Elon Musk doesn’t respect the SEC, which is still investigating Tesla



Last Sunday, *60 Minutes* — which still exists, though in a much more diminished form than its investigative heyday — did a segment on Elon Musk and Tesla. It was a mostly benign overview of Tesla’s hard year, complete with a sit-down interview between Lesley Stahl and Musk. The part that caught my attention, and evidently *everyone else’s*, were some exchanges regarding the SEC action from earlier this year that got Musk removed as chairman of Tesla’s board and required monitoring of his tweets. (Musk was also fined $20 million; Tesla was fined $20 million, too, and required to add two independent directors to the board. Those directors haven’t been announced yet.)

Anyway, Musk says in the interview that no one is approving his tweets and he hand-picked his new chairwoman, Robyn Denholm. Also: “I want to be clear, I do not respect the SEC. I do not respect them.”

Well, all right. From my point of view – that of a dilettante – this is a bad PR move and not a lot more. The lawyers I've spoken to so far *do* agree that Musk's comments don't violate the part of the settlement agreement where Musk agrees not to deny the securities fraud charges. He's allowed to make fun of the SEC, if he wants. The SEC's spokesman, Christopher Carofine, declined to comment; Tesla spokeswoman Gina Antonini didn't respond to an email requesting comment by publish time.

Besides, the deadline hasn't passed for the things the SEC demands in the settlement to be put into place; that deadline is December 28th, though the language of the settlement indicates that Tesla and Musk can ask for an extension if necessary. So even if no one is reviewing Musk's tweets *right now*, that doesn't necessarily mean no one will *ever* review them.

I know what you're about to say: "But it's Elon!" Yeah, it is: a notably mercurial guy who has at times changed his mind so quickly that it gives everyone whiplash. (For instance: the current settlement deal arrived days after it became public that Musk had rejected a better one.) It is within the realm of possibility he'll be announcing his Twitter-lawyer pick *tomorrow*, with great fanfare about the lawyer's specific love of *Neon Genesis Evangelion*, *Yuri on Ice*, and *Revolutionary Girl Utena*.

So, while Matt Levine is saying that the interview means Tesla and Musk aren't complying with the terms of the settlement – well, friends, that can always change. But I'm going to quote Levine anyway because he does say something *very* interesting about public relations:

> *One could imagine a different CEO giving a different answer: "I do personal tweets myself but run anything about the business by the lawyers, and err on the side of caution," say, or "I like to think that after years of service as a public-company CEO I know what is and isn't material to the*

stock price." Musk did not give those answers!

Musk's answers matter as PR snafus, and not just in the context of the SEC settlement, because you may recall that the SEC still has an open, separate investigation into Musk and Tesla when it comes to Model 3 production, and it's issued some, you know, *subpoenas*. To be clear, I have asked a number of lawyers a number of questions about what the subpoenas in that case mean, and I've gotten a different answer from every single one.

For instance: Tesla may be complying *perfectly* with the investigation, but the SEC may still need subpoenas for certain kinds of records, says Jay Dubrow, a former SEC enforcement division branch chief, who's now a partner in the White Collar Litigation and Investigations Practice Group and co-chair of the Securities and Financial Services Enforcement Group at Pepper Hamilton LLP. Last month, former SEC commissioner Harvey Pitt, the CEO of Kalorama Partners, told *The Verge* that receiving subpoenas is "never a good thing."

Subpoenas mean the cops are in your shit!
Let's leave aside for now the cost and annoyance of responding to subpoenas and think about what subpoenas *mean*. They mean the cops are in your shit! Not just the money cops (SEC), but the regular FBI ones, some of whom literally hang out at the SEC all day long *because those agencies coordinate.*

The problem with having cops, money or otherwise, in your business is that inevitably someone has fucked *something* up. (Human error is one reason why people keep trying to build robot overlords.) So then there's a question of oversight, Evelyn Cruz Sroufe, a partner at Perkins Coie who specializes in corporate governance, told me in November. There's always an error, that's to be expected — but who's in charge of catching it? Was someone paying attention? Were there consequences for the error? Did something change in response?

When Denholm was appointed, Sroufe pointed out that her *existence* as chairwoman was a good thing — one that indicated that Tesla took its duty to improve governance seriously. If Denholm can act independently and not look deferential to Musk, that further strengthens Tesla's position in the ongoing investigation. Stahl asked about this: her "impression was that [Denholm] was put in to kind of watch over you," Stahl said.

"That's not realistic, in the sense that I'm the largest shareholder in the company, and I can just call for a shareholder vote and get anything done that I want," Musk replied.

