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PAYMENT DATA SYSTEMS INC
Form S-8 POS
June 03, 2005

AS FILED WITH THE SECURITIES AND EXCHANGE COMMISSION ON JUNE 3, 2005

FILE NO. 333-122312

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON D.C. 20549

POST-EFFECTIVE AMENDMENT NO. 1

TO THE

FORM S-8

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

PAYMENT DATA SYSTEMS, INC.

(Exact name of registrant as specified in its charter)

NEVADA

98-0190072

(State or other jurisdiction
of incorporation or organization)

(IRS Employer
Identification No.)

12500 SAN PEDRO, SUITE 120
SAN ANTONIO, TX 78216
Telephone: (210) 249-4100

(Address, Including Zip Code and Telephone Number, of Principal Executive
Offices)

AMENDED AND RESTATED 1999 EMPLOYEE COMPREHENSIVE STOCK PLAN

AMENDED AND RESTATED 1999 NON-EMPLOYEE DIRECTOR PLAN

(Full Title of the Plans)

MICHAEL R. LONG
CHIEF EXECUTIVE OFFICER
12500 SAN PEDRO
SUITE 120
SAN ANTONIO, TEXAS 78216
(210) 249-4100

(Name, Address and Telephone Number,
including Area Code, of Agent for Service)

Copies of communications to:

AMY M. TROMBLY, ESQ.
TROMBLY BUSINESS LAW
1163 WALNUT STREET, SUITE 7
NEWTON, MA 02461
(617) 243-0060

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PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

ITEM 1. PLAN INFORMATION

Pursuant to the Note to Part I of the Form S-8, the information required by Part I is not filed with the Securities and Exchange Commission.

ITEM 2. REGISTRANT INFORMATION AND EMPLOYEE PLAN ANNUAL INFORMATION

The Registrant will provide without charge to each person to whom a copy of a Section 10(a) Prospectus hereunder is delivered, upon the oral or written request of such person, a copy of any document incorporated in this Registration Statement by reference. Requests for such information should be directed to Payment Data Systems, 12500 San Pedro, Suite 120, San Antonio, TX 78216.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

ITEM 3. INCORPORATION OF DOCUMENTS BY REFERENCE.

The following documents are incorporated by reference in this registration statement.

a) The Registrant's Annual Report on Form 10-KSB for the fiscal year ended December 31, 2004 filed pursuant to Section 13(c) or 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act");

b) All other reports filed by Registrant pursuant to Section 13(c) or 15(d) of the Exchange Act since the end of the fiscal year covered by the Form 10-K referred to in (a) above.

c) The description of the common stock, \$.001 par value per share (the "Common Stock") of the Registrant is contained in the Registrant's annual report on Form 10-KSB.

All documents filed by the Registrant pursuant to Section 13(a), 13(c), 14 and 15(d) of the Exchange Act subsequent to the date of this registration statement and prior to the filing of a post-effective amendment to this registration statement which indicates that all securities offered hereby have been sold or which deregisters all securities then remaining unsold shall be deemed to be incorporated in this registration statement by reference and to be a part hereof from the date of filing of such documents. Any statement contained in this registration statement, in a supplement to this registration statement or in a document 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 in any subsequently filed supplement to this registration statement or in any document that is subsequently 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. The class of securities to be offered is registered under Section 12 of the Exchange Act.

ITEM 5. INTEREST OF NAMED EXPERTS AND COUNSEL

No expert or counsel will receive a direct or indirect interest in our company

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or was our promoter, underwriter, voting trustee, director or officer or employee. Nor does any expert or counsel have any contingent based agreement with us or any other interest in or connection to us.

ITEM 6. INDEMNIFICATION OF DIRECTORS AND OFFICERS.

Nevada law generally sets forth the powers of the Company to indemnify officers, directors, employees and agents. The Articles of Incorporation for the Company provide as follows:

No director or officer shall have any personal liability to the corporation or its stockholders for the damages for breach of fiduciary duty as a director or officer, except that this Article shall not eliminate or limit the liability of a director or officer for (i) acts or omissions that involve intentional misconduct, fraud or a knowing violation of the law, or (ii) the payment of dividends in violation of Nevada Revised Statutes.

