

DIGI INTERNATIONAL INC

Form S-8

September 16, 2010

Table of Contents

As filed with the Securities and Exchange Commission on September 16, 2010.

Registration No. 333-

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549**

**FORM S-8
REGISTRATION STATEMENT UNDER THE
SECURITIES ACT OF 1933**

DIGI INTERNATIONAL INC.

(Exact name of Registrant as specified in its charter)

DELAWARE
(State or other jurisdiction of
incorporation or organization)

41-1532464
(I.R.S. Employer
Identification No.)

**11001 BREN ROAD EAST
MINNETONKA, MINNESOTA**
(Address of principal executive offices)

55343
(Zip Code)

**DIGI INTERNATIONAL INC. EMPLOYEE STOCK
PURCHASE PLAN AS AMENDED AND RESTATED AS OF
DECEMBER 4, 2009**

(Full title of the plan)

Joseph T. Dunsmore

Chairman, President and Chief Executive Officer

Digi International Inc.

11001 Bren Road East

Minnetonka, Minnesota 55343

(Name and address of agent for service)

(952) 912-3444

(Telephone number, including area code, of agent for service)

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer or a smaller reporting company. See definitions of large accelerated filer, accelerated filer and smaller reporting company in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer

Smaller reporting
company

(Do not check if a smaller
reporting company)

Calculation of Registration Fee

Title of securities to be registered	Amount to be Registered (1)(2)(3)	Proposed maximum offering price per share (4)	Proposed maximum aggregate offering price (4)	Amount of registration fee
	250,000 shares	\$8.31	\$2,077,500	\$148.13

Common Stock, \$.01 par
value per share

- (1) The Registration Statement relates to 250,000 shares of Common Stock to be offered pursuant to the Registrant's Employee Stock Purchase Plan as Amended and Restated as of December 4, 2009.
 - (2) Pursuant to Rule 416 under the Securities Act of 1933, as amended (Securities Act), this Registration Statement includes an indeterminate number of additional shares as may be issuable as a result of a stock split, stock dividend or similar adjustment of the outstanding Common Stock of the Registrant.
 - (3) Associated with the Common Stock of the Registrant are preferred share purchase rights that will not be exercisable or evidenced separately from the Common Stock prior to the occurrence of certain events.
 - (4) Estimated solely for the purpose of calculating the amount of the registration fee pursuant to Rule 457(h)(1) under the Securities Act, based on the average of the high and low sales prices per share of the Registrant's Common Stock on September 13, 2010 as reported on the Nasdaq Global Select Market.
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TABLE OF CONTENTS

PART I

PART II

Item 3. Incorporation of Documents by Reference.

Item 4. Description of Securities.

Item 5. Interests of Named Experts and Counsel.

Item 6. Indemnification of Directors and Officers.

Item 7. Exemption from Registration Claimed.

Item 8. Exhibits.

Item 9. Undertakings.

SIGNATURES

INDEX TO EXHIBITS

EX-5.1

EX-23.2

EX-24.1

Table of Contents

DIGI INTERNATIONAL INC.

PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

The information specified in Part I of Form S-8 is not required to be filed with the Securities and Exchange Commission (the Commission) either as part of this Registration Statement or as prospectuses or prospectus supplements pursuant to the introductory Note to Part I of Form S-8 and Rule 424 under the Securities Act. The information required in the Section 10(a) prospectus is included in the documents being maintained and delivered by Digi International Inc. (the Company) as required by Part I of Form S-8 and by Rule 428 under the Securities Act.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents of the Company, filed with the Commission pursuant to the Securities Exchange Act of 1934, as amended (the Exchange Act), are, as of their respective dates, incorporated herein by reference and made a part hereof:

- (1) The latest Annual Report on Form 10-K of the Company for the fiscal year ended September 30, 2009 filed pursuant to Section 13 of the Exchange Act (File No. 1-34033);
- (2) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the Annual Report referred to in (1) above;
- (3) The description of the Company's Common Stock which is included in registration statements and reports filed under the Exchange Act from time to time, which include the description of the Company's Common Stock contained in the Registration Statement on Form 8-A (File No. 0-17972) filed on October 5, 1989 under the Exchange Act and all amendments and reports filed for the purpose of updating such description; and
- (4) The description of the Company's Purchase Rights contained in the Registration Statement on Form 8-A (File No. 1-34033) filed on April 25, 2008 under the Exchange Act, and all amendments and reports filed for the purpose of updating such description.

