

AVOCENT CORP
Form S-8
April 12, 2004

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As filed with the Securities and Exchange Commission on April 12, 2004

Registration No. 333-

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-8

REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

AVOCENT CORPORATION

(Exact name of Registrant as specified in its charter)

Delaware
(State of incorporation)

4991 Corporate Drive
Huntsville, Alabama 35805
(256) 430-4000
(Address of Principal Executive Offices)

91-2032368
(I.R.S. Employer Identification No.)

2003 Inducement Plan
OSA Technologies, Inc. 2000 Stock Plan
(Full title of the plan)

Samuel F. Saracino, Esq.
Senior Vice President of Legal and Corporate Affairs,
General Counsel and Secretary
9911 Willows Road N.E.
Redmond, Washington 98052
(425) 861-5858
(Name, address, and telephone number of agent for service)

Copy to:

Patrick J. Schultheis, Esq.
Wilson Sonsini Goodrich & Rosati,
Professional Corporation
5300 Carillon Point
Kirkland, Washington 98033
(425) 576-5800

CALCULATION OF REGISTRATION FEE

| Title of securities to be registered | Amount to be registered (1)(2) | Proposed maximum offering price per share (3) | Proposed maximum aggregate offering price (3) | Amount of registration fee |
|---|-----------------------------------|---|---|-------------------------------|
|---|-----------------------------------|---|---|-------------------------------|

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| | | | | |
|--|----------------|---------|-----------------|------------|
| Common Stock (\$0.001 par value) issuable pursuant to Avocent Corporation's 2003 Inducement Plan | 500,000 shares | \$37.45 | \$18,725,000.00 | \$2,372.46 |
|--|----------------|---------|-----------------|------------|

| | | | | |
|--|----------------|---------|-----------------|------------|
| Common Stock (\$0.001 par value) issuable pursuant to the OSA Technologies, Inc. 2000 Stock Plan (2) | 389,175 shares | \$37.45 | \$14,574,603.75 | \$1,846.61 |
|--|----------------|---------|-----------------|------------|

- (1) This Registration Statement shall also cover any additional shares of Avocent Corporation common stock that become issuable under the 2003 Inducement Plan and the OSA Technologies, Inc. 2000 Stock Plan (the "OSA Stock Plan") by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without the Registrant's receipt of consideration which results in an increase in the number of the outstanding shares of Registrant's common stock.
- (2) On April 6, 2004, the Registrant completed the acquisition of OSA Technologies Inc., a Delaware corporation. In connection with the acquisition, the Registrant assumed the OSA Stock Plan and all options outstanding and available for issuance thereunder and is obligated to issue up to 238,351 shares of common stock of the Registrant pursuant to the exercise of stock options that were outstanding under the OSA Stock Plan on the date the acquisition was consummated.
- (3) Calculated solely for purposes of this offering under Rule 457(h) of the Securities Act of 1933, as amended, (the "Securities Act") on the basis of the average of the high and low prices of the Registrant's Common Stock as reported on the Nasdaq Stock Market on April 8, 2004.

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 or until the Registration Statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The Registrant hereby incorporates by reference in this registration statement the following documents previously filed with the Securities and Exchange Commission:

- (a) The Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2003 filed with the Securities and Exchange Commission on March 12, 2004.
- (b) The Registrant's Current Reports on Form 8-K filed on January 9, 2004, March 29, 2004 and April 8, 2004.
- (c) The description of the Registrant's Common Stock contained in its registration statement on Form 8-A, filed May 9, 2000, pursuant to Section 12(g) of the Securities Exchange Act of 1934.

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All documents subsequently filed by the Registrant pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Securities Exchange Act of 1934, prior to the filing of a post-effective amendment which indicates that all securities offered have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference in this registration statement and to be a part hereof from the date of filing of such documents.

Item 4. Description of Securities.

Not applicable.

Item 5. Interests of Named Experts and Counsel.

Not applicable.

Item 6. Indemnification of Directors and Officers.

Section 145 of the Delaware General Corporation Law permits a corporation to include in its charter documents, and in agreements between the corporation and its directors and officers, provisions expanding the scope of indemnification beyond that specifically provided by current law.

