CORRECTED

Form **8937** (December 2011) Department of the Treasury Internal Revenue Service

# Report of Organizational Actions Affecting Basis of Securities

▶ See separate instructions.

OMB No. 1545-2224

## Part I Reporting Issuer

| | | |
|---|---|---|
| 1 Issuer's name: APOLLO ENDOSURGERY, INC (FORMERLY KNOWN AS LPATH, INC.) | | 2 Issuer's employer identification number (EIN): 16-1630142 |
| 3 Name of contact for additional information: INVESTOR RELATIONS | 4 Telephone No. of contact: 512-279-5100 | 5 Email address of contact: INVESTOR-RELATIONS@APOLLOENDO.COM |
| 6 Number and street (or P.O. box if mail is not delivered to street address) of contact: 1120 SOUTH CAPITAL OF TEXAS HIGHWAY, BLDG 1, SUITE 300 | | 7 City, town, or post office, state, and Zip code of contact: AUSTIN, TX 78746 |
| 8 Date of action: 12/29/2016 | 9 Classification and description: EXCHANGE OF COMMON SHARES | |

| 10 CUSIP number | 11 Serial number(s) | 12 Ticker symbol | 13 Account number(s) |
|---|---|---|---|
| 03767D108 | N/A | APEN | N/A |

## Part II Organizational Action

Attach additional statements if needed. See back of form for additional questions.

**14** Describe the organizational action and, if applicable, the date of the action or the date against which shareholders' ownership is measured for the action ▶ SEE ATTACHED. THIS CORRECTED FORM 8937 UPDATES INFORMATION PROVIDED ON FORM 8937 DATED 1/1/17. CHANGES WERE MADE TO PROVIDE ADDITIONAL INFORMATION RELATED TO PREFERRED SHARES AND CONVERTIBLE DEBT.

**15** Describe the quantitative effect of the organizational action on the basis of the security in the hands of a U.S. taxpayer as an adjustment per share or as a percentage of old basis ▶ SEE ATTACHED

**16** Describe the calculation of the change in basis and the data that supports the calculation, such as the market values of securities and the valuation dates ▶ SEE ATTACHED

**Part II Organizational Action** (continued)

**17** List the applicable Internal Revenue Code section(s) and subsection(s) upon which the tax treatment is based ▶

SECTIONS 368, 1001, 1221, 1223

**18** Can any resulting loss be recognized? ▶ SEE ATTACHED

**19** Provide any other information necessary to implement the adjustment, such as the reportable tax year ▶ SEE ATTACHED

**Sign Here**

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Signature ▶ Date ▶

Print your name ▶ STEFANIE CAVANAUGH Title ▶ CFO

**Paid Preparer Use Only**

| Print/Type preparer's name | Preparer's signature | Date | Check ☐ if self-employed | PTIN |
|---|---|---|---|---|
| KEVIN FINCHER, CPA | | 3/07/17 | | P00291599 |
| Firm's name ▶ RSM US LLP | | | Firm's EIN ▶ | 42-0714325 |
| Firm's address ▶ 811 BARTON SPRINGS ROAD, STE 500 AUSTIN, TX 78704 | | | Phone no. | 512-476-0717 |

Send Form 8937 (including accompanying statements) to: Department of the Treasury, Internal Revenue Service, Ogden, UT 84201-0054

Apollo Endosurgery, Inc.
16-1630142
CORRECTED Attachment to Form 8937

**Part II Line 14 – Describe the organizational action and, if applicable, the date of the action or the date against which shareholders' ownership is measured for the action:**

On December 29, 2016, Lpath Merger Sub, Inc., a wholly-owned subsidiary of Lpath, Inc. ("Lpath") merged with and into Apollo Endosurgery, Inc., a Delaware corporation ("Apollo"), with Apollo surviving as a wholly-owned subsidiary of Lpath, pursuant to an Agreement and Plan of Merger and Reorganization, dated September 8, 2016. Simultaneously, Lpath changed its name to Apollo Endosurgery, Inc.

Immediately prior to the effective time of the merger, each share of Apollo preferred stock was converted into shares of Apollo common stock at a ratio determined in accordance with the Apollo certificate of incorporation then in effect.

During 2015, Apollo issued unsecured subordinated convertible promissory notes. The unsecured subordinated convertible promissory notes, plus accrued interest, converted into shares of Apollo common stock pursuant to the terms of the Securities Purchase Agreement immediately prior to the consummation of the merger.

