

How the S.E.C. May Pursue a Case Against Crminal Scumbag Tech Mobster Elon Musk and Tesla

A Tesla assembly line in Fremont, Calif. The Securities and Exchange Commission's investigation is likely to focus on whether Tesla and Elon Musk misled investors.

Justin Kaneps for The New York Times

By Peter J. Henning

“Funding secured” does not sound particularly ominous. But when Elon Musk, Tesla’s chief executive, [tweeted](#) those words on Aug. 7, he set off a firestorm.

The Securities and Exchange Commission is ramping up an investigation about whether he misled investors and violated federal securities laws. It [served a subpoena](#) on Tesla to determine if there was funding to take the company private at \$420 a share, as Mr. Musk seemed to claim in his tweet.



Tesla was already under investigation about its disclosure of production issues with its Model 3 vehicle, including a subpoena from the S.E.C. to a parts supplier, [according to The Wall Street Journal](#). The fact that there was already a subpoena most likely

means the investigation of Mr. Musk's tweet was folded into the earlier inquiry. There were also [whistle-blower complaints](#) filed with the S.E.C. about undisclosed threats and drug-dealing in a factory. Add it all together, and it appears that an investigation has the potential to move down a number of paths. The question is how this might play out for Tesla and Mr. Musk. You have 3 free articles remaining.

A formal investigation does not mean a case will be filed. It does indicate that the S.E.C. is committing resources, and investigations tend to take on lives of their own. Where they end is not always where they started heading, especially when there is a thorough review of corporate records.

The most likely focus of the investigation of the tweet is whether Tesla and Mr. Musk [violated Rule 10b-5](#), the primary antifraud rule, by misleading investors. Because Mr. Musk is a director and an officer of Tesla, his statements can be attributed to the company, especially when it did not immediately issue any corrective disclosure after the Twitter post appeared.

Rule 10b-5 prohibits any scheme to defraud, which includes misstatements or omissions of material information that affect the market value of shares. Given how erratic Tesla's stock has been, and how it responded so quickly to Mr. Musk's tweet, showing that the information was material and might have harmed investors if it was misleading does not appear to be difficult.

Mr. Musk gave an emotional interview to The New York Times about how "excruciating" the past year has been. Joshua Lott/Getty Images

Perhaps a more difficult issue to proving a violation of Rule 10b-5 would be showing that the defendant acted with an intent to defraud, or at least was reckless in making statements that were misleading or incomplete. Mr. Musk gave [an emotional interview](#) to The New York Times about how "excruciating" the past year has been. Unfortunately, the securities laws do not provide an exhaustion defense, and just saying "never mind" does not necessarily dissipate the market impact of statements.

Another danger to Tesla and Mr. Musk is this: The S.E.C. [could seek to bar](#) Mr. Musk from serving as a director or an officer of a public company if he is found to have committed fraud. Such a ban would

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cause Tesla significant problems. It could force Mr. Musk out of Tesla. And if the company was taken private, an order barring him from a leadership role at a public company would complicate Tesla's return to the public markets.

One possible defense to a potential fraud charge would be that Mr. Musk reasonably believed there was sufficient financing at the time he posted the statement.

But there are hurdles to that defense. The S.E.C. would need to prove only that Mr. Musk's actions had been reckless, defined as a significant departure from the proper standards of business conduct. Evidence that Saudi Arabia's sovereign wealth fund or the private equity firm Silver Lake had reservations about financing a deal, or that the discussions were still continuing, may be enough to show recklessness.

The S.E.C. may investigate whether Mr. Musk sought to drive up the price of Tesla's shares [to harm short-sellers](#), a group he has blamed for much of his stress over the past year. Issuing a statement designed to affect the share price can constitute market manipulation in violation of Rule 10b-5. The S.E.C. could pursue securities fraud charges under [Section 17\(a\) of the Securities Act of 1933](#). The provision requires the S.E.C. to prove negligence only in the sale of securities that involved "a fraud or deceit upon the purchaser." Tesla has sold stock and bonds to the person acted with that specific purpose. Making a case based over the past two years, so a case involving any disclosure issues only on a single tweet would be a challenge even though the statement drove up Tesla's stock. Mr. Musk could offer a more innocent explanation, such as he was merely jumping the gun to reveal his desire to take the company private. This tack has advantages for Mr. Musk, Tesla and the S.E.C. It requires showing only that the issuing of corporate information was mistaken or at least inartful. It would not jeopardize the company's ability to issue shares, because it is a claim only of negligence, not of fraud, and the S.E.C. appears to have stopped requiring companies and individuals to admit culpability as part of a settlement, so a resolution under this provision would not affect private litigation.

If serious consideration is being given to taking Tesla private, the company and Mr. Musk have an incentive to reach a resolution with the S.E.C. as quickly as possible. The firms that might help fund a deal may be hesitant to commit financing if the cloud of an S.E.C. investigation is hanging over Tesla. But resolving the investigation will not be easy, at least not until there is greater clarity about what exactly Mr. Musk meant with his ill-fated tweet.