

## [Securities Regulation Daily Wrap Up, ENFORCEMENT—S.D.N.Y.: SEC says Musk's unvetted tweet is in contempt of court, \(Feb. 26, 2019\)](#)

Securities Regulation Daily Wrap Up

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By [Anne Sherry, J.D.](#)

Elon Musk admitted to the agency that he did not obtain preapproval of a recent tweet that misrepresented Tesla's 2019 production outlook.

The SEC began proceedings that could end with a contempt order against Tesla CEO Elon Musk for tweeting false information that had not been preapproved. Last October, the Southern District of New York approved a settlement requiring Tesla to implement, and Musk to comply with, procedures for the oversight of social media posts and other writings. The Commission is now asking the court to order Musk to explain how a February 19 tweet that mischaracterized Tesla's projected production numbers does not constitute contempt of court ([SEC v. Musk](#), February 25, 2019).

**Settlement terms.** The settlement came about after Musk tweeted last August that he had secured funding to take Tesla private at a substantial premium to its then-trading price. Later in the month Tesla walked back these statements and eventually clarified that it was not pursuing a going-private transaction. The SEC charged Musk with fraud based on the tweets, and the parties reached a settlement that, among other things, required Tesla to implement procedures to preapprove "any written communications that contain, or reasonably could contain, information material to the Company or its shareholders." Tesla also undertook to designate an experienced securities lawyer charged with reviewing those communications. The court [approved](#) the settlement after requiring the parties to submit a joint letter in support.

**Another false tweet.** On the evening of February 19, Musk tweeted that Tesla would make "around 500k" cars in 2019. Later that night, after intervention by the designated securities counsel, Musk corrected this tweet to say that Tesla's annualized rate of production would reach 500,000 by the end of the year. The SEC now seeks a contempt order against Musk (but not Tesla) for violating the court's order "by engaging in the very conduct that the pre-approval provision ... was designed to prevent."

Tesla directors, including Musk, are defending a private class-action [lawsuit](#) over the failure to implement internal controls and procedures to ensure that Musk's tweets were truthful. This action, which concerns conduct prior to Tesla's adoption of the preapproval requirement, had been pending for about a week when Musk made the "500k" tweet.

**Musk failed to abide by order.** The SEC notes that Tesla did adopt a "senior executives communications policy" as required by the final judgment. The policy states that writings that reasonably could contain material information must be submitted to the general counsel and disclosure counsel prior to publication. "Projections, forecasts, or estimates regarding Tesla's business" are specifically listed as examples of information that may be material. Under the policy, preapproval essentially expires after two days—if the executive waits longer than that to publish the approved post, he must re-confirm the preapproval.

After a communication from SEC staff, counsel confirmed on behalf of Musk and Tesla that the initial February 19 tweet had not been preapproved and that as soon as Tesla's designated counsel saw it, that attorney arranged to meet with Musk and they drafted the corrective tweet. Musk claimed that he did not believe that he needed to seek preapproval because the tweet was recapitulating information that had been preapproved 20 days prior. The SEC counters that a violation need not be willful in order to find contempt and that Musk's claim is undermined by the two-day expiration date on preapprovals.

**A defensive approach.** The SEC's settlement was generally perceived as a slap on the wrist, and the agency kept quiet when Musk subsequently [tweeted](#) that "the Shortseller Enrichment Commission is doing incredible work." With the February 19 tweet, however, Musk gave the Commission an opening. In its motion, the SEC quotes from a transcript of Musk's appearance on *60 Minutes*, emphasizing his assertions that "we might make some mistakes" (by releasing some material information without preapproval) and that "nobody's perfect." The excerpt continues with Musk's statement, "I want to be clear. I do not respect the SEC".

The case is [No. 18-cv-8865](#).

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Companies: Tesla, Inc.

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