

Confirmed, Undisclosed SEC Investigation

New Data Reveals the SEC Was Already Investigating Tesla Before Any News Surfaced about an Autopilot-Related Crash

If we alert you to existence of an undisclosed SEC probe, that means we filed a Freedom of Information Act (FOIA) request with the SEC on the company in question and have a response, in black-and-white, on government letterhead that supports our statement. Other interpretative guidance and disclosures appear below.

Analyst Summary: Through clever language and careful omission, we think Tesla is misleading investors about SEC investigative risk. On Monday, the Wall Street Journal [broke a story claiming the SEC was investigating Tesla's disclosure practices](#). The company promptly issued a widely-reported denial, leaving investors to wonder. Doesn't matter. Tesla's denial was too narrow; deliberately we say, and does not cover our newest data.

We now know, with certainty, that as of 06-Jul-2016, Tesla was involved in an undisclosed SEC investigation that was on-going at the time. It was and remains undisclosed. Further, and this is important, we received an earlier response from the SEC dated 27-Jun-2016, that makes it clear there was *already* an SEC investigation of Tesla *before* 30-Jun-2016, the day the company first disclosed news of a recent crash of one of its cars. That means the SEC was investigating something else, something unrelated to the disclosures of the crash. With the cleverly narrow language we saw coming from the company earlier this week, this is the SEC probe Tesla avoided speaking to. We explain in this report.

The best way forward is for Tesla to answer this very simple question: What contact has Tesla had with the SEC's Division of Enforcement in the past two years regarding *any* matter? Monday's denial did not answer that question. It only spoke to the issues raised in the Journal story. It's time Tesla gives investors a more complete answer regarding its interactions with the SEC.

Facts of Interest or Concern: Monday, the Wall Street Journal published a story claiming the SEC was investigating Tesla's disclosure practices regarding a

recent Autopilot-related crash. As the story gained traction, the company issued the following denial, which was widely reported in the media: "Tesla has not received any communication from the SEC *regarding this issue*. Our blog post last week provided the relevant information *about this issue*." [Emphasis added to draw attention to the narrowness of this denial as it speaks only to a sole "issue", on which we comment below]

For our part, in a letter dated 27-Jun-2016, we received information from the SEC suggesting Tesla Motors was involved in unspecified SEC investigative activity that was undisclosed at the time. We filed an appeal, and now, in a letter dated 06-Jul-2016, the SEC confirmed this company's involvement in on-going enforcement proceedings (excerpt below). No clear disclosure of SEC investigative activity was found in a search of Tesla Motors filings dating back to Oct-2012.

Here is a timeline of notable recent history –

07-May-2016: Tesla vehicle on Autopilot involved in fatal crash in Florida that would ultimately not be disclosed until 30-Jun-2016.

16-May-2016: This is the date Tesla claims it told the National Highway Traffic Safety Administration (NHTSA) about the accident. According to the company, "When Tesla told NHTSA about the accident on May 16th, we had barely started our investigation."¹

17-May-2016: In a routine update to our database, Probes Reporter filed Freedom of Information Act (FOIA)

¹ Tesla stated this in a blog posting of 06-Jul-2016

request on Tesla. We had no awareness of any accident at this time.

21-Jun-2016: [Tesla Makes Offer to Acquire SolarCity](#)

This transaction was widely criticized over concerns related to governance and/or potential conflicts of interest.

27-Jun-2016: In a letter dated 27-Jun-2016, the SEC cited the "law enforcement exemption" of the FOIA as basis to block our access to the detailed records we sought on Tesla Motors, Inc. As a matter of law, the SEC is acknowledging some sort of investigative activity. We filed an appeal to challenge this.

30-Jun-2016: For the first time, Tesla discloses the accident that occurred on 07-May-2016. [Tesla announced](#), "We learned yesterday evening that NHTSA is opening a preliminary evaluation into the performance of Autopilot during a recent fatal crash that occurred in a Model S." This same announcement states, "Tesla informed NHTSA about the incident immediately after it occurred." (We note Tesla's version of 'immediately' allows for an accident that occurred on 07-May-2016 to not be reported until nine days later, on 16-May-2016.)

In the days following this announcement, Tesla came under criticism from investors upset the company did not disclose the accident sooner.

