

What happens if your CEO tweets tales of a takeover?

Elon Musk, the CEO of Tesla Inc, has been in hot water with the U.S. authorities recently after tweeting about a potential takeover bid for the company, and then telling his followers that Tesla would produce 500,000 cars this year (which turned out not to be quite right).

In this Article we take a look at what might happen if the CEO of a UK-listed company were to share sensitive or unverified information on social media.

Why can't a director tweet company information?

In Europe there are procedures to follow when a company has important updates for the market. Unsurprisingly this does not include the CEO posting it on Twitter. Some might say there's no harm done: the information has been made public so what's the problem? Well, the rules about dissemination of inside information in the UK and EU¹ are there to ensure all investors have simultaneous access to accurate information and know where they can find it. In fact, it's clear that a company must share inside information on its website, and may post its news on social media, but only after it has first made it available via a regulatory information service.²

When the news is about a takeover approach there are additional rules to consider - in the UK the Takeover Code³ bans the use of social media to publish information relating to an offer, with limited exceptions related to posting a link to a full announcement and sharing the full text of a document which has been published in accordance with the Takeover Code.

Why are there such strict rules on this?

The rules on disclosure of this type of information are part of the backbone of market integrity. If directors were free to share this kind of essential information without the right checks and balances it could mislead the market, undermine public confidence in securities, and destroy the level playing field that is vital to the proper operation of the financial markets. For investors to have confidence in the markets, they must be confident that companies will release information that is accurate through the right channels. This justifies taking firm action against those who flout the rules.

What will happen to a director who breaches these rules?

In the most extreme cases an individual director who tweets UK company information could be criminally liable for making a materially false or misleading

¹ Article 17 of the EU Market Abuse Regulation (596/2014) and Article 2 of Commission Implementing Regulation 2016/1055 (technical standards under MAR)

² Statement of the European Securities and Markets Authority in its consultation paper of 15 July 2014 on technical standards under MAR, para 251.

³ Rule 20.4 of the Takeover Code.

statement⁴, or for insider dealing (just by sharing inside information, even if they don't personally deal)⁵. They could face up to seven years' jail time, an unlimited fine⁶ and disqualification from acting as a company director for up to 15 years⁷.

The UK's Financial Conduct Authority has been cracking down on those who commit market abuse in recent years and has shown that it is not averse to bringing criminal proceedings when the circumstances justify it. However, a criminal case is not the only tool in its armoury. The FCA also has extensive civil sanctioning powers. It can name and shame those who have breached the rules, impose an unlimited civil fine against any director knowingly involved in a breach of the rules on proper disclosure of inside information⁸ and even apply to the court for an order that restitution be paid to affected third parties⁹. These civil powers are particularly useful in cases where the higher burden of proof and need to prove intention in a criminal case cannot be met.

As well as the individual officer, the company itself may be liable to compensate anyone who suffers loss after dealing in securities in reliance on untrue or misleading statements made knowingly or recklessly by a director¹⁰.

What's more, if the company is FCA regulated there will likely be further consequences under the Senior Managers and Certification Regime.

What are the lessons for UK companies from the Elon Musk affair?

UK-listed companies should have robust procedures and controls to maintain the secrecy of sensitive information and to prevent the publication of misleading information. Staff training and firm policies should cover the risks posed by social media in this context. Whilst retweeting an authorised post by the company, or sharing that on LinkedIn, should pose no risks, no board members should share any other type of company information on social media until it has been verified as accurate and checked by the legal team for compliance with all applicable rules¹¹. The high profile nature of the Elon Musk tweets creates a perfect opportunity to remind staff of these rules.

⁴ Section 89 Financial Services Act 2012

⁵ Section 52 Criminal Justice Act 1993

⁶ Section 92 FSA 2012 and Section 61 CJA 1993

⁷ Section 2 Company Directors Disqualification Act 1986

⁸ Section 123 Financial Services and Markets Act 2000

⁹ Section 383 FSMA

¹⁰ Schedule 10A FSMA

¹¹ For example, is it a financial promotion? Could it be misleading the market? Is it unauthorised disclosure of inside information?

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