

July 17, 2023

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Dear Chair Gensler,

I am writing to request an investigation into Tesla, Inc., and the company's U.S. Securities and Exchange Commission (SEC) disclosures regarding the actions of its Board of Directors (the "Board") in managing the apparent conflicts of its Chief Executive Officer, Elon Musk. Mr. Musk's actions since purchasing Twitter and becoming its Chief Executive Officer (CEO) – while remaining Tesla's CEO – have raised concerns about conflicts of interest, misappropriation of corporate assets, and other negative impacts to Tesla shareholders. Despite recent and repeated calls from investors to address these actions, the Board appears to have failed to uphold its legal duty to ensure that Mr. Musk act in the best interest of Tesla. The Board also does not appear to have adequately disclosed concerns about these issues to investors, undermining shareholders' ability to make informed voting and investing decisions and to hold their fiduciaries accountable. The Board's inaction and inadequate disclosures, and the close relationships of several Board members to Mr. Musk, raise questions about the effectiveness of their corporate governance and potential violations of securities laws.

Though Mr. Musk recently announced the hiring of Linda Yaccarino as the new CEO of Twitter, this does little to address the concerns to Tesla and its shareholders related to his dual role. Despite hiring Ms. Yaccarino, he is likely to retain "significant control" over the company¹ and intends to continue overseeing core functions of the business.² Given the concerns about the actions by Mr. Musk and the Board, I ask that the SEC conduct a review to determine if they have complied with relevant securities laws.

¹ CNN Business, "Elon Musk says he's found a new CEO for Twitter," Clare Duffy, May 12, 2023, <https://www.cnn.com/2023/05/11/tech/elon-musk-twitter-ceo/index.html>.

² Tweet from Elon Musk, May 11, 2023, <https://twitter.com/elonmusk/status/1656748197308674048>; Tweet from Elon Musk, May 12, 2023, <https://twitter.com/elonmusk/status/1657050349608501249>.

The Tesla Board's Failure to Address Concerns about Mr. Musk's Actions after His Purchase of Twitter

Mr. Musk first announced his intention to purchase Twitter in April 2022 and completed the deal in October of that year, appointing himself as CEO.³ In December 2022, in a letter⁴ to Tesla's Chair of the Board of Directors, Dr. Robyn Denholm, I expressed my concerns about the corporate governance issues raised by the structure of Mr. Musk's deal to buy Twitter and his actions after becoming CEO, including:

- The possible misappropriation of Tesla resources by Mr. Musk's funneling of "more than 50 of his trusted Tesla employees" to work on his Twitter takeover, including Tesla's Chief Information Officer and other senior staff.⁵ This use of Tesla employees raised obvious questions about whether Mr. Musk appropriated resources from a publicly traded firm, Tesla, to benefit his own private company, Twitter. This would potentially violate Mr. Musk's legal duty of loyalty to Tesla and trigger questions about the Board's responsibility to prevent such actions, and may also run afoul other "antitunneling" rules that aim to prevent corporate insiders from extracting resources from their firms.⁶
- Inevitable conflicts of interest arising from, for example, Twitter's reliance on advertising revenue from automobile companies that are in direct competition with Tesla, including Audi, Chevrolet, Ford, GM, Jeep, and Volkswagen.⁷ As the owner of Twitter, Mr. Musk could decide to run the company to maximize badly-needed revenue, even if that includes great deals for Tesla's competitors and potential injury to Tesla. Alternatively, Mr. Musk could run Twitter to benefit Tesla through favorable algorithms or free advertising. These concerns have only grown since Tesla recently announced its intention to begin

³ Reuters, "Explainer: How Elon Musk funded the \$44 billion Twitter deal," Hyunjoon Jin and Chibuike Oguh, October 28, 2022, <https://www.reuters.com/markets/us/how-will-elon-musk-pay-twitter-2022-10-07/>; CNBC, "Elon Musk now in charge of Twitter, CEO and CFO have left, sources say," David Faber and Jonathan Vania, October 27, 2022, <https://www.cnbc.com/2022/10/27/elon-musk-now-in-charge-of-twitter-ceo-and-cfo-have-left-sources-say.html>.

