

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69439 / April 24, 2013

Admin. Proc. File No. 3-14935

In the Matter of

A-POWER ENERGY GENERATION
SYSTEMS, LTD.

ORDER SUMMARILY AFFIRMING IN PART AND IMPOSING REMEDIAL SANCTIONS

A-Power Energy Generation Systems, Ltd. is a British Virgin Islands corporation located in the People's Republic of China with stock registered with the Commission pursuant to § 12(b) of the Securities Exchange Act of 1934.¹ It appeals from the initial decision of an administrative law judge.² In that decision, the law judge revoked the registration of the company's securities based on her finding that A-Power had violated § 13(a) of the Exchange Act³ and Rule 13a-1 promulgated thereunder,⁴ in that it had failed to file its required annual report for fiscal year 2010 as charged in the Order Instituting Proceedings.⁵ She also found that A-Power failed to file an annual report for fiscal year 2011 or report the resignation of Simon & Edward as its auditor on Form 6-K.⁶

A-Power filed a timely appeal of the initial decision, and the parties filed briefs in accordance with the schedule that was issued. We reviewed the hearing transcript and the record of action before the law judge *de novo*, as well as the briefs filed by the parties on appeal. We also take official notice that A-Power failed to make any of its required filings since the date of

¹ 15 U.S.C. § 781(b).

² *A-Power Energy Generation Sys., Ltd.*, Initial Decision Release No. 470, 2012 SEC LEXIS 3419 (Nov. 2, 2012).

³ Exchange Act § 13(a), 15 U.S.C. § 78m(a), requires issuers of securities registered pursuant to Exchange Act § 12 to file periodic reports in accordance with Commission rules.

⁴ Rule 13a-1, 17 C.F.R. § 240.13a-1, requires registrants to file annual reports.

⁵ *A-Power Energy Generation Sys., Ltd.*, Exchange Act Release No. 67338, 2012 SEC LEXIS 2090 (July 3, 2012).

⁶ *Id.*

the initial decision,⁷ including its annual reports for fiscal years 2010 and 2011 and notification via Form NT 20-F of its inability to file the 2011 annual report.⁸

I. Summary Affirmance In Part

Based on our review, we have determined that the law judge's factual findings are correct (with the exception of her finding discussed below concerning Form 6-K). We have also determined that the law judge was correct in finding that "A-Power violated Exchange Act Section 13(a) and Exchange Act Rule 13a-1."⁹ We find that these issues do not warrant consideration by the Commission of further oral or written argument. We further find that no prejudicial error was committed in the conduct of the proceeding and that the decision embodies no exercise of discretion or decision of law or policy that is important and that the Commission should review.¹⁰ Accordingly, on our own initiative, we summarily affirm and adopt these findings of the law judge.¹¹

II. Sanctions

As to sanctions, however, while we arrive at the same outcome as the law judge, we must separately analyze the factors set forth in *Gateway Int'l Holdings, Inc.*¹² because the law judge based her sanctions determination, in part, on a finding that A-Power "failed to report the resignation of its auditor on Form 6-K, in violation of 17 C.F.R. § 240.13a-16."¹³ While A-Power was in the practice of reporting information on Form 6-K (until it stopped filing forms with the Commission altogether), it is not clear that it was required to do so. A foreign private issuer is required to make reports on Form 6-K to furnish whatever information it (i) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized, (ii) files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange, or (iii) distributes or is

⁷ Our Rules of Practice permit us to take official notice of information (or the lack thereof) in the Commission's EDGAR database. *See* 17 C.F.R. § 201.323.

⁸ 17 C.F.R. §§ 240.12b-25, 249.322 (requiring issuers to provide notification of their inability to file Form 20-F, or other periodic report, along with supporting reasons, by filing a Form NT 20-F "no later than one business day after the due date" for such report). A-Power did, however, file a Form NT 20-F with respect to its 2010 annual report.

