tesla Inc. recently reached a settlement with the SEC, after the commission filed enforcement actions against Musk and Tesla alleging that Musk's August 7<sup>th</sup> tweet — "Am considering taking Tesla private at \$420. Funding secured." — and several other statements he made that day were materially misleading. The settlement was submitted to a U.S. District Judge, and approved on October 16, 2018. Its terms included, among other things, Musk's removal as Tesla's board chairman, the establishment of a new committee of independent directors, the implementation of additional controls and procedures to oversee Musk's communications, and \$20 million penalties against each of Musk and Tesla. Despite the focus on regulating Musk's communications, his unorthodox and irreverent approach to social media seemed to be undeterred. As of this writing, one of Musk's recent tweets mocked the SEC, renaming it the "Shortseller Enrichment Commission."

When it comes to social media, the struggle for business leaders is real. On the one hand, investors and customers alike are demanding new levels of transparency, accessibility, and personality. Platforms such as Twitter and Facebook provide businesses with an efficient way to deliver on those demands. On the other hand, as we learned from the Musk/Tesla settlement, tweeting or posting about your company can carry substantial risk.

The solutions to this dilemma may appear binary: either render your social media presence completely banal or roll the dice with unfiltered communications. The former is a missed opportunity. The latter, as Musk and Tesla found out, is fraught with peril.

However, there are key lessons embedded in the Musk/Tesla settlement that lend themselves to a practical middle ground of these two extremes:

- **Take stock of the company's communication assets and develop a customized social media strategy.** First, companies should familiarize themselves with all of their communication channels and assess each platform's audience and reach (i.e., number of followers, etc.). Everything from the CEO's personal Twitter account to the company's website to EDGAR should be included in this assessment. Following the communication inventory, corporate leadership and marketing executives should determine the most appropriate social media voice and strategy for the company, taking into account investors, customers, and competitors.
- **Know the rules.** To be clear, the SEC is comfortable with companies using social media to announce material information, as long as investors have been told where to look for the information. A tangled web of rules and regulations govern the timing and content of any social media disclosure, as well as whether the disclosure requires a corresponding SEC filing. For example, Musk's tweet violated a NASDAQ rule that requires companies to provide the exchange with at least 10 minutes advance notice of the public disclosure of information that is expected to affect the value of company securities or influence investors' decisions. Company leadership should consult experienced legal experts to assist with mapping and understanding the applicable disclosure rules and regulations.
- **Create and implement public disclosure policies.** A key element of the settlement was the requirement for Tesla to establish a committee of independent directors to enact controls overseeing Musk's communications. All boards of directors should contemplate proactively establishing similar committees and controls. At a minimum, these controls should apply to a company's public facing communication conduits, including the requirement that any public disclosures be subjected to a robust, but nimble, review process. Other policy considerations might include a ban on use of company-affiliated social media platforms during certain hours, and restrict the authority to make material disclosures to certain management positions.
- **Review, Tweet, Repeat.** Social media provides businesses with valuable opportunities for brand differentiation. Company leadership can directly engage with investor and customer communities, and in the process, manifest an increased transparency and unique personality. Fortunately, companies can appropriately mitigate the risks inherent in social media engagement and disclosure without having to choose between sitting on the sidelines or permitting unrestricted tweetstorms.

Happy tweeting, everyone.

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