⁴ Letter from Senator Elizabeth Warren to Tesla Chairman of the Board Dr. Robyn Denholm, December 18, 2022, <https://www.warren.senate.gov/oversight/letters/senator-warren-questions-tesla-board-chairman-on-conflicts-of-interest-with-elon-musks-takeover-of-twitter>.

⁵ NBC News, "Elon Musk has pulled more than 50 Tesla employees into his Twitter takeover," Lora Kolodny, October 31, 2022, <https://www.nbcnews.com/tech/tech-news/elon-musk-pulled-50-tesla-employees-twitbertakeover-rcna54946>; CNBC, "SpaceX, Tesla, and Boring Company execs are helping Elon Musk at Twitter, records reveal," Lora Kolodny, December 8, 2022, <https://www.cnbc.com/2022/12/08/spacex-tesla-and-boring-companyexecs-helping-musk-at-twitter.html>.

⁶ See, e.g., Atanasov, Vladimir & Black, Bernard & Ciccotello, Conrad. (2011). Law and Tunneling. Journal of Corporation Law. 37, https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id1444414.pdf.

⁷ Business Insider, "Tesla competitor GM will reportedly temporarily suspend advertising on Twitter after Elon Musk's takeover," Samantha Delouya, October 28, 2022, <https://www.businessinsider.com/tesla-competitor-general-motors-suspends-twitter-advertising-elon-musk-takeover-2022-10>; Wall Street Journal, "General Mills, Audi and Pfizer Join Growing List of Companies Pausing Twitter Ads," Suzanne Vranica and Patience Haggin, November 3, 2022, <https://www.wsj.com/articles/general-mills-audi-and-pfizer-join-growing-list-of-companies-pausing-twitter-ads-11667507765>; Media Matters, "In less than a month, Elon Musk has driven away half of Twitter's top 100 advertisers," Sharon Kann and Angela Carusone, November 22, 2022, <https://www.mediamatters.org/elon-musk/less-month-elon-musk-has-driven-away-half-twitters-top-100-advertisers>.

advertising, choosing to release its first ever ad through Twitter.⁸

- Possible violations of state and federal labor law in Mr. Musk’s appropriation of Tesla employees. It is unclear whether Tesla employees were invited to work for Twitter or – either implicitly or explicitly – forced to do so and whether their existing employment contracts were respected. It is also unclear whether any Tesla employees refused to make the transition and whether their position was threatened or if they were fired. Despite Mr. Musk facing multiple lawsuits for illegally firing Twitter employees,⁹ Tesla’s Board has not announced any investigation into Mr. Musk’s treatment of Tesla employees, potentially shirking its duty to prevent the company from breaking the law.¹⁰

In this same letter, I posed a series of questions to the Board to determine if it was properly addressing the corporate governance concerns posed by Mr. Musk’s dual CEO roles at Tesla and Twitter. To date, the Board has refused to provide answers to these important questions.

New Concerns about Mr. Musk’s Dual Roles

Concerns about Mr. Musk’s actions as Tesla CEO have only increased in recent months. In April 2023, a group of 17 major Tesla investors wrote an open letter to Tesla’s Board expressing concern “that the Board of Directors is failing to adequately represent the interests of Tesla’s shareholders.”¹¹ The letter notes that Mr. Musk “appears to be distracted or overly focused on other ventures” and the Board’s “meager oversight” over his behavior is “jeopardizing [Tesla’s] long-term value.”¹² Moreover, the letter notes the reported “close personal relationships” between Mr. Musk and several members of Tesla’s Board, as well as Board members’ “exceptionally high compensation,” expressing concern about the Board’s “objectivity, independence, and ability to prioritize the needs of Tesla and its shareholders.”¹³

The group asked the Board to either limit Mr. Musk’s commitments or announce a Tesla CEO succession plan, and to remove directors with close ties to Mr. Musk from the Board.¹⁴ The letter also indicates the group’s belief that Mr. Musk’s actions have meaningfully harmed shareholders: as of April 3, 2023, nearly one year after Mr. Musk first disclosed his stake in Twitter, “Tesla had lost \$582.4 billion in market capitalization.”¹⁵ Over that same period, Tesla’s reputation dropped from 12th to 62nd among the top 100 most visible brands, falling “across all nine measured

⁸ Business Insider, “Elon Musk said Tesla would finally advertise. It just dropped a video on Twitter — is this its first commercial?” Grace Kay, May 22, 2023, <https://www.businessinsider.com/watch-tesla-elon-musk-first-ever-electric-car-ad-2023-5>.

