

NetApp, Inc.
Form S-4
June 04, 2009

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As filed with the Securities and Exchange Commission on June 4, 2009

Registration No. 333-

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

**Form S-4
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933**

NetApp, Inc.

(Exact name of Registrant as specified in its charter)

Delaware
*(State or other jurisdiction
of incorporation)*

3572
*(Primary Standard Industrial
Classification Code Number)*

77-0307520
*(I.R.S. Employer
Identification Number)*

**495 East Java Drive
Sunnyvale, California 94089
(408) 822-6000**

*(Address, including Zip Code, and Telephone Number, including Area Code, of Registrant's Principal Executive
Offices)*

**Daniel J. Warmenhoven
Chief Executive Officer and Director
NetApp, Inc.
495 East Java Drive
Sunnyvale, California 94089
(408) 822-6000**

(Name, Address, including Zip Code, and Telephone Number, including Area Code, of Agent for Service)

With copies to:

**Steven E. Bochner, Esq.
Michael S. Ringler, Esq.
Nathaniel P. Gallon, Esq.
Wilson Sonsini Goodrich & Rosati
Professional Corporation
650 Page Mill Road
Palo Alto, California 94304-1050
(650) 493-9300**

**Robert G. Specker, Esq.
Vice President, In-house Counsel
Data Domain, Inc.
2421 Mission College Blvd.
Santa Clara, California 95054
(408) 980-4800**

**Gordon K. Davidson, Esq.
Dennis R. Debroeck, Esq.
Robert A. Freedman, Esq.
R. Gregory Roussel, Esq.
Fenwick & West LLP
801 California Street
Mountain View, California 94041
(650) 938-5200**

Approximate date of commencement of the proposed sale of the securities to the public: As soon as practicable after this Registration Statement becomes effective and upon completion of the merger described in the enclosed document.

If the securities being registered on this Form are being offered in connection with the formation of a holding company and there is compliance with General Instruction G, check the following box. ☐

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

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

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e-4(i) (Cross-Border Issuer Tender Offer) ☐

Exchange Act Rule 14d-1(d) (Cross-Border Third-Party Tender Offer) ☐

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered(1)	Amount to be Registered(2)	Proposed Maximum Offering Price per Unit	Proposed Maximum Aggregate Offering Price(3)	Amount of Registration Fee
Common Stock, par value \$0.001 per share	54,695,347	N/A	\$613,152,900	\$34,214

- (1) This Registration Statement relates to shares of common stock, par value \$0.001 per share, of the Registrant (NetApp) issuable to holders of shares of common stock, par value \$0.0001 per share, of Data Domain, Inc., a Delaware corporation (Data Domain), in the proposed acquisition of Data Domain by the Registrant pursuant to the terms of the Agreement and Plan of Merger, dated as of May 20, 2009, as amended on June 3, 2009, by and among the Registrant, Kentucky Merger Sub One Corporation, Derby Merger Sub Two LLC and Data Domain.
- (2) Based on the maximum number of shares of NetApp common stock to be issued in connection with the merger, calculated as the product of (a) 70,275,404 shares, the maximum number of shares of Data Domain common stock that may be cancelled and exchanged in the merger and (b) the maximum exchange ratio of 0.7783 shares of the Registrant's common stock for each share of Data Domain common stock, which represents the highest possible exchange ratio pursuant to the Agreement and Plan of Merger.
- (3) Estimated solely for purposes of calculating the registration fee in accordance with Rules 457(c) and 457(f) of the Securities Act of 1933, as amended, the market value of the securities to be registered was calculated as the product of (A) \$25.175, the average of the high and low prices per share of Data Domain common stock on

May 29, 2009, as quoted on the NASDAQ Global Select Market, multiplied by (B) 70,275,404, the maximum number of shares of Data Domain common stock that may be cancelled and exchanged in the merger; less \$1,156,030,396, the aggregate amount of cash that would be payable to the holders of Data Domain common stock in the merger assuming 70,275,404 shares of Data Domain common stock were outstanding and assuming a per share cash amount of \$16.45.

The Registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until the Registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933, as amended, or until the Registration Statement shall become effective on such dates as the Commission, acting pursuant to said Section 8(a), may determine.

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Information contained herein is subject to completion or amendment. A registration statement relating to these securities has been filed with the Securities and Exchange Commission. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective. This document shall not constitute an offer to sell or the solicitation of any offer to buy nor shall there be any sale of these securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction.

