

June 17, 2022

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RE: Request for an investigation of Tesla, Inc.'s failure to comply with the consent decree entered into on September 29, 2018.

The SOC Investment Group (“SOC IG”) requests that the Securities and Exchange Commission (“SEC”) investigate, and decline to clear the pending proxy of, Tesla, Inc. (“Tesla”) based on its failure to comply with the consent decree into which Tesla and the SEC entered on September 29, 2018,¹ to resolve the SEC’s complaint alleging that the company did not have in place adequate controls over its disclosure procedures in violation of Rule 13a-15 of the Securities Exchange Act of 1934 (“Exchange Act”). The consent decree required Tesla to implement mandatory procedures to oversee and pre-approve written communications from then-Chair and CEO Elon Musk, including communications on Twitter, that could reasonably contain information material to the company or its shareholders.² The consent decree further required that Tesla appoint two independent directors to the Board and create an independent committee to, *inter alia*, oversee controls and processes regarding disclosures of potentially material information. Our examination of Tesla’s draft proxy statement filed on June 10, 2022, on Form PRE 14A and other publicly available sources reveals that:

1. Ample evidence, including statements from CEO Elon Musk, indicates that, contrary to the requirements of the consent decree, the Tesla Board of Directors has not exercised effective oversight or established a credible pre-clearance process for Mr. Musk to follow when making potentially material public statements regarding Tesla.
2. One of the two independent directors Tesla appointed to comply with the consent decree – Lawrence J. Ellison – is resigning and will not stand for re-election to the Tesla Board.

¹ The consent decree was entered as a final judgment in *Securities and Exchange Commission v. Tesla, Inc.*, Dkt. 14, 18-cv-08947-LJL (S.D.N.Y. Oct. 16, 2018). A consent judgment was also entered in a companion case the SEC brought against Mr. Musk in which Mr. Musk agreed to adhere to the pre-approval process, resign as Chair, and pay a civil fine. Dkt. 14, *Sec. and Exchange Comm’n v. Musk*, 18-cv-08865-LJL (S.D.N.Y. Oct. 16, 2018).

² The parties subsequently agreed to modify this provision of the consent decree between Mr. Musk and the SEC to require Mr. Musk to obtain pre-approval from a senior securities lawyer employed by the company for any one of several specific types of communication, including topics whose pre-approval would protect the interests of shareholders. *SEC v. Tesla*, Dkt. 17 at 2 (April 30, 2019).

3. Tesla has not appointed or nominated an independent director to replace Mr. Ellison and has not otherwise maintained either the proportion of independent directors or the ratio of independent to non-independent directors that held after it initially complied with the consent decree in December 2018.

As a result of these failures to comply with the consent decree, Tesla shareholders have experienced sharp gyrations in the value of their shares, largely stemming from exactly the type of off-the-cuff statements from Mr. Musk that prompted the SEC to take action against Mr. Musk and Tesla originally. Moreover, as we will illustrate below, as a result of departures by independent directors, Tesla's failure to nominate a sufficient number of new independent director candidates, and a reduction in the Board's size, Tesla's Board following the company's upcoming annual meeting will have a significantly lower proportion of independent directors than it did immediately following the company's initial and temporary compliance with the consent decree. Tesla should be required to return to compliance with the decree by nominating at least one additional independent director for election to its Board prior to its upcoming annual general meeting scheduled for August 4, 2022. Tesla's issuance of its Form PRE 14A appears to reflect a Board that fails to comply with the SEC's consent decree and the court's ongoing consent judgment in this case. The SEC should not give clearance to Tesla's preliminary proxy statement until the statement reflects company action intended to bring it back in compliance with the consent decree once again by nominating at least one additional independent director to the Board.

The SOC Investment Group

The SOC Investment Group works with pension funds sponsored by unions affiliated with the Strategic Organizing Center, a coalition of unions representing millions of members, to enhance long term shareholder value through active ownership. These funds have over \$250 billion in assets under management and are also substantial Tesla shareholders

Background on Tesla and Elon Musk

Tesla, Inc. designs, develops, manufactures, leases, and sells electric vehicles, and energy generation and storage systems in the United States, China, and internationally. Elon Musk is an engineer and entrepreneur who has founded or co-founded multiple companies including PayPal, SpaceX, and The Boring Company. Tesla has been a publicly traded company since 2010, and Elon Musk has been CEO and/or Chairman of the Board of Tesla since 2008. In April 2022 Musk disclosed a significant stake in Twitter, Inc. and has subsequently entered into a definitive agreement to acquire Twitter.

Legal Authority

Rule 13a-15 of the Exchange Act requires, *inter alia*, that issuers must maintain controls over disclosure and procedures, as well as internal controls over financial reporting. These controls should be reviewed periodically by the issuer's principal executive officer and principal financial officer to determine their effectiveness and should ensure that the procedures governing the disclosure of information required to be provided on SEC forms are effective. Section 21 (d) of the Exchange Act establishes the SEC's broad authority to enforce the Act by seeking injunctive relief in federal district court.

