

### Independent Investment Research Focused on Public Company Interactions with the SEC.

#### Confirmed, Undisclosed SEC Investigation

#### SEC Investigated & Reviewed Twitter's User Metrics Many Times, Most Recently in 2020-2021



**Confirmed Update.** Undisclosed SEC investigation again confirmed at Twitter. *Maintained on Watch List.*

**In response to a few tweets we saw:** The SEC already investigated and reviewed Twitter's user metrics – many times, most recently in 2020-2021. Twitter kept investors in the dark on this, as well as any ongoing SEC investigation(s). A credible due diligence effort would have easily found this activity. A lot going on here, right?

- The first Freedom of Information Act (FOIA) response indicating the latest SEC investigation of Twitter was dated 13-May-2019. On-going enforcement proceedings now confirmed on appeal four times since, most recently on 15-Mar-2022.\*\*

Investors will likely find a recently confirmed SEC investigation of Twitter more interesting now that Elon Musk is on the scene. We know it's not because of him.

**The Big Question:** What is the undisclosed SEC investigation about that we've been tracking at Twitter since May-2019? Is there just one investigation? Twitter management needs to speak fully and clearly to this.

- Our research back to 2014, shows Twitter has a long history of not disclosing its SEC investigations. In addition to the current warning, we also know of at least six additional undisclosed SEC investigations of Twitter since 2014.
- Mr. Musk is making a lot of noise about bots and users. Between Dec-2015 and Apr-2021, there were three undisclosed SEC investigations involving Twitter's user metrics. The term 'bot' does not appear in any of the SEC investigative documents we obtained on Twitter or any of the SEC comment letters exchanged with Twitter in the past 10 years.

- We were tracking ongoing SEC investigative activity at Twitter long before Elon Musk took an interest in the company. Again, since May 2019, well before Mr. Musk's activities with Twitter.

Given the headlines this week, those three undisclosed SEC investigations we found involving Twitter user metrics take on greater importance. So too do the comment letters. We discuss this further in our analysis below, including where they showed up in SEC comment letters

**The Wild Card.** How will Elon Musk, a man with a contemptible record of keeping SEC investigations from his own investors, react to this information? How much, if any of it, did he or his people already know?

To be clear, none of this means Twitter did anything wrong. But stay tuned. This could get interesting fast.

– John P. Gavin, CFA

*Our analysis; full research history; notable events and disclosures; and, summary of SEC investigative records acquired appear below. **No positions in Twitter or Tesla.***



#### Service note:

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will soon be  
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*\*\* This March 2022 data point, which has a long shelf life, would have been published sooner but your dedicated analyst was out of service for most of April with a personal health matter. He is recovering nicely.*

## Disclosure Insight® – Analysis and Opinion



An undisclosed SEC investigation of Twitter, now confirmed as ongoing four times since May-2019, could easily be the new excuse Mr. Musk needs to get out of, or renegotiate, his deal to buy the company.

Three undisclosed SEC investigations since late 2015 into Twitter user metrics adds fuel to the fire.

**Think about it:** The SEC not once, not twice even – but three times – asked about Twitter’s user metrics in three different investigations since late 2015. It also raised questions about user metrics in comment letters sent to the company three times over the past 10 years.

- In the documents we could obtain on those investigations (excerpts below), we saw the SEC use the terms, **MAU (monthly average users); DAU (daily average users);** “Twitter’s calculation of its monthly users”; and, “Twitter’s Daily Average Users”.

The earliest investigation into user metrics, in Dec-2015, appears to have started and ended within the same month. Not disclosing that one seems reasonable to us.

**But we do question why the 2017 and 2020 SEC investigations involving user metrics were not disclosed.**

DAU and MAU are key performance metrics for Twitter. Investors pay attention to them. They have also been clearly, and repeatedly on the SEC’s radar. Elon Musk claims to have deep concerns about them today.

- The SEC’s Division of Corporation Finance sent comment letters to Twitter five times in the past 10 years, since 2012. These were accounting and disclosure reviews, not investigations.

In three of those reviews, the SEC asked questions related to Twitter’s MAU and DAU. They took place starting in Aug-2013, Apr-2015, and Mar-2017. The SEC letters and Twitter’s responses are posted on EDGAR for free (thanks in large part to my early FOIA work starting in the late 90’s; your recognition of, and appreciation for this is genuinely appreciated.)