All reports and other documents filed by the Company pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act subsequent to the date of this Registration Statement and prior to the filing of a post-effective amendment that indicates that all of the securities offered have been sold or that deregisters all securities then remaining unsold shall be deemed to be incorporated by reference in and a part of this Registration Statement from the date of filing of such documents.

Any statement contained in a document incorporated, or deemed to be incorporated, by reference herein shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that a statement contained herein or incorporated herein by reference or in any other subsequently filed document that also is or is deemed to be incorporated by reference herein modifies or supersedes such statement. Any statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

Item 4. Description of Securities.

Not Applicable.

Table of Contents

Item 5. Interests of Named Experts and Counsel.

James E. Nicholson, Secretary of the Company, is a partner of Faegre & Benson LLP. Faegre & Benson LLP has given its opinion about certain legal matters affecting the shares of the Common Stock of the Company registered under this Registration Statement. Mr. Nicholson holds options to purchase 104,500 shares of Common Stock of the Company, all of which are exercisable within 60 days of the date hereof. Such options are held by Mr. Nicholson under nominee agreements for the benefit of Faegre & Benson LLP. In addition, attorneys at Faegre & Benson LLP participating in matters relating to the Registration Statement beneficially own 12,085 shares of Common Stock of the Company.

Item 6. Indemnification of Directors and Officers.

Under Delaware law, a corporation may indemnify any person who was or is a party or is threatened to be made a party to an action (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the corporation's request, as a director, officer, employee or agent of another corporation or other enterprise, against expenses (including attorneys fees) that are actually and reasonably incurred by the person (Expenses), and judgments, fines and amounts paid in settlement that are actually and reasonably incurred by the person, in connection with the defense or settlement of such action, provided that the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the corporation's best interests, and, with respect to any criminal action or proceeding, had no reasonable cause to believe that his conduct was unlawful. Although Delaware law permits a corporation to indemnify any person referred to above against Expenses in connection with the defense or settlement of an action by or in the right of the corporation, provided that the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the corporation's best interests, if such person has been judged liable to the corporation, indemnification is only permitted to the extent that the Court of Chancery (or the court in which the action was brought) determines that, despite the adjudication of liability, such person is entitled to indemnity for such Expenses as the court deems proper. The General Corporation Law of the State of Delaware also provides for mandatory indemnification of any director or officer against Expenses to the extent such person has been successful in any proceeding covered by the statute. In addition, the General Corporation Law of the State of Delaware provides the general authorization of advancement of a director's or officer's litigation Expenses in lieu of requiring the authorization of such advancement by the board of directors in specific cases, and that indemnification and advancement of Expenses provided by the statute shall not be deemed exclusive of any other rights to which those seeking indemnification of Expenses may be entitled under any bylaw, agreement or otherwise.

Article V of the By-Laws of the Company and indemnification agreements with directors and officers of the Company provide for the broad indemnification of the directors and officers of the Company and for advancement of litigation Expenses to the fullest extent required or permitted by current Delaware law.

The Company maintains a policy of directors and officers liability insurance that reimburses the Company for Expenses that it may incur in conjunction with the foregoing indemnity provisions and that may provide direct indemnification to officers and directors where the Company is unable to do so.