The By-laws of the Company provide as follows:

Every person who was or is a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he or a person of whom he is the legal representative is or was a Director or officer of the corporation or is or was serving at the request of the corporation or for its benefit as a Director or officer of another corporation, or as its representative in a partnership, joint venture, trust or other enterprise, shall be indemnified and held harmless to the fullest legally permissible extent under the general Corporation Law of the State of Nevada from time to time against all expenses, liability and loss (including attorney's fees, judgment, fines and amounts paid or to be paid in settlement) reasonably incurred or suffered by him in connection therewith. The expenses of officers and Directors incurred in defending a civil or criminal action, suit or proceeding must be paid by the corporation as they are incurred and in advance of the final disposition of the action, suit or proceeding upon receipt of an undertaking by or on behalf of the Director or officer to repay the amount if it is ultimately determined by a court of competent jurisdiction that he is not entitled to be indemnified by the corporation. Such right of indemnification shall be a contract right which may be enforced in any manner desired by such person. Such right of indemnification shall not be exclusive of any other right which such Directors, officers or representatives may have or hereafter acquire and, without limiting the generality of such statement, they shall be entitled to their respective rights of indemnification under any bylaw, agreement, vote of stockholders, provision of law or otherwise, as well as their rights under this Article. The Board of Directors may cause the corporation to purchase and maintain insurance on behalf of any person who is or was a Director or officer of the corporation, or is or was serving at the request of the corporation as a Director or officer of another corporation, or as its representative in a partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred in any such capacity or arising out of such status, whether or not the corporation would have the power to indemnify such person. The Board of Directors may from time to time adopt further Bylaws with respect to indemnification and amend these and such Bylaws to provide at all times the fullest indemnification permitted by the General Corporation Law of the State of Nevada.

Under the foregoing provisions of the Registrant's Articles of Incorporation and By-Laws, each person who is or was a director or officer shall be indemnified by the Registrant to the full extent permitted or authorized by the General Corporation Law of Nevada. Under such law, to the extent that such person is successful on the merits of defense of a suit or proceeding brought against such

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person by reason of the fact that such person is a director or officer of Payment Data Systems, such person shall be indemnified against expenses, including attorneys' fees, reasonably incurred in connection with such action. If unsuccessful in defense of a third-party civil suit or a criminal suit or if such a suit is settled, such a person shall be indemnified under such law against both (1) expenses (including attorneys' fees) and (2) judgments, fines and amounts paid in settlement if such person acted in good faith and in a manner such person reasonably believed to be in, or not opposed to, our best interests, and with respect to any criminal action, had no reasonable cause to believe such person's conduct was unlawful.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant 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.

ITEM 7. EXEMPTION FROM REGISTRATION CLAIMED.

Not applicable.

ITEM 8. EXHIBITS

Exhibit No. Description

5.1 Opinion of Amy Trombly, Esq.

4.1 Amended and Restated 1999 Employee Comprehensive Stock Plan (incorporated by reference to such exhibit in the Registrant's Registration Statement on Form S-8, filed January 26, 2005)

4.2 Amended and Restated 1999 Non-Employee Director Plan (incorporated by reference to such exhibit in the Registrant's Registration Statement on Form S-8, filed January 26, 2005)

23.1 Consent of Akin, Doherty, Klein & Feuge, P.C.

23.2 Consent of Counsel (included in Exhibit 5.1 hereto).

ITEM 9. UNDERTAKINGS

(a) The Registrant hereby undertakes:

1. To file, during any period in which it offers or sells securities are being made, a post-effective amendment to this registration statement to:

(i) Include any additional or changed material information with respect to the plan of distribution.

2. For determining liability under the Securities Act of 1933, that each post-effective amendment as a new registration statement of the securities offered, and the offering of the securities at that time to be the initial bona fide offering.

3. File a post-effective amendment to remove from registration any of the securities that remain unsold at the end of the offering.

For determining any liability under the Securities Act, treat the information

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omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in form of prospectus filed by the Registrant under Rule 424(b)(1), or (4) or 497(h) under the Securities Act as part of this registration statement as of the time the Commission declared it effective.

