

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 50514 / October 12, 2004

Admin. Proc. File No. 3-10977

In the Matter of  
E-SMART TECHNOLOGIES, INC.

ORDER  
REMANDING  
PROCEEDING

I.

On March 4, 2004, an administrative law judge issued an initial decision pursuant to Section 12(j) of the Securities Exchange Act of 1934 revoking the registration of the common stock of e-Smart Technologies, Inc. ("e-Smart" or the "Company"). 1/ The law judge found that e-Smart failed to make required annual and quarterly filings during the period between May 30, 2000, when e-Smart filed its registration statement, and December 16, 2002, when the Order Instituting Proceedings ("OIP") was issued, and that this failure to file violated Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 13a-13. 2/ In

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1/ E-Smart Techs., Inc., Initial Decision Rel. No. 247 (Mar. 4, 2004), 82 SEC Docket 1194. Exchange Act Section 12(j), 15 U.S.C. § 78j(j), in relevant part, authorizes the Commission "as it deems necessary or appropriate for the protection of investors to deny, . . . to suspend for a period not exceeding twelve months, or to revoke the registration of a security" if the issuer of the security has failed to comply with any provision of the securities laws or any rule thereunder.

2/ Section 13(a), 15 U.S.C. § 78m(a), requires, among other things, that every issuer of a security registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. § 78j, file with the Commission annual and quarterly reports as prescribed by the Commission.

Rule 13a-1, 17 C.F.R. § 240.13a-1, requires issuers of securities registered pursuant to Section 12 to file an annual report on the appropriate form "for each fiscal year after the last full fiscal year for which financial statements were filed in its registration statement." The filing must be made "within the period specified in the appropriate form." Id. Rule 13a-13, 17 C.F.R. § 240.13a-13, requires, with certain exceptions not relevant here,

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determining to revoke the Company's registration, the law judge rejected as overly optimistic e-Smart's claim that it would return to reporting compliance by March 31, 2004. E-Smart appealed the law judge's decision, and on March 30, 2004, the Company filed what purported to be a consolidated annual report covering its 2002 and 2003 fiscal years. 3/ The Company also has filed reports covering the first two quarters of this year.

On July 16, 2004, we issued an order denying a motion of the Division of Enforcement to affirm summarily the law judge's decision. 4/ In determining to deny the Division's motion, we held, among other things, that one of the premises underlying the law judge's sanctioning determination -- that the Company could not readily remedy its reporting problems -- no longer appeared valid. For essentially the same reason, we have determined to remand this proceeding for reconsideration of the law judge's sanctioning determination. To the extent we make findings, we base them on an independent review of the record, except with respect to those findings not challenged on appeal.

## II.

E-Smart, a Nevada corporation, is involved in developing and producing biometric verification security systems to be used in combating identity theft and payment fraud. 5/ On May 30, 2000, e-Smart registered its common stock pursuant to Section 12(g) of

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that every issuer of a security registered pursuant to Section 12 who is required to file annual reports pursuant to Section 13, and who has filed or intends to file such reports on Form 10-K and Form 10-KSB, to file quarterly reports on Form 10-Q and 10-QSB, within a specified period, for each of the first three quarters of each fiscal year of the issuer, commencing with the first fiscal quarter following the most recent fiscal year for which full financial statements were included in the registration statement.

3/ We note that our rules do not provide for the filing of consolidated annual reports.

4/ E-Smart Techs., Inc., Exchange Act Rel. No. 50030 (July 16, 2004), \_\_\_ SEC Docket \_\_\_.

5/ Among its products is a "smart card," an identification device that can store personal data and confirm the cardholder's identity by a fingerprint sensor embedded in the card.

the Exchange Act 6/ by filing Form 10-SB, a registration statement for small business issuers. After registering its common stock, e-Smart filed two unaudited quarterly reports, using Form 10-QSB, for the quarters ending June 30 and September 30, 2000. Between the September 30, 2000 filing and the issuance of the OIP on December 16, 2002, e-Smart filed no quarterly or annual reports. 7/ The law judge found that, by failing to file annual and quarterly reports during the relevant period, e-Smart violated Section 13(a) of the Exchange Act and Exchange Act Rules 13a-1 and 13a-13.