Tesla Board's Ongoing Failure to Oversee Musk's Communications

On September 29, 2018, Tesla CEO and then-Chairman Mr. Musk entered into an agreement with the SEC to settle allegations that he had violated Section 10 (b) of the Exchange Act and Rule 10b-5 promulgated thereunder by issuing a series of tweets concerning a potential going-private transaction at Tesla and the funding commitment secured for such a transaction. On the same day, the SEC entered into a consent decree with Tesla to settle allegations that it violated Rule 13a-15 by failing to implement

adequate controls to assess whether information disseminated by Mr. Musk via his Twitter account was required to be disclosed in reports Tesla files pursuant to the Exchange Act. In the settlement, Tesla agreed to, among other steps, establish a new standing committee of the Board, comprised exclusively of independent directors, to oversee all communications by Mr. Musk – including statements made via Twitter or Tesla’s blog – to ensure that they reflect his obligations as the principal officer of a public company. The Board duly created the Disclosure Controls Committee, which the Board reports has been meeting regularly since its creation in December 2018.

However, subsequent developments strongly encourage the inference that this Committee has not established or enforced effective procedures to ensure that Mr. Musk’s communications comply with law and regulation. Since the Committee’s creation, it has been reported that the SEC has at least twice communicated to Tesla concerning communications by Mr. Musk that were not pre-approved or otherwise subject to disclosure controls consistent with the settlement,³ and finally issued subpoenas to Tesla and Mr. Musk stating the SEC had information that tended to show violations of the federal securities laws after another series of tweets by Mr. Musk in November 2021.⁴ Furthermore, Mr. Musk has repeatedly tweeted disparaging remarks about the SEC which it is difficult to believe could have won approval through any appropriate compliance review process. Some of Mr. Musk’s tweets have clearly impacted the Tesla share price, as for instance when he asked his followers if he should sell 10% of his Tesla shares, or when he tweeted that the Tesla share price was “too high.”⁵ Finally, in connection with what eventually became his proposal to acquire Twitter, Inc., Mr. Musk first made a delayed filing concerning the size of his holdings in Twitter, and may have submitted this filing on the wrong form, in so far as he contemplated attempting to take control of or influence Twitter, before entering into a definitive merger agreement.⁶ Given that Mr. Musk plans to acquire Twitter through a significant personal equity investment, and given that Mr. Musk’s personal wealth is reportedly comprised primarily of Tesla shares, his statements about the Twitter transaction clearly have consequences for Tesla’s stock price and for Tesla investors.

Declining Proportion of Independent Directors on Tesla’s Board

As noted above, in the settlement with the SEC, Tesla also agreed to appoint two new independent directors. On December 28, 2018, Tesla announced the appointments of Lawrence J. Ellison and Kathleen Wilson-Thompson to its Board of Directors. However, since that time Tesla’s Board has allowed the resulting super-majority of independent directors to erode considerably, which may help to explain why the Board has not been more effective in overseeing Mr. Musk’s communications.

Prior to this settlement, Tesla’s Board was comprised of nine directors, of whom the company considered seven, or 78%, to be independent (a 7 to 2 ratio). Following the December 2018 appointment of two new independent directors, the Board totaled eleven directors, nine of whom, or 82%, were considered independent (a 9 to 2 ratio). Over the following three years, the independence level of the board has fluctuated as a result of additions and departures, with the most recent being Mr. Ellison’s impending

³ “SEC watchdog says two Elon Musk tweets violated settlement deal” *The Guardian*, June 2, 2021.

⁴ Opinion and Order, *SEC v. Musk*, Dkt. 81 at 4-5 (April 27, 2022).

⁵ Jessica Bursztynsky “Tesla shares tank after Elon Musk tweets the stock price is ‘too high’” CNBC May 1, 2020; Harry Robertson, “Kimbal Musk cashed out \$109 million of Tesla stock just before Elon's tweets whacked the share price” Market Insider, Nov. 9, 2021.

⁶ Jacob Kastrenakes, “SEC questions Elon Musk over late Twitter disclosure” *The Verge*, May 27, 2022.

departure. As a result, as it heads into its 2022 annual meeting scheduled for August 2, 2022, Tesla has a Board comprised of seven directors, of whom five are independent, equivalent to 71.4% (a 5 to 2 ratio).⁷

While the consent decree specified the addition of two new independent directors within 90 days of the settlement, rather than a proportion of the Board that must be independent, we believe that the changes to Tesla's Board since 2018, including the departure of one of the two independent directors appointed pursuant to the consent decree, constitute failure to comply with the decree. Absent any action by the SEC, following its annual meeting Tesla will have two fewer independent directors than it had before entering into the settlement, and four fewer than it had when the decree was fully implemented. As noted, these independent directors would also comprise a smaller proportion of the Tesla Board either prior to or after the settlement came into effect.

Given the plethora of public statements that the SEC has already reportedly found to be in violation of securities law and regulation, we see no reason to give Tesla, the Tesla Board, or the Disclosure Controls Committee the benefit of the doubt. Indeed, it is difficult not to connect the Board's continuing failure to comply with the control provisions under the consent decree with the steady erosion of independence on the Tesla Board. With its upcoming proxy statement, which fails to put forward any additional independent director candidates, the Board is poised to entrench a further degradation of board independence unless the SEC acts to preserve the meaning and force of the consent decrees. Instead, the SEC should inform Tesla that it should nominate at least one additional independent director to its Board to comply with the consent decree, and decline to clear the company's definitive proxy statement until it does so.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dieter Waizenegger". The signature is stylized and includes a large, sweeping flourish at the end.

Dieter Waizenegger
Executive Director

⁷ See Tesla proxy statements on Form DEF 14A for 2019 to 2022. In each year Tesla has designated all directors as independent except Kimball and Elon Musk.