

EMISPHERE TECHNOLOGIES INC
Form 8-K
March 30, 2011

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
FORM 8-K
CURRENT REPORT**

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of Earliest Event Reported): March 28, 2011

Emisphere Technologies, Inc.

(Exact name of registrant as specified in its charter)

Delaware

000-17758

13-3306985

(State or other jurisdiction
of incorporation)

(Commission
File Number)

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

240 Cedar Knolls Road, Suite 200,
Cedar Knolls, New Jersey

07927

(Address of principal executive offices)

(Zip Code)

Registrant's telephone number, including area code: 973-532-8000

Not Applicable

Former name or former address, if changed since last report

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
 - Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
 - Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
 - Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
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Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.

(b) On March 28, 2011, Management of Emisphere Technologies, Inc. (the Company), after consulting with the Audit Committee of the Board of Directors and with McGladrey and Pullen, LLP (McGladrey), its independent registered public accounting firm, concluded that the Company's previously issued financial statements included in its quarterly interim period reports previously reported on Forms 10-Q for the periods ended March 31, June 30, and September 30, 2009 and 2010, and its annual report on Form 10-K for the period ended December 31, 2009 (the Financial Statement Periods) should no longer be relied upon due to errors in the application of accounting guidance regarding the determination of whether a financial instrument is indexed to its own stock. At the time these financial statements were originally issued, the Company had reviewed its accounting for the adoption of Financial Accounting Standards Board Accounting Codification Topic 815-40-15-5, *Evaluating Whether an Instrument Is Considered Indexed to an Entity's Own Stock* (FASB 815-40-15-5 or the Guidance) and concluded it was in accordance with GAAP. The Company's adoption of the Guidance was not straightforward because GAAP specifies the application of a level interest method to amortize interest and debt discounts in accordance with FASB 835-30-35-2, *The Interest Method* (FASB 835-30-35-2). In adopting the guidance, the Company estimated the fair value of the bifurcated conversion feature embedded in the Company's 11% senior secured convertible notes in favor of MHR Institutional Partners IIA due September 26, 2012 (collectively, the MHR Convertible Notes) as a derivative liability and developed an amortization schedule to recognize non-cash interest expense and debt discounts over time. In accordance with the guidance, the Company deducted the incremental value of the conversion feature from the book value of the instrument at its inception. Because the fair value of the conversion feature was in excess of the book value of the instrument, the Company believed it could not apply a level rate method to determine the amortization schedule because the resulting book value would have been \$0 and because it is mathematically impossible to apply a level interest rate to amortize from a \$0 balance. Therefore, the Company developed an amortization schedule that it believed was consistent with the adoption of the new accounting guidance and was still representative of the economic substance of the financial instrument. This accounting treatment was reflected in the Company's financial statements during the Financial Statement Periods.

McGladrey audited the Company's financial statements for 2009. The Company's Audit Committee and Management discussed the results of the audit including a review of financial statements for 2009 with McGladrey.

On March 24, 2011, McGladrey notified the Company that the amortization schedule described above was not in accordance with the level rate method required by GAAP and that it should be recalculated accordingly. McGladrey further notified the Company that as a result of this error, the financial statements did not reflect the proper amortization of non-cash interest expense and debt discounts in connection with the bifurcated conversion feature embedded in the MHR Convertible Notes as a derivative liability. McGladrey further notified the Company that it should make disclosures and take appropriate actions to prevent future reliance on the financial statements disclosed in the Financial Statement Periods.

After discussions between Management, the Audit Committee and McGladrey, the Company reevaluated its accounting for the adoption of the Guidance and for its assessment of the debt modification entered into during June 2010 and determined that its original accounting was incorrect. Consequently, the Company determined to restate its financial statements for the Financial Statement Periods. The Company used the level rate method in accordance with FASB 835-30-35-2 to revise its amortization schedule in accordance with GAAP. The Company assigned a beginning balance nominally close to \$0 to develop this amortization schedule. The restatements of financial statements previously reported on Forms 10-Q for the periods ended March 31, June 30, and September 30, 2009 and 2010, and on Form 10-K for the period ended December 31, 2009 will reflect adjustments primarily to correct for the revised amortization schedule and resulting overstatement of non-cash interest charges and the recorded value of notes payable, which included the effects of the accretion of debt discount resulting from the valuation of the embedded derivative associated with the MHR Convertible Note. Additionally, after correcting the misapplication of guidance for determining whether a financial instrument is indexed to its own stock, the Company reevaluated its accounting for debt modification in connection with the Master Agreement and Amendment by and between the Company and Novartis Pharma AG dated June 4, 2010 and the letter agreement entered into with MHR in connection

therewith and concluded that modifications to the MHR Convertible Notes should have been accounted for as extinguishment of debt in accordance with FASB ASC 470-50, *Modifications and Extinguishments*, which resulted in a \$17.0 million non-cash adjustment to recognize the loss on extinguishment of debt.

The Company emphasizes that all reclassifications and related charges to correct the misapplication of the relevant accounting pronouncement and subsequent debt modification adjustment have no impact on the Company's operating income, its cash position, its cash flows or its future cash requirements.

In addition to the description contained in this report, the Company plans to include the restated financial information in its Annual Report on Form 10-K for the fiscal year ended December 31, 2010 (the 2010 Form 10-K). More detailed information about the restatements will be provided in the Notes to the Financial Statements contained in the 2010 Form 10-K.

McGladrey provided a letter confirming its agreement with the disclosures contained herein, which is attached hereto as exhibit 99.1.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

Exhibit No.	Description
99.1	Letter from McGladrey & Pullen, LLP to the Securities and Exchange Commission dated March 30, 2011

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Emisphere Technologies, Inc.

March 30, 2011

By: */s/ Michael R. Garone*

Name: *Michael R. Garone*

Title: *Interim Chief Executive Officer and
Chief Financial Officer*