PRELIMINARY SUBJECT TO COMPLETION DATED JUNE 3, 2009

**MERGER PROPOSAL
YOUR VOTE IS VERY IMPORTANT**

Dear Stockholder:

On May 20, 2009, Data Domain, Inc., referred to as Data Domain, and NetApp, Inc., referred to as NetApp, announced a business combination in which a direct, wholly owned subsidiary of NetApp will merge with Data Domain, with Data Domain continuing as the interim surviving entity, and, immediately thereafter, subject to certain conditions, Data Domain will merge with a second direct, wholly owned subsidiary of NetApp, with such subsidiary continuing as the final surviving entity. On June 3, 2009, NetApp and Data Domain amended the original merger agreement to reflect the terms described in this proxy statement/prospectus. The first merger is referred to herein as the first-step merger, the second merger is referred to herein as the second-step merger, and together such mergers are referred to herein as the merger. If the first-step merger is completed, you will have the right to receive \$16.45 in cash, without interest and less any applicable withholding, referred to as the cash consideration, subject to adjustment, and a number of shares of NetApp common stock equal to the exchange ratio, referred to as the stock consideration, and together with the cash consideration, referred to as the merger consideration, for each outstanding share of common stock of Data Domain that you hold immediately prior to the first-step merger.

The exchange ratio is equal to (i) 0.7783 shares of NetApp common stock if the closing average (as described below) is less than \$17.41, (ii) 0.6370 shares of NetApp common stock if the closing average is greater than \$21.27, and (iii) that fraction of a share of NetApp common stock (rounded to the nearest ten thousandth) equal to the quotient obtained by dividing \$13.55 by the closing average, if the closing average is (A) less than or equal to \$21.27 and (B) greater than or equal to \$17.41. The closing average means the average of the closing sales prices for NetApp common stock (rounded to the nearest one-hundredth of a cent) as reported on the NASDAQ Global Select Market for the 10 most recent consecutive trading days ending on the third trading day immediately prior to the closing of the first-step merger. Data Domain stockholders may contact Innisfree M&A Incorporated, Data Domain's information agent, toll free at (888) 750-5834, and banks or brokers may call collect at (212) 750-5833, for information regarding the approximate merger consideration payable in connection with the first-step merger based on information available as of the date of inquiry. In addition, on the third trading day preceding the date of the special meeting of the Data Domain stockholders described below, NetApp and Data Domain will issue a joint press release announcing the aggregate merger consideration that would be payable to the Data Domain stockholders, assuming that the merger closed on the date of the special meeting. As further described in this proxy statement/prospectus, under certain conditions, NetApp may elect to reduce, or be required to reduce, the stock consideration, and in the event of such a reduction, NetApp will be required to increase the cash consideration.

If the closing average is less than \$17.41, the value of the merger consideration will be less than the aggregate \$30.00 value of the merger consideration on June 3, 2009, the date on which the revised terms of the merger were announced. If the closing average is greater than \$21.27, the value of the merger consideration will be greater than the aggregate \$30.00 value of the merger consideration on June 3, 2009. The following table shows the closing sale prices of NetApp common stock and Data Domain common stock as reported on the NASDAQ Global Select Market on May 19, 2009, the last trading day before the initial announcement of the potential merger, on June 2, 2009, the last trading day before the revised terms of the merger were announced and on [], 2009, the last trading day before the distribution of the enclosed proxy statement/prospectus for which data was available. This table also shows the implied value of the merger consideration proposed for each share of Data Domain common stock, which was calculated by adding to \$16.45, or the cash consideration, the product obtained by multiplying the closing price of NetApp common stock on those dates by the implied exchange ratio for the stock consideration that would apply if the closing average were equal to such closing price on such dates.

	NetApp Common Stock	Data Domain Common Stock	Implied Value of One Share of Data Domain Common Stock
May 19, 2009(1)	\$ 18.07	\$ 17.43	\$ 25.00
June 2, 2009	\$ 19.34	\$ 31.58	\$ 30.00
[], 2009	\$ []	\$ []	\$ []

(1) Based on the terms of the original merger agreement.

The market prices of both NetApp common stock and Data Domain common stock will fluctuate before the merger. You should obtain current stock price quotations for NetApp common stock and Data Domain common stock. NetApp common stock is quoted on the NASDAQ Global Select Market under the symbol NTAP. Data Domain common stock is quoted on the NASDAQ Global Select Market under the symbol DDUP.

