

Accelerate Diagnostics, Inc
Form S-8
March 22, 2013

As filed with the Securities and Exchange Commission on March 22, 2013

Registration No. 333-_____

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-8 REGISTRATION STATEMENT

UNDER THE SECURITIES ACT OF 1933

Accelerate Diagnostics, Inc.

(Exact name of registrant as specified in its charter)

Delaware

84-1072256

(State or other jurisdiction of
of incorporation or organization)

(I.R.S. Employer
Identification No.)

**3950 South Country Club Road, Suite 470
Tucson, Arizona**

85714

(Address of principal executive offices)

(Zip Code)

Accelerate Diagnostics, Inc. 2012 Omnibus Equity Incentive Plan

(formerly known as the Accelr8 Technology Corporation 2012 Omnibus Equity Incentive Plan)

(Full title of the plan)

Steve Reichling

Chief Financial Officer

Accelerate Diagnostics, Inc.

3950 South Country Club Road, Suite 470

Tucson, Arizona 85714

(520) 365-3100

Copies to:

Daniel M. Mahoney

Snell & Wilmer L.L.P.

One Arizona Center

400 East Van Buren

Phoenix, Arizona 85004

(602) 382-6000

(Name, address and 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 the definitions of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act (check one):

| | | | |
|-------------------------|-----------------------|---------------------------|----------------------------------|
| Large accelerated filer | <input type="radio"/> | Accelerated filer | <input type="radio"/> |
| Non-accelerated filer | <input type="radio"/> | Smaller reporting company | <input checked="" type="radio"/> |

(Do not check if a smaller reporting company)

CALCULATION OF REGISTRATION FEE

| Title of securities to be registered | Amount to be registered | Proposed maximum offering price per share | Proposed maximum aggregate offering price | Amount of registration fee |
|---|--------------------------------|--|--|-----------------------------------|
| Common Stock, par value \$0.001 per share | 1,677,500 shares (1) | \$6.22 (2) | \$10,434,050 | \$831.10 (3) |

Effective October 31, 2012, the registrant's board of directors approved the Accelerate Diagnostics, Inc. 2012 Omnibus Equity Incentive Plan (formerly known as the Accler8 Technology Corporation 2012 Omnibus Equity Incentive Plan), as amended (the "2012 Plan"), which supersedes the Accler8 Technology Corporation 2004 Omnibus Stock Option Plan and all other prior equity compensation plans or programs maintained by the registrant (collectively, the "Prior Plans"). On December 12, 2012, the registrant's stockholders approved the 2012 Plan. The

- (1) total number of shares of stock reserved and available for grant pursuant to the 2012 Plan is equal to the total number of shares of stock that were authorized but unissued under the Prior Plans, which is equal to 1,677,500 shares of the registrant's common stock. Pursuant to Rule 416(a) under the Securities Act of 1933, as amended, this Registration Statement shall also cover any additional shares of common stock that may become issuable under the 2012 Plan by reason of any stock dividend, stock split, recapitalization or similar adjustments.
- (2) Estimated solely for purposes of calculating the registration fee pursuant to Rules 457(c) and 457(h) based upon the average of the high and low prices of the registrant's common stock, as reported on the NASDAQ Capital Market, on March 18, 2013.

- (3) The total registration fee payable with respect to the shares registered on this Registration Statement is \$1,423.20. As permitted by Rule 457(p), the registration fee set forth in the table above is equal to such total fee minus the \$592.10 registration fee that the registrant previously paid with respect to such shares in connection with filing a Registration Statement on Form S-8 (File No. 333-182930) on July 30, 2012. Concurrently with the filing of this Registration Statement, the registrant is filing a post-effective amendment to terminate the offering contemplated by such previously filed Registration Statement.

PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

Item 1. Plan Information.*

Item 2. Registrant Information and Employee Plan Annual Information.*

* The documents containing the information specified in Part I of this Form S-8 will be delivered to each employee, officer, director or other person, as specified by Rule 428(b)(1) under the Securities Act of 1933, as amended (the “Securities Act”), who is eligible to participate in the Accelerate Diagnostics, Inc. 2012 Omnibus Equity Incentive Plan (formerly known as the Accelr8 Technology Corporation 2012 Omnibus Equity Incentive Plan), as amended (the “Plan”). These documents are not being filed with the Securities and Exchange Commission (the “Commission”) either as part of this registration statement or as prospectuses or prospectus supplements pursuant to Rule 424 under the Securities Act. These documents and the documents incorporated by reference into this registration statement pursuant to Item 3 of Part II of this Form S-8, taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents have been filed by Accelerate Diagnostics, Inc. (the “Registrant” or the “Company”) with the Commission pursuant to the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and are hereby incorporated by reference in this Registration Statement:

1. the Company’s Annual Report on Form 10-K for the fiscal year ended July 31, 2012, filed with the Commission on October 26, 2012;

2.

