



DIVISION OF  
CORPORATION FINANCE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

October 16, 2018

Bradley J. Bondi  
Cahill Gordon & Reindel LLP  
Eighty Pine Street  
New York, NY 10005-1702

Re: ***SEC v. Elon Musk*, Civil Action No. 1:18-cv-08865 (S.D.N.Y., Sept. 27, 2018) - Waiver of disqualification pursuant to Rule 506(d)(2)(ii) of Regulation D**

Dear Mr. Bondi:

This letter responds to your letter dated September 28, 2018 (“Waiver Letter”), written on behalf of Tesla Inc. (“Tesla”) and constituting an application for a waiver of disqualification under Rule 506(d)(2)(ii) of Regulation D under the Securities Act of 1933 (“Securities Act”). In the Waiver Letter, you requested relief from any disqualification that will arise as to Tesla under Rule 506 of Regulation D under the Securities Act as a result of the entry of a final judgment on October 16, 2018 in the United States District Court for the Southern District of New York relating to the complaint filed by the Commission on September 27, 2018 against Elon Musk (the “Musk Judgment”) in *SEC v. Elon Musk*, (Civil Action No. 1:18-cv-08865).

Based on the facts and representations in the Waiver Letter and assuming Elon Musk (“Musk”) fully complies with the Musk Judgment, we have determined that Tesla has made a showing of good cause under Rule 506(d)(2)(ii) of Regulation D that it is not necessary under the circumstances to deny it reliance on Rule 506 of Regulation D by reason of the entry of the Musk Judgment. Accordingly, the relief requested in the Waiver Letter regarding any disqualification that may arise as to Tesla under Rule 506 of Regulation D by reason of the entry of the Musk Judgment is granted on the condition that Musk fully complies with the terms of the Musk Judgment. Any different facts from those represented or Musk’s failure to comply with the terms of the Musk Judgment would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver to Tesla. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Elizabeth M. Murphy  
Associate Director  
Division of Corporation Finance

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\* ADMITTED IN DC ONLY

September 28, 2018

**VIA FEDEX & EMAIL**

Timothy B. Henseler, Esq.  
Chief, Office of Enforcement Liaison, Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: In the Matter of Tesla Motors, Inc.

Dear Mr. Henseler:

We write on behalf of Tesla Inc. (“Tesla”), in connection with the settlement and entry of final judgment as to Mr. Musk (the “Musk Judgment”) relating to *In the Matter of Tesla Motors, Inc.* As discussed in more detail below, Tesla understands that the entry of the Musk Judgment, enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 10b-5 promulgated thereunder, will disqualify Tesla from relying on exemptions from registration under Rule 506 of Regulation D, promulgated under the Securities Act of 1933 (the “Securities Act”). On behalf of Tesla, we hereby respectfully request a waiver of any disqualification of Tesla from these Rule 506 exemptions that will result from the entry of the Musk Judgment. We respectfully submit that relief from disqualification is appropriate in this case for the reasons stated below.

**BACKGROUND**

The staff of the Division of Enforcement (the “Staff”) has engaged in settlement discussions with Tesla in connection with the above-captioned matter. As a result of these discussions, Tesla

submitted the Consent of Defendant Tesla Inc. (the “Tesla Consent”), and Mr. Musk submitted the Consent of Defendant Musk (the “Musk Consent”), which the Staff presented to the United States District Court for the Southern District of New York in connection with a complaint (the “Complaint”) against Tesla related to the investigation captioned above. The Complaint alleges that on August 7, 2018, Mr. Musk made a series of statements via Twitter regarding his consideration of taking Tesla private, and that Mr. Musk made these statements recklessly because he did not have an adequate basis for his statements. The Complaint also alleges that Tesla did not have sufficient disclosure controls or procedures in place to assess whether the information Mr. Musk disseminated via his Twitter account was accurate, complete, or required to be disclosed in reports Tesla files pursuant to the Exchange Act within the time periods specified in the Commission’s rules and forms.

In the Tesla Consent, solely for the purpose of proceedings brought by or on behalf of the Commission or to which the Commission is a party, Tesla consented to the entry of a final judgment permanently restraining and enjoining it from violations of Rule 13a-15, promulgated under Section 13(a) of the Exchange Act [17 C.F.R. § 240.13a-15], without admitting or denying the assertions contained therein (other than those relating to the jurisdiction of the Commission, which are admitted). Pursuant to the Musk Consent, solely for the purpose of proceedings brought by or on behalf of the Commission or to which the Commission is a party, Mr. Musk consented to the entry of a final judgment permanently restraining and enjoining him from violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], without admitting or denying the assertions contained therein (other than those relating to the jurisdiction of the Commission, which are admitted). The entry of the Musk Judgment renders Mr. Musk disqualified under Rule 506(d)(1)(ii)(A) [CFR 230.506(d)(1)(ii)(A)], from relying on exemptions from registration under Rule 506 of Regulation D, and also a covered person under Rule 506(d)(1) [CFR 230.506(d)(1)],<sup>1</sup> which will, by extension, disqualify Tesla from relying on these Regulation D exemptions.

