

BIO KEY INTERNATIONAL INC

Form S-8

June 16, 2016

As filed with the Securities and Exchange Commission on June 16, 2016

Registration No. 333-_____

United States

SECURITIES AND EXCHANGE cOMMISSION

Washington, D.C. 20549

Form S-8

registration statement under the securities act of 1933

BIO-KEY International, Inc.

(Exact name of registrant as specified in its charter)

Delaware

41-1741861

(State or other jurisdiction of incorporation or organization) (I.R.S. Employer Identification No.)

3349 Highway 138, Building A, Suite E

Wall, NJ 07719

(Address of Principal Executive Offices) (Zip Code)

BIO-key International, Inc. 2015 Equity Incentive Plan

(Full title of the plan)

Michael W. DePasquale

Chief Executive Officer

BIO-key International, Inc.

3349 Highway 138, Building A, Suite E

Wall, NJ 07719

(732) 359-1100

(Name and address, including zip code, and telephone number, including area code, of agent for service)

Copies requested to:

Vincent A. Vietti

Sean F. Reid

Fox Rothschild LLP

997 Lenox Drive, Building 3

Lawrenceville, NJ 08648

(609) 896-3600

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.

Large accelerated filer

Non-accelerated filer (Do not check if a smaller reporting company)

Accelerated filer

Smaller reporting company

CALCULATION OF REGISTRATION FEE

| Title of Securities | Amount to be | Proposed Maximum | Proposed Maximum | Amount of |
|---|---------------------------------|---------------------------|---------------------------|---------------------|
| to be Registered | Registered | Offering Price Per | Aggregate Offering | Registration |
| | | Share | Price | Fee |
| Common Stock, par value \$.0001 per share | 7,825,000 shares ⁽¹⁾ | \$0.285 ⁽²⁾ | \$2,230,125.00 | \$224.57 |
| Common Stock, par value \$.0001 per share | 100,000 shares ⁽³⁾ | \$0.285 ⁽²⁾ | \$28,500.00 | \$2.87 |
| Common Stock, par value \$.0001 per share | 75,000 shares ⁽⁴⁾ | \$0.17 ⁽⁵⁾ | \$12,750.00 | \$1.28 |
| Total | 8,000,000 shares | | \$2,271,375.00 | \$228.72 |

The number of shares of common stock, par value \$.0001 per share, of BIO-key International, Inc. (“Common Stock”), consists of the aggregate number of shares which may be issued under the BIO-key International, Inc. 2015 Equity Incentive Plan (the “Plan”). The maximum number of shares of Common Stock that may be issued under the Plan is subject to adjustment in accordance with certain provisions of the Plan. Accordingly, pursuant to Rule 416⁽¹⁾ under the Securities Act of 1933, as amended (the “Securities Act”), to the extent additional shares of Common Stock may be issued or issuable as a result of a stock split, stock dividend or other similar transaction while this Registration Statement is in effect, this Registration Statement is hereby deemed to cover all such additional shares of Common Stock.

Estimated solely for the purpose of calculating the amount of the registration fee and calculated pursuant to Rule (2)457(c) and Rule 457(h) under the Securities Act on the basis of the average of the high and low sales prices of the Common Stock, as reported on the QB tier of the OTC Marketplace on June 15, 2016.

(3) The number of shares of Common Stock consists of shares issued as a restricted stock grant under the Plan.

(4) The number of shares of Common Stock consists of shares issuable upon exercise of outstanding options under the Plan.

Estimated solely for the purpose of calculating the amount of the registration fee and calculated pursuant to Rule (5)457(h) under the Securities Act on the basis of the average weighted per share exercise price of the underlying options.

PART I

Information Required In The SECTION 10(a) PROSPECTUS

The documents containing the information specified in "Item 1. Plan Information" and "Item 2. Registrant Information and Employee Plan Annual Information" of Form S-8 will be sent or given to participants of the BIO-key International, Inc. 2015 Equity Incentive Plan, as specified by Rule 428(b)(1) under the Securities Act of 1933, as amended (the "Securities Act"). Such documents are not required to be, and are not, filed with the Securities and Exchange Commission (the "Commission") either as part of this Registration Statement or as a prospectus or prospectus supplement pursuant to Rule 424 under the Securities Act. These documents and the documents incorporated by reference in this Registration Statement pursuant to Item 3 of Part II of 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 rules of the Securities and Exchange Commission (the "Commission") allow BIO-key International, Inc. (the "Registrant") to incorporate by reference information into this Registration Statement. This means that the Registrant may disclose important information to you by referring you to another document.