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the Company's Transition Report on Form 10-K for the transition period ended December 31, 2012, filed with the Commission on March 20, 2013;

the Company's Quarterly Report on Form 10-Q for the quarterly period ended October 31, 2012, filed with the Commission on December 14, 2012, and any amendments or reports filed for the purpose of updating the Company's Quarterly Reports;

the Company's Current Reports on Form 8-K filed with the Commission on August 15, 2012, August 24, 2012, November 2, 2012, December 13, 2012 and March 12, 2013, and any amendments or reports filed for the purpose of updating the Company's Current Reports; and

the description of the Company's common stock, par value \$0.001 per share (the "Common Stock"), contained in Form 5.8-A, filed with the Commission on December 26, 2012 and any amendment or report filed for the purpose of updating such description.

In addition, all documents subsequently filed by the Company with the Commission pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act and prior to the filing of a post-effective amendment which indicates that all securities offered hereby have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference in this Registration Statement and to be a part hereof from the date of filing of such documents. Any statement contained in a document, all or a portion of which is 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 in any other subsequently filed document which also is or is deemed to be incorporated by reference herein) modifies or supersedes such statement. Any such 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.

Item 5. Interests of Named Experts and Counsel.

Not applicable.

Item 6. Indemnification of Directors and Officers.

Section 145(a) of the General Corporation Law of the State of Delaware (the “General Corporation Law”) provides that a Delaware corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (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 request of the corporation as a director, officer, employee or agent of another corporation or enterprise, against expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person’s conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person’s conduct was unlawful.

Section 145(b) provides that a Delaware corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that such person acted in any of the capacities set forth above against expenses (including attorneys’ fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification may be made in respect to any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to be indemnified for such expenses which such court shall deem proper.

Section 145 further provides that to the extent a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in Section 145, subsections (a) and (b), or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith; that indemnification provided for by Section 145 shall not be deemed exclusive of any other rights to which the indemnified party may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise; and that the corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under such Section 145.

Section 102(b)(7) of the General Corporation Law provides that a corporation in its certificate of incorporation may eliminate or limit personal liability of members of its board of directors or governing body for violations of a director's fiduciary duty. However, no such provision may eliminate or limit the liability of a director for breaching his or her duty of loyalty, acting or failing to act in good faith, engaging in intentional misconduct or knowing violations of law, paying an unlawful dividend or approving an unlawful stock repurchase, or obtaining an improper personal benefit. A provision of this type has no effect on the availability of equitable remedies, such as injunction or rescission, for breach of fiduciary duty.

Article VIII of the Company's Certificate of Incorporation provides:

1. Limitation of Liability. To the fullest extent permitted by law, a director of the Company shall not be personally liable to the Company or to its stockholders for monetary damages for any breach of fiduciary duty as a director. No amendment to, modification of or repeal of this Article VIII, Paragraph 1 shall apply to or have any effect on the liability or alleged liability of any director of the Corporation for or with respect to any acts or omissions of such director occurring prior to such amendment.

2. Indemnification. The Company shall indemnify, advance expenses, and hold harmless, to the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, any person (a "Covered Person") who was or is made or is threatened to be made a party or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a "Proceeding"), by reason of the fact that he or she, or a person for whom he or she is the legal representative, is or was a director or officer of the Company or, while a director or officer of the Company, is or was serving at the request of the Company as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust, enterprise or nonprofit entity, including service with respect to employee benefit plans, against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such Covered Person. Notwithstanding the preceding sentence, except for claims for indemnification (following the final disposition of such Proceeding) or advancement of expenses not paid in full, the Company shall be required to indemnify a Covered Person in connection with a Proceeding (or part thereof) commenced by such Covered Person only if the commencement of such Proceeding (or part thereof) by the Covered Person was authorized in the specific case by the Board of Directors of the Company. Any amendment, repeal or modification of this Article VIII, Paragraph 2 shall not adversely affect any right or protection hereunder of any person in respect of any act or omission occurring prior to the time of such repeal or modification.

Article VI of the Company's Bylaws provides that each director and officer of the Company, and each person who shall serve at its request as a director or officer of another corporation in which the Company owns shares of capital stock or of which it is a creditor, whether or not then in office, and his personal representatives, shall be indemnified by the Company against all costs and expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he may be involved or to which he may be made a party by reason of his being or having been such director or officer, except in relation to matters as to which he shall be finally adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of his duties. Such costs and expenses shall include amounts reasonably paid in settlement for the purposes of curtailing the costs of litigation, but only if the Company is advised in writing by its counsel that in his opinion the person indemnified did not commit such negligence or misconduct. The foregoing right of indemnification shall not be exclusive of other rights to which he may be entitled as a matter of law or by agreement.