At the hearing, e-Smart admitted that it had failed to make required quarterly and annual filings, and that the only issue before the law judge was the appropriate sanction. E-Smart produced evidence, primarily through the testimony of its chief executive officer, Mary Grace, that the Company's failure to file the required reports was due to a variety of factors, including lack of capital, loss of key personnel involved in the Company's financial reporting, and distractions related to criminal proceedings brought against Grace and one of the inventors of the "smart card." 8/ E-Smart represented that it had begun to put in place controls and procedures designed to ensure that information was disclosed in accordance with the Exchange Act; it had retained new counsel for its securities work and had arranged for new accounting controls and the hiring of a new auditor. E-Smart explained that it was concentrating its resources on getting current financial information to investors. The Company represented that it expected to file a quarterly report for the quarter ending September 30, 2003 by the end of December, 2003, and an annual report for the years ending December 31, 2002 and December 31, 2003 by March 31, 2004 at the latest. Thereafter, it would turn to the preparation and submission of the forms that should have been submitted during the period between 2000 and 2003. 9/

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6/ 15 U.S.C. § 781(g).

7/ Between the issuance of the OIP and December 8, 2003, when the law judge held a hearing in this matter, e-Smart filed an unaudited quarterly report on Form 10-QSB for the quarter ending June 30, 2003. This report was received late, on November 14, 2003.

8/ In a quarterly report on Form 10-QSB filed in late 2003, the Company indicated that the proceeding against the CEO had subsequently been dismissed.

9/ Although the law judge found that e-Smart had claimed that it intended to "bring itself into full compliance" with the periodic reporting requirements by March 31, the hearing  
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Although the Company in late December 2003 filed a Form 10-QSB for the third quarter of 2003, as it had represented it would do, the law judge gave little credence to the Company's assertions regarding its ability to return to reporting compliance. The law judge determined that, although e-Smart represented that it intended to "bring itself into full compliance with the periodic reporting requirements" by March 31, 2004, "this endeavor seems doomed." 10/ Because "overwhelming evidence" convinced the law judge that e-Smart could not "readily remedy its periodic reporting violations," which she found "likely to recur in the future," she concluded that a suspension -- the only sanction other than a revocation available under Section 12(j) under the circumstances of this case -- would not sufficiently protect the investing public. 11/ She therefore revoked the registration of e-Smart's securities.

On March 30, 2004, shortly after issuance of the law judge's decision, e-Smart filed audited financial statements and other information for the Company on Form 10-KSB for fiscal years 2002 and 2003. On May 17, 2004, e-Smart timely filed its quarterly report on Form 10-QSB for the first three months of 2004, and on August 16, 2004, e-Smart timely filed its quarterly report on Form 10-QSB for the second three months of 2004. 12/

### III.

The purpose of the periodic reporting requirements is to supply the investing public with current, accurate financial information about an issuer so that investors may make informed

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9/ (...continued)

transcript indicates that e-Smart did not represent that it would submit the filings due between September 30, 2000 and December 16, 2002 by that date.

10/ 82 SEC Docket at 1200.

11/ Id. Section 12(j) also allows the Commission to suspend the effective date of the registration of a security, an action not applicable here.

12/ Additionally, on June 30, 2004, e-Smart filed a Form 10-QSB for the quarter ending March 31, 2003, and on September 8, 2004, e-Smart filed a Form 10-KSB for the fiscal years ending December 31, 2001 and December 31, 2002. These reports, like e-Smart's other filings, are available through the Commission's website, [www.sec.gov](http://www.sec.gov). Rule 323 of our Rules of Practice, 17 C.F.R. § 201.323, allows us to take official notice of "any matter in the public official records of the Commission."

decisions. 13/ The reporting requirements of the Exchange Act are "the primary tool which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities." 14/

It is undisputed that e-Smart violated Section 13(a) and Rules 13a-1 and 13a-13 by failing to make required periodic reports. The law judge characterized e-Smart's violations as both recurring and egregious, and found that the Company's actions prior to the initiation of this proceeding raised serious doubts as to its future compliance with the periodic reporting requirements.

After the law judge issued her opinion, however, e-Smart filed annual and quarterly reports on a timely basis. 15/ Thus, the investing public now has access to current, audited financial information about the Company. Moreover, the Company has begun to fill the gaps in its reporting history by filing the reports it failed to file during the period between the filing of its registration statement and the issuance of the OIP. 16/ Although

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13/ SEC v. Beisinger Indus. Corp., 552 F.2d 15, 18 (1st Cir. 1977).

