

## **Social Media and the SEC: The Risk of Violating Rule 10b-5 on Twitter**

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*“Am considering taking Tesla private at \$420. Funding Secured.”*

On August 7, 2018, Elon Musk rattled the investing community with just fifty-three characters, tweeting: “Am considering taking Tesla private at \$420. Funding secured.”<sup>2</sup> Musk’s tweet quickly drew the ire of the Securities and Exchange Commission (SEC) and the United States Justice Department, as allegations swirled that Musk’s tweet could have been a scheme to defraud investors.<sup>3</sup> Following a brief investigation, the SEC sued

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<sup>2</sup> Elon Musk (@elonmusk), TWITTER (Aug. 7, 2018, 9:48 AM), <https://twitter.com/elonmusk/status/1026872652290379776> [<https://perma.cc/E8XL-HAE5>]. Musk also subsequently tweeted that “[s]hareholders could either to sell at 420 or hold shares & go private.” Elon Musk (@elonmusk), TWITTER (Aug. 7, 2018, 11:13 AM), <https://twitter.com/elonmusk/status/1026894228541071360> [<https://perma.cc/3RKD-7YSA>].

<sup>3</sup> See Matthew Goldstein et al., *Tesla Is Said to Be Subpoenaed by S.E.C. over Elon Musk Tweet*, N.Y. TIMES (Aug. 15, 2018),

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<https://www.nytimes.com/2018/08/15/business/tesla-musk-sec-subpoena-goldman.html> [<https://perma.cc/3U34-5K3V>] (describing subpoena served by SEC on Tesla following Elon Musk’s tweets); *see also* Simon Jessop, *Tesla Investor Says SEC Asked it About ‘Funding Secured’ Tweet*, REUTERS (Sept. 12, 2018), <https://www.reuters.com/article/us-tesla-musk-investor/tesla-investor-says-sec-asked-it-about-funding-secured-tweet-idUSKCN1LS2RD> [<https://perma.cc/M458-EYD5>] (explaining institutional investor questioned by SEC); Tom Schoenberg & Matt Robinson, *Tesla Is Facing U.S. Criminal Probe over Elon Musk Statements*, BLOOMBERG (Sept. 18, 2018), <https://www.bloomberg.com/news/articles/2018-09-18/tesla-is-said-to-face-u-s-criminal-probe-over-musk-statements> [<https://perma.cc/9HL7-LLY9>] (revealing Justice Department criminal investigation into Tesla). The SEC has pursued traders for securities fraud stemming from misleading tweets in the past. *See* SEC v. Craig, Litigation Release No. 23401, 2015 WL 6777073 (Nov. 6, 2015) (charging traders with securities fraud for tweeting false statements); Jonathan Stempel, *U.S. Charges Scottish Man over Fake Tweets that Hurt Stocks*, REUTERS (Nov. 5, 2015), <https://www.reuters.com/article/us-usa-crime-tweets-idUSKCN0SV07G20151106> [<https://perma.cc/X2RH-BJRB>] (describing SEC charges for false and misleading tweets).

Musk for violating Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (Exchange Act)—arguably the most important section and promulgated rule targeting securities fraud.<sup>4</sup> But should it have?

The legislative history of Section 10(b) is barren of any explicit congressional explanation of intent.<sup>5</sup> Nevertheless, the

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<sup>4</sup> See Complaint at 3, SEC v. Musk, No. 1:18-cv-08865 (S.D.N.Y. Sept. 27, 2018) (bringing action against Elon Musk for violating Section 10(b) and Rule 10b-5); see also Goldstein et al., *supra* note 3 (explaining SEC conducting investigation into Tesla); Dave Michaels et al., *SEC Sues Elon Musk for Fraud, Seeks Removal from Tesla*, WALL ST. J. (Sept. 27, 2018), <https://www.wsj.com/articles/elon-musk-sued-by-the-sec-for-securities-fraud-1538079650?mod=searchresults&page=3&pos=9> [<https://perma.cc/MBN5-NDYT>].

<sup>5</sup> See Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 385 (1990) (opining Section 10(b) “bereft of any explicit explanation of Congress’ [sic] intent” (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976))); see also *Chiarella v. United States*, 445 U.S. 222, 226 (1980) (noting neither legislative history nor statute offers specific guidance on legislative intent); *Ernst & Ernst*, 425 U.S. at 201 (stating intended scope of Section 10(b) not revealed explicitly in legislative history of Exchange Act).

substantial legislative history of the Exchange Act itself demonstrates that Section 10(b) and Rule 10b-5 were intended to shield investors from *any* misstatement of material facts.<sup>6</sup> Given that Congress intended for the Exchange Act to be “flexible and mobile” in areas such as corporate reporting, presumptively the SEC—when designing Rule 10b-5—intended for it to have an expansive reach.<sup>7</sup> Therefore, the legislature and the SEC wanted Rule 10b-5 to apply to a variety of disclosure mechanisms, including

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<sup>6</sup> See 15 U.S.C. § 78j(b) (2018) (describing prohibition of manipulative devices in Section 10(b)); 17 C.F.R. § 240.10b-5 (2018) (promulgating rule to target prohibited behavior under Section 10(b)). Section 10(b) prohibits the employment of “*any* manipulative or deceptive device . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 78j(b) (emphasis added); see also Thel, *supra* note 5, at 385 (explaining Section 10(b) legislative intent found in Exchange Act debate).

<sup>7</sup> See MICHAEL E. PARRISH, *SECURITIES REGULATION AND THE NEW DEAL* 5, 124 (1970) (noting need for implementation of Rule 10b-5).

social media.<sup>8</sup> Musk’s conduct would thus explicitly fall within the purview of Rule 10b-5 because his tweets were deceptive, and such deception harmed Tesla investors.<sup>9</sup>

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<sup>8</sup> See *id.* at 124; see also *To Tweet or Not to Tweet? Lessons in Careful Use of Social Media*, KING & SPALDING: NEWS & INSIGHTS (Oct. 18, 2018), <https://www.kslaw.com/news-and-insights/to-tweet-or-not-to-tweet-lessons-in-careful-use-of-social-media> [<https://perma.cc/Z86Z-9DRJ>] (referencing Rule 10b-5’s application to Twitter). “Rule 10b-5 applies to all corporate communications, social media being no exception.” *To Tweet or Not to Tweet? Lessons in Careful Use of Social Media*, *supra*.

<sup>9</sup> See Complaint, *supra* note 4, at 4-21 (detailing factual allegations against Musk). The SEC alleged that Musk’s tweets contained multiple materially false statements and left market participants with false and misleading impressions. *Id.* at 16. The SEC further averred that Musk’s “[f]unding secured” assertion was false and misleading because, in reality, no such funding was secured. *Id.* Moreover, according to the SEC, Musk’s tweets caused “[m]arket [c]haos and [h]armed Tesla [i]nvestors.” *Id.* at 20. Therefore, as a result of Musk’s tweets, “investors who purchased Tesla stock in the period after the false and misleading statements but before accurate information was made known to the market were harmed.” *Id.* at 21.