- In Oct-2017, the SEC’s Division of Enforcement then sent a letter to Twitter’s legal counsel requesting documents related to Twitter’s Daily Average Users. This opens the question of whether the Mar-2017 SEC comment letter exchange resulted in a referral to Enforcement. To us, it appears it did.

**Elon Musk is no babe in the woods when it comes to keeping SEC investigations from investors.** We have not held back in criticizing Mr. Musk for the same. For an example, see our report published 14-Dec-2017, [As Elon Musk Hyped and Happy-Talked Investors and Fans, Tesla Kept Quiet About a Year-Long Formal SEC Probe into the Model 3](#). The paywall is down on this one.

But if it serves his purposes, we don’t expect Mr. Musk’s own proclivity for keeping investors in the dark on these things will stop him from exploiting another management team for not disclosing its SEC investigative activity.

The real trouble for Twitter will show up if management kept this from Musk’s team, especially if the exposure would be considered material by them. Hint: Of course they will consider it material if it helps Mr. Musk achieve his objectives regarding Twitter.

What if Team Musk knew about Twitter’s undisclosed SEC investigative activity but is prohibited from talking about it due to a non-disclosure agreement? Let’s be with that for a moment.

Okay, that’s possible. Musk’s people might already know about Twitter’s current SEC matter(s). But do they also know about the six earlier undisclosed SEC investigations we found, including the three between late 2015 and Apr-2021 into Twitter’s user metrics? That could leave a mark. If they didn’t know about the comment letters, then user metrics may just be a noisy Elon Musk distraction/excuse.

**How should you proceed?** Since we know there was at least one investigation in the recent past, we recommend those with an interest ask Twitter what contact it had with the SEC’s Division of Enforcement in the past two years. If our work shows up in a Musk tweet, don’t accept his framing of the issue as the final word on this. **Ask Twitter.**

Below is our full research history on Twitter.

## Notable Events and Disclosures

Repeated searches of Twitter’s SEC filings, back to May-2012, found no clear disclosure of SEC investigative activity.

## From the Probes Reporter Library

We filed our first Freedom of Information Act (FOIA) request on this company in **May-2014**. Investigative records we obtained from Twitter’s closed SEC investigations are summarized further down. Here is our more recent FOIA response history –

<b>13-May-2019</b>	FOIA Response with Document(s)	Two-part response: 1) <b>SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities"</b> ; and, 2) Documents released on separate, closed SEC probe(s) of this company. However, access to certain of these investigative records was denied.
29-Aug-2019	Appeal Response	<b>Existence of on-going SEC enforcement proceedings officially confirmed on appeal</b> ; Access to records remains blocked.
1-Oct-2019	FOIA Response with Document(s)	Documents released on closed SEC probe(s) of this company.
26-Mar-2020	FOIA Response	SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities."
4-Jun-2020	Appeal Response	<b>Existence of on-going SEC enforcement proceedings officially confirmed on appeal</b> ; Access to records remains blocked.
5-Jul-2020	FOIA Response with Document(s)	Documents released on closed SEC probe(s) of this company.
29-Dec-2020	FOIA Response	SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities."
26-Feb-2021	Appeal Response	<b>Existence of on-going SEC enforcement proceedings officially confirmed on appeal</b> ; Access to records remains blocked.
8-Dec-2021	FOIA Response with Document(s)	Two-part response: 1) SEC denies access to records over concern their release, "could reasonably be expected to interfere with enforcement activities"; and, 2) Documents released on separate, closed SEC probe(s) of this company. However, access to certain of these investigative records was denied.
<b>15-Mar-2022</b>	Appeal Response	Two-part appeal response: <b>Existence of on-going SEC enforcement proceedings officially confirmed on appeal</b> ; Access to those records remains blocked. Appeal to try to access certain records (previously identified) from a closed, but separate SEC probe(s) of this company was also denied on grounds they are internal SEC documents.

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## Documents Acquired by Probes Reporter Under the Freedom of Information Act

We have plenty of investigative records in our library from closed SEC investigations of this company. They are detailed below.

### Regarding the Current Warning –

If we alert you to the existence of an undisclosed SEC investigation – or any response from the SEC – that means we filed a Freedom of Information Act (FOIA) request on the company in question and have a response, in black-and-white on government letterhead, that supports our statement.

As can be seen in the table above, at least once in the past the SEC cited the "law enforcement exemption" of the FOIA as basis to deny the public's access to the detailed records we sought on this company. As a matter of law, the SEC is acknowledging some sort of investigative activity with this response.