The following documents previously filed by the Registrant with the Commission are incorporated by reference into this Registration Statement:

- (a) The Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2015;
- (b) The Registrant's Quarterly Report on Form 10-Q for the fiscal quarter ended March 31, 2016;

(c)The Registrant's Current Reports on Form 8-K filed on May 4, 2016 and May 16, 2016; and

The description of the Registrant's Common Stock contained in the Registrant's Registration Statement filed with (d)the Commission pursuant to Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"), including any amendments or reports filed for the purpose of updating such descriptions (File No. 333-16451).

In addition, all documents filed with the Commission by the Registrant (other than portions of such documents which are furnished and not filed) pursuant to Sections 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 which indicates that all securities offered hereby have been sold or which deregisters all such securities then remaining unsold, shall be deemed to be incorporated by reference in this Registration Statement and to be a part hereof from the time of filing of such documents.

Any statement contained in the documents incorporated or deemed to be incorporated by reference in this Registration Statement 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 incorporated or deemed to be incorporated by reference in this Registration Statement 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 of the Delaware General Corporation Law (“DGCL”) authorizes a corporation to indemnify its directors and officers against liabilities arising out of actions, suits and proceedings to which they are made or threatened to be made a party by reason of the fact of their prior or current service to the corporation as a director or officer, in accordance with the provisions of Section 145, which are sufficiently broad to permit indemnification under certain circumstances for liabilities arising under the Securities Act. The indemnity may cover expenses (including attorneys’ fees) judgments, fines and amounts paid in settlement actually and reasonably incurred by the director or officer in connection with any such action, suit or proceeding. Section 145 permits corporations to pay expenses (including attorneys’ fees) incurred by directors and officers in advance of the final disposition of such action, suit or proceeding. In addition, Section 145 provides that a corporation has the power to purchase and maintain insurance on behalf of its directors and officers against any liability asserted against them and incurred by them in their capacity as a director or officer, or arising out of their status as such, whether or not the corporation would have the power to indemnify the director or officer against such liability under Section 145.

Our certificate of incorporation, as amended, provides that, unless otherwise required under applicable law (1) a director shall not be personally liable to us or our stockholders for monetary damages for breach of fiduciary duty as a director, and (2) we shall indemnify any director or officer made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact of such person’s current or prior service as a director or officer of the Company, any predecessor of the Company or any other enterprise per the Company’s or any predecessor to the Company’s request.

Our bylaws provide that (a) we shall indemnify and hold harmless our directors and officers to the maximum extent and in the manner permitted by the DGCL against expenses (including attorneys’ fees) reasonably incurred in connection with any proceeding, whether civil, criminal, administrative or investigative, arising by reason of the fact that such person is or was an agent of the Company, (b) we shall advance expenses incurred by any director or officer

prior to the final disposition of any proceeding to which the director or officer was or is or is threatened to be made a party promptly following a request therefore, subject to certain limited requirements, and (c) the rights conferred in our Bylaws are not exclusive.

We have also obtained insurance policies covering our directors and officers with respect to certain liabilities, including liabilities arising under the Securities Act.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