⁹ *A-Power Energy Generation Sys., Ltd.*, 2012 SEC LEXIS 3419, at *6.

¹⁰ *See* 17 C.F.R. § 201.411(e)(2).

¹¹ *See id.* (permitting the Commission, on its own initiative, to summarily affirm an initial decision); *Andover Holdings, Inc.*, Exchange Act Release No. 68966, 2013 SEC LEXIS 548, at *3 (Feb. 21, 2013); *Eric S. Butler*, Exchange Act Release No. 65204, 2011 SEC LEXIS 3002, at *1 n.2 (Aug. 26, 2011).

¹² Exchange Act Release No. 53907, 2006 SEC LEXIS 1288, at *19-20 (May 31, 2006).

¹³ *A-Power Energy Generation Sys., Ltd.*, 2012 SEC LEXIS 3419, at *8. This violation was not charged in the OIP.

required to distribute to its security holders.¹⁴ The record, however, does not establish that information concerning the resignation of Simon & Edward was required to be reported by A-Power on Form 6-K.

Our determination of the appropriate sanction under Exchange Act § 12(j)¹⁵ "turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions, on the other hand."¹⁶ We consider a non-exclusive list of factors in making this determination, including (i) the seriousness of the issuer's violations, (ii) the isolated or recurrent nature of the violations, (iii) the degree of culpability involved, (iv) the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and (v) the credibility of its assurances, if any, against further violations.¹⁷

Based on our consideration of these *Gateway* factors, we find that the protection of investors requires revoking the registration of A-Power's stock. The company's violations are serious, recurrent, and demonstrate a high degree of culpability.¹⁸ Indeed, A-Power's failure to file two annual reports deprived both existing and prospective shareholders of current and reliable information about the company's operations and financial condition. As we stated in *Gateway*:

Failure to file periodic reports violates a central provision of the Exchange Act. The purpose of the periodic filing requirements is to supply investors with current and accurate financial information about an issuer so that they may make sound decisions. Those requirements are the primary tools which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities.¹⁹

A-Power also failed to file Form NT 20-F in connection with its delinquent 2011 annual report, further demonstrating its disregard for our reporting requirements.

We have held that a respondent's repeated failure to file its periodic reports on time is "so serious" a violation of the Exchange Act that only a "strongly compelling showing" regarding the

¹⁴ See 17 C.F.R. §§ 240.13a-16; <http://www.sec.gov/about/forms/form6-k.pdf>.

¹⁵ Section 12(j) authorizes the Commission to suspend or revoke an issuer's registration for violation of Exchange Act filing requirements if it is "necessary or appropriate for the protection of investors." 15 U.S.C. § 78l(j).

¹⁶ *Gateway Int'l Holdings, Inc.*, 2006 SEC LEXIS 1288, at *19.

¹⁷ See *id.* at *19-20.

¹⁸ See *Am. Stellar Energy, Inc.*, Exchange Act Release No. 64897, 2011 SEC LEXIS 2455, at *15-16 (July 18, 2011) (finding issuer's failure to file two annual reports and eight quarterly reports to be serious and recurrent violations); *Impax Labs., Inc.*, Exchange Act Release No. 57864, 2008 SEC LEXIS 1197, at *27 (May 23, 2008) ("[T]he failure to provide accurate, complete, and timely financial information is serious."); *America's Sports Voice, Inc.*, Exchange Act Release No. 55511, 2007 SEC LEXIS 1241, at *11 (Mar. 22, 2007) (finding that a "long history of ignoring . . . reporting obligations" evidences a "high degree of culpability").

¹⁹ 2006 SEC LEXIS 1288, at *26 (internal quotation omitted).

other *Gateway* factors would justify a sanction less than revocation.²⁰ No such showing has been made here. To the contrary, revocation is supported further by A-Power's failure to demonstrate any effort to remedy its past violations or to offer any credible assurances against future violations.

