

March 21, 2024

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 provide additional information related to my July 17, 2023 request for an investigation of Tesla's Board of Directors (Board) and its Chief Executive Officer, Elon Musk.<sup>1</sup> In that request, I raised concerns about the Board's failure to address possible misappropriation of Tesla resources and conflicts of interest arising from Mr. Musk's dual role at Tesla and X—renamed from Twitter.<sup>2</sup> I asked the Securities and Exchange Commission (SEC) to investigate possible violations of U.S. securities laws, including Nasdaq listing rules and SEC Rule 10b-5.<sup>3</sup>

New evidence has emerged in recent months that deepen my concerns that Tesla's Board lacks independence from Mr. Musk, who uses his control over the Board for his personal benefits, rather than in the best interest of Tesla's shareholders. This is important information for SEC's consideration.

Tesla's stock price has declined 29.4 percent since the start of 2024, giving the company the title of the "worst performer on the S&P 500."<sup>4</sup> But, regardless of whether the stock value is up or down, Tesla's requirement to comply with SEC's rules is not contingent upon its stock value, and the Board's responsibilities to shareholders do not fluctuate based on day to day changes in stock prices.

### **Tesla's Board of Directors Lacks Independence**

Mr. Musk has exerted a high degree of control over the Tesla Board. On January 30, 2024, the Delaware Court of Chancery found that Tesla's Board breached their fiduciary duties when

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<sup>1</sup> Tesla, "Corporate Governance: Elon Musk," <https://ir.tesla.com/corporate/elon-musk>.

<sup>2</sup> Letter from Senator Elizabeth Warren to the Chair of U.S. Securities and Exchange Commission Gary Gensler, July 17, 2023, <https://www.warren.senate.gov/imo/media/doc/Letter%20to%20SEC%20asking%20for%20investigation%20into%20Tesla%20-%20FINAL1.pdf>.

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

<sup>4</sup> Investor's Business Daily, "Nvidia Has Soared In 2024, But These 8 Stocks Are Far From Magnificent," Ed Carson, March 11, 2024, <https://www.investors.com/news/sp-500-stocks-nvidia-soared-tesla-big-losers/>.

awarding Musk an “unfathomable” equity compensation plan worth \$55.8 billion.<sup>5</sup> The Court concluded that Mr. Musk “enjoyed thick ties with the directors tasked with negotiating on behalf of Tesla, and dominated the process that led to board approval of his compensation plan.”<sup>6</sup> The court found that Mr. Musk’s large equity stake and deep personal and professional relationship with Tesla’s Board members—some of which dated back over 15 and 20 years<sup>7</sup>—raised significant concerns about the effectiveness of the Board’s corporate governance. The Court further found that, in the context of this compensation agreement, “Musk controlled Tesla.”<sup>8</sup>

On January 30, 2024, the same date that the Delaware decision was released, Mr. Musk posted a public poll on X asking his followers whether Tesla should change its state of incorporation to Texas.<sup>9</sup> After receiving over one million responses where 87 percent voted “yes,” Mr. Musk posted again, stating, “The public vote is unequivocally in favor of Texas! Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas.”<sup>10</sup> To do so, Mr. Musk would likely have to gain approval from the Board, yet his statements and actions with his private companies raise concerns that he may have already decided to take steps toward this process.<sup>11</sup> In the weeks that followed his statement, Mr. Musk took swift action to incorporate his private businesses outside of Delaware, creating more uncertainty for Tesla’s future. On February 8<sup>th</sup>, 2024, Mr. Musk changed the state of incorporation for Neuralink, his brain-chip implant company, from Delaware to Nevada.<sup>12</sup> On February 14<sup>th</sup>, 2024, Mr. Musk moved the incorporation of his rocket company SpaceX from Delaware to Texas.<sup>13</sup> To date, there is no public indication that the Board addressed any of Mr. Musk’s statements or actions regarding the potential reincorporation.<sup>14</sup>

A clear, years-long pattern has emerged where the Board has failed to adequately address conduct by Mr. Musk that may harm Tesla shareholders.<sup>15</sup> In my July 2023 letter, I outlined a

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<sup>5</sup> *Tornetta v. Musk et al.*, C.A. No. 2018-0408-KSJM (Del. Ch. Jan. 30, 2024), p.180.