At the effective time of the merger, each share of Apollo common stock was converted into the right to receive 0.3163 shares of Lpath common stock (the "exchange ratio"), subject to adjustment to account for the effect of a reverse stock split of Lpath common stock, at a ratio of one new share for every five and one half shares outstanding (1:5.5), to be implemented prior to the consummation of the merger. Lpath will assume outstanding and unexercised warrants to purchase Apollo capital stock and options to purchase Apollo common stock, and they will be converted into warrants and options, as applicable, to purchase Lpath common stock. Lpath stockholders will continue to own and hold their existing shares of Lpath common stock. Immediately following the consummation of the merger, Apollo stockholders, warrant holders and option holders will own approximately 95.9% of the fully-diluted common stock of Lpath, with Lpath stockholders, option holders and warrant holders, whose shares of Lpath stock will remain outstanding after the merger, holding approximately 4.1% of the fully-diluted common stock of Lpath.

**Part II Line 15 – Describe the quantitative effect of the organization action on the basis of the security in the hands of a U.S. taxpayer as an adjustment per share or as a percentage of old basis:**

Apollo's preferred stock had an accruing cumulative dividend that increased the ratio into which Apollo's preferred stock holders converted into Apollo common stock upon conversion immediately prior to the consummation of the merger. The preferred stock conversion is calculated by dividing (1) preferred stock original price of $1.2223 per share plus accrued dividends of 8% per annum calculated on a monthly basis and prorated on a daily basis for periods of less than one month beginning on the date each share of preferred stock was issued through the date of the conversion immediately prior to the merger by (2) the preferred stock original issue price of $1.2223 per share, adjustable for certain dilutive events.

In addition to interest, the convertible notes also had a beneficial conversion feature. The holders of the convertible debt will generally have a carryover basis in the Apollo common stock equal to their basis in the debt, plus any accrued interest previously recognized in income.

As a part of the merger, the election of a U.S. holder of Apollo common stock to receive shares of Lpath common stock in exchange for such U.S. holder's Apollo common stock generally will not have an effect on such U.S. holder's tax basis (but refer to discussion above regarding convertible preferred shares and convertible debt.) Generally, a U.S. holder's aggregate tax basis in the Lpath common stock received by such U.S. holder in the merger, including any fractional shares deemed received by the U.S. holder under the treatment discussed below in "Cash in Lieu of Fractional Shares of Lpath Common Stock," will equal such U.S. holder's aggregate tax basis in the Apollo common stock surrendered in the merger. The holding period of the shares of Lpath common stock received by an Apollo stockholder in the merger should include the holding period of the shares of Apollo common stock surrendered in exchange therefor.

**Cash in Lieu of Fractional Shares of Lpath Common Stock**

A U.S. stockholder who receives cash in lieu of a fractional share of Lpath common stock will be treated as having received the fractional share of Lpath common stock pursuant to the merger and then as having exchanged the fractional share of Lpath common stock for cash in a redemption by Lpath. In general, this deemed redemption will be treated as a sale or exchange and a U.S. holder will recognize gain or loss equal to the difference between (i) the amount of cash received by such U.S. holder and (ii) the portion of the basis of the shares of Apollo common stock allocable to such fractional interest.

**Part II Line 16 – Describe the calculation of the change in basis and the data that supports the calculation, such as the market values of the securities and the valuation dates:**

As discussed above, a U.S. holder's aggregate tax basis in the Lpath common stock received in the merger, including any fractional shares deemed received, generally will equal such U.S. holder's aggregate tax basis in the Apollo common stock surrendered by such U.S. holder in the merger.

**Part II Line 18 – Can any resulting loss by recognized?**

A U.S. stockholder should not recognize gain or loss upon the exchange of Apollo common stock for Lpath common stock pursuant to the merger, except to the extent of cash received in lieu of a fractional share of Lpath common stock. A U.S. stockholder who receives cash in lieu of a fractional share of Lpath common stock will be treated as having received the fractional share of Lpath common stock pursuant to the merger and then as having exchanged the fractional share of Lpath common stock for cash in a redemption by Lpath. In general, this deemed redemption will be treated as a sale or exchange and a U.S. holder will recognize gain or loss equal to the difference between (i) the amount of cash received by such U.S. holder and (ii) the portion of the basis of the shares of Apollo common stock allocable to such fractional interest. Such gain or loss generally will constitute capital gain or loss and will be long-term capital gain or loss if the U.S. holder's holding period for the Apollo common stock exchanged by such U.S. holder is greater than one year as of the effective time. The deductibility of capital losses is subject to limitations.

**Part II Line 19 – Provide any other information necessary to implement the adjustment, such as the reportable tax year:**

The merger occurred on December 29, 2016. Therefore any gain or loss recognized with respect to the fractional shares should be reported by Apollo shareholders in the tax year which includes December 29, 2016 (e.g. calendar-year shareholder would report the transaction on his or her federal income tax return filed for the 2016 calendar year).

For additional information please refer to the full text of the Merger Agreement.

Apollo shareholders are urged to consult their own tax advisors with respect to their individual tax consequences of the merger. The information in this document does not constitute tax advice and is not intended or written to be used, and cannot be used, for the purposes of (i) avoiding penalties under the Internal Revenue Code of 1986, as amended, or (ii) promoting, marketing, or recommending any transaction or matter addressed herein.