⁹ CNN Business, “Former employees suing Twitter speak out on Elon Musk’s ‘clumsy and inhumane’ layoffs,” Clare Duffy, December 8, 2022, <https://www.cnn.com/2022/12/08/tech/twitter-employees-lawsuits-elon-musk/index.html>.

¹⁰ See, e.g., American Bar Association, Jeremy S. Piccini, “Director Liability, The Duty of Oversight, and the Need to Investigate,” April 30, 2011.

¹¹ Letter from Tesla Investors to Tesla Directors Robyn M. Denholm and Ira Ehrenpreis, <https://static1.squarespace.com/static/5d374de8aae9940001c8ed59/t/644298578c858b5963c7a411/1682085975961/TSLA+23+Board+letter+FINAL.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

attributes, with the biggest declines in the categories of character, trust, culture and ethics.”¹⁶ The Board has not released a public response to this investor letter.

On May 11, 2023, Mr. Musk stated that Twitter had hired a new CEO and that Mr. Musk’s role “will transition to being exec chair & CTO, overseeing product, software & sysops.”¹⁷ The next day, Mr. Musk announced Linda Yaccarino as the new CEO of Twitter. But this announcement does little to address the concerns of Mr. Musk’s dual role. According to Mr. Musk, Ms. Yaccarino “will focus primarily on business operations, while I focus on product design & new technology.”¹⁸ As one former Twitter board member put it, Mr. Musk will be “running product and technology for a 100% software company,” leaving little responsibility for the CEO except maybe “not paying the vendors.”¹⁹ And should Mr. Musk change his mind about stepping down as CEO, there is nothing to stop him from firing Ms. Yaccarino and returning to the helm – because Twitter lacks a board of directors, so long as Mr. Musk retains majority ownership of the private company, he will remain “a dominant force.”²⁰

The Role of Tesla’s Board and Potential Violations of Securities Laws

Unlike Twitter, Tesla is a public company listed on the Nasdaq Stock Exchange.²¹ As such, it must have an independent board of directors whose role it is to “act on behalf of investors to maximize shareholder value ... and guard against conflicts of interest.”²² But despite repeated calls to address the risks posed by Mr. Musk’s conflicting dual roles at Tesla and Twitter and his actions since acquiring Twitter, the Tesla Board has taken no apparent action to address concerns related to Mr. Musk and protect its shareholders. Whether the Tesla Board is upholding its fiduciary duty to shareholders is largely a question of state law. But for investors to enforce their rights under state law, they need full and fair disclosure of the relevant facts. The Board’s apparent lack of independence, combined with its inaction and incomplete disclosures, raise questions about possible violations of securities laws and exchange rules which fall under SEC’s jurisdiction.

1. Potential Violations of Nasdaq Listing Rules

The SEC may open investigations to determine if any person or company has violated “the rules of a national securities exchange,”²³ including Nasdaq. The SEC may bring action for violations of these rules if doing so is “necessary or appropriate in the public interest or for the protection of

¹⁶ Axios, “Tesla’s reputation slumps as GM, Ford climb,” Joann Muller, May 24, 2023, <https://www.axios.com/2023/05/24/tesla-reputation>.

¹⁷ Tweet from Elon Musk, May 11, 2023, <https://twitter.com/elonmusk/status/1656748197308674048>.

¹⁸ Tweet from Elon Musk, May 12, 2023, <https://twitter.com/elonmusk/status/1657050349608501249>.

¹⁹ Vox, “Who is Linda Yaccarino, Elon Musk’s pick for new Twitter CEO?” Shirin Ghaffary, May 12, 2023, <https://www.vox.com/technology/2023/5/11/23720327/elon-musk-new-twitter-ceo-linda-yaccarino>.

²⁰ ABC News, “Does Elon Musk’s resignation from Twitter mean he’ll give up control? Experts weigh in,” Max Zahn, December 22, 2022, <https://abcnews.go.com/Business/elon-musks-resignation-twitter-hell-give-control-experts/story?id=95649617>.

