

Charges Against Nikola Founder Provide Reminder to Use Caution in All Public Statements and Offer Governance Lessons

WRITTEN BY

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On July 29, 2021, both the SEC and the U.S. Attorney for the Southern District of New York announced charges against Trevor Milton, the founder, former CEO and former executive chairman of Nikola Corporation, a company engaged in the development of electric trucks. The complaint and indictment allege a series of misleading and inaccurate public statements by Milton on social media and elsewhere leading up to and after the company's merger with a special purpose acquisition company (SPAC) through which Nikola became a public company, which included related private placements (PIPEs).

The alleged facts paint a picture of an executive unfettered by the truth and concerned primarily with sustaining stock market enthusiasm, and in particular retail investor enthusiasm, for Nikola's stock by delivering positive news. According to the complaint and indictment, through private social media posts, podcasts and interviews, in addition to official Nikola press releases and Twitter posts that he controlled, Milton made statements that inaccurately portrayed the company's prototype truck as being fully functioning; inaccurately characterized the company's hydrogen production capabilities; inaccurately characterized the company's access to electricity needed to produce hydrogen; inaccurately described the development of a pickup truck that did not yet exist; and inaccurately described "billions and billions and billions and billions of dollars in orders" for the company's trucks. The alleged misstatements are described in detail in the complaint (available [here](#)) and the indictment (available [here](#)).

The falsity of many of these statements came to light in September 2020, when a financial research firm with a short position in the stock published a report alleging, among other things, that the prototype truck demonstration had been staged. Ten days later, Milton resigned his position at Nikola.

On one level, the allegations are a simple case of enforcing anti-fraud rules under a fairly extreme set of facts, where a corporate executive was driving up his company's stock price by knowingly making demonstrably false statements out of concern for market reaction. But there may also be lessons for executives at any public company.

Caution Should be Used in All Public Statements

The actions against Milton are a reminder that public statements by corporate officers in relatively informal settings, outside of SEC filings, can be used as a basis for Rule 10b-5 sanctions. A company's lawyers may scrutinize annual and quarterly reports to ensure that they contain appropriate cautionary statements. In contrast,

private tweets, other social media postings and statements in podcasts or interviews are often made without compliance in mind. In Milton's case, he encouraged investors to follow him on Twitter to get "accurate information" about Nikola "faster than anywhere else." In practice, he used Twitter to announce corporate initiatives that he had not vetted internally, to answer investor questions with misleading or outright false information, and even to double down on prior false statements.[1]

Moreover, according to the allegations, Milton responded to other senior executives' expressions of concern about his social media presence and his public statements by asserting that these other executives "did not understand current capital market dynamics or what he was trying to accomplish with retail investors, and that he needed to be on social media to put out good news about Nikola to support its stock price." Retail investor frenzy driven by social media and retail-oriented trading platforms such as Robinhood does not give companies a pass from the application of the securities laws. The SEC has emphasized that it will monitor these situations for manipulation or other misconduct.

Effective Governance and Controls Remain a Responsibility of Public Companies

The actions against Milton offer a number of lessons for companies:

- Strong independent board oversight, as mandated by the Sarbanes-Oxley Act, where effective and not offered as window-dressing, can protect both the company and its management team from conduct that may lead to trouble down the road. Responsible CEOs can welcome this oversight. Upon the merger with the publicly traded SPAC, Milton switched roles from CEO to executive chairman. While the company's board met Nasdaq independence standards, Milton nevertheless appeared to exercise nearly total control over the company. He personally hired the CEO, CFO and chief legal officer. When a board member encouraged him to appoint additional independent directors with public company experience, Milton is alleged to have responded that "the most important [thing] is that I fully control the board at all times and have people who work well with my personality.... No one sees the future like I do...." The inability to rein him in indicates a failure of effective oversight.
- "Tone at the top" and a culture of compliance are important aspects of an effective governance and control structure. These were noticeably lacking as a result of Milton's activities. Although he appears to have been warned on multiple occasions, including following the well-publicized investigation into Elon Musk's social media statements, about the dangers of using social media, these warnings allegedly were not heeded. Despite social media training being scheduled for all senior executives, Milton did not attend, and such a failure sends a troubling message through the ranks.
- Executive compensation programs that reward higher stock prices without regard to underlying financial metrics can sometimes create skewed short-term incentives. SEC rules require disclosure about risks posed by a company's compensation structure, and compensation committees have an oversight role in managing the risk posed by financial incentives. Milton's compensation package included a significant number of RSUs that would vest only if Nikola's stock price reached certain milestones for 20 consecutive trading days during a three-year period. Milton received the maximum payout under that award in August 2020, the month before his false statements were publicized.

If you have any questions about this or related topics, your regular Locke Lord contact or any of the authors can discuss these matters with you.

[1] In its Section 21(a) report concerning Netflix, Inc. and its CEO, Reed Hastings, available [here](#), the SEC has

given guidance on the use of social media channels to deliver information to investors under Regulation FD. While Milton was not charged with Regulation FD violations, this guidance should be considered in addition to the anti-fraud rules.

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