The Certificate of Incorporation of the Company eliminates the personal liability of a director to the Company or its stockholders for monetary damages for breach of fiduciary duty as a director, except under certain circumstances involving certain wrongful acts such as breach of a director's duty of loyalty, acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, for any unlawful acts under Section 174 of the General Corporation Law of the State of Delaware, or for any transaction from which a director derives an improper personal benefit.

Item 7. Exemption from Registration Claimed.

Not Applicable.

Table of Contents

Item 8. Exhibits.

Exhibit

- 4.1 Restated Certificate of Incorporation of the Company, as amended (incorporated herein by reference to Exhibit 3(a) to the Company's Form 10-K for the year ended September 30, 1993 (File No. 0-17972)).
- 4.2 Amended and Restated By-Laws of the Company (incorporated by reference to Exhibit 3(b) to the Company's Form 10-Q for the quarter ended June 30, 2008 (File No. 1-34033)).
- 4.3 Digi International Inc. Employee Stock Purchase Plan as Amended and Restated as of December 4, 2009 (incorporated by reference to Exhibit 10(b) to the Company's Form 8-K filed on January 29, 2010 (File No. 1-34033)).
- 5.1 Opinion of Faegre & Benson LLP as to the legality of the shares being registered.
- 23.1 Consent of Faegre & Benson LLP (contained in its opinion filed as Exhibit 5.1 of this Registration Statement).
- 23.2 Consent of PricewaterhouseCoopers LLP.
- 24.1 Powers of Attorney

Item 9. Undertakings.

A. The Company hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

- (i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933;
- (ii) To reflect in the prospectus any facts or events arising after the effective date of the Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the Registration Statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20 percent change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective Registration Statement; and

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement; *provided, however*, that paragraphs (A)(1)(i) and (A)(1)(ii) above do not apply if the Registration Statement is on Form S-8, and the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by the Company pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Registration Statement.

Table of Contents

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

B. The Company hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the Company's annual report pursuant to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered herein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

C. Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the Company pursuant to the foregoing provisions, or otherwise, the Company has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Company of expenses incurred or paid by a director, officer or controlling person of the Company in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Company will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

Table of Contents

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Company certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the city of Minnetonka, State of Minnesota, on September 16, 2010.

DIGI INTERNATIONAL INC.

By /s/ Joseph T. Dunsmore
Joseph T. Dunsmore
Chairman, President and Chief Executive Officer

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities indicated on September 16, 2010:

Signature	Title
/s/ Joseph T. Dunsmore Joseph T. Dunsmore	Chairman, President, Chief Executive Officer and Director <i>(Principal Executive Officer and Director)</i>
/s/ Brenda L. Mueller Brenda L. Mueller	Corporate Controller and Acting Principal Financial Officer <i>(Acting Principal Financial and Accounting Officer)</i>
Guy C. Jackson	
Kenneth E. Millard	
Ahmed Nawaz	A majority of the Board of Directors*
William N. Priesmeyer	
Bradley J. Williams	

* Joseph T. Dunsmore, by signing his name hereto, does hereby sign this document on behalf of each of the above named directors of the Company pursuant to powers of attorney duly executed by such.

By /s/ Joseph T. Dunsmore
Joseph T. Dunsmore
Attorney in Fact

Table of Contents

INDEX TO EXHIBITS

Exhibit	Description	Method of Filing
4.1	Restated Certificate of Incorporation of the Company as amended	Incorporated by Reference
4.2	Amended and Restated By-Laws of the Company	Incorporated by Reference
4.3	Digi International Inc. 2000 Omnibus Stock Plan as Amended and Restated as of December 4, 2009	Incorporated by Reference
5.1	Opinion of Faegre & Benson LLP as to the legality of the shares being registered	Filed Electronically
23.1	Consent of Faegre & Benson LLP (contained in its opinion filed as Exhibit 5.1 to this Registration Statement)	Filed Electronically
23.2	Consent of PricewaterhouseCoopers LLP	Filed Electronically
24.1	Powers of Attorney	Filed Electronically