Indeed, A-Power does not state when it expects to file its long overdue 2010 annual report, although it requests an extension of time for that filing.²¹ A-Power further claims that it needs six additional months after filing its 2010 annual report to complete and file its delinquent 2011 annual report. But A-Power has provided no information on the steps that it has taken or plans to take to remedy its past violations and ensure future compliance. And it has not indicated whether it has hired an auditor to replace Simon & Edward, which resigned over a year ago. Therefore, it is unreasonable to expect that A-Power can become current in its reporting obligations in the foreseeable future.

A-Power argues that revocation will harm its shareholders. We previously have recognized that "in any deregistration current shareholders could be harmed by a diminution in the liquidity and value of their stock by virtue of the deregistration,"²² but also have held that "any harm that may result to existing shareholders cannot be the determining factor in our analysis."²³ In evaluating what is necessary or appropriate to protect investors, "regard must be had not only for existing stockholders of the issuer, but also for potential investors."²⁴ Indeed, we have emphasized the significant interests of prospective investors who can be substantially hindered in their ability to evaluate an issuer in the absence of current filings.²⁵ In any event, both existing and prospective shareholders are harmed by the continuing lack of current and reliable financial information for the company.

A-Power also argues that matters outside of the OIP, such as A-Power's failure to file its 2011 annual report, cannot "be regard[ed] as the main evidence[]" in imposing sanctions and "should be applied cautiously."²⁶ This argument is without merit. A-Power's later filing history—

²⁰ *Nature's Sunshine Prods., Inc.*, Exchange Act Release No. 59268, 2009 SEC LEXIS 81, at *30 (Jan. 21, 2009); *Impax Labs., Inc.*, 2008 SEC LEXIS 1197, at *27.

²¹ A-Power's brief to the law judge requested a one-year extension of the time to file its 2010 annual report. Its briefs to the Commission simply request an extension of time.

²² *Eagletech Commc'ns, Inc.*, Exchange Act Release No. 54095, 2006 SEC LEXIS 1534, at *13 (July 5, 2006).

²³ *Gateway Int'l Holdings*, 2006 SEC LEXIS 1288, at *31.

²⁴ *Id.* (citation omitted).

²⁵ *See id.* (stating that, in the context of NASD listing decisions, the Commission has emphasized the interests of future investors rather than the interests of existing shareholders, and noting that "similar policy considerations are applicable in a Section 12(j) proceeding").

²⁶ Company's Br. in Support of Pet. for Review at 6 (internal quotations and ellipsis omitted). The company did not cite any authority in support of this argument.

of which the Commission may take official notice—is a relevant factor in determining whether revocation is necessary or appropriate for the protection of investors.²⁷

Finally, A-Power argues that suspension rather than revocation is an appropriate sanction. However, given its serious and recurrent failure to file its periodic reports and its failure to remedy its past violations or offer credible assurances against future violations, we find that revocation is necessary and appropriate for the protection of investors.

III. Conclusion

Accordingly, it is ORDERED that the law judge's findings of fact are summarily affirmed, with the exception of her finding of fact with respect to Form 6-K;

it is further ORDERED that the law judge's finding that A-Power Energy Generation Systems, Ltd. violated Exchange Act § 13(a) and Rule 13a-1 promulgated thereunder, is summarily affirmed; and

it is further ORDERED that the registration of all classes of the registered securities of A-Power Energy Generation Systems, Ltd. under § 12(b) of the Securities Exchange Act of 1934, be revoked pursuant to Exchange Act § 12(j).

By the Commission.

Elizabeth M. Murphy
Secretary

²⁷ See, e.g., *Gateway Int'l Holdings, Inc.*, 2006 SEC LEXIS 1288, at *24 n.30; *e-Smart Tech., Inc.*, Exchange Act Release No. 50514, 2004 SEC LEXIS 2361, at *10 (Oct. 12, 2004).