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Is Elon Musk Too Big to Fail?

By Rob Peters

Going into last weekend, it appeared to all the world as if Elon Musk's goose was cooked.

The SEC had him dead to rights on charges of securities fraud stemming from his infamous tweets boasting of a "firm offer" to take Tesla private at $420 a share, with "funding secured." This turned out to be near-total fiction, and the SEC's resulting complaint asked for the ultimate penalty: that Elon Musk be barred from serving as a director or officer of a public company. He appeared to have less chance of surviving than a Thai soccer team stranded in a – actually never mind, that's a bad example. Let's just say things looked grim.

Musk is such a larger-than-life figure, and the case against him so strong, that Bloomberg's Matt Levine described the allure to an SEC investigator in these terms: "If Warren Buffet was giving insider tips about accounting fraud at the Fed to Lloyd Blankfein so that he could help Donald Trump and the Pope insider trade against the Illuminati, the SEC team investigating that would be scheming to get transferred to the Elon Musk team."

And yet, over the weekend, the SEC settled for a relative pittance. Musk and Tesla pony up $20 million each; Musk relinquishes his chairmanship of the board for three years; Tesla installs three new independent directors, including a new chair; and Musk gets someone to babysit his Twitter account. But, crucially, Musk stays on as CEO of Tesla. So, why did the SEC blink? That's the obvious question, given that the agency's case was more airtight than a miniature submarine designed to rescue a – well, you get the idea.

The best explanation we've heard is a political one. It calls to mind events of ten years ago, when a different set of automakers were in a different kind of trouble. Then, Mitt Romney penned a famous op-ed urging Washington to "Let Detroit Go Bankrupt." The Obama administration chose a different course, feeling that the auto industry was too big to fail.

Today, there's a sense that Elon Musk is Tesla, and that his excommunication from the company would have marked its "death knell." Those are the words of investment banker Lloyd Greif, who pointed out in the Los Angeles Times that "The SEC is a government organization subject to political pressure, and you can bet they received a lot of pressure since announcing the penalty."

It makes sense. Tesla stock lost 14 percent, or $7 billion in shareholder value, on the mere news of the SEC charges against Musk. Perhaps Washington made a calculation that it was preferable to leave this revolutionary American automaker standing than to maximize Musk's punishment for an ill-considered tweet that was designed, in part, to impress his girlfriend.

Of course, despite getting off easy, Musk still has plenty of hurdles to clear before the outlook can be called "sunny" at Tesla. There's a looming third-quarter earnings report, which Musk has promised will show a profit. That will be necessary to dull the sword of Damocles that hangs over Tesla: a cash crunch exacerbated by a $230-million payment on convertible debt due in November, and another $920 million due in March (unless the stock price hits $360 after December). And, of course, the SEC settlement does nothing to wipe away the investor suits (and a possible DOJ investigation) regarding the tweets that started this whole thing.

All that said, maybe there's a sign that Elon Musk is growing up. After he rallied the troops with an email to employees on Sunday, the company filed that email in an 8-K. It suggested that Tesla, which has failed to file 8-Ks when warranted in the past, may be getting serious about compliance. Then again, it still hasn't filed one about the $40-million case that nearly took the company down.