

[Securities Regulation Daily Wrap Up, ENFORCEMENT—S.D.N.Y.: Musk responds in contempt proceedings over unvetted tweet, \(Mar. 12, 2019\)](#)

Securities Regulation Daily Wrap Up

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

Among other arguments, Elon Musk says that his tweet about Tesla's production outlook could not reasonably be considered material because it was celebratory and forward-looking.

Elon Musk responded to contempt proceedings initiated by the SEC by arguing that he was not required to get preapproval for an after-hours tweet because it was not material. Musk also cites his recent restraint on Twitter as reflecting his commitment to the settlement he reached with the SEC and avoiding further conflicts. Finally, Musk spins his appearance on *60 Minutes* in his favor, noting that in light of his "sincerely-held criticism of the SEC" the contempt action amounts to agency overreach (*SEC v. Musk*, March 11, 2019).

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 policy that Tesla adopted states that writings that reasonably could contain material information must be submitted to the general counsel and disclosure counsel prior to publication. On the evening of February 19, Musk tweeted that Tesla would make "around 500k" cars in 2019, but he clarified a few hours later that Tesla's annualized rate of production would reach 500,000 by the end of the year.

Materiality. Musk now counters the SEC's [contempt motion](#) by arguing that the tweet could not reasonably be considered material. The response puts the tweet into context with other tweets from the same evening, presenting an overall picture that "Tesla has come a long way and is now flourishing globally." This was celebratory and forward-looking, Musk maintains, and any reasonable observer would take it as "a statement of pride and optimism, not of guidance." Musk notes that his own tweet did not notably move the market (citing a 0.09 percent movement in after-hours trading), but the SEC's motion seeking to hold him in contempt caused a 3.4 percent stock price decline (also in after-hours trading).

The SEC said that Musk was required to seek preapproval of the tweet because Tesla's policy lists "projections, forecasts, or estimates" as examples of subjects that may be material. Musk notes that the policy actually says that this type of information "may, depending on its significance, be material." Requiring Musk to obtain preapproval of every statement that arguably falls into any of the non-exhaustive categories listed in the policy would go beyond the requirements of the order, and the district court is not authorized to impose obligations beyond those mandated by the consent decree.

Finally, Musk counters the SEC's argument that he needed to obtain preapproval even if the tweet restated previously disclosed information, because that disclosure occurred more than two days prior. In Tesla and Musk's reading of Tesla's policy, a preapproved communication must be released within two days of the preapproval, but this does not mean that a communication is subject to mandatory preapproval just because of a prior disclosure. "Such a requirement would make no sense, because information already known on the market is immaterial," Musk argues (internal quotation omitted).

Attempts to comply with policy. According to the response, the court cannot hold Musk in contempt unless he did not diligently attempt to comply with the court's order, and Musk has cut his tweets related to Tesla nearly in half since entry of the order. He also no longer tweets information that he believes is, or could be, material. Musk's conferral with disclosure counsel after the tweet in question, and his subsequent correction, do not amount to "willful flouting" of judicial authority, he says. Finally, in the *60 Minutes* interview cited by the

SEC, Musk unequivocally said that he would comply with the order out of respect for the justice system, and his allowance that he may make mistakes cannot be used as evidence that he intended to violate Tesla's policy.

First Amendment concerns. Musk asserts that the SEC's institution of contempt proceedings was motivated by embarrassment at his criticisms of the agency, including on *60 Minutes*. The "sweeping gag order" the SEC seeks amounts to a content-based prior restraint that would fail review under a strict scrutiny standard, as there are less restrictive means to achieve the government's interest.

The case is [No. 18-cv-08865](#).

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Companies: Tesla, Inc.

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