06-Jul-2016: In an SEC letter dated 06-Jul-2016, the SEC denied our appeal citing confirmation of Tesla's involvement in on-going enforcement proceedings (excerpt below). This remains undisclosed as of today

Our Take: Because of the timing of SEC responses to us, we think Tesla could easily be under investigation for matters related to governance, potential conflicts of interest, and/or proposed or past transactions of Elon Musk's public companies. The SEC could even be investigating the pending SolarCity deal. We wrote on related matters before (See our report of 27-Jun-2016, [Tesla/SolarCity: Governance Conflicts, Disclosure Shortcomings](#).)

Keep in mind the SEC also could be investigating something unrelated to the SolarCity deal. For that matter, the SEC probe may pertain to something investors might not even care about.

But couldn't the SEC have been investigating the car crash at the time it gave us its response of 27-Jun-2016?

Probably not. According to the company, the NHTSA had not even opened its "preliminary evaluation" of Autopilot until 29-Jun-2016. By then we already had in hand the SEC response of 27-Jun-2016. While the company had contacted the NHTSA earlier, on 16-May-2016, we strongly doubt the SEC was contacted by that agency about Tesla's crash. There would be no reason to. This tells us the SEC was already investigating something unrelated to the car crash by the time that news came out on 30-Jun-2016.

Tesla's cleverly narrow response to the Wall Street Journal story Again, after Monday's Wall Street Journal story broke, a company spokesperson was widely reported to say, "Tesla has not received any communication from the SEC regarding *this issue*." Our blog post last week provided the relevant information about *this issue*."

Apparently, "this issue" is company disclosures related to the crash. The Journal claimed this was the basis of a new SEC probe of Tesla. But read that denial again and you will see that Tesla's denial does not rule out communication from the SEC regarding issues unrelated to the crash. The company could have said it had no communication with the SEC whatsoever regarding any investigation, but they didn't. That's because they can't.

Dodgy statements from Tesla regarding SEC investigative activity are not new to us. In the past a Tesla representative called our work "rumor and speculation" as a way to avoid speaking directly to it. This is despite the fact that every single time we report on a company's involvement in an undisclosed SEC probe, like today, we can back it up with a response from the SEC – in black & white on government letterhead.

There is no rumor. The confirmation of an on-going SEC probe of Tesla is not speculation. It's time Tesla speaks to this directly.

Documents of Interest: In addition, in its letter of 27-Jun-2016, the SEC said it was denying the public's access to 13 pages of records on a now-closed, but undisclosed investigation. In an earlier letter, on 03-Mar-2016, the SEC had similarly informed us it was denying the public's access to 18 pages of records on an investigation that ended 16-Dec-2013. A single-paged Case Closing report was released but, as usual, is not meaningful.

Excerpt from SEC letter of 06-Jul-2016, confirming on-going enforcement proceedings appears next page.



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

Stop 9612

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Probes Reporter
P.O. Box 47331
Plymouth, MN 55447

Re: Appeal, Freedom of Information Act (FOIA) Request No. 16-03973-T, designated on appeal as No. 16-00516-APPS

Dear

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer's denial of your May 17, 2016 FOIA request for certain investigative records concerning Tesla Motors, Inc., obtained or generated by the Commission since May 16, 2014. By letter dated June 27, 2016, the FOIA Officer denied your request pursuant to FOIA Exemption 7(A). By letter dated July 1, 2016, you filed the subject FOIA appeal in which you challenge the FOIA Officer's invocation of Exemption 7(A).¹ I have reviewed your appeal and it is denied.

I have determined that the FOIA Officer correctly asserted Exemption 7(A).² There is a two-step test to determine whether information is protected under Exemption 7(A): (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm.³ We have confirmed with staff that releasing the withheld information could reasonably be expected to interfere with on-going enforcement proceedings.⁴

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Notes: *The SEC did not disclose the details on investigations referenced herein. All we know is that they somehow pertain to the conduct, transactions, and/or disclosures of the companies referenced. The SEC reminds us that its assertion of the law enforcement exemption should not be construed as an indication by the Commission or its staff that any violations of law have occurred with respect to any person, entity, or security. New SEC investigative activity could theoretically begin or end after the date covered by this latest information which would not be reflected here.*

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