14/ Id. Administrative proceedings under Section 12(j) are one of the remedies the Exchange Act provides to address the problem of publicly traded companies that are delinquent in the filing of their Exchange Act reports and thereby deprive investors of accurate financial information upon which to make informed investment decisions. See n.17, infra. Section 12(j) proceedings play an important role in the Commission's enforcement program because many publicly traded companies that fail to file on a timely basis are "shell companies" and, as such, attractive vehicles for fraudulent stock manipulation schemes. Revocation under Section 12(j) can make such issuers less appealing to persons who would put them to fraudulent use.

15/ The Division concedes that the law judge's "assessment of e-Smart's capacity to submit audited reports by March 31, 2004 ultimately turned out to be incorrect," but argues that this fact "does not establish that her determination was unfounded when it was made."

16/ The law judge's statement that e-Smart was unlikely to "bring itself into full compliance with the periodic reporting requirements by March 31," 82 SEC Docket at 1200, could be read as a prediction that e-Smart would not make all the required filings that it should have made during the period between May 30, 2000 and December 16, 2002, the

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we consider e-Smart's violations serious, we also believe the Company's subsequent filing history is an important factor to be considered in determining whether revocation is "necessary or appropriate for the protection of investors." 17/ Under the circumstances, therefore, we believe it is appropriate to provide the law judge an opportunity to assess her sanctioning

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16/ (...continued)

period encompassed by the OIP, by March 31, 2004. However, the law judge's mention of the March 31, 2004 date suggests that she was referring not to all the delinquent filings, but rather to e-Smart's repeated representations at the hearing that it would file a Form 10-KSB for 2002 and 2003 by March 31. See, e.g., 82 SEC Docket at 1199 (characterizing e-Smart's position as "request[ing] a grace period within which to complete and file its audited annual reports for the years 2002 and 2003"). E-Smart's emphasis on filing its Form 10-KSB as expeditiously as possible, while not remedying the delinquencies on which the findings of violation were based, did provide current, audited financial information to the investing public, which, as noted above, fulfilled the purpose behind the periodic reporting requirements. Additionally, e-Smart's Forms 10-QSB for the quarters ending March 31 and June 30, 2004 provide additional information to investors.

17/ We note that, in addition to revocation or suspension of registration under Section 12(j), the Exchange Act provides other remedies to address reporting violations. See Exchange Act Section 15(c)(4), 15 U.S.C. § 78o(c)(4) (allowing Commission to issue order requiring issuer to comply with reporting requirements, upon specified terms and conditions and within specified time; if necessary, the Commission may apply to a United States District Court for enforcement of such an order, Exchange Act Section 21(e), 15 U.S.C. § 78p(e)); Exchange Act Section 21C, 15 U.S.C. § 78u-3 (allowing Commission to impose cease-and-desist order). While these remedies are not available in the current proceeding because it was not instituted pursuant to those provisions, they may be utilized by us in a future proceeding involving similar circumstances.

determination in light of e-Smart's subsequent reporting record. 18/

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18/ On June 17, 2004, the Company filed a motion seeking oral argument, which we deny. Rule 451(b) of our Rules of Practice, 17 C.F.R. § 201.451(b), states that motions for oral argument should "accompany[] the initial brief on the merits." E-Smart's initial brief was filed on April 27, 2004 and, therefore, its oral argument request could be denied as untimely. Moreover, Rule 451(a) of our Rules of Practice, 17 C.F.R. § 201.451, provides that "[m]otions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable," and we believe that oral argument would be inadvisable in light of our determination to remand this proceeding. See James F. Glaza, Exchange Act Rel. No. 50474 (Sept. 29, 2004), \_\_\_ SEC Docket \_\_\_, \_\_\_ n.14 (denying oral argument request where proceeding remanded to law judge); D.E. Wine Inv., Inc., Exchange Act Rel. No. 43929 (Feb. 6, 2001), 74 SEC Docket 2573, 2581 n.25 (denying oral argument request where proceeding dismissed).

Our decision in this case is dependent on the particular facts and circumstances involved, and should not be construed as suggesting that a determination to revoke an issuer's registration will be reconsidered simply because the issuer has returned to reporting compliance and begun to submit long overdue filings. Other considerations, including the need for finality in Commission administrative proceedings, may justify a different result.

Accordingly, IT IS ORDERED that this proceeding be, and it hereby is, remanded to the administrative law judge for further proceedings in accordance with this opinion. 19/ The law judge is ordered to file the decision on remand with the Office of the Secretary within 120 days from the date of service of this order.

By the Commission.

Jonathan G. Katz  
Secretary

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19/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.