<sup>6</sup> *Id.* p. 2.

<sup>7</sup> *Id.* p. 15-20.

<sup>8</sup> *Id.* p. 2.

<sup>9</sup> Tweet by Elon Musk, January 30, 2024, <https://twitter.com/elonmusk/status/1752491924848820595>.

<sup>10</sup> Reuters, “Musk seeks Tesla shareholder vote on moving incorporation to Texas,” Shubham Kalia et al., February 1, 2024, <https://www.reuters.com/business/autos-transportation/tesla-take-shareholder-vote-shifting-incorporation-texas-musk-says-2024-02-01/>.

<sup>11</sup> CNBC, “Elon Musk says Tesla will hold a shareholder vote to incorporate in Texas after Delaware pay snub,” Arjun Kharpal and Lora Kolodny, February 1, 2024, <https://www.cnbc.com/2024/02/01/elon-musk-tesla-will-hold-a-shareholder-vote-to-incorporate-in-texas.html>.

<sup>12</sup> Associated Press, “Elon Musk’s Neuralink moves legal home to Nevada after Delaware judge invalidates his Tesla pay deal,” Tom Krisher, February 10, 2024, <https://apnews.com/article/elon-musk-neuralink-brain-implant-corporate-move-nevada-delaware-09c2eee269beebccf9a701f21ea2b9f7>.

<sup>13</sup> Reuters, “Musk says SpaceX has moved its incorporation to Texas from Delaware,” February 14, 2024, [https://www.reuters.com/technology/space/musk-says-spacex-has-moved-its-incorporation-texas-delaware-2024-02-15/#:~:text=Feb%2014%20\(Reuters\)%20%2D%20Rocket,incorporation%20from%20Delaware%20to%20Texas!](https://www.reuters.com/technology/space/musk-says-spacex-has-moved-its-incorporation-texas-delaware-2024-02-15/#:~:text=Feb%2014%20(Reuters)%20%2D%20Rocket,incorporation%20from%20Delaware%20to%20Texas!)

<sup>14</sup> CNBC, “Elon Musk says Tesla will hold a shareholder vote to incorporate in Texas after Delaware pay snub,” Arjun Kharpal and Lora Kolodny, February 1, 2024, <https://www.cnbc.com/2024/02/01/elon-musk-tesla-will-hold-a-shareholder-vote-to-incorporate-in-texas.html>

<sup>15</sup> CNBC, “Elon Musk says Tesla will hold a shareholder vote to incorporate in Texas after Delaware pay snub,” Arjun Kharpal and Lora Kolodny, February 1, 2024, <https://www.cnbc.com/2024/02/01/elon-musk-tesla-will-hold-a-shareholder-vote-to-incorporate-in-texas.html>; Letter from Senator Elizabeth Warren to the Chair of U.S. Securities and Exchange Commission Gary Gensler, July 17, 2023,

series of emerging concerns related to the effectiveness of the Board’s corporate governance given Mr. Musk’s personal relationships with existing Board members and control over day-to-day operations at Tesla.<sup>16</sup> And in February 2024, the *Wall Street Journal* reported in detail on the personal and financial connections between Mr. Musk and the Board, concluding that “Multiple other directors of Musk companies have deep personal and financial ties to the billionaire entrepreneur, and have profited enormously from the relationship. The connections are an extreme blurring of friendship and fortune and raise questions among some shareholders about the independence of the board members charged with overseeing the chief executive.”<sup>17</sup> This pattern of inaction coupled with the lack of disclosure about the Board’s diminished independence raises questions about possible violations of securities laws and exchange rules, which fall under SEC’s jurisdiction.<sup>18</sup> Specifically, these new and deeply troubling reports raise additional questions about the autonomy of these “independent” directors, and warrant SEC investigation of potential violations of Nasdaq exchange Rules 5605 (a) and (b).<sup>19</sup>

### **Mr. Musk Leverages His Control of Tesla to Benefit His Private Companies, Causing Harm to Shareholders**

Mr. Musk’s recent public statements and actions have raised fresh concerns about conflicts of interest, the redirection of Tesla’s resources to Mr. Musk’s private companies, and other harms to Tesla shareholders that I raised in my earlier letter.<sup>20</sup> And by failing to adequately address the

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<https://www.warren.senate.gov/imo/media/doc/Letter%20to%20SEC%20asking%20for%20investigation%20into%20Tesla%20-%20FINAL1.pdf>.