Tesla is a publicly traded company with its common stock listed on the New York Stock Exchange and is a reporting company under the Exchange Act.

## DISCUSSION

Tesla has never needed to seek, nor has it ever sought, a Regulation D waiver. Tesla understands that, absent a waiver, the entry of the Musk Judgment will disqualify Tesla and certain other issuers from relying on certain exemptions under Rule 506 of Regulation D, promulgated under the Securities Act. The Commission may waive these Regulation D disqualifications with respect to Tesla upon a showing of good cause that it is not necessary under the circumstances that the exemptions be denied. Based on the factors set forth by the Division of Corporation Finance for

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<sup>1</sup> Mr. Musk is a “covered person” under Rule 506(d)(1) because (1) as CEO, he is an executive officer of Tesla and (2) he is the beneficial owner of 20% or more of Tesla’s outstanding voting equity securities.

considering waiver requests<sup>2</sup> and the facts and circumstances set forth below, Tesla requests that the Commission waive any disqualifying effects that the Musk Judgment will have on Tesla under Regulation D.

*1. The Alleged Misconduct Did Not Involve the Offer and Sale of Securities*

The conduct set forth in the Complaint does not relate to the offer or sale of securities as neither Tesla nor Mr. Musk offered or sold any securities during August 2018.

*2. Tesla Is Not Subject to the Higher Burden to Show Good Cause in This Case*

The Division of Corporation Finance's statement on waivers states that it will "consider whether the conduct involved a criminal conviction or scienter based violation, as opposed to a civil or administrative non-scienter based violation. Where there is a criminal conviction or a scienter based violation involving the offer and sale of securities, the burden on the party seeking the waiver to show good cause that a waiver is justified would be significantly greater."<sup>3</sup> Notwithstanding the fact that the Complaint alleges scienter-based violations with respect to Mr. Musk, because the misconduct did not involve the offer or sale of securities, Tesla is not subject to the higher burden to show good cause in this case. Further, the Complaint relates only to civil causes of action. The Complaint has charged Tesla only with a non scienter-based violation under Rule 13a-15, and no criminal charges were filed against Tesla or any of its directors, officers, or other employees. As mentioned above, neither Tesla nor Mr. Musk admits nor denies the allegations in the Complaint (other than those relating to the jurisdiction of the Commission, which are admitted).

*3. Responsibility for the Conduct*

With respect to who was responsible for the misconduct, the Division of Corporation Finance has stated that it also would consider, among other factors, whether (1) "the misconduct reflects more broadly on the entity as a whole" or (2) "the tone at the top of the party seeking the waiver condoned, encouraged or did not address the misconduct, or actions or omissions by the party seeking the waiver, or any of its affiliates, obstructed the regulatory or law enforcement investigation."<sup>4</sup>

The misconduct at issue does not reflect broadly on Tesla. To the contrary, we believe the misconduct at issue involved statements made by Mr. Musk in his personal capacity as a potential bidder, and not on behalf of Tesla. We believe that Tesla addressed the alleged misconduct promptly. After learning of Mr. Musk's August 7, 2018 tweets, Tesla worked with internal counsel, external counsel and Mr. Musk to publish additional information and issued its own statement within

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<sup>2</sup> See Division of Corporation Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D (Mar. 13, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

days of Mr. Musk's original tweet.<sup>5</sup> In addition, certain independent members of Tesla's Board of Directors issued a statement on August 8, 2018 to provide additional details regarding Mr. Musk's tweets.

4. *Duration of the Conduct*

The Complaint limits the duration of the conduct to August 2018.

5. *Enhancements to Governance and Disclosure Controls*

The Division of Corporation Finance's statement on waivers states that it would look at (1) "whether there were changes in the control of the party seeking the waiver or if the personnel involved in the misconduct remain employed by the party seeking the waiver" and (2) "whether the party seeking the waiver has taken steps to improve training or has made improvements to its policies, procedures or practices."<sup>6</sup> Many steps will be taken, pursuant to the resolution in this case, to satisfy both elements.<sup>7</sup> First, while Mr. Musk remains CEO of Tesla, Mr. Musk will step down as Chairman of Tesla's Board of Directors for a minimum of three years.

