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Elon Musk's brain-implant startup Neuralink may have misled regulators about Musk's leadership role

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February 4, 2022 5:30 AM EST

FORTUNE



Neuralink, the startup co-founded and run by Elon Musk that hopes [to implant computer chips in people's brains](#), may have misled federal securities regulators about the billionaire entrepreneur's role at the company.

That's according to government documents and *Fortune* interviews with securities lawyers and a half-dozen former employees of the company. The employees mostly spoke anonymously out of concern for violating non-disclosure agreements and

possible retaliation from Musk.

The episode involves a 2018 letter in which an attorney representing Neuralink downplayed Musk's leadership role at the company in a letter to the Securities and Exchange Commission. The attorney's characterization contradicts former employees' accounts, which depict Musk as very much in charge. Neuralink and the attorney involved in the filing did not respond to requests for comment.

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Some securities lawyers said that the incident could further antagonize the SEC, which has had [a rocky relationship](#) with Musk. It might also prompt Congress to look at the process by which the SEC grants certain waivers to companies looking to raise money through private share offerings.

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The potentially misleading statements about Musk's role at Neuralink arose from the brain-computer interface company's efforts to avoid the fallout from one of the most damaging setbacks in Musk's career.



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In 2018, Musk agreed to pay a personal fine of \$20 million, step down as chairman of [Tesla](#) for three years, and have his public communication stringently vetted, in order to settle charges that [he had misled Tesla investors](#) about a possible deal to take the electric-car company private. As part of the settlement, Musk also agreed

not to make any misleading statements in connection with the sale of securities going forward.

The Tesla settlement alarmed managers at Musk's private companies, including at Neuralink, according to two former Neuralink employees. It made it likely that Musk would be considered a "bad actor" under a key portion of U.S. securities law, which in turn would mean these private companies would no longer be allowed to raise venture capital funds without registering the sale of the shares with the SEC and having to also register in each state in which those investing in the shares lived. That would add considerable time and expense to any future fund-raising round.

To avoid this, Neuralink's lawyers wrote to the SEC on September 28, 2018, requesting a waiver from the SEC that would enable Neuralink to continue to qualify for an exemption from having to register any private share sale with the SEC. In that request, which is [available in SEC records](#), Roel Campos, a former SEC commissioner who is now a partner at the law firm Hughes, Hubbard, and Reed, in Washington, D.C., wrote that Musk "has no executive or management role at Neuralink." Campos also stated that "Mr. Musk does not serve as an officer or director of Neuralink."

On October 16, 2018, according to agency records, the SEC granted Neuralink this waiver "based on the facts and representations" in Campos's letter, and with the caveat that Musk continue to abide by the Tesla settlement.

But the SEC's [own guidance](#) says that a person is considered an "executive officer" as long as they perform "policy making functions" at a company similar to those of a CEO, president, or vice president in charge of a business unit would perform. Yuliya Guseva, a professor of securities law at Rutgers University Law School, said that the SEC also looks broadly at who can, through their control of shares, influence the decisions of the managers and officers of a company. This ability to direct management matters far more than an official title, she said.

Musk was never officially listed as the CEO of Neuralink, which was founded in its current form in 2016. But a half-dozen former Neuralink employees told *Fortune* that Musk often referred to himself as Neuralink's CEO and, although he was not present at the company on a daily basis, has always [had the final say](#) all major strategic and product decisions at the company. "He definitely had executive authority," one former employee said.

What's more, when Neuralink raised \$205 million in a venture capital round in August 2021, Neuralink listed Musk as the company's "executive officer" in [a document](#) filed with the SEC, known as a Form D. In two previous such [documents](#), Musk was not listed at all, even though former employees say that his functional role at Neuralink has not changed since Musk established the company.

On Form Ds that Neuralink filed in 2017 and 2019, Jared Birchall, a wealth manager who runs Musk's family office, is listed as "executive officer." In 2017, Birchall is also listed as a "director" and as having the title "president." In the 2019 document, Birchall is still listed as a director but now has the title of just "secretary." Former employees said that Birchall did not exercise decision-making authority at the company. "It was just a legal convenience having things go out under Jared's name," one former employee said.