Article XI of the Registrant's Certificate of Incorporation provides for the indemnification of directors to the fullest extent permissible under the Delaware General Corporation law.

Article VI of the Registrant's Bylaws provides for the indemnification of officers, directors and third parties acting on behalf of the Registrant to the fullest extent permissible under the Delaware General Corporation Law.

The Registrant has entered into indemnification agreements with its directors and executive officers, in addition to the indemnification provided for in its Certificate of Incorporation and Bylaws, and the Registrant intends to enter into indemnification agreements with any new directors and executive officers in the future.

Insofar as indemnification for liabilities arising under the Securities Act of 1933, as amended, may be permitted to directors, officers or persons controlling the Registrant pursuant to the foregoing provisions, the Registrant has been informed that in the opinion of the Securities and Exchange Commission, such indemnification is against public policy as expressed in the Securities Act of 1933, as amended, and is therefore unenforceable.

Item 7. Exemption from Registration Claimed.

Not applicable.

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Item 8. Exhibits.

| Exhibit Number | Description |
|---------------------------|--|
| 4.1 | Avocent Corporation's 2003 Inducement Plan (incorporated by reference to the Registrant's Annual Report on Form 10-K filed March 12, 2004) |
| 4.2 | OSA Technologies, Inc. 2000 Stock Plan |

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| Exhibit Number | Description |
|---------------------------|--|
| 5.1 | Opinion of Wilson Sonsini Goodrich & Rosati, P.C., as to the legality of the securities being registered |
| 23.1 | Consent of PricewaterhouseCoopers LLP, Independent Accountants for the Registrant. |
| 23.2 | Consent of Counsel (contained in Exhibit 5.1) |
| 24.1 | Power of Attorney (included 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 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.

(2) That, for the purpose of determining any liability under the Securities Act of 1933, 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.

(3) To remove from registration by means of a 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 Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) 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 that time shall be deemed to be the initial bona fide offering thereof.

(h) Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of 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.

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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 the City of Redmond, State of Washington, on April 12, 2004.

AVOCENT CORPORATION

By: /s/ SAMUEL F. SARACINO

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Samuel F. Saracino
 Senior Vice President of Legal and Corporate Affairs, General
 Counsel and Secretary

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints Samuel F. Saracino, Douglas E. Pritchett, and Doyle C. Weeks and each one of them, acting individually and without the other, as his attorney-in-fact, each with full power of substitution, for him in any and all capacities, to sign any and all amendments to this registration statement on Form S-8, and to file the same, with exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, hereby ratifying and confirming all that each of said attorneys-in-fact, or his substitute or substitutes, may do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the date indicated.

| Signature | Title | Date |
|---|---|----------------|
| <u>/s/ JOHN R. COOPER</u> John R. Cooper | President, Chief Executive Officer and Chairman of the Board of Directors (Principal Executive Officer) | April 12, 2004 |
| <u>/s/ DOUGLAS E. PRITCHETT</u> Douglas E. Pritchett | Senior Vice President of Finance, Chief Financial Officer, Treasurer, and Assistant Secretary (Principal Financial Officer) | April 12, 2004 |
| <u>/s/ EDWARD H. BLANKENSHIP</u> Edward H. Blankenship | Vice President of Accounting and Chief Accounting Officer (Principal Accounting Officer) | April 12, 2004 |
| <u>/s/ HAROLD D. COPPERMAN</u> Harold D. Copperman | Director | April 12, 2004 |
| <u>/s/ FRANCIS A. DRAMIS, JR.</u> Francis A. Dramis, Jr. | Director | April 12, 2004 |
| <u>/s/ EDWIN L. HARPER</u> Edwin L. Harper | Director | April 12, 2004 |
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| <u>/s/ WILLIAM H. MCALEER</u> William H. McAleer | Director | April 12, 2004 |
| <u>/s/ STEPHEN F. THORNTON</u> Stephen F. Thornton | Director | April 12, 2004 |
| <u>/s/ DAVID P. VIEAU</u> David P. Vieau | Director | April 12, 2004 |
| <u>/s/ DOYLE C. WEEKS</u> | Director | April 12, 2004 |

Doyle C. Weeks

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PART II INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

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