²¹ Nasdaq, “Tesla, Inc. Common Stock,” <https://www.nasdaq.com/market-activity/stocks/tsla>.

²² Nasdaq Marketplace Rule [hereinafter Nasdaq Rule] IM-4350-4.

²³ 15 U.S.C. 78u(a)(1).

investors.”²⁴ Nasdaq rules require that a “majority of the board of directors must be comprised of Independent Directors,”²⁵ meaning they must not be people who have a relationship which, “in the opinion of the Company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.”²⁶ This important requirement exists so that shareholders can “have confidence that individuals serving as Independent Directors do not have a relationship with the listed Company that would impair their independence.”²⁷ According to Nasdaq guidance, this obligation also gives the Tesla Board the “responsibility to make an affirmative determination that no such relationships exist.”²⁸

The composition of Tesla’s eight-person Board²⁹ raises concerns about whether it is in violation of the majority independent director requirement. As the founder and CEO of Tesla, Mr. Musk exercises significant control over the day-to-day management of the company, describing himself as a “nano-manager” who “can’t find people to delegate to,” most recently instituting a policy requiring that all Tesla hires be personally approved by him.³⁰ As discussed above, Mr. Musk has regularly used Tesla resources for his other ventures, including SpaceX and Twitter, and may even be a controlling shareholder of Tesla.³¹ Tesla’s own 10-K filings admit the company is “highly dependent” on Mr. Musk and that he “spends significant time with Tesla and is highly active in [its] management.”³² Mr. Musk has stated he “handpick[ed]” Tesla’s Chair Robyn Denholm and bragged that he “can just call for a shareholder vote and get anything done that [he] want[s].”³³ Given Mr. Musk’s control over Tesla, any close relationship between a Board member and Mr. Musk might constitute a “relationship with the listed Company that would impair [the member’s] independence.”³⁴

Members of the Board with known ties to Mr. Musk or Tesla include Mr. Musk himself; Mr. Musk’s brother, Kimball Musk; Ira Ehrenpreis, a “longtime friend” of Mr. Musk who helped design his record-breaking compensation package and explored limiting the disclosure of its details to investors;³⁵ James Murdoch, Mr. Musk’s friend of almost 20 years who vacations with

²⁴ 15 U.S.C. 78u(f).

²⁵ Nasdaq Rule 5605(b)(1).

²⁶ Nasdaq Rule 5605(a)(2).

²⁷ Nasdaq Rule IM-5605.

²⁸ *Id.*

²⁹ Tesla Inc., “Corporate Governance,” <https://ir.tesla.com/corporate>.

³⁰ Business Insider, “Elon Musk just told Tesla staff he wants to personally approve all new hires. Here’s a look into his management style at Twitter, Tesla, and SpaceX over the years,” Sarah Jackson, May 16, 2023, <https://www.businessinsider.com/elon-musk-management-leadership-style-at-tesla-spacex-2022-4>.

³¹ Cadwaladar, “M&A Update: Delaware Chancery Court Finds Elon Musk May Be Controlling Stockholder of Tesla Motors,” April 16, 2018, <https://www.cadwalader.com/resources/clients-friends-memos/delaware-chancery-court-finds-elon-musk-may-be-controlling-stockholder-of-tesla-motors>.

³² Tesla Inc., Form 10-K, December 31, 2022, <https://www.sec.gov/Archives/edgar/data/1318605/000095017023001409/tsla-20221231.htm>.

³³ CBS News, “Tesla CEO Elon Musk: The 60 Minutes Interview,” Lesley Stahl, December 9, 2018, <https://www.cbsnews.com/news/tesla-ceo-elon-musk-the-2018-60-minutes-interview/>.

³⁴ Nasdaq Rule IM-5605.

³⁵ Fortune, “Elon Musk’s longtime friend defends his role designing the Tesla CEO’s \$55 billion pay package: ‘He has been as hard working a CEO as there can be,’” Randall Chase, November 14, 2022, <https://fortune.com/2022/11/14/elon-musk-friend-tesla-compensation-trial-ira-ehrenpreis-55-million/>.

him;³⁶ and J.B. Straubel, a former Tesla executive whose election to the Board in May of this year was opposed by both proxy advisory firm Glass Lewis³⁷ and an investor group over concerns about Straubel's role as a "company insider."³⁸

The investor group noted that Mr. Straubel's election means "at least five of [the Board's] eight members lack independence."³⁹ Mr. Murdoch and Mr. Ehrenpreis also serve on Tesla's audit and compensation committees, respectively, both of which are generally required by Nasdaq rules to be composed of independent directors.⁴⁰ Despite repeated calls from its shareholders for independence, the Board has continued to appoint and retain members who have relationships to the company, either directly or through Mr. Musk, that may impede their independent decision-making.

