

Tesla's Elon Musk could be suspended as CEO in latest SEC scuffle, securities lawyers say

- Securities lawyers say Elon Musk could face a suspension for tweets the SEC said were not properly vetted.
- The ordeal with the agency also opens Tesla up to lawsuits.

[Robert Ferris](#) | [@RobertoFerris](#)

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Mike Blake | Reuters

Elon Musk

[Tesla](#) CEO [Elon Musk](#) is facing pretty significant fines and a possible suspension as CEO for recent activity on Twitter that federal regulators said violated his Sept. 29 settlement with the [Securities and Exchange Commission](#), securities lawyers say.

Musk and Tesla have until March 11 to respond to an order from a judge explaining why the court shouldn't hold him in contempt after he tweeted about Tesla's production forecasts for the Model 3, a midsize sedan. The agency said the CEO broke an agreement that requires him to vet any public comments that could affect investor decisions.

Former SEC attorneys and other securities lawyers said it looks like a clear violation. Neither Tesla nor the SEC responded to requests for comment.

 [Tesla CEO Elon Musk attends the Tesla Shanghai Gigafactory groundbreaking ceremony in Shanghai, China, January 7, 2019. Investors would not want to remove Musk as Tesla CEO, says managing director 5:09 PM ET Wed, 6 March 2019 | 02:24](#)

Musk is still considered a first-time offender, in that he hasn't been convicted of a crime, like [Martha Stewart](#) was in 2004, or indicted on criminal charges, like [Elizabeth Holmes](#) of Theranos was in 2018, and he isn't quite yet a habitual or serial offender, said Elliot Lutzker, a former attorney in the SEC's enforcement division. So it is unlikely the agency would seek an outright ban.

But Musk's Feb. 19 tweet about Tesla's production estimates may temporarily cost him his job as CEO, Lutzker and other attorneys said. Securities attorneys compared it to Stewart's settlement deal with the SEC, where she agreed to a five-year ban as CEO but remained as the creative director of Martha Stewart Living.

"It is looking pretty ominous for Musk," Lutzker said. "I could very easily see a very significant fine and a possible suspension."

Musk's initial settlement with the SEC required Tesla to develop a process for vetting any communication, including tweets, that Musk makes with the public. That was supposed to prevent the sort of misleading tweets that led to the SEC's first dispute with Tesla, after Musk tweeted in mid-2018 that he had already secured the funding to take Tesla private at \$420 a share. The tweet turned out to be false.

The tweet at the center of the SEC's most recent complaint is one Musk sent out on Feb. 19 at 7:15 p.m. that said, "Tesla made 0 cars in 2011, but will make around 500k in 2019."

Musk

He then corrected himself at 11:41 p.m.: "Meant to say annualized production rate at end of 2019 probably around 500k, ie 10k cars/week. Deliveries for year still estimated to be about 400k."

Musk later defended the tweet, saying the projection has been previously disclosed and thus didn't need to go through the typical vetting process.

But the SEC isn't buying it.

"There was no pre-approved written communication anywhere in the January 30 communications that stated that Tesla would make around 500,000 cars in the 2019 year," the agency said in its complaint.

The Supreme Court has defined material information very simply, Lutzker said, as anything a reasonable investor would want to know in deciding whether to buy or sell a stock. The settlement requires vetting for any projections about Tesla's business, which would include production forecasts.

Musk may simply have made a mistake, but the SEC has to enforce the settlement anyway, said Jay Knight, an attorney at Bass, Berry & Sims who previously worked in the SEC's corporate finance division. Enforcement is necessary both to keep Musk in check and to send a message to other public company CEOs that

disclosure rules still apply, even though the public is increasingly accustomed to social media and the rapid and direct communication enabled by the internet, he said.

"In the world of public companies there are a lot of mini Elon Musks," Knight said, and there is a tension between getting information out to investors as soon as possible and the possibility that something could be incorrect or misleading.

"While it is difficult for a CEO to write a press release and release it on a wire service, it is really easy to pull out a phone and start tweeting," he said.

This action also could be part of a longer strategy with Tesla and Musk, said Britt Latham, an attorney at Bass, Berry & Sims who litigates securities cases.


"They are building their case," Latham said. "If they get a violation here, they could get the court to issue an order that puts some more teeth into the consequences of the next violation. Then at some point, given how unpredictable Mr. Musk is, the agency may assume he will hang himself and give them the opportunity to really take some more serious action."

This whole ordeal also opens up Tesla to lawsuits. If the company is not enforcing its policies, and the CEO is clearly violating policies that were required by a court order just a few months ago, that is a pretty easy opportunity for plaintiffs' lawyers to step in. That is especially true if Tesla's share price drops.

"At some point these lawsuits start costing a lot of money, even for a big company like that," Latham said.

Correction: This article has been corrected to state that Elizabeth Holmes of Theranos has been indicted on, but not yet convicted of, criminal charges.

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