To further the provisions of Delaware law and the Company's governing documents, as described above, the Company has entered into indemnification agreements with each of its directors and executive officers. The provisions of the indemnification agreements generally parallel the portions of the governing documents described above. Absent the

indemnification agreements, the indemnification that might be available to directors and officers could be changed by amendment to the Company's Articles of Incorporation and/or Bylaws. In the event of changes, after the date of such indemnification agreements, in any applicable law, statute or rule which expands the right of a corporation to indemnify a member of its board of directors or an officer, such changes shall be, *ipso facto*, within the purview of the rights and obligations under the indemnification agreements.

The Company has customary policies of directors' and officers' liability insurance that insure directors and officers against the costs of defense, settlement or payment of a judgment under certain circumstances.

Item 7. Exemption From Registration Claimed.

Not applicable.

Item 8. Exhibits.

The exhibit list in the Index to Exhibits is incorporated herein by reference as the list of exhibits required as part of this Registration Statement.

Item 9. Undertakings.

(a) The undersigned Registrant 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 twenty percent change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective Registration Statement.

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 (ii) of this section 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 reports filed with or furnished to the Commission by the Registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Registration Statement.

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 undersigned Registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the Registrant'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 therein, and the offering of such

securities at that time shall be deemed to be the initial bona fide offering thereof.

Insofar as indemnification for liabilities arising under the Securities Act of 1933 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. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer (c) or controlling person of the Registrant 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 Registrant 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.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, as amended, the Registrant certifies that it has reasonable grounds to believe that it meets all 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 Tucson, State of Arizona, on March 22, 2013.

ACCELERATE DIAGNOSTICS, INC.

By: /s/ Steve Reichling

Name: Steve Reichling

Title: Chief Financial Officer
(Principal Financial Officer and Principal Accounting Officer)

POWER OF ATTORNEY

The officers and directors of Accelerate Diagnostics, Inc., whose signatures appear below, hereby constitute and appoint Lawrence Mehren or Steve Reichling, their true and lawful attorney-in-fact and agent, with full power of substitution, with power to act alone, to sign and execute on behalf of the undersigned any and all amendments to this registration statement on Form S-8, including post-effective amendments and any registration statement filed pursuant to Rule 462(b) under the Securities Act of 1933, and each of the undersigned does hereby ratify and confirm all that said attorney-in-fact and agent, or his substitutes, shall do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, as amended, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

| <u>Signature</u> | <u>Title</u> | <u>Date</u> |
|----------------------------|--|--------------------|
| <i>/s/ Lawrence Mehren</i> | President, Chief Executive Officer and Director | March 22, 2013 |
| Lawrence Mehren | (Principal Executive Officer,) | |
| <i>/s/ Steve Reichling</i> | Chief Financial Officer | March 22, 2013 |
| Steve Reichling | (Principal Financial Officer and Principal Accounting Officer) | |
| <i>/s/ John Patience</i> | Chairman of the Board | March 22, 2013 |

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John Patience
/s/ Jack Schuler

Director

March 22, 2013

Jack Schuler
/s/ Matthew W. Strobeck, Ph.D.

Director

March 22, 2013

Matthew W. Strobeck, Ph.D.
/s/ Frank J.M. ten Brink

Director

March 22, 2013

Frank J.M. ten Brink

EXHIBIT INDEX

| <u>Exhibit No.</u> | <u>Description</u> |
|--------------------|--|
| 4.1 | Certificate of Incorporation of Accelerate Diagnostics, Inc. (incorporated by reference to Appendix B of the Registrant's Definitive Proxy Statement on Schedule 14A filed on November 13, 2012) |
| 5.1 | Opinion of Snell & Wilmer L.L.P. (filed herewith) |
| 23.1 | Consent of Comiskey & Company, P.C. (filed herewith) |
| 23.2 | Consent of Snell & Wilmer L.L.P. (included in Exhibit 5.1) |
| 24.1 | Power of Attorney (included on signature page) |
| 99.1 | Accelr8 Technology Corporation 2012 Omnibus Equity Incentive Plan (incorporated by reference to Appendix C of the Registrant's Definitive Proxy Statement on Schedule 14A filed on November 13, 2012) |
| 99.2 | First Amendment to Accelr8 Technology Corporation 2012 Omnibus Equity Incentive Plan (among other things, changing the name of the plan to the Accelerate Diagnostics, Inc. 2012 Omnibus Equity Incentive Plan) (filed herewith) |
| 99.3 | Form of Nonqualified Stock Option Award Agreement (filed herewith) |
| 99.4 | Form of Incentive Stock Option Award Agreement (filed herewith) |