These close relationships may explain the Board's persistent inability or unwillingness to address the concerns posed by Mr. Musk's actions. In a letter to Tesla in 2020, the SEC told the Board it had "abdicated the duties required of it" by failing to enforce a court-ordered policy requiring Mr. Musk's tweets be preapproved by company lawyers "despite repeated violations by Mr. Musk."⁴¹ In December of 2022, Mr. Musk sold nearly \$3.6 billion of Tesla shares less than a month before the company announced fourth-quarter vehicle deliveries were significantly below the forecasts it had provided to investors.⁴² Tesla shares plummeted by over \$50 the following day, dropping the value of the shares Mr. Musk sold by \$1.2 billion.⁴³ In an earnings call in April of this year, Mr. Musk explained that Tesla receives a "daily real-time update of how many cars were ordered yesterday, how many cars were produced yesterday;" that this data "does not have latency;" and touted that he is "not sure there's any company on Earth that has better real-time data than Tesla, except maybe SpaceX Starlink."⁴⁴ If Tesla's exceptional real-time data allowed Mr. Musk to see the shortcomings in vehicle deliveries and sell his shares before the company publicly disclosed that information to investors, that would constitute insider trading under Rule 10b5-1.⁴⁵ Yet there is no indication that the Board attempted to stop this problematic sale.

³⁶ CNN Business, "Tesla's close-knit leadership team goes under the spotlight in court," Matt McFarland, November 17, 2022, <https://www.cnn.com/2022/11/17/business/elon-musk-board-friends/index.html>.

³⁷ Reuters, "Glass Lewis recommends Tesla investor vote against board nominee JB Straubel," Hyunjoo Jin, April 23, 2023, <https://www.nasdaq.com/articles/glass-lewis-recommends-tesla-investor-vote-against-board-nominee-jb-straubel>.

³⁸ Wall Street Journal, "Tesla Investors Urge Vote Against Company's Board Nominee," Dean Seal, April 24, 2023, <https://www.wsj.com/articles/tesla-investor-urges-vote-against-companys-board-nominee-30b10d2d>.

³⁹ *Id.*

⁴⁰ Nasdaq Rule 5605(c)(2)(A); 5605(d)(2)(A).

⁴¹ Wall Street Journal, "Tesla Failed to Oversee Elon Musk's Tweets, SEC Argued in Letters," Dave Michaels and Rebecca Elliott, June 1, 2021, <https://www.wsj.com/articles/tesla-failed-to-oversee-elon-musk-s-tweets-sec-argued-in-letters-11622582765>.

⁴² Wall Street Journal, "Elon Musk Sold Tesla Shares Before Company Acknowledged Weakness," Jonathan Weil, January 20, 2023, <https://www.wsj.com/articles/elon-musk-sold-tesla-shares-before-company-acknowledged-weakness-11674177642>.

⁴³ *Id.*

⁴⁴ Wall Street Journal, "Tesla's 'Real-Time' Order Data Could Shed Light on Elon Musk's Share Sales," Jonathan Weil, April 20, 2023, <https://www.wsj.com/livecoverage/stock-market-news-today-04-20-2023/card/tesla-s-real-time-order-data-could-shed-light-on-elon-musk-s-share-sales-lr8UXbCUZbv3ceaMJM4>.

⁴⁵ 17 CFR 240.10b5-1 ("The "manipulative or deceptive device[s] or contrivance[s]" prohibited by Section 10(b) of [the Exchange Act and Rule 10b-5] include, among other things, the purchase or sale of a security of any issuer, on

This pattern of inaction and the Board members' conflicts of interest call into question whether it is truly majority independent, as required by Nasdaq rules. The SEC should determine whether the Board is in fact independent, and if not, take whatever action is necessary to protect Tesla investors and the public.