We cannot complete the merger unless Data Domain's stockholders adopt the merger agreement, the proposal to adopt the merger agreement being referred to in the proxy statement/prospectus as the merger proposal. Data Domain will hold a special meeting of its stockholders to vote on the merger proposal at 2421 Mission College Blvd., Santa Clara, CA 95054 at [], local time, on [], 2009. **Your vote is important. The market price of NetApp common stock will continue to fluctuate following the date of the stockholder vote on the merger proposal at the special meeting. Consequently, at the time of the stockholder vote, the value of the stock consideration will not yet be determined. Regardless of whether you plan to attend the special meeting, please take the time to vote your shares in accordance with the instructions contained in this proxy statement/prospectus. Failing to vote will have the same effect as voting against the merger proposal. You will also have an opportunity to vote to approve the adjournment or postponement of the special meeting, if necessary, to solicit additional proxies in favor of the approval of the merger proposal, referred to as the adjournment proposal.**

The Data Domain board of directors unanimously recommends that Data Domain stockholders vote FOR approval of the merger proposal and FOR the adjournment proposal.

This proxy statement/prospectus describes the special meeting, the merger proposal and the adjournment proposal, the documents related to each proposal, and other related matters. **Please carefully read this entire proxy statement/prospectus, including Risk Factors beginning on page 16, for a discussion of the risks relating to the merger proposal.** You also can obtain information about NetApp and Data Domain from documents that each of us has filed with the Securities and Exchange Commission.

By Order of the Board of Directors

Sincerely,

Frank Sloodman
President and Chief Executive Officer

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the NetApp common stock to be issued under this proxy statement/prospectus or determined if this proxy statement/prospectus is accurate or adequate. Any representation to the contrary is a criminal offense.

The date of this proxy statement/prospectus is [], 2009, and it is first being mailed or otherwise delivered to Data Domain stockholders on or about [], 2009.

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**DATA DOMAIN, INC.
2421 Mission College Blvd.
Santa Clara, CA 95054**

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

[], 2009

To the Stockholders of Data Domain, Inc.:

Data Domain, Inc., or Data Domain, will hold a special meeting of stockholders at 2421 Mission College Blvd., Santa Clara, CA 95054 at [], local time, on [], 2009 to consider and vote upon the following proposals:

1. To adopt the Agreement and Plan of Merger, dated as of May 20, 2009, as amended on June 3, 2009, by and among NetApp, Kentucky Merger Sub One Corporation, Derby Merger Sub Two LLC and Data Domain, as the agreement may be amended from time to time, which proposal is referred to as the merger proposal; and
2. To approve the adjournment or postponement of the special meeting, if necessary, to solicit additional proxies, in the event that there are not sufficient votes at the time of the special meeting to approve the merger proposal, which proposal is referred to as the adjournment proposal.

The Data Domain board of directors has fixed the close of business on [], 2009 as the record date for the special meeting. Only Data Domain stockholders of record at that time are entitled to notice of, and to vote at, the special meeting, or any adjournment or postponement of the special meeting. In order for the merger proposal to be approved, the holders of at least a majority of the Data Domain shares outstanding and entitled to vote thereon must vote in favor of approval of the merger proposal. In the event that a quorum is not present in person or represented by proxy at the special meeting, the chairman of the meeting may adjourn the meeting to another place, date or time. If a quorum is present in person or represented by proxy at the special meeting, approval of the adjournment proposal requires the affirmative vote of the majority of the outstanding shares that are present in person or represented by proxy and entitled to vote at the special meeting.

Regardless of whether you plan to attend the special meeting, please submit your proxy with voting instructions. Please vote as soon as possible. If you hold stock in your name as a stockholder of record, please vote your shares by (i) completing, signing, dating and returning the enclosed proxy card, (ii) using the telephone number on your proxy card, or (iii) using the Internet voting instructions on your proxy card. If you hold your stock in street name through a bank, broker, or other nominee, please direct your bank, broker, or other nominee to vote in accordance with the instructions you have received from your bank, broker, or other nominee. This will not prevent you from voting in person, but it will help to secure a quorum and avoid additional solicitation costs. Any holder of Data Domain common stock who is present at the special meeting may vote in person instead of by proxy, thereby canceling any previous proxy. In any event, a proxy may be revoked in writing at any time before the special meeting in the manner described in the accompanying document.

The Data Domain board of directors has unanimously approved the merger proposal and unanimously recommends that Data Domain stockholders vote FOR approval of the merger proposal and FOR approval of the adjournment proposal.

BY ORDER OF THE BOARD OF DIRECTORS,

Sincerely,

Frank Sloodman
President and Chief Executive Officer

[], 2009

YOUR VOTE IS IMPORTANT.

**PLEASE VOTE YOUR SHARES PROMPTLY, REGARDLESS OF WHETHER YOU PLAN TO ATTEND
THE SPECIAL MEETING.**

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REFERENCES TO ADDITIONAL INFORMATION

This proxy statement/prospectus incorporates important business and financial information about NetApp and Data Domain from documents that are not included in or delivered with this document. You can obtain documents incorporated by reference in this proxy statement/prospectus, other than certain exhibits to those documents, or filed as exhibits to the registration