<sup>16</sup> Tesla’s own 10-K filings stating the company is “highly dependent” on Mr. Musk and that he “is highly active in [Tesla’s] management Letter from Senator Elizabeth Warren to the Chair of U.S. Securities and Exchange Commission Gary Gensler, July 17, 2023,

<https://www.warren.senate.gov/imo/media/doc/Letter%20to%20SEC%20asking%20for%20investigation%20into%20Tesla%20-%20FINAL1.pdf>; Tesla, Inc., Form 10-K, January 30, 2023,

<https://www.sec.gov/Archives/edgar/data/1318605/000095017023001409/tsla-20221231.htm>.

<sup>17</sup> Wall Street Journal, “The Money and Drugs That Tie Elon Musk to Some Tesla Directors,” Kirsten Grind et al., February 3, 2024, <https://www.wsj.com/tech/elon-musk-tesla-money-drugs-board-61af9ac4>; Wall Street Journal, “Tesla Board’s Independence Is Tested by Musk’s Buyout Idea,” Rolfe Wilkler, August 10, 2018,

<https://www.wsj.com/articles/tesla-boards-independence-is-tested-by-musks-buyout-idea-1533893403>.

(“Shareholder advocates have frequently challenged Tesla’s board, with little success.”).

<sup>18</sup> Letter from Senator Elizabeth Warren to the Chair of U.S. Securities and Exchange Commission Gary Gensler, July 17, 2023,

<https://www.warren.senate.gov/imo/media/doc/Letter%20to%20SEC%20asking%20for%20investigation%20into%20Tesla%20-%20FINAL1.pdf>; Tesla, Inc., Form 10-K, January 30, 2023,

<https://www.sec.gov/Archives/edgar/data/1318605/000095017023001409/tsla-20221231.htm>.

<sup>19</sup> Nasdaq Rule 5605(a); Nasdaq Rule 5605(b).

<sup>20</sup> These actions are even more concerning because they may violate the terms of Mr. Musk’s 2018 fraud settlement with the SEC that stemmed from misleading tweets that boosted Tesla’s stock price. The settlement required that Tesla lawyers review Musk’s statements about the company before he posts them on the platform. See U.S. Securities and Exchange Commission, “Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge,” September 29, 2018, <https://www.sec.gov/news/press-release/2018-226> (“Musk tweeted on August 7, 2018 that he could take Tesla private at \$420 per share — a substantial premium to its trading price at the time — that funding for the transaction had been secured, and that the only remaining uncertainty was a shareholder vote.”). It is unclear whether the tweets referenced above were, in fact, reviewed by Tesla counsel prior to posting Letter from Senator Elizabeth Warren to the Chair of U.S. Securities and Exchange Commission Gary Gensler, July 17, 2023,

negative consequences of Mr. Musk's actions to Tesla shareholders, the Board may have violated their fiduciary duties.

In a January 15, 2024 post on X, Mr. Musk stated he would be uncomfortable growing Tesla as a leader in artificial intelligence (AI) without nearly doubling his ownership share of the company to roughly 25 percent, noting he “would prefer to build products outside of Tesla.”<sup>21</sup> By threatening to divert AI products away from Tesla, the post highlighted a potential conflict of interest between Musk's role at Tesla and his private AI company xAI.<sup>22</sup> Tesla shareholders expressed concern over Musk's comments, and 4,000 of Tesla's retail investors voted to discuss the issue during his January 24, 2024 earnings call.<sup>23</sup> On the call, Musk said he chose the 25 percent figure because it would give him “a strong influence but not control” of the company.<sup>24</sup> The Board made no public statements in response to Mr. Musk's request for greater control and took no public action to address these shareholder concerns.<sup>25</sup>

Analysts noted the clear corporate governance problems posed by this threat:

