

ABIOMED INC
Form S-8
August 13, 2008

As filed with the Securities and Exchange Commission on August 13, 2008

Registration No. 333-

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-8

REGISTRATION STATEMENT

UNDER

THE SECURITIES ACT OF 1933

ABIOMED, INC.

(Exact Name of Registrant as Specified in Its Charter)

Delaware

(State or Other Jurisdiction of

Incorporation or Organization)

04-2743260

(I.R.S. Employer

Identification No.)

22 Cherry Hill Drive, Danvers, MA

(Address of Principal Executive Offices)

01923

(Zip Code)

ABIOMED, INC. 2008 STOCK INCENTIVE PLAN

(Full Title of the Plan)

Michael R. Minogue

Chief Executive Officer and President

ABIOMED, Inc.

22 Cherry Hill Drive

Danvers, Massachusetts 01923

(Name and Address of Agent For Service)

(978) 777-5410

(Telephone Number, Including Area Code, of Agent For Service)

with a copy to:

Peter M. Rosenblum, Esq.

Foley Hoag LLP

155 Seaport Boulevard

Boston, Massachusetts 02210

(617) 832-1000

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 | <input type="checkbox"/> | Accelerated filer | <input checked="" type="checkbox"/> |
| Non-accelerated filer | <input type="checkbox"/> | Smaller reporting company | <input type="checkbox"/> |

(Do not check if a smaller reporting company)

CALCULATION OF REGISTRATION FEE

| Title of Securities To Be Registered | Amount | Proposed Maximum Offering Price Per Share | Proposed Maximum Aggregate Offering Price | Amount of Registration Fee |
|---|---------------|--|--|---------------------------------------|
| Common Stock, \$0.01 par value | 2,000,000 (1) | \$19.08 (2) | \$38,160,000 | \$1,500 |

- (1) Represents shares of common stock issuable upon exercise of stock options or as stock awards granted under the ABIOMED, Inc. 2008 Stock Incentive Plan.
- (2) Calculated pursuant to Rule 457(c) under the Securities Act of 1933 based on the average of the high and low prices of the common stock as reported by the Nasdaq Global Market on August 7, 2008.

PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

The document(s) containing the information concerning the ABIOMED, Inc. 2008 Stock Incentive Plan (the Plan) required by Item 1 of Part 1 of Form S-8 and the statement of availability of Registration Information, Plan Information and other information required by Item 2 of Part 1 of Form S-8 will be sent or given to participants as specified by Rule 428 under the Securities Act of 1933, as amended (the Securities Act). In accordance with Rule 428 and the requirements of Part 1 of Form S-8, such documents are not being filed with the Securities and Exchange Commission (the Commission) either as part of this Registration Statement or as prospectuses or prospectus supplements pursuant to Rule 424 under the Securities Act. The Registrant shall maintain a file of such documents in accordance with the provisions of Rule 428. Upon request, the registrant shall furnish to the Commission or its staff a copy or copies of all of the documents included in such file.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference

The following documents are hereby incorporated by reference in this Registration Statement:

- (a) Our annual report on Form 10-K for the fiscal year ended March 31, 2008 (as filed on June 16, 2008);
- (b) Our quarterly report on Form 10-Q for the fiscal quarter ended June 30, 2008 (as filed on August 11, 2008);
- (c) Our current report on Form 8-K dated May 22, 2008 (as filed on May 22, 2008);
- (d) Our current report on Form 8-K dated May 23, 2008 (as filed on May 30, 2008);
- (e) Our current report on Form 8-K dated June 2, 2008 (as filed on June 2, 2008);
- (f) Our current report on Form 8-K dated June 20, 2008 (as filed on June 26, 2008);
- (g) Our current report on Form 8-K dated June 27, 2008 (as filed on July 2, 2008);
- (h) Our current report on Form 8-K dated June 30, 2008 (as filed on July 2, 2008);
- (i) Our current report on Form 8-K dated June 27, 2008 (as filed on July 3, 2008);
- (j) Our current report on Form 8-K dated July 25, 2008 (as filed on July 30, 2008);
- (k) Our current report on Form 8-K dated July 31, 2008 (as filed on August 6, 2008);

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- (l) Portions of our proxy statement on Schedule 14A filed with the SEC on July 9, 2008 that have been incorporated by reference into our annual report on Form 10-K; and

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(m) The description of our common stock contained in our registration statement on Form 8-A filed with the SEC under Section 12 of the Securities Exchange Act of 1934, including any amendment or report filed for the purpose of updating such description.

