

ATHEROGENICS INC
Form S-8
April 28, 2004

Table of Contents

As filed with the Securities and Exchange Commission on April 28, 2004
Registration No. 333-

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

**FORM S-8
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933**

ATHEROGENICS, INC.

(Exact name of registrant as specified in its charter)

Georgia

(State or other jurisdiction
of incorporation or organization)

58-2108232

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

8995 Westside Parkway, Alpharetta, Georgia 30004

(Address of principal executive offices, including zip code)

AtheroGenics, Inc. 2004 Equity Ownership Plan

(Full title of the plan)

Russell M. Medford

President and Chief Executive Officer

AtheroGenics, Inc.

8995 Westside Parkway

Alpharetta, Georgia 30004

(Name and address of agent for service)

(678) 336-2500

(Telephone number, including area code,
of agent for service)

Copy to:

Leonard A. Silverstein, Esq.

McKenna Long & Aldridge LLP

303 Peachtree Street, N.E.

Suite 5300

Atlanta, Georgia 30308-3201

(404) 527-4000

Table of Contents**CALCULATION OF REGISTRATION FEE**

| Title Of Each Class of Securities To Be Registered | Amount To Be Registered (1) | Proposed Maximum Offering Price Per Share (2) | Proposed Maximum Aggregate Offering Price (2) | Amount Of Registration Fee (2) |
|---|--|--|--|---|
| Common Stock, no par value per share (3) | 4,500,000 | \$ 24.72 | \$ 111,240,000 | \$ 14,094 |

- (1) The shares of common stock being registered represent shares of common stock available for issuance as incentive stock options, non-qualified stock options, stock appreciation rights, restricted stock and performance awards to be granted under the AtheroGenics, Inc. 2004 Equity Ownership Plan. An undetermined number of additional shares may be issued, or the shares registered hereunder may be combined into an undetermined lesser number of shares, as a result of events such as stock splits, stock dividends or similar transactions pursuant to the terms of the AtheroGenics, Inc. 2004 Equity Ownership Plan.
- (2) The offering price for these shares is estimated pursuant to Rule 457(c) and (h) of the Securities Act of 1933, as amended, solely for the purpose of calculating the registration fee and is based upon the average of the high and low prices of our common stock on April 23, 2004 as reported on the Nasdaq National Market.
- (3) Includes common stock purchase rights which initially attach to and trade with the shares of common stock being registered hereby. Value attributable to such rights, if any, is reflected in the market price of the common stock.

TABLE OF CONTENTS

PART I

PART II

ITEM 3. INCORPORATION OF DOCUMENTS BY REFERENCE

ITEM 6. INDEMNIFICATION OF DIRECTORS AND OFFICERS

ITEM 8. EXHIBITS

ITEM 9. UNDERTAKINGS

SIGNATURES

EXHIBIT INDEX

EX-4.4 2004 EQUITY OWNERSHIP PLAN

EX-5.1 OPINION OF MCKENNA LONG & ALDRIDGE LLP

EX-23.1 CONSENT OF ERNST & YOUNG LLP

Table of Contents

PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

The documents containing the information specified in Part I of the instructions to the registration statement on Form S-8 will be sent or given to participants in the AtheroGenics, Inc. 2004 Equity Ownership Plan as required by Rule 428(b)(1) of the rules promulgated under the Securities Act. These documents are not being filed with the Securities and Exchange Commission (the Commission) as a part of this registration statement in accordance with Rule 428(b) and the Note to Part I of Form S-8.

Table of Contents

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

ITEM 3. INCORPORATION OF DOCUMENTS BY REFERENCE

The Commission allows us to incorporate by reference the information we file with it, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is considered part of this registration statement, and later information that we file with the Commission will automatically update and supersede this information. We incorporate by reference documents listed below and any future filings made with the Commission under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934, as amended, until we file a post-effective amendment which indicates that all securities offered in this registration statement have been sold or which de-registers all securities then remaining unsold.

We have filed the following documents with the Commission that are incorporated by reference as of their respective dates:

- (1) Our Annual Report on Form 10-K for the fiscal year ended December 31, 2003;
- (2) The description of our common stock included in Item 1 of our Registration Statement on Form 8-A (Registration No. 0-31261), as filed with the Commission on August 4, 2000; and
- (3) The description of our common stock purchase rights included in Item 1 of our Registration Statement on Form 8-A (Registration No. 0-31261), as filed with the Commission on November 19, 2001.