[It] basically confirm[ed] that [Mr. Musk] has a conflict of interest between Tesla and xAI. You could even make the argument that he is breaking his fiduciary duty to Tesla investors....The most ridiculous thing about this whole situation and how Tesla is reacting to it, or more accurately not reacting to it, is that it shows how much control Musk currently has over Tesla. If Tesla wasn't under his control all the way up to the board, the Tesla board would have already, at the very least, commented on the situation. They haven't.<sup>26</sup>

The substantial holdings of several Tesla Board members in Musk's private companies raise further concerns about the Board's independence when Musk positions the interests of Tesla against that of his own private companies as he did in his January 15, 2024 post.<sup>27</sup>

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<https://www.warren.senate.gov/imo/media/doc/Letter%20to%20SEC%20asking%20for%20investigation%20into%20Tesla%20-%20FINAL1.pdf>.

<sup>21</sup> New York Times, “Musk Demands Bigger Stake in Tesla as Price for A.I. Work,” Jack Ewing, January 16, 2024, <https://www.nytimes.com/2024/01/16/business/tesla-elon-musk-stock.html>.

<sup>22</sup> Reuters, “Musk's warning about Tesla stake raises governance questions,” Aditya Soni et al., January 17, 2024, <https://www.reuters.com/technology/musks-warning-about-tesla-stake-raises-governance-questions-2024-01-16/>.

<sup>23</sup> Electrek, “Elon Musk tries to explain his ask for more control over Tesla, but TSLA not buying it,” Fred Lambert, January 25, 2024, <https://electrek.co/2024/01/25/elon-musk-tries-explain-ask-more-control-over-tesla-tsla/>.

<sup>24</sup> *Id.*

<sup>25</sup> *See e.g.*, Reuters, “Musk's warning about Tesla stake raises governance questions,” Aditya Soni et al., January 17, 2024, <https://www.reuters.com/technology/musks-warning-about-tesla-stake-raises-governance-questions-2024-01-16/>; Electrek, “Elon Musk tries to explain his ask for more control over Tesla, but TSLA not buying it,” Fred Lambert, January 25, 2024, <https://electrek.co/2024/01/25/elon-musk-tries-explain-ask-more-control-over-tesla-tsla/>. (“They haven't. The CEO is publicly saying that he would prefer building products outside of the company without a 25% voting control and crickets from the board.”).

<sup>26</sup> Wall Street Journal, “The Money and Drugs That Tie Elon Musk to Some Tesla Directors,” Kirsten Grind et al., February 3, 2024, <https://www.wsj.com/tech/elon-musk-tesla-money-drugs-board-61af9ac4>; Electrek, “Elon Musk tries to explain his ask for more control over Tesla, but TSLA not buying it,” Fred Lambert, January 25, 2024, <https://electrek.co/2024/01/25/elon-musk-tries-explain-ask-more-control-over-tesla-tsla/>.

<sup>27</sup> *Id.*

This is not the first time that potential conflicts have emerged between Mr. Musk’s relationship with Tesla and his private companies. In my December 2022 letter to Tesla’s Board Chair, Dr. Robyn Denholm, I expressed concerns about the possible misappropriation of Tesla resources to help Musk run his new company, including funneling Tesla’s Chief Information Officer and more than 50 employees to work on his X takeover.<sup>28</sup> In this same letter, I asked the Tesla Board to provide an explanation how it was addressing the corporate governance issues posed by Mr. Musk’s dual roles at Tesla and X.<sup>29</sup> I received no responses to these important questions.

Mr. Musk has also created a pathway that would allow Tesla to channel money to X through paid advertising. In a May 2023 shareholder meeting, Musk announced that Tesla would reverse its longstanding policy and start to advertise online.<sup>30</sup> Musk acknowledged it was “ironic” to change his stance only few months after buying Twitter, which is “highly dependent on ads.”<sup>31</sup> In February 2024, Tesla launched its first paid video advertisement on X, raising further concerns that Mr. Musk may have acted based on his conflicts of interest, and that the Board may have breached their fiduciary duties to Tesla shareholders.<sup>32</sup>

The securities laws and exchange rules help ensure that public companies provide accurate information to investors<sup>33</sup> and meet their disclosure requirements.<sup>34</sup> The Board has a legal obligation to address and disclose business risks, such as financial conflicts of interest or other risks to the Board’s ability to remain independent.<sup>35</sup> Despite the growing concerns posed by Mr. Musk’s conflicting roles at Tesla and his private companies, the Board appears to have taken no action to address these risks or protect its shareholders. By all appearances, it seems that the Board continues to operate as if Mr. Musk is the “Technoking”<sup>36</sup> who can do no wrong.