The following exhibits are filed with or incorporated by reference into this Registration Statement:

| Exhibit No. | Description |
|--------------------|--|
| 3.1 | Certificate of Incorporation of BIO-key International, Inc., a Delaware corporation (incorporated by reference to Exhibit 3.1 to the current report on Form 8-K, filed with the SEC on January 5, 2005) |
| 3.2 | Bylaws (incorporated by reference to Exhibit 3.3 to the current report on Form 8-K, filed with the SEC on January 5, 2005) |
| 3.3 | Certificate of Amendment to Certificate of Incorporation (incorporated by reference to Appendix A to the definitive proxy statement, filed with the SEC on January 18, 2006) |
| 3.4 | Certificate of Amendment of Certificate of Incorporation of Bio-key International, Inc., a Delaware corporation (incorporated by reference to Exhibit 3.4 to the annual report on Form 10-K, filed with the SEC on March 31, 2015) |
| 3.5 | Certificate of Elimination of BIO-key International, Inc. filed October 6, 2015 (incorporated by reference to Exhibit 3.5 to the registration statement on Form S-1, File No. 333-208747) |
| 3.6 | Certificate of Designation of Preferences, Rights and Limitations of Series A-1 Convertible Preferred Stock (incorporated by reference to Exhibit 3.1 to the current report on Form 8-K, filed with the SEC on November 2, 2015) |
| 3.7 | Certificate of Designation of Preferences, Rights and Limitations of Series B-1 Convertible Preferred Stock (incorporated by reference to Exhibit 3.1 to the quarterly report on Form 10-Q, filed with the SEC on November 16, 2015) |
| 4.1 | Specimen Stock Certificate (incorporated by reference to Exhibit 4.1 to the registration statement on Form SB-2, File No. 333-16451) |
| 5.1 | Opinion of Counsel Regarding Legality (filed herewith) |

| Exhibit No. | Description |
|--------------------|--|
| 23.1 | Consent of Counsel (included as part of Exhibit 5.1) |
| 23.2 | Consent of Rotenberg Meril Solomon Bertiger & Guttilla, P.C. (filed herewith) |
| 24.1 | Power of Attorney (included on signature page hereof) |
| 99.1 | BIO-key International, Inc. 2015 Equity Incentive Plan (incorporated by reference to Appendix A to the definitive proxy statement filed with the SEC on December 15, 2015) |

Item 9. Undertakings.

(a) The undersigned Registrant hereby undertakes as follows:

(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;

(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 20% 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) 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 Registrant pursuant to Section 13 or Section 15(d) of

the Exchange Act that are incorporated by reference in the Registration Statement.

(2) That, for the purpose of determining any liability under the Securities Act, 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, each filing of the Registrant's annual report pursuant to Section 13(a) or 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Exchange Act) 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.

(c) 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 Securities 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 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 Securities Act and will be governed by the final adjudication of such issue.

Signatures

Pursuant to the requirements of the Securities Act, 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 Wall, State of New Jersey, on June 16, 2016.

BIO-KEY INTERNATIONAL, INC.
(Registrant)

By: /s/ Michael W. DePasquale
Michael W. DePasquale
Chairman and Chief Executive
Officer

KNOW ALL PERSONS BY THESE PRESENTS, that each individual whose signature appears below constitutes and appoints Michael W. DePasquale, with full authority to act without the others, his true and lawful attorney-in-fact and agent with full power of substitution and resubstitution, for him and in his name, place and stead, in any and all capacities, to sign any and all amendments to this registration statement, and to file the same, with all exhibits thereto, and all documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorney-in-fact and agents full power and authority to do and perform each and every act and thing requisite and necessary to be done in and about the premises, as fully to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or his or her substitute or substitutes, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, 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> |
|---------------------------|---|---------------|
| | Chairman and Chief Executive Officer | June 16, 2016 |
| /s/ Michael W. DePasquale | (Principal Executive Officer) | |
| Michael W. DePasquale | | |

| | | |
|-------------------------|---|---------------|
| /s/ Cecilia Welch | Chief Financial Officer (Principal Financial and Accounting Officer) | June 16, 2016 |
| Cecilia Welch | | |
| /s/ Charles P. Romeo | Director | June 16, 2016 |
| Charles P. Romeo | | |
| /s/ John Schoenherr | Director | June 16, 2016 |
| John Schoenherr | | |
| /s/ Thomas E. Bush, III | Director | June 16, 2016 |
| Thomas E. Bush, III | | |
| /s/ Thomas Gilley | Director | June 16, 2016 |
| Thomas Gilley | | |

Director June 16, 2016

Wong Kwok Fong

Director June 16, 2016

Yao Jianhui

Director June 16, 2016

Pieter Knook

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