Also incorporated by reference are all documents that we may file with the SEC under Sections 13(a), 13(c), 14, or 15(d) of the Exchange Act after the initial filing of this registration statement and before we stop offering the securities described in this registration statement. These documents include periodic reports, such as annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K, as well as proxy statements. Pursuant to General Instruction B of Form 8-K, any information submitted under Item 2.02, Results of Operations and Financial Condition, or Item 7.01, Regulation FD Disclosure, of Form 8-K is not deemed to be filed for the purpose of Section 18 of the Exchange Act, and we are not subject to the liabilities of Section 18 with respect to information submitted under Item 2.02 or Item 7.01 of Form 8-K. We are not incorporating by reference any information submitted under Item 2.02 or Item 7.01 of Form 8-K into any filing under the Securities Act or the Exchange Act or into this prospectus. Any statement contained herein or in a document incorporated or deemed to be incorporated by reference herein shall be deemed to be modified or superseded for purposes of this prospectus to the extent that a statement contained herein or in any other subsequently filed document which also is or is deemed to be incorporated by reference herein modifies or supersedes such statement.

You may request copies of these filings, at no cost, by writing to or calling our Investor Relations department at:

ABIOMED, Inc.

22 Cherry Hill Drive

Danvers, Massachusetts 01923

Telephone: (978) 777-5410

Any statement contained in an Incorporated Document or deemed to be incorporated by reference herein shall be deemed to be modified or superseded for purposes hereof to the extent that a statement contained herein or in any other subsequently filed Incorporated Document 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 hereof.

Item 4. Description of Securities

Not Applicable.

Item 5. Interest of Named Experts and Counsel

The validity of the shares of common stock being registered herein has been passed upon for us by Foley Hoag LLP, Boston, Massachusetts. A partner at Foley Hoag is our secretary, and he and other partners beneficially own, together with their immediate families, approximately 10,000 shares of our common stock.

Item 6. Indemnification of Directors and Officers

Section 145 of the Delaware General Corporation Law, as amended, provides that we may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was our director, officer, employee or agent or is or was serving at our request as a director, officer, employee, agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. Section 145 further provides that we similarly may indemnify any such person serving in any such capacity who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in our favor, against expenses actually and reasonably incurred in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Delaware Court of Chancery or such other court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

We have entered into indemnification agreements with each of our directors and certain of our officers and top management personnel and anticipate that we will enter into similar agreements with future directors and officers. Generally, these agreements attempt to provide the maximum protection permitted by Delaware law with respect to indemnification. The indemnification agreements provide that we will pay certain amounts incurred by our directors in connection with any civil or criminal action or proceeding, specifically including actions by or in our name (derivative suits) where the individual's involvement is by reason of the fact that he is or was a director or officer. For directors, such amounts include, to the maximum extent permitted by law, attorney's fees, judgments, civil or criminal fines, settlement amounts and other expenses customarily incurred in connection with legal proceedings. Under the indemnification agreements, a director will not receive indemnification if the director is found not to have acted in good faith and in a manner he reasonably believed to be in or not opposed to our best interests. The indemnification agreements with our officers are slightly more restrictive. Generally, the indemnification agreements attempt to provide the maximum protection permitted by Delaware law with respect to indemnification of directors and officers. Our by-laws provide similar indemnification for officers and directors.

The effect of these provisions would be to permit indemnification for liabilities arising under the Securities Act of 1933, as amended.

