

Elon Musk should be held in contempt for unauthorized tweet about Tesla, SEC says

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Tesla Inc. Chief Executive Elon Musk violated an agreement that settled fraud charges with the Securities and Exchange Commission by tweeting material information about his electric car company without prior review, and should be held in contempt, the federal regulatory agency said Monday in a court filing.

The potential repercussions are big: It's possible that Musk could be unseated as CEO and banned from serving as an officer of a publicly traded company.

Musk, who has repeatedly expressed his distaste and disrespect for the SEC, tweeted last week that Tesla would produce 500,000 cars this year. In doing so, he violated a deal requiring pre-approval for tweets containing information material to Tesla or its shareholders, the SEC said.

Tesla shares fell about 5% in after-hours trading Monday as news of the court filing spread.

Tesla did not respond to emails and phone calls seeking comment. The SEC declined to comment beyond its legal motion. Musk himself posted a tweet after the news was made public that appeared to show



Elon Musk agreed in 2018 to get pre-approval for tweets containing information material to Tesla or its shareholders. (Robyn Beck / AFP/Getty Images)

his face superimposed over a setting sun. Later Monday evening, Musk tweeted that the production numbers had been discussed in Tesla's fourth-quarter earnings call, nearly three weeks before the tweet cited by the SEC.

H. Peter Haveles Jr., an expert in SEC matters who is a partner at law firm Pepper Hamilton, said he thinks Musk will retain his CEO seat. "Likely the judge will issue some very strong words and warnings about what will happen next time," Haveles said, referring to U.S. Southern District of New York Judge Alison Nathan.

"But her patience for his conduct will be very short-lived," Haveles said. "She's fair, but she's very tough. She does not tolerate people playing games or being disingenuous with her."

Others thought tougher penalties are inevitable.

"I think he's got problems," Charles Elson, a professor of finance at the University of Delaware, said of Musk. "You poke the bear once, and the bear snaps. You poke the bear twice, and he does a lot more than snap. We'll see what the SEC does, but if they don't do

something what's the point of regulators?"

Lloyd Greif, chief executive at Los Angeles investment bank Greif & Co., concurred. "This man is not controllable. He can't help himself. Unfortunately, the long arm of the law is about to grab him by the throat," Greif said.

In court papers filed Monday, the SEC cited a Feb. 19 tweet: "Tesla made 0 cars in 2011, but will make around 500k in 2019." The agency said he "did not seek or receive pre-approval prior to publishing this tweet, which was inaccurate and disseminated to over 24 million people."

Last September, Musk, Tesla and the SEC struck a deal to settle fraud charges over a series of Aug. 7 tweets, including one in which Musk claimed he had "funding secured" for a deal to take Tesla private at \$420 a share.

Under the deal, Musk agreed to have the company monitor his public comments about Tesla before putting them out on Twitter or elsewhere. He also agreed to personally pay a \$20-million fine, give up his chairman's seat at Tesla and bring two new independent directors onto the electric-car maker's board. Tesla agreed to pay a separate \$20-million fine.

Days after reaching that agreement in October, Musk thumbed his nose at the SEC by flinging an insult at it on Twitter.

In December, Tesla adopted a "senior executives communications policy" requiring any written communications that "contain, or reasonably could contain, information

material to Tesla or its stockholders" be submitted to the company's general counsel or other designated attorney for review before becoming public.

The SEC, in its legal motion, said such information includes "projections, forecasts or estimates regarding Tesla's business."

On Feb. 19, Musk tweeted his initial 500,000 car forecast at 7:15 p.m. EST. At 11:41 p.m., he published another tweet correcting the first one: "Meant to say annualized production rate at end of 2019 probably around 500K, ie 10k week. Deliveries for year still estimated to be about 400k."

The next day, SEC staffers questioned Musk and Tesla about whether Musk had complied with the pre-approval procedures, the agency's motion said; the staffers were told that Tesla's "designated securities counsel" saw the first tweet only after it was made public and then met with Musk to jointly draft the second tweet, containing the correction.

Musk admitted he didn't seek prior approval of the first tweet, according to the motion, claiming that "he did not believe that he needed to seek and obtain pre-approval" because he thought he was simply recapitulating information that had already been pre-approved in two company communications Jan. 30.

That explanation was "not credible," the agency said: "Musk is the CEO of Tesla and undoubtedly familiar with the details of Tesla's production projections."

The tweet, said the SEC, was a clear violation of Musk's agreement,

which required any public communication that had been edited or is more than 2 days old to get pre-approval in writing again.

The agency also alleged that Musk had not made a "diligent or good-faith effort" to comply with the agreement, citing a Dec. 9 "60 Minutes" interview with broadcaster Lesley Stahl in which Musk said he did not "respect" the SEC and maintained he did not have to have all his tweets reviewed if he did not think they would move markets.

The document cites a portion of the interview, during which Stahl asks Musk how it could be known if a tweet could move markets if someone was not reviewing them, to which Musk replies, "Well, I guess we might make some mistakes. Who knows?"

On Feb. 20, the day after Musk sent the tweets about Tesla production, the carmaker announced that its general counsel was leaving after just two months on the job.

Dane Butswinkas, who was hired to represent Musk after his initial run-in with the SEC in August, said he was returning full time to his trial practice in Washington.

Butswinkas' exit was the latest in a string of departures that have unnerved investors. Last month, Chief Financial Officer Deepak Ahuja announced he was leaving the company, and last year the firm lost senior managers from Tesla's sales, accounting, finance, supply management, human resources and communications departments.