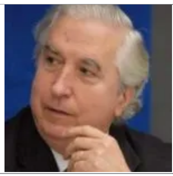
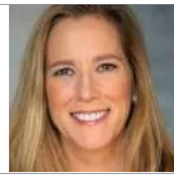


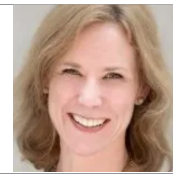
John C. Coffee, Jr. – Boeing and the Future of Deferred Prosecution Agreements

By John C. Coffee, Jr.



Leveraging Information Forcing in Good Faith

By Hillary Sale



The Dark Side of Safe Harbors

2 *By Susan C. Morse*

THE CLS BLUE SKY BLOG

COLUMBIA LAW SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS

Tesla Investors Deserve Musk's Attention

By Lucian Bebchuk and Robert J. Jackson, Jr. June 7, 2024

3 Comments

Yesterday's news that Tesla's chief executive, Elon Musk, asked a supplier to redirect scarce chips needed for artificial-intelligence development from Tesla to other Musk-owned companies followed reports that Donald Trump is considering Musk for a role in a new administration. All of this comes just days before Tesla stockholders must cast an unprecedented vote on Musk's pay package, which a Delaware court invalidated in January. The news shines light on a key flaw of Musk's pay arrangements at Tesla: They have not in the past, and would not in the future, limit the time and effort Musk spends on endeavors other than Tesla. Rather than ask stockholders to hope that Musk will focus on the company, Tesla's board should ensure that the CEO gives Tesla and its investors the high priority they deserve.

Next week's vote is the board's attempt to reinstate an option award that was worth about $50 billion when a Delaware court struck it down. The board has argued that stockholders should vote to do so because the award succeeded in motivating Musk's "continued service and dedication to Tesla," and restoring the award would do so in the future. In fact, however, the award failed to effectively achieve that objective in the past, and it should not be expected to do so going forward. If the grant is restored, Musk will get massive monetary payoffs — but Tesla stockholders would get little assurance that they will get most of his future time and attention.

Tesla's board first approved Musk's grant in 2018 and asked stockholders to endorse it, arguing then that "many of Tesla's past successes were driven significantly by Mr. Musk's leadership" and that the award was intended to motivate him to "focus more of his attention on" "key product and strategic matters that most impact Tesla's long-term growth." But earlier this year, after a lengthy trial, a Delaware judge concluded that the process that produced the grant was driven by Musk's influence rather than the interests of Tesla's investors.

Among other problems with that process, the court found, was that the grant failed to require Musk to prioritize Tesla and its investors over his other endeavors. In fact, the court concluded that the Tesla board failed even to try to convince Musk to make any such commitment. "Trial testimony," the court said, "revealed that no one raised this issue with Musk."

Corporate boards commonly obtain contractual limits on the time their CEO may spend on other endeavors. "[T]he most obvious way" to ensure that the award motivated Musk to focus on Tesla, the court explained, "would have been a requirement that Musk devote substantially all his professional time and attention to Tesla-related matters," but "no one proposed anything like that to Musk." A less demanding, but still meaningful, contractual provision would have required Musk to spend at least a specified fraction of this time at Tesla or limited the fraction of time he could spend elsewhere. Strikingly, the terms of the 2018 award, which the board now seeks to restore, imposed no limits whatsoever on the amount of time and effort that Tesla's CEO may spend on his other projects.

And we now know that, in fact, the grant failed to induce Musk to focus his time and effort on Tesla. Free to spend his time as he wished while his Tesla options accumulated enormous value, Musk acquired Twitter and was soon "pouring . . . all" his time "into Twitter." During that same period,. Musk continued to lead SpaceX and live substantially in a home near the SpaceX spaceport. And the amount of time that Musk spends on social media is well-known — and has increased since he acquired Twitter two years ago.

To be sure, some might argue that, in light of Musk's considerable talents, it might be better to have just a fraction of his time rather than all of somebody else's. But as Tesla investors consider whether to approve a multi-billion-dollar package for him, they should know that an award ostensibly aimed at getting Musk's time and attention was not well-designed for this purpose.

Instead of asking shareholders to approve the grant that has failed to get Musk to attach a high priority to Tesla matters, the Tesla board should have heeded the court's advice and bargained with their CEO over how he spends his time. Indeed, even if the board preferred for whatever reason to restore the old award, the board should have obtained from Musk, in exchange for bringing the package to a vote, a commitment to devote at least a specified appropriate fraction of his time and effort to Tesla.

As matters stand, the key question for Tesla stockholders is not whether devotion of Musk's full efforts to Tesla is worth the $50 billion that reinstating this package would cost them. Instead, stockholders should recognize that restoring the award would not secure for them the full devotion of Musk's time and attention. Yesterday's news highlights the risk really facing Tesla stockholders next week: that they will both bear the $50 billion cost of Musk's ill-designed pay package and *not* get adequately high priority among Musk's many endeavors.

This post comes to us from Lucian Bebchuk, a professor of law, economics, and finance, and director of the corporate governance program, at Harvard Law School; and Robert J. Jackson, Jr., a professor of law at NYU School of Law who served as a commissioner of the U.S. Securities and Exchange Commission from 2018 to 2020. They have served as independent experts on behalf of the plaintiff in the Delaware litigation regarding Musk's pay package. The post is part of a series of academic posts on Tesla's governance. Yesterday's installment is available here.

3 Comments

John Chevedden
I am presenting my simple majority vote proposal at the Wednesday TSLA shareholder meeting.

Important to Vote for a Simple Majority Vote Standard – Proposal 7
https://www.sec.gov/Archives/edgar/data/1318605/000121465924008392/g56240px14a6g.htm

June 7, 2024 at 8:59 pm

Bernard Sharfman
I have a lot of sympathy for the arguments Professors Bebchuk and Jackson make in regard to Tesla's shareholder vote. Musk may get what he wants in terms of pay and still be distracted by his other ventures. Of course it is not fair that anyone should be getting $50 billion to run anything. But from an investment perspective, the issue is not about fairness or whether the board did a good job in tying Musk to Tesla versus his other enterprises. How one votes should simply come down to whether the investor thinks it is more value enhancing to vote yes or no. This is especially true for fiduciaries who oversee public pension funds and index funds. The Musk premium may outweigh all other considerations. Also, if an investor, such as a retail investor, doesn't have the resources to become informed on this issue, then they should simply defer to the board recommendation or, at the very least, just don't vote. Of course, retail investors only have duties to themselves so they can do whatever they want.

June 11, 2024 at 5:32 pm

John Chevedden
Two shareholder proposals were approved by Tesla shareholders at the 2024 annual meeting:
6. One year terms for directors
7. Simple Majority Voting Standard
Both proposals received 54% of the for and against votes.

June 14, 2024 at 8:14 pm

Comments are closed.