For determining any liability under the Securities Act, treat each post-effective amendment that contains a form of prospectus as a new registration statement for the securities offered in the registration statement, and that offering of the securities at that time as the initial bona fide offering of those securities.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant 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 San Antonio, State of Texas on the 3rd day of June, 2005.

PAYMENT DATA SYSTEMS, INC.

By: /s/ Michael Long

Michael R. Long
Chief Executive
Officer and Chief Financial Officer

SIGNATURES

DATE

By: /s/ Michael R. Long

Michael R. Long
Chief Executive
Officer and Chief Financial Officer
(principal executive officer and
principal financial and accounting officer)

June 3, 2005

By: /s/ Louis A. Hoch

Louis A. Hoch
President, Chief Operating Officer
and Director

June 3, 2005

By: /s/ Peter G. Kirby

Peter G. Kirby
Director

June 3, 2005

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Exhibit 5.1

AMY TROMBLY, ESQ.
1163 Walnut Street, Suite 7
Newton, Massachusetts 02461
(617) 243-00600

June 3, 2005

Payment Data Systems, Inc.
12500 San Pedro, Suite 120
San Antonio, Texas 78216

Gentlemen:

I have acted as counsel to Payment Data Systems, Inc., a Nevada corporation (the "Company"), in connection with the preparation and filing with the Securities and Exchange Commission (the "Commission") of a Registration Statement on Form S-8 (the "Registration Statement"), pursuant to which the Company is registering under the Securities Act of 1933, as amended (the "Securities Act"), up to 6,000,000 shares of its common stock, \$.001 par value per share (the "Shares") which may be issued from time to time on a delayed or continuous basis pursuant to Rule 415 under the Securities Act. This opinion is being rendered in connection with the filing of the Registration Statement. All capitalized terms used herein and not otherwise defined shall have the respective meanings given to them in the Registration Statement.

In connection with this opinion, I have examined the Company's Articles of Incorporation, as amended, and Bylaws, as amended; and such other records of the corporate proceedings of the Company and certificates of the Company's officers as I deemed relevant; and the Registration Statement and the exhibits filed with the Commission.

In my examination, I have assumed the genuineness of all signatures, the legal capacity of natural persons, the authenticity of all documents submitted to me as originals, the conformity to original documents of all documents submitted to me as certified or photostatic copies and the authenticity of the originals of such copies.

Based upon the foregoing, and subject to the limitations set forth below, I am of the opinion that, once (i) the Registration Statement, as amended, has become effective under the Securities Act, (ii) the Shares have been issued as contemplated by the Registration Statement, and (iii) the Company has received the consideration in the manner described in the Registration Statement, the Shares will be duly and validly issued, fully paid and non-assessable shares of the Common Stock.

No opinion is expressed herein with respect to the qualification of the Shares under the securities or blue sky laws of any state or any foreign jurisdiction.

This opinion is based upon currently existing statutes, rules, regulations and judicial decisions, and I disclaim any obligation to advise you of any change in any of these sources of law or subsequent legal or factual developments which might affect any matters or opinions set forth herein.

I understand that you wish to file this opinion as an exhibit to the Registration Statement, and I hereby consent thereto.

Very truly yours,

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/s/ Amy Trombly, Esq.

Amy Trombly, Esq.

Exhibit 23.1

AKIN, DOHERTY, KLEIN & FEUGE, P.C.
Certified Public Accountants
8610 North New Braunfels, Suite 101
San Antonio, Texas 78217
Telephone: 210 829-1300
Fax: 210 829-4080

CONSENT OF INDEPENDENT PUBLIC ACCOUNTANTS

As independent public accountants for Payment Data Systems, Inc. (the "Company"), we hereby consent to the incorporation by reference in this Registration Statement of our report dated February 18, 2005, except for Note 15, to which the date is March 11, 2005, included in the Company's Form 10-KSB for the year ended December 31, 2004, and to all references to our firm included in this Registration Statement.

/s/ Akin, Doherty, Klein & Feuge

Akin, Doherty, Klein & Feuge, P.C.
San Antonio, Texas

By: /s/ Thomas A. Akin

Date: June 3, 2005