Second, Tesla has undertaken, or has agreed to undertake, additional enhancements to its governance and disclosure controls to address the conduct alleged in the Complaint. These enhancements include the creation of a new, permanent committee of Tesla's Board of Directors, consisting of independent directors only. This Committee will provide an additional check on the procedures and processes for overseeing Mr. Musk's Tesla-related public statements. Tesla also has agreed to implement additional oversight of public statements of Mr. Musk. Furthermore, Tesla will add another experienced securities lawyer to its legal department (or designate an experienced securities lawyer from within the Tesla's legal department), whose qualifications are not unacceptable to the staff, to undertake an enhanced review of communications made through Twitter and other social media by the Tesla's senior officers. Tesla also will add two independent directors to its Board of Directors. Tesla believes that these undertakings, directly related to the misconduct at issue, will strengthen Tesla's disclosure controls and procedures, prevent a recurrence of the alleged misconduct and mitigate the possibility of future violations.

6. *Failure to Grant Waiver Relief May Cause Hardship to Tesla and Its Shareholders*

If Tesla is disqualified from relying on the exemptions under Regulation D, it could have a potential and material adverse impact on third parties, namely innocent Tesla shareholders. Tesla

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<sup>5</sup> See Tesla, Inc., Form 8-K (Aug. 14, 2018), available at <http://ir.tesla.com/static-files/8b0b5a34-d5e4-47bd-b6b6-b58a6677088d>.

<sup>6</sup> See Division of Corporation Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D (Mar. 13, 2015).

<sup>7</sup> Please see the Consent Judgment with respect to Tesla for a complete discussion of enhancements to governance and disclosure controls that have been or will be implemented by Tesla.

has issued hundreds of millions of dollars of securities under Regulation D and likely will consider relying on Regulation D for further issuances of securities in the future.

Tesla is a fast-growing technology and manufacturing company focused on producing and selling both electric vehicles and energy products. The design, manufacture, sale, installation and/or servicing of automobiles, energy storage products and solar products is a capital intensive business. Tesla needs sufficient capital to fund its ongoing operations and future expansions, for example: ramping vehicle production, continuing research and development projects, establishing sales, delivery and service centers, building and deploying Superchargers, expanding Gigafactory 1, ramping production at Gigafactory 2, building Gigafactory 3 and making the investments in tooling and manufacturing capital required to introduce new vehicles, energy storage products and solar products. Tesla may need to raise capital (or refinance existing indebtedness) for these operations and expansions, including through private securities offerings and/or the use of stock as consideration for strategic acquisitions, in reliance on Regulation D. If Tesla cannot raise additional funds or consummate refinancing through such means in reliance on Regulation D, Tesla's operations and prospects could be negatively affected.

On several occasions, Tesla has relied on Regulation D for its financing activities. In 2010, concurrently with and following its initial public offering, Tesla raised \$50 million from Toyota in a sale of common equity and \$30 million from Panasonic in a sale of common equity, both in reliance on Regulation D. In 2011, Tesla raised \$59 million in reliance on Regulation D through offerings to Elon Musk and a Daimler affiliate. In 2013, Tesla relied again on Regulation D to raise \$55 million from Elon Musk. Tesla also relied on Regulation D several times in offerings conducted prior to its initial public offering in 2010, such as its Series B through Series F financings consummated between February 2005 and August 2009, as indicated in Forms D filed with the Commission and available on EDGAR. In the past, Tesla also has contemplated and discussed additional offerings to sell large amounts of securities to sophisticated investors, which, if realized, likely would have been structured in reliance on Regulation D.

Moving forward, Tesla likely will consider relying on Regulation D to issue securities for financing and other strategic purposes. For example, Tesla may conduct private placements of equity securities with specific investors who seek to take large positions in Tesla's equity, and would likely structure such investments as securities offerings in reliance on Regulation D as Tesla previously had done with Toyota and Panasonic. Tesla has a large amount of convertible securities outstanding, including approximately \$920 million due in March 2019, and it may choose to refinance or otherwise settle such notes using issuances of securities in reliance on Regulation D. Additionally, Tesla may choose to acquire or invest in other companies by offering securities in reliance on Regulation D. As Tesla's needs and operational plans change quickly, the additional flexibility and expediency afforded by Regulation D, including the allowance of general solicitation and advertising and certain preemptive effects on state securities laws, is valuable in allowing Tesla to obtain capital to quickly grow its business. Furthermore, the availability of a safe harbor from registration allows Tesla to take quick and decisive action for the benefit of its shareholders.

Additionally, the Complaint does not allege that Tesla, its officers or directors, or its shareholders received any benefit from the alleged misconduct described therein. The vast majority of Tesla's shares are owned by public shareholders—institutional and retail investors alike who were uninvolved in the misconduct alleged in the SEC's Complaint. Declining to issue a waiver could harm innocent shareholders who did not benefit from the alleged misconduct, which is not consistent with the SEC's mission to protect shareholders.

### CONCLUSION

For the reasons stated above, Tesla respectfully requests that the Commission (or the Division of Corporation Finance pursuant to delegated authority) waive, effective as of the date of entry of the Musk Judgment, any disqualification under Regulation D with regard to Tesla arising as a result of such entry.

Please let us know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Bradley J. Bondi". The signature is written in a cursive, flowing style.

Bradley J. Bondi