It is important for the SEC to examine these new concerns as it determines whether the actions of Mr. Musk and the Tesla Board may have violated securities laws. I therefore ask the SEC to carefully consider the following questions:

- 1) Did the Tesla Board accurately disclose information pertaining to the Court’s decision in *Tornetta v. Musk*,<sup>37</sup> including, but not limited to:

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<sup>28</sup> Letter from Senator Elizabeth Warren to Tesla Chairman of the Board Dr. Robyn Denholm, December 18, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.12.18%20Letter%20to%20Tesla%20Board%20on%20Musk%20Concerns.pdf>; 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-twittertakeovercna54946>.

<sup>29</sup> *Id.*

<sup>30</sup> Reuters, “Elon Musk reverses course and says Tesla will advertise its cars,” Hyunjoo Jin and Sheila Dang, May 16, 2023, <https://www.reuters.com/business/autos-transportation/elon-musk-reverses-course-says-tesla-will-advertise-its-cars-2023-05-17/>.

<sup>31</sup> *Id.*

<sup>32</sup> Teslarati, “Tesla launches advertising on X in the U.S., expanding ‘small scale’ strategy outlined by Musk,” Joey Klender, February 6, 2024, <https://www.teslarati.com/tesla-launches-advertising-x-u-s-expanding-small-scale-strategy-elon-musk/>.

<sup>33</sup> 15 U.S.C. 78j (b).

<sup>34</sup> 15 U.S.C. 77k, 17 C.F.R. 229.

<sup>35</sup> 17 CFR 229.407(a); 17 CFR 229.407(c).

<sup>36</sup> CNBC “Elon Musk has officially been made the ‘Technoking of Tesla,’” Sam Shead, March 15, 2021, <https://www.cnbc.com/2021/03/15/elon-musk-officially-made-the-technoking-of-tesla.html>.

<sup>37</sup> *Tornetta v. Musk et al.*, C.A. No. 2018-0408-KSJM (Del. Ch. Jan. 30, 2024).

- a. the court’s finding that Tesla’s Board lacked independence when agreeing to Mr. Musk’s compensation package,
  - b. the court’s rescission of Mr. Musk’s compensation package and its implication regarding ownership of Tesla stocks and stock options,
  - c. corporate governance issues that create risks to Tesla shareholders, and
  - d. other risks to Tesla shareholders?
- 2) Did the Tesla Board accurately disclose information pertaining to Mr. Musk’s January 15, 2024 statement “would prefer to build products outside of Tesla.”<sup>38</sup> without increasing his ownership share in Tesla to roughly 25 percent including, but not limited to:
- a. conflicts of interest between Musk’s ownership stake in Tesla and his private companies, which would pose financial risks to Tesla shareholders,
  - b. corporate governance issues that create risks to Tesla shareholders, and
  - c. other risks to Tesla shareholders?
- 3) Did the Tesla Board accurately disclose information pertaining to the decision to launch a paid advertising campaign for Tesla on X, including, but not limited to:
- a. conflicts of interest between Musk’s ownership stake in Tesla and his private ownership of X, which would pose financial risks to Tesla shareholders,
  - b. corporate governance issues that create risks to Tesla shareholders, and
  - c. other risks to Tesla shareholders?
- 4) Do the longstanding financial and personal connections between the Board and Mr. Musk represent violations of SEC and exchange rules regarding Board independence?

Sincerely,



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Elizabeth Warren  
United States Senator

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<sup>38</sup> New York Times, “Musk Demands Bigger Stake in Tesla as Price for A.I. Work,” Jack Ewing, January 16, 2024, <https://www.nytimes.com/2024/01/16/business/tesla-elon-musk-stock.html>.