

Securities Regulation Daily Wrap Up, TOP STORY—S.D.N.Y.: SEC says Musk hasn't sought preapproval of a single tweet, (Mar. 19, 2019)

Securities Regulation Daily Wrap Up

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

The SEC contends that by retaining the sole authority to determine whether tweets contain material information, Elon Musk renders a court order's preapproval requirement meaningless.

In a reply brief filed in contempt proceedings initiated by the SEC against Elon Musk, the agency argues that Musk cannot have attempted to comply with a court order requiring him to obtain preapproval of potentially material tweets. The SEC says that at the time of its motion for order to show cause, Musk had not sought preapproval of a single tweet. The agency also countered Musk's First Amendment argument and said that there is no need for an evidentiary hearing because there is no dispute of material fact ([SEC v. Musk](#), March 18, 2019).

The parties continue to debate whether Musk's tweet saying that Tesla "will make around 500k [cars] in 2019" contained information that was potentially material to investors. If so, Musk was required to get approval from Tesla's counsel in charge of vetting Musk's tweets before posting. Musk's response to the SEC's motion described the tweet as being celebratory and forward-looking, especially in the context of the larger chain Musk posted the same evening. The SEC replies that production forecasts have long been significant to Tesla's investors, "as evidenced by the frequency with which [Musk] and Tesla highlight such forecasts in their public statements."

The SEC also disputes that Musk has attempted to comply with the court order. Musk has regularly tweeted other substantive information about Tesla since the December 11 order, including about tax credits and pricing, vehicle maintenance costs, the possible phase-out of certain models, and regulatory matters. Musk's interpretation of the order as vesting in him the exclusive authority to determine if a tweet contains material information has no support in the order or Tesla's policy implementing the order, and Musk did not articulate how he decides whether a tweet needs preapproval. "This is particularly troublesome given that it was Musk's lack of judgment with respect to public statements about Tesla that led to entry of the Court's order in the first place," the SEC writes.

Musk also waived his First Amendment argument by consenting to the order, according to the SEC. Furthermore, the preapproval requirement does not impose a prior restraint. If Musk seeks preapproval of a tweet that is not false or misleading, Tesla will presumably approve it, and if the tweet is false or misleading, it is not protected. Furthermore, in the SEC's view, the First Amendment does not apply to a requirement that Tesla, a private actor, vet Musk's tweets. The agency also denies that it is exceeding its authority—authority to enforce the court's order is vested with the court and does not depend on the SEC's statutory or other authority.

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

Attorneys: Cheryl L. Crumpton for the SEC. Alison Lynn Plessman (Irell & Manella LLP) for Elon Musk.

Companies: Tesla, Inc.

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