2. Potential Violations of SEC Disclosure Requirements Regarding Board Independence

The Board's ties to Mr. Musk and Tesla also raise questions about its compliance with disclosure requirements about director independence. Regulation S-K governs how companies should disclose the non-financial statement portions of registration statements, periodic reports, and other filings under the *Securities Act of 1933* and the *Securities Exchange Act of 1934*.⁴⁶ Item 407 of that regulation requires that a company identify each director who is independent according to the relevant stock exchange standards.⁴⁷ For each independent director, the company must disclose "any transactions, relationships or arrangements . . . that were considered by the board of directors under the applicable independence definitions in determining that the director is independent."⁴⁸ These disclosures "must be provided in such detail as is necessary to fully describe the nature of the transactions, relationships or arrangements."⁴⁹

Tesla's 14A proxy statement from April of this year states that its Board determined six of its eight directors, with the exception of Mr. Musk and his brother Kimball, to be independent.⁵⁰ In two sentences, the Board notes it considered certain members' "minority investments in certain companies or investment funds" involving other Tesla directors or with which Tesla has relationships and concluded that "none of these investments are material so as to impede the exercise of independent judgment."⁵¹ Although Item 404 of Regulation S-K only requires disclosure of "material" transactions with all directors, Item 407 requires disclosure of *any* transactions, relationships, or arrangements with independent directors.⁵² Tesla cannot avoid disclosure by claiming independent directors' transactions, relationships, and arrangements are not material.⁵³ If Tesla failed to disclose in adequate detail all such relationships between each independent director and Mr. Musk or Tesla – several of which have been identified above and do not appear to be referenced in Tesla's proxy statement – that the Board considered in determining director independence, this would amount to a violation of Item 407.

the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer . . .").

⁴⁶ 17 CFR 229.10(a).

⁴⁷ 17 CFR 229.407(a).

⁴⁸ 17 CFR 229.407(c).

⁴⁹ 17 CFR 229.407(a), Instructions to Item 407(a).

⁵⁰ Tesla, Inc., Schedule 14A Information, 2023,

https://www.sec.gov/Archives/edgar/data/1318605/000119312523094075/d451342ddef14a.htm#toc451342_6.

⁵¹ *Id.*

⁵² 17 CFR 229.407(a), Instructions to Item 407(a)(3).

⁵³ Columbia Business Law Review, "The SEC and the Courts' Cooperative Policing of Related Party Transactions," Geeyoung Min, February 1, 2015, p. 671,

<https://journals.library.columbia.edu/index.php/CBLR/article/view/1782/801>.

3. Potential Violations of SEC Rules Regarding Disclosure of Related Party Transactions

The actions of Mr. Musk and the Board since his takeover of Twitter also raise questions about whether the Board has disclosed sufficient details as required by law about related party transactions between Board members and Mr. Musk and his other ventures. As noted above, Mr. Musk used “more than 50 of his trusted Tesla employees” to work on his Twitter takeover, including Tesla’s Chief Information Officer and several senior staff.⁵⁴ It is of paramount importance to Tesla shareholders that the Board properly disclose the details of these transactions and ensure that they provide sufficient benefit to Tesla, including a calculation of the full costs – including the costs to Tesla of distracted employees – that they have incurred.

If the Board members were not aware of this use of Tesla resources, it would represent a failure of corporate oversight. If they were aware, it represents a failure to disclose information relevant to investors. Item 404 of Regulation S-K requires public companies to disclose any transactions involving the company where “the amount involved exceeds \$120,000, and in which any related person had or will have a direct or indirect material interest.”⁵⁵ The company must provide details of the transaction, including any other information “that is material to investors in light of the circumstances.”⁵⁶ Though the dollar value of Mr. Musk’s use of Tesla employees for his takeover of Twitter remains unknown, it is likely – given that it included dozens of employees – that it exceeded \$120,000. But Tesla has not clearly disclosed – or not disclosed at all – the details of these transactions in its filings with the SEC.⁵⁷ The company stated in its May 2023 proxy statement that “Twitter is party to certain commercial and support agreements with Tesla. Under these agreements, Twitter incurred expenses of approximately \$1.0 million in the aggregate in 2022 and \$0.4 million in 2023 through February.”⁵⁸ It is not clear what this disclosure refers to or what it means.