We filed an appeal with the SEC's Office of the General Counsel to challenge that response. In response to our latest appeal(s), the date(s) of which is/are also shown in the table above, the SEC stated,

**"We have confirmed with Division of Enforcement staff that the investigation from which you seek records is still active and ongoing."**

### Documents from the Probes Reporter Document Library from SEC investigations involving Twitter –

1. **08-Dec-2021:** SEC releases 82 pages of records from an investigation that appears to have started in or around Jan-2020, and ended in Apr-2021. The investigation titled, **"In the Matter of Twitter, Inc. SF-4242"**, appeared focused on audit issues related to two key metrics the company was reporting to investors at the time; specifically, **MAU (monthly average users)**, and **DAU (daily average users)**. This investigation ended on 05-Apr-2021, with no enforcement action recommended.

**Important note:** This is the third time since late 2015 we learned of SEC investigations into Twitter's users. The other two instances are highlighted below.

The following is an excerpt from an SEC email sent to Twitter on 13-Apr-2020 --

The screenshot shows an email excerpt with two logos at the top: Probes Reporter and disclosure insight. The text is a bulleted list of requirements for an internal audit. Several parts of the text are highlighted in yellow, and the acronym 'MAU/DAU' is enclosed in a red box.

- an explanation of the issues identified by the MAU internal audit, how each was remediated and when, and how Internal Audit was able to conclude that the issues were sufficiently remediated;
- if and how the company views the controls related to the public disclosures of MAU/DAU (e.g., in the 10-K and 10-Q filings) as within the scope of management's evaluation of the effectiveness of internal controls over financial reporting (ICFR);
- what specific controls exist and how those controls are evaluated for adequacy as part of management's certifications that the company's ICFR have been appropriately designed and operating effectively; and
- how management evaluated the issues identified by the MAU internal audit to determine whether any of them constituted ICFR material weaknesses.



Relative to this same investigation, the SEC blocked our access to a 10-page Case Closing Recommendation. A 10-page Case Closing Recommendation is at the high end of those we've seen or heard about from the SEC. This piece of meta-data suggests this was a relatively complex investigation that required a large document to narrate.


*Note: A Case Closing Recommendation is the SEC's report that tells you why an investigation was opened, what work was done, and the conclusions reached. To date, the SEC almost always refuses to release its Case Closing Recommendations and similar documents, a practice for which we remain sharply critical of the agency.*

2. **04-Jul-2020:** SEC releases the same 26 pages of records it released to us in Sep-2019.
3. **26-Sep-2019:** SEC releases 26 pages of records from a 2018 investigation titled, **"In the Matter of Trading in the Securities of Twitter, Inc. (SF-4113)**. Curiously, within this same batch of documents, there were several pages from SEC investigation of "Facebook, Inc. (MSF-04124)", closed 09-Jun-2017; "Facebook, Inc. (MSF-04184)", closed 28-Feb-2018; and "Facebook, Inc., TISO (MSF-04271)", closed 21-May-2019.


Among the documents released, there was also a subpoena sent to Verizon for certain phone/text data. We suspect this was a trading-related investigation involving both Twitter and Facebook shares. **We are not counting this among the undisclosed SEC investigations of Twitter.**

4. **13-May-2019:** SEC releases 42 pages of records from a **2017-2018 investigation** titled, **"In the Matter of Twitter, Inc. (MSF-04174)"**, that included a focus on the metric **"Twitter's Daily Average Users"**, covering the period Jan-2015 to the date of an SEC document request, dated 02-Oct-2017. This investigation ended on 27-Aug-2018.

**The following is an excerpt from a letter the SEC sent to Twitter's General Counsel on 07-Oct-2017.** These were the only documents Twitter was asked to produce in this letter.



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**C. Relevant Periods**


The term "Production Period" refers to the period January 1, 2015 to the present.


**D. Documents to be Produced**

Please produce the following documents for the Production Period:

1. All Documents, Communications and presentations provided to Twitter's Board of Directors Concerning Twitter's quarterly and annual results, including any discussion, presentation or analysis of **Twitter's Daily Average Users** (as that term is used in Twitter's filings with the Commission) and **percentage change in Daily Average Users**; and
2. All Documents, Communications and presentations provided to Twitter's Board of Directors Concerning **Twitter's public disclosure of Daily Average Users** (as that term is used in Twitter's filings with the Commission) and **percentage change in Daily Average Users**.

