Lessons Learned from the Elon Musk Twitter Fiasco

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The reckless use of Twitter by certain C-Suite corporate executives has not only put those executives at the mercy of the Securities and Exchange Commission (SEC), but has exposed their companies to corporate liability as well. Look no further than the Elon Musk saga. On August 7, 2018, Musk famously tweeted, "Am considering taking Tesla private at $420. Funding secured." The tweet sent markets into a frenzy.

The SEC utilizes Rule 10b-5 and Rule 13a-15 of the Securities Exchange Act of 1934 (Exchange Act) to combat fraud by requiring issuers of securities, like Tesla, to follow certain controls and procedures when disclosing information.[2] Thus, aside

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[2] *See* Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Securities Act Release No. 8238, Exchange Act Release No. 47986,

from the complaint brought against Musk personally, the SEC also sued Tesla for its failure to implement adequate disclosure controls or procedures.[3] Although Tesla correctly notified investors in 2013 that it intended to release material information through Musk's personal Twitter account, the company failed to adequately implement any disclosure controls or procedures that would have determined whether Musk's tweets contained information required to be disclosed in Tesla's SEC filings.[4] Further, the company did

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Investment Company Act Release No. 26068, 80 SEC Docket 1014 (June 5, 2003); *see also SEC Announces Enforcement Cases on Public Company Internal Controls*, CLEARY GOTTLIEB (Feb. 5, 2019), https://www.clearygottlieb.com/-/media/files/alert-memos-2019/sec-announces-enforcement-cases-on-public-company-internal-controls.pdf [https://perma.cc/6CAW-LEZP] (explaining recent SEC actions, including Elon Musk's failure to holster his Twitter fingers).

[3] *See* Complaint at 1, SEC v. Tesla, Inc., No. 1:18-cv-8947 (S.D.N.Y. Sept. 29, 2018).

[3] *See id.* at 8.

not have any process in place to verify whether Musk's tweets were even accurate.[5] Following extensive media coverage, Musk and Tesla settled the charges against them without admitting or denying the SEC's allegations.

Although Musk's alleged violation of Rule 10b-5 was essentially a slam dunk for the SEC, the media remained captivated with his conduct and Twitter habits. The narrative that should have garnered the media's attention, however, was not Musk's twitter transgressions, but rather the SEC's allegation that Tesla failed to comply with Rule 13a-15. The SEC's charge that Tesla violated Rule 13a-15 by failing to silence Musk provides a stark warning to companies who also have C-Suite executives with a strong social media presence: Be careful what you tweet.

The SEC drove this message home when it dropped the hammer on Tesla with its settlement terms. Although Tesla was not required to admit any fault, the SEC required the company to oversee all of

[5] *See id.* at 2.

Musk's future social media posts and pre-approve any such communications that could potentially contain material information. By requiring Tesla to implement such heavy-handed corporate governance procedures, the SEC is signaling that any future tweets by Musk or Tesla are the equivalent of an Exchange Act filing, and the company must properly vet and scrutinize such tweets before publication.

This strict SEC standard would appear to render the utility of Twitter—the ability to spontaneously communicate with investors and the public at large—moot. Officers and directors of public companies may now almost certainly shun the usage of Twitter as a means of communicating with their investors because the risk of violating federal securities laws is exponentially higher. Additionally, the hassle of requiring each executive to clear their tweets with a compliance team or securities expert would certainly deter these executives from even trying to use Twitter as a method of communication.

Considering the SEC's previous guidance regarding social media use and the implementation of Regulation Fair Disclosure, it seems impractical that the SEC now expects every public corporation to implement the same disclosure controls and procedures as Tesla. Instead, it is more likely that the SEC is sending a message that simply filing a Form 8-K to alert investors that social media may be used to disseminate information is no longer sufficient as the sole acceptable disclosure control or procedure. Unfortunately, however, the SEC is muddying the waters by imposing such onerous terms on Tesla, but then refraining from providing additional guidance on social media usage by corporate executives.