4. Potential Violations of SEC Rule 10b-5 Regarding Code of Ethics

Rule 10b-5 makes it “unlawful for any person, directly or indirectly, ... [t]o make any untrue statement of a material fact ... in connection with the purchase or sale of any security.”⁵⁹ This applies to “any information released to the public.”⁶⁰ Item 406 of Regulation S-K requires the disclosure of any code of ethics adopted by the company that applies to its CEO, which must be

⁵⁴ NBC News, “Elon Musk has pulled more than 50 Tesla employees into his Twitter takeover,” Lora Kolodny, October 31, 2022, <https://www.nbcnews.com/tech/tech-news/elon-musk-pulled-50-tesla-employees-twittertakeover-rcna54946>; CNBC, “SpaceX, Tesla, and Boring Company execs are helping Elon Musk at Twitter, records reveal,” Lora Kolodny, December 8, 2022, <https://www.cnbc.com/2022/12/08/spacex-tesla-and-boring-company-execs-helping-musk-at-twitter.html>.

⁵⁵ 17 CFR 229.404(a).

⁵⁶ 17 CFR 229.404(a)(6).

⁵⁷ Tesla, Inc., Schedule 14A Information,

<https://www.sec.gov/Archives/edgar/data/1318605/000119312523094075/d451342ddef14a.htm#toc451342> 55.

⁵⁸ *Id.*

⁵⁹ 17 CFR § 240.10b-5.


⁶⁰ U.S. Securities and Exchange Commission, “Existing Regulatory Protections Unchanged by Either H.R. 3606 or S. 1933,” <https://www.sec.gov/info/smallbus/acsec/ongoinginvestorprotections.pdf>.

posted on the company's website.⁶¹ Tesla's disclosed code of ethics requires that the CEO and all senior officials bring to the attention of the Disclosure Committee any information that "affects the disclosures made by Tesla in its public filings," and to the attention of the Audit Committee any information concerning "any actual or apparent conflicts of interest between personal and professional relationships" or "evidence of a material violation of the securities or other laws."⁶² The Board must determine "appropriate actions to be taken in the event of violations" of this code of conduct. Despite Mr. Musk's clearly documented conflicts of interest, appropriation of Tesla resources for Twitter, and possible violations of labor laws arising from his takeover of Twitter, the Tesla Board has taken no obvious action. The resulting lack of enforcement of Tesla's publicly disclosed CEO code of ethics may constitute an "untrue statement" under Rule 10b-5 about the ethics standards that Tesla has publicly promised investors to uphold.⁶³

Conclusion

Mr. Musk purchased Twitter and took the company private, and as such, he can run that company as he sees fit – consistent, of course, with relevant federal and state laws.⁶⁴ But Tesla is publicly owned, and Mr. Musk and the Board have responsibilities to shareholders and the public in their management of the company. Mr. Musk's personal wealth – and his personal relationships with Board members – do not shield him or the Tesla Board from meeting basic SEC governance and disclosure rules. The concerns about Mr. Musk's actions as Tesla CEO since his purchase of Twitter and the Board's failure to address or disclose potential risks related to them raise obvious questions about Tesla's compliance with SEC rules and regulations. I am therefore asking the SEC to open an investigation into Tesla to ensure that the actions of Mr. Musk and the Tesla Board have not violated securities laws.

Sincerely,



Elizabeth Warren
United States Senator

⁶¹ 17 CFR 229.406.

⁶² Tesla Inc., "Code of Business and Ethics," p. 16, https://tesla-cdn.thron.com/static/D4EJXC_business-code-of-ethics_UOAY2V.pdf?xseo=&response-content-disposition=inline%3Bfilename%3D%27code_of_business_and_ethics.pdf.

⁶³ 17 CFR 240.10b-5.

⁶⁴ For example, Twitter is still required to meet its long-standing series of FTC Consent agreements. Letter from Sens. Warren, Wyden, Markey, and Hirono, to Twitter Owner Elon Musk and Designated Chief Executive Officer Linda Yaccarino, June 2, 2023,

<https://www.warren.senate.gov/imo/media/doc/2023.06.02%20Letter%20to%20Twitter%20re%20FTC%20consent%20decree.pdf>.