In the 2019 Form D, Max Hodak, who was Neuralink's president at the time, is also listed alongside Birchall as an "executive officer." From 2016 until he resigned in August 2021, day-to-day operations at Neuralink were supervised by Hodak, according to former employees. But when it came to major company actions, Hodak was mostly tasked with executing Musk's decisions, the former employees said.

Neuralink and Campos did not respond to multiple requests to comment for this story. An SEC spokesperson did not directly address questions related to its decision to grant Neuralink a waiver, saying only "it could neither confirm nor deny the existence of any investigation" into the matter.

The SEC's balancing act

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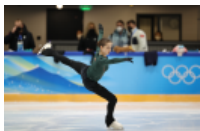
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Securities lawyers said, based on *Fortune*'s reporting, that there was a good chance Neuralink's 2018 letter and also possibly its 2017 and 2019 Form Ds contained misleading statements. "My guess is that is not a true statement," Julie O'Neill, a securities lawyer at Bowditch, a law firm in Boston, said of Neuralink's claim that Musk was not an officer of the company. O'Neill also said that making materially false statements on Form D could be illegal. Making false statements to SEC officials is also a criminal offense. Both are punishable by potential fines and even imprisonment.

"Arguably it is a materially false representation on which they relied in granting the waiver," said David Chase, a former attorney with the SEC's division of enforcement who now runs his own private practice representing white-collar defendants.

Chase said that given his experience at the SEC's enforcement division, the agency "would not take kindly" to being misled, especially by Musk, given the high-profile

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The SEC has already reportedly called Musk on the carpet for violations of the 2018 Tesla settlement. In letters to Tesla sent in 2019 and 2020, the SEC twice accused Musk and Tesla of violating the terms of the settlement by not properly vetting Musk's tweets, according to [a June 2021 story](#) in *The Wall Street Journal*. Neuralink's potentially misleading statements about Musk's role at the company

could add momentum to any SEC effort to go after Musk for violating the terms of the settlement.

That's not a certainty, however. Stephen Diamond, a professor at the University of Santa Clara Law School who specializes in corporate governance and securities law, said that it appeared likely the SEC granted the Neuralink waiver based on more than just Campos's statements about Musk's authority at the company.

The agency likely took into account Campos's other arguments, which included the fact that the misconduct that led to Musk's SEC settlement concerned Tesla, which is a completely separate corporate entity from Neuralink, in a completely unrelated field, and the fact that Neuralink itself had never been accused of any misconduct related to the sale of securities, he said.

The SEC, Diamond said, would also have had to weigh the deterrent effect of making it harder for Musk's other companies, such as Neuralink, to raise capital, against the extent to which it was unfair to essentially punish Neuralink's employees and other investors for Musk's misconduct at a different company. He said it was likely the rationale for granting the waiver might still be valid, even if Campos had not been fully forthcoming about exactly how much sway Musk exercised at Neuralink. He also said it was unlikely the SEC was unfamiliar with how much influence Musk had at Neuralink, even if he held no formal managerial title.

Donald Langevoort, a professor of securities law at Georgetown University Law School, said that Campos no doubt chose the terminology in his letter extremely carefully, but that it still might violate the spirit of the SEC regulations.

"The SEC strongly takes the position that in all correspondence you offer the truth, the whole truth and nothing but the truth, rather than play with definitions in a clever, technical way that misleads," he said.

Representative Maxine Waters (D-California), who chairs the House Committee on Financial Services, has several times introduced [legislation](#) that would make it more difficult for the SEC to grant waivers such as the one Neuralink obtained in cases where top corporate officials or controlling shareholders have been deemed "bad actors" due to past securities law violations or misconduct.

The latest version of that bill, which was introduced in 2019 but failed to make it

out of committee, would have eliminated the agency's ability to handle waiver requests confidentially; instead, it would have made waiver requests subject to a public hearing. It would also have forced the SEC to find that the waiver was in the public interest, was necessary to protect investors, and promoted market integrity, before one could be granted.

Diamond said that if it were true that Neuralink made misrepresentations to the SEC in its effort to obtain a waiver, that would potentially strengthen Waters' efforts to crack down on the agency's waiver process.

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