

AMERICAN APPAREL, INC

Form 10-K/A

May 03, 2011

[Table of Contents](#)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K/A

Amendment No. 2

(Mark One)

☒ **Annual report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**
For the fiscal year ended December 31, 2010

or

☐ **Transition report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**
For the transition period from to

Commission File Number 001-32697

American Apparel, Inc.

(Exact name of registrant as specified in its charter)

Edgar Filing: AMERICAN APPAREL, INC - Form 10-K/A

Delaware
(State of Incorporation)

20-3200601
(I.R.S. Employer

Identification No.)

747 Warehouse Street

Los Angeles, California 90021-1106

(Address of principal executive offices) (Zip code)

Registrant's telephone number, including area code: (213) 488-0226

Securities registered pursuant to Section 12(b) of the Act:

Common Stock, par value \$.0001 per share
(Title of Each Class)

NYSE Amex
(Name of Each Exchange on Which Registered)

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☐ No ☒

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☐ No ☒

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K ☐

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 "accelerated filer", "large 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 ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes ☐ No ☒

Edgar Filing: AMERICAN APPAREL, INC - Form 10-K/A

The aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant as of June 30, 2010 was approximately \$60,436,830 based upon the closing price of the common stock on such date as reported by the NYSE Amex.

The number of shares of the registrant's common stock outstanding (subject to vesting) as of April 26, 2011 was 98,547,932.

DOCUMENTS INCORPORATED BY REFERENCE

None.

Table of Contents

TABLE OF CONTENTS

	PART II	Page
ITEM 9A. <u>Controls and Procedures</u>		1
	PART III	
ITEM 14. <u>Principal Accountant Fees and Services</u>		3
	PART IV	
ITEM 15. <u>Exhibits, Financial Statement Schedules</u>		4

Table of Contents

EXPLANATORY NOTE

American Apparel, Inc.'s Annual Report on Form 10-K for the year ended December 31, 2010 (the "Original Filing") was filed with the Securities and Exchange Commission (the "SEC") on March 31, 2011, and was amended by Amendment No. 1 on Form 10-K/A ("Amendment No. 1") filed with the SEC on May 2, 2011. This Amendment No. 2 on Form 10-K/A ("Amendment No. 2") is filed for the purpose of (i) deleting in its entirety the amendment and restatement of Item 9A contained in Amendment No. 1 (which inadvertently duplicated the Report of Independent Public Accounting Firm contained in the Original Filing); (ii) amending and restating Sections (a), (b) and (c) of Item 9A of the Original Filing (but not including the Report of Independent Accounting Firm included in the Original Filing) in response to comments the Company received from SEC staff regarding the original filing and (iii) amending and restating in its entirety Item 14 contained in Amendment No. 1. Capitalized terms used but not otherwise defined in this Amendment have the meanings given in the Original Filing. Except as expressly set forth in this Amendment No. 2, the Original Filing, as amended by Amendment No. 1, has not been amended, updated or otherwise modified.

Table of Contents

PART II

Item 9A. Controls and Procedures

(a) *Disclosure Controls and Procedures*

Under the supervision and participation of our management, including our Chief Executive Officer and Chief Financial Officer, we conducted an evaluation of the effectiveness of our disclosure controls and procedures as such term is defined under Rule 13a-15(e) and 15d-15(e) under the Securities Exchange Act of 1934, as amended (the Exchange Act). Based upon this evaluation, our Chief Executive Officer and our Chief Financial Officer have concluded that as of December 31, 2010, our disclosure controls and procedures were ineffective due to material weaknesses existing in our internal controls over financial reporting as of December 31, 2009 (described below), which have not been fully remediated as of December 31, 2010.

Notwithstanding the material weaknesses described in this report, our management has concluded that our consolidated financial statements for the periods covered by and included in this Annual Report are prepared in accordance with accounting principles generally accepted in the United States (GAAP) and fairly present, in all material respects, our financial position, results of operations and cash flows for each of the periods presented herein.