At the top of the next page you will see an excerpt from a **letter dated 15-Nov-2017, in which the SEC then asked Twitter for more information on its "MAUs", also known as "Monthly Average Users.** These were the only documents Twitter was asked to produce in this letter.





**C. Relevant Periods**

The term “Production Period” refers to the period January 1, 2015 to the present.

**D. Documents to be Produced**

Please produce the following documents for the Production Period:

1. The “document retention policy” referred to in footnote \*\*\* of page 1 of the Shareholder Letter;
2. All Documents concerning Twitter’s discovery that “since the fourth quarter of 2014 we had included users of certain third-party applications as **Twitter MAUs that should not have been considered MAUs**” as disclosed on page 7 of the Shareholder Letter;
3. Documents sufficient to identify the location of data related to the **miscounted MAUs** prior to the fourth quarter of 2014; and
4. All Documents concerning policies and procedures for **calculating and disclosing MAUs** (including documents related to controls for such procedures).

5. **In Apr-2018**, in an appeal response denying our access to records on closed SEC investigations of Twitter, the General Counsel’s office of the SEC cited a 2014 SEC investigation of Twitter, **Matter MSF-03917**, of which we were previously unaware. All we know is this matter closed on 03-Feb-2014. We have no further records or information on it.
6. **In Dec-2017**, the SEC released a one-page Case Closing Report from an investigation titled, “**Twitter, Inc.**”, **Matter MSF-04112**, dated 09-Jun-2017. Our access to 27 pages of internal SEC records on this matter was blocked. We have no idea what it was about.
7. **In Aug-2016**, the SEC identified 57 pages of records from two closed investigations of Twitter. 29 pages were released. “The remaining 28 pages of records consist of matter detail reports, and they are being withheld in their entirety ...”
  - One investigation, which appears to have taken place in 2015, was titled, “**In the Matter of Twitter, Inc. (MSF-03995)**”. It focused on Twitter’s dissemination of earnings and related audit information. It ended without an enforcement action taken.
  - In a separate investigation “**Twitter MSF-4036**”, in **Dec-2015**, the SEC sent two notable letters to Twitter.
    - The first, to Twitter’s General counsel, dated 07-Dec-2015, was a document preservation letter which included this sentence, “The Commission considers potentially relevant documents to include those created on or after July 1, 2014 that relate or refer to **Twitter’s calculation of its monthly active users.**”
    - The second letter, dated 28-Dec-2015, was sent to Twitter’s outside legal counsel a letter informing it the SEC had concluded an inquiry as to Twitter. No further information was released on this matter.

**Because it appears this matter ended so quickly and without an enforcement action recommended, Twitter would likely have legitimate basis for not disclosing it to investors.**

8. **May-2015**, the SEC released a Case Closing Report and two other pages from **an investigation titled, “Iridium Advisors, LLC”**. This matter ended 19-Nov-2013. How it is connected to Twitter was not indicated. We were denied access to 36 pages of internal reports in full from this matter. We only know these records were released in response to a request we had filed on Twitter at the time. **We are not counting this among the undisclosed SEC investigations of Twitter.**
9. **Aug-2014**, the SEC sent us a letter saying it, “identified a preliminary inquiry In the Matter of Twitter, Inc. dated from October 2013 through February 2014”. Access was fully denied to 15 internal pages of SEC records from this matter. We have no idea what it was about. **We are not counting this among the undisclosed SEC investigations of Twitter** as the company may not have known about it.

We have no other documents or information that would help the investor to better gauge the timing, duration, or scale of the above closed matters.

*Editor’s Note: When the SEC denies access to records on closed SEC investigations, they are frequently blocking internal SEC documents known as “Opening and Closing Reports, including ‘Case Closing Recommendation,’ ‘Matter Under Inquiry Summary,’ ‘Investigation Summary,’ and/or similar documents and/or reports.” A Case Closing Report is merely the cover page for a report called a Case Closing Recommendation. A Case Closing Recommendation is the SEC’s report that tells you why an investigation was opened, what work was done, and the conclusions reached. To date, the SEC almost always refuses to release its Case Closing Recommendations and similar documents, a practice for which we remain sharply critical of the agency.*

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**Notes:** 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 the latest information in this report, which would not be reflected here. 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 above. Companies with undisclosed SEC investigations are maintained on our Watch List of companies with undisclosed SEC investigations.

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