The aired version of Musk's interview suggests he views Denholm's position as weak

This undercuts Denholm's authority — making her look dependent on Musk, and weakening Tesla and Musk's hand in any kind of SEC settlement action should one emerge from the Model 3 probe. The aired version of Musk's interview suggests he views Denholm's position as weak, says Stephen Diamond, an expert on corporate governance at Santa Clara University's law school, in an email.

This might be why Musk is now quibbling about the edit. Tesla fansite *Electrek* has a transcript of the interview — which I am guessing did not come from *60 Minutes* — and is saying the edit is misleading. Here's the quote *Electrek* has: "Yes…handpicked her? I asked for a chair, and the rest of the board was very supportive of that."

It's instructive to imagine what Musk could have said instead: "I hand-picked her specifically because she has different strengths than I do, and she's always told me honestly when I have a bad idea."

And on the question of Denholm's ability to watch Musk, *Electrek* quotes this:

> *I mean that's not realistic because I am the largest shareholder in the company and a very high percentage of the shareholders support me and the company. So essentially I could just call for a shareholder vote and get anything done that I want provided I could get support of at least a third of the other shareholders, which is likely. At the end of the day the shareholders control the company.*
>
> *Incorrect. "Chairman" is an honorific, not executive role, which means it's not needed to run Tesla. Will retire that title at Tesla in 3 years. 60 Mins edited out end of my sentence, where I said I could do whatever I want. They cut "provided I have the support of shareholders".*
>
> *— Elon Musk (@elonmusk)* ***December 11, 2018***

Musk tweeted Tuesday that the chairwoman position is "honorific." So I, uh, hit the Tesla bylaws to see if that is true. Here is what they say: "The chairperson of the board shall have the powers and duties customarily and usually associated with the office of the chairperson of the board. The chairperson of the board shall preside at meetings of the stockholders and of the board of directors." For Denholm that means she can call votes, set meeting agendas, and do other kinds of corporate tasks. You'd have to change the bylaws to eliminate the position — not impossible! — but not quite an honorific, either.

I don't know what will happen with the SEC probe into the Model 3. Maybe nothing! But *should* there be settlement talks on those matters, "then Musk's thumbing his nose at the SEC and possibly undermining the governance settlement could limit his and Tesla's credibility," says Diamond. "The agencies would be right to be skeptical of his intentions."

Dubow agrees: "I don't think it shows good judgement to say something like that, especially when you've got that same

agency allegedly investigating you for something else. Why would you stick your thumb in their eye?"

This might explain why Musk is now yelling at various news outlets on Twitter.

> *This is a very misleading edit. Please post the full transcript where I complete the sentence.*
>
> *— Elon Musk (@elonmusk)* ***December 11, 2018***

Yelling at reporters on Twitter is an unforced error, not least because it makes the reporters feel important. If some celebrity wants to elevate me to being their debating partner, how could I not feel flattered? I am but a mere mortal, with access to plebian skincare.

Separately from flattering reporters, though, this kind of touchy response is a bad idea because it prolongs the story. Look, if you wanted to bury your *somewhat impulsive* commentary on the SEC, you could just shut up and wait for Donald Trump to do something very stupid in public — this would take probably 12 hours at most — and let everyone drift over to pay attention to *that* instead.

If you *keep* it in the news, perhaps by complaining about the edit on the video or perhaps by insisting — wrongly! — that you can just abolish the title of Chairperson of the Board… You have created *novelty* and pushed the news story into another cycle. Regular readers will know a recurring theme of this column is "never tweet" and this is yet another place where not tweeting was the best possible move on the board.

those comments drowned out Musk's smart PR play
So from a public-relations standpoint, the SEC comments and the kerfuffle afterwards were probably a mistake. From an ongoing-probe standpoint, well, it's hard to say without knowing the specifics of the probe — but they're unlikely to

help.

It’s a shame, because those comments drowned out Musk’s smart PR play: telling Stahl that Tesla could likely exist without him. A stable company can lose a brilliant CEO and continue on without trouble. If Musk is right, and Tesla *can* go on without him, he’s built Tesla into a grown-up company. SEC or not, that’s a notable achievement.

But while we’re talking about the SEC, I’d just like to say: we are about to get two brand-new independent board members mandated by the settlement. Aren’t you just *dying* to know who they are?

With reporting by Sean O’Kane and Andrew J. Hawkins

https://www.theverge.com/2018/12/14/18139544/elon-musk-60-minutes-tesla-sec-investigation-fine