Management's Report on Internal Control Over Financial Reporting

Our management is responsible for establishing and maintaining adequate internal control over financial reporting, as is defined in the Exchange Act. Internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of our financial reporting and the preparation of financial statements for external reporting purposes in accordance with GAAP. Internal control over financial reporting includes maintaining records that, in reasonable detail, accurately and fairly reflect our transactions and dispositions of the assets of the Company; providing reasonable assurance that transactions are recorded as necessary for preparation of our financial statements in accordance with GAAP; providing reasonable assurance that receipts and expenditures of the Company are made only in accordance with management authorization; and providing reasonable assurance that unauthorized acquisition, use or disposition of Company assets that could have a material effect on our financial statements would be prevented or detected on a timely basis. Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

Our management conducted an evaluation, under the supervision and with the participation of our Chief Executive Officer and Chief Financial Officer, of the effectiveness of our internal control over financial reporting based on the framework in Internal Control Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). Based on this evaluation, our management concluded that our internal control over financial reporting was not effective at December 31, 2010 because of the material weaknesses described below.

Based on the COSO criteria, management identified control deficiencies that constitute material weaknesses. A material weakness is a deficiency, or a combination of deficiencies, in Internal Control over Financial Reporting (ICFR), such that there is a reasonable possibility that a material misstatement of the Company's annual or interim financial statements will not be prevented or detected on a timely basis. Material weaknesses would permit information required to be disclosed by the Company in the reports that it files or submits to not be recorded, processed, summarized and reported, within the time periods specified in the SEC rules and forms. As of December 31, 2010, the following material weaknesses existed:

Material weakness related to the control environment. We concluded that, in certain instances, we did not maintain an adequate control environment that fully emphasized the establishment of, adherence to, or adequate communication regarding appropriate internal control over financial reporting. Specifically, we concluded that we did not have adequate controls in the following areas for the purposes of establishing, maintaining and communicating our control environment: (i) a sufficient number of adequately trained accounting personnel in our foreign subsidiaries with appropriate expertise in GAAP, and (ii) a sufficient number of trained accounting personnel with expertise in GAAP to ensure complex material and/or non-routine transactions are properly reflected in our consolidated financial statements.

Material weakness related to financial closing and reporting process. We concluded that we did not perform adequate independent review and maintain effective controls over the preparation of financial statements in the following respects: preparation of the consolidated financial

Edgar Filing: AMERICAN APPAREL, INC - Form 10-K/A

statements and related notes thereto, account analyses, account summaries and account reconciliations prepared in the areas of inventory and related inventory reserves, cost of sales and certain other accounts. We also identified

Table of Contents

deficiencies in (i) our inventory costing related to our retail segment that was offset by adjustments in our transfer pricing, (ii) our identification and evaluation of manufacturing variances resulting from out-of-date standard costs and recent changes in the manufacturing process and (iii) the timely completion of our evaluation of excess and obsolete inventory reserves.

(b) Remediation Activities

Over the course of fiscal 2010, the Company continued to take substantial measures to remediate the remaining material weaknesses, described as follows:

Material weakness related to the control environment: We have identified a number of additional resources necessary to improve the overall domestic and international financial accounting and reporting departments. As of December 31, 2010, we have filled openings in certain key financial positions and are in the process of recruiting resources for the remaining open positions that are expected to enhance the overall technical capabilities of our resources. Additionally, we have developed and are implementing a technical training program for the accounting and finance staff in the areas of GAAP related to complex and non-routine transactions relevant to our operations. We continue to improve our corporate wide procedures to facilitate uniform application of accounting policies on a global basis.

Material weakness related to financial closing and reporting process: We continue to improve the preparation and review of account reconciliations by implementing specific procedures and internal controls, including the detailed review of our financial closing process by our internal audit group, to monitor and evaluate key accounts and assumptions behind our critical estimates. We have identified and implemented additional internal controls to strengthen account analysis within the categories of fixed assets, deferred rent, and inventory. To address inventory costing, we have transitioned the responsibility for maintaining standard costs from our production planning department to our accounting department and have enhanced production reporting in order to separately record and analyze production variances. We are implementing an enhanced workforce management system which will enable us to more accurately track direct labor to specific production runs. We continue to enhance our international cost accounting procedures for intercompany inventory transfers and inventory costing. As we continue to solidify our staffing levels we expect our internal controls over the financial closing and reporting process to strengthen and remediate this material weakness.

(c) Changes in ICFR

There has been no change in our internal control over financial reporting (as defined in Rule 13a-15(f) under the Exchange Act) during the most recent fiscal quarter ended December 31, 2010 that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting,

During the year ended December 31, 2010, the Company's management continued to implement the steps outlined above under Remediation Activities to improve the quality of its ICFR.

