

When is Information “Material”?: Tesla Motors and the Autopilot Crash Disclosure Dilemma

This summer, the [Wall Street Journal reported](#) that the Securities and Exchange Commission (“SEC”) was engaging in a preliminary investigation that Tesla failed to timely disclose to investors material information. The WSJ’s report raises interesting questions about what constitutes material information when it comes to companies developing new technologies.

What Information is “Material”?

Securities laws and regulations require that reporting companies periodically publicly disclose certain information, as well as any information that is “material” to investors. Information is deemed material if there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” [Matrixx Initiatives, Inc., et al. v. Siracusano et al.](#) Since this is a subjective test, there is no bright line rule and what information must be disclosed is highly dependent on the facts and circumstances at hand. Disclosure may be done via a [Private Placement Memorandum](#), in periodic public filings with the SEC, or any other public forum such as the company’s website.

Did Tesla Motors Fail to Disclose Material Information to Investors?

According to reports, Joshua Brown was killed on May 7th when his Tesla vehicle collided with a tractor-trailer truck that pulled in front of him on a highway in Florida. Brown’s vehicle was driving itself using Tesla’s Autopilot system at the time of the crash, which is still a very new technology and a major feature of Tesla vehicles. The timeline after the crash is as follows:

- May 10: Tesla files its quarterly Q-10 disclosure filing with the SEC, without any reference to the crash.
- May 16: Tesla reports the crash to the National Highway Traffic Safety Administration.
- May 18 & 19: Tesla files offering documents with the SEC to sell up to \$2 billion worth of shares of common stock, including \$600 million to be sold by Tesla CEO, Elon Musk. No mention of the crash is made in the offering documents.
- May 30: [Tesla publicly reports the crash in a blog post.](#)

The reported investigation is regarding whether the crash was material information, such that Tesla should have disclosed the crash to potential investors in the offering documents filed on May 18th and 19th. According to Tesla, it was unable to recover data regarding the crash remotely, and so had to send an investigator to Florida to collect data in order to determine the cause of the crash. As a result, Tesla did not know that the Autopilot feature was in control of the vehicle at the time of the crash.

Tesla is, first and foremost, an automobile company. Automobile accidents are extremely common, and therefore generally would not be considered material in most cases absent a recall or product liability lawsuit. However, since Tesla’s autopilot feature is one of the most touted and innovative features of their automobiles, making it a major draw for investors, any incident



that could cause the public to perceive driverless cars as unsafe, and therefore reduce potential profits, could be material information for investors. For this reason, Tesla's reported position is that it had no duty to disclose the crash until it knew that the Autopilot feature was activated at the time of the accident, which it claims did not happen until after it had filed its offering documents with the SEC.

Conclusion

While it appears that there will be no SEC action taken against Tesla for its failure to disclose the crash prior to its stock offering, the public speculation that Tesla may have violated its obligation to disclose material information to investors is a reminder to companies that are subject to SEC reporting requirements and/or are selling securities that they should carefully consider the information that is included in their disclosure documents. It is advisable to err on the side of caution in drafting investor disclosures, especially when the disclosing company is developing highly anticipated new technologies where there is no precedent for disclosure.