Section 102(b)(7) of the Delaware Corporation Law gives a Delaware corporation the power to adopt a charter provision eliminating or limiting the personal liability of our

directors to us or our stockholders for breach of fiduciary duty as directors, provided that such provision may not eliminate or limit the liability of directors for (i) any breach of the director's duty of loyalty to us or our stockholders, (ii) any acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) any payment of a dividend or approval of a stock purchase that is illegal under Section 174 of the Delaware Corporation Law or (iv) any transaction from which the director derived an improper personal benefit. Article 10 of our certificate of incorporation eliminates the personal liability of our directors to us or our stockholders for monetary damages for breach of fiduciary duty to the full extent permitted by Delaware law.

Item 7. Exemption from Registration Claimed

Not Applicable

Item 8. Exhibits

| Exhibit No. | Description |
|--------------------|--|
| 4.1 | Restated Certificate of Incorporation (incorporated herein by reference to Exhibit 3.1 to our registration statement on Form S-3, File No. 333-36657). |
| 4.2 | Amendment to our Restated Certificate of Incorporation to increase the authorized shares of Common Stock from 25,000,000 to 100,000,000 (incorporated herein by reference to our current report on Form 8-K dated March 21, 2007 and filed on March 21, 2007). |
| 4.3 | Certificate of Designations of Series A Junior Participating Preferred Stock (incorporated herein by reference to Exhibit 3.3 to our registration statement on Form S-3, File No. 333-36657). |
| 4.4 | Amended and Restated By-Laws (incorporated herein by reference to Exhibit 3.2 of our annual report on Form 10-K for the year ended March 31, 2004). |
| 4.5 | Specimen Certificate of Common Stock (incorporated herein by reference to our registration statement on Form S-1, Registration No. 33-14861). |
| 5.1 | Opinion of Foley Hoag LLP. |
| 23.1 | Consent of Deloitte & Touche LLP. |
| 23.2 | Consent of PricewaterhouseCoopers LLP. |
| 23.2 | Consent of Foley Hoag LLP (included in Exhibit 5.1). |
| 24.1 | Power of Attorney (contained on signature page). |

Item 9. Undertakings

(a) The undersigned Registrant hereby undertakes:

(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 a 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 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 this 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; and

(3) To remove from registration by means of 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 of 1933, each filing of the Registrant's Annual Report pursuant to Section 13(a) or Section 15(d) of the Exchange Act (and each filing of the 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 the 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 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 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 Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, 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 Danvers, Massachusetts, on August 13, 2008.

ABIOMED, INC.

By: /s/ Daniel J. Sutherby
Daniel J. Sutherby

Chief Financial Officer

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POWER OF ATTORNEY

We, the undersigned officers and directors of ABIOMED, Inc., hereby severally constitute and appoint Michael R. Minogue and Daniel J. Sutherby, and each of them singly (with full power to each of them to act alone), our true and lawful attorneys-in-fact and agents, with full power of substitution and resubstitution in each of them for him or her and in his or her name, place and stead, and in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement (or any other Registration Statement for the same offering that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act of 1933), and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite or necessary to be done in and about the premises, as full 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 any of them or their 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 on Form S-8 has been signed below by the following persons in the capacities and on the dates indicated.

| Signature | Title | Date |
|--|--|-----------------|
| /s/ Michael R. Minogue Michael R. Minogue | Chief Executive Officer, President and Director (Principal Executive Officer) | August 13, 2008 |
| /s/ Daniel J. Sutherby Daniel J. Sutherby | Chief Financial Officer (Principal Financial Officer, Principal Accounting Officer) | August 13, 2008 |
| /s/ W. Gerald Austen W. Gerald Austen | Director | August 13, 2008 |
| /s/ Ronald W. Dollens Ronald W. Dollens | Director | August 13, 2008 |
| /s/ Louis E. Lataif Louis E. Lataif | Director | August 13, 2008 |
| /s/ Desmond H. O'Connell, Jr. Desmond H. O'Connell, Jr. | Director | August 13, 2008 |
| /s/ Dorothy E. Puhly Dorothy E. Puhly | Director | August 13, 2008 |
| /s/ Eric A. Rose Eric A. Rose | Director | August 13, 2008 |
| /s/ Martin P. Sutter Martin P. Sutter | Director | August 13, 2008 |
| /s/ Henri A. Termeer Henri A. Termeer | Director | August 13, 2008 |