Table of Contents**PART III****Item 14. PRINCIPAL ACCOUNTANT FEES AND SERVICES****Principal Accounting Firm Fees**

As described in Item 9 of this Annual Report on Form 10-K, effective July 22, 2010, Deloitte & Touche LLP (Deloitte) resigned as the independent registered public accounting firm for the Company. Deloitte served as the company's independent registered public accounting firm since April 3, 2009. On July 26, 2010, the Audit Committee of the Company engaged Marcum LLP (Marcum) as the Company's independent auditors to audit the Company's financial statements for the fiscal year ending December 31, 2010. Marcum had previously served as the Company's independent registered public accounting firm through April 3, 2009.

In connection with the Company's Annual Meeting of Stockholders held on December 10, 2010, the Audit Committee and management formally engaged Marcum to reaudit the Company's financial statements for the fiscal year ending December 31, 2009.

Aggregate fees billed to us for the fiscal years ended December 31, 2010 and 2009 by the Company's current and former independent auditors are as follows.

	2010	2009
	(in thousands)	
Deloitte & Touche LLP ⁽¹⁾		
Audit fees ⁽³⁾	\$ 203	\$ 3,033
Audit-related fees ⁽⁴⁾		
Tax fees ⁽⁵⁾		35
All other fees ⁽⁶⁾		5
	\$ 203	\$ 3,073
Marcum LLP (formerly known as Marcum & Kleigman LLP) ⁽²⁾		
Audit fees ⁽³⁾	\$ 4,240	\$ 152
Audit-related fees ⁽⁴⁾	291	
Tax fees ⁽⁵⁾		
All other fees ⁽⁶⁾		
	\$ 4,531	\$ 152

(1) Deloitte served as the Company's independent auditors from April 3, 2009 to July 22, 2010.

(2) Marcum, the Company's current independent auditors since July 26, 2010, also served as the Company's independent auditors through April 3, 2009. The audit fees for 2010 consist of fees for the reaudit of the 2009 consolidated financial statements.

(3) Audit fees consist of fees for professional services rendered by the principal accountant for the audit of the Company's annual financial statements included in Form 10-Ks, the review of financial statements included in Form 10-Qs and for services that are normally provided by the auditor in connection with statutory and regulatory filings or engagements for those fiscal years.

(4) Audit-related fees consist of fees for assurance and related activities by the principal accountant that are reasonably related to the performance of the audit or review of the Company's financial statements and are not reported as audit fees.

(5) Tax fees consist of fees for professional services rendered by the principal accountant for tax compliance, tax advice and tax planning. Deloitte reviewed the Company's tax provision work papers, and all documentation supporting each uncertain tax position that we recognized in 2009.

(6) All other fees consist of fees for any products and services provided by the principal accountant not included in the first three categories. In accordance with Section 10A(i) of the Exchange Act, before the Company engages its independent accountant to render audit or non-audit services, the engagement is approved by the Company's Audit Committee. All of the Company's independent auditor's fees were pre-approved by

Edgar Filing: AMERICAN APPAREL, INC - Form 10-K/A

the Audit Committee in 2010. The Audit Committee utilizes a policy pursuant to which the audit, audit-related, and permissible non-audit services to be performed by the independent auditor are pre-approved prior to the engagement to perform such services. Pre-approval is generally provided annually, and any pre-approval is detailed as to the particular service or category of services and is generally limited by a maximum fee amount. The independent auditor and management are required to periodically report to the Audit Committee regarding the extent of services provided by the independent auditor in accordance with this pre-approval, and the fees for the services performed to date. The Audit Committee considered whether the provision of non-audit services provided by Deloitte and Marcum as described above was compatible with maintaining such accountant's independence, and believes that the provision of these services is consistent with maintaining such accountant's independence.

Table of Contents

PART IV

ITEM 15. EXHIBITS AND FINANCIAL STATEMENT SCHEDULES

Exhibit No.	Description
31.1*	Certification of Chief Executive Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002
31.2*	Certification of Chief Financial Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002
32.1*	Certification of Chief Executive Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002
32.2*	Certification of Chief Financial Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002

* Filed herewith.

Table of Contents

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

May 3, 2011

AMERICAN APPAREL, INC.
(Registrant)

/s/ John Luttrell
John Luttrell
Chief Financial Officer
(Principal Accounting Officer)