ITEM 6. INDEMNIFICATION OF DIRECTORS AND OFFICERS

Our Fourth Amended and Restated Articles of Incorporation eliminate, as permitted by Section 14-2-202(b)(4) of the Georgia Business Corporation Code (the Georgia Code), the personal liability of directors and officers for monetary damages to the corporation or its shareholders for breach of their duty of care and other duties; provided, however, that our Articles of Incorporation and Section 14-2-202(b)(4) of the Georgia Code do not permit us to eliminate or limit liability for (1) a breach of duty involving appropriation of a business opportunity of ours; (2) an act or omission which involves intentional misconduct or a knowing violation of law; (3) any transaction from which an improper personal benefit is derived; or (4) any payments of a dividend or any other type of distribution that is illegal under Section 14-2-832 of the Georgia Code. In addition, if at any time the Georgia Code is amended to authorize further elimination or limitation of personal liability, then the liability of each of our directors and officers shall be eliminated or limited to the fullest extent permitted by such provisions, as so amended, without further action by the shareholders, unless the provisions of the Georgia Code require such action.

Sections 14-2-850 to 14-2-859, inclusive, of the Georgia Code govern the indemnification of directors, officers, employees and agents. Section 14-2-851 of the Georgia Code provides for indemnification of any of our directors for liability incurred by him in connection with any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrative or investigative and whether formal or informal, in which he may become involved by reason of being a member of our board of directors. Section 14-2-851 also provides such indemnity for directors who, at

Table of Contents

our request, act as directors, officers, partners, trustees, employees or agents of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan or another enterprise. Section 14-2-851 permits indemnification if the director acted in a manner he believed in good faith to be in or not opposed to our best interest and, in addition, in criminal proceedings, if he had no reasonable cause to believe his conduct was unlawful. If the required standard of conduct is met, indemnification may include judgments, settlements, penalties, fines or reasonable expenses, including attorneys' fees, incurred with respect to a proceeding. However, if the director is adjudged liable to us in a derivative action or on the basis that personal benefit was improperly received by him, the director will only be entitled to such indemnification for reasonable expenses as a court finds to be proper in accordance with the provisions of Section 14-2-854.

Section 14-2-852 of the Georgia Code provides that directors who are successful with respect to any claim brought against them, which claim is brought because they are or were directors, are entitled to indemnification against reasonable expenses as a right. Conversely, if the charges made in any action are sustained, the determination of whether the required standard of conduct has been met will be made, in accordance with the provisions of Section 14-2-855 of the Georgia Code, as follows: (1) if there are two or more disinterested members of the board of directors, by the majority vote of a quorum of the disinterested members of the board of directors, (2) by a majority of the members of a committee of two or more disinterested directors, (3) by special legal counsel or (4) by the shareholders, but, in such event, the shares owned by or voted under the control of directors seeking indemnification may not be voted.

Section 14-2-857 of the Georgia Code provides that an officer who is not a director has the mandatory right of indemnification granted to directors under Section 14-2-852, as described above. In addition, we may, as provided by our Articles of Incorporation, Bylaws, general or specific actions by our board of directors, or by contract, indemnify and advance expenses to an officer, employee or agent who is not a director to the extent that such indemnification is consistent with public policy.

Article V of our Third Amended and Restated Bylaws, as amended, provide for indemnification of directors, officers and in-house legal counsel acting in a legal capacity on our behalf against third-party actions and derivative actions in which the individual becomes involved, as a party or otherwise, arising from their status as such. Our Bylaws provide for the same standard of conduct for indemnification as set out above in Section 14-2-851 of the Georgia Code. Our Bylaws prohibit indemnification where such person is adjudged liable under similar situations set out above in Section 14-2-854 of the Georgia Code. Section 3 of Article V provides for advancement of expenses as authorized by our board of directors upon receipt of a written affirmation of such persons good faith belief that he has met the relevant standard of conduct and an undertaking to repay if it is determined that he is not entitled to indemnification. Our Bylaws contain similar requirements for determining indemnification rights that are set out above in Section 14-2-855 of the Georgia Code. Our Bylaws also contain a provision that allows us to purchase and maintain insurance on behalf of an individual who is or was a director, officer or in-house legal counsel.

Our officers and directors are presently covered by insurance which (with certain exceptions and within certain limitations) indemnifies them against any losses or liabilities arising from any alleged wrongful act, including any alleged breach of duty, neglect, error, misstatement, misleading statement, omissions or other act done or wrongfully attempted. We pay the cost of such insurance as permitted by our Bylaws and the laws of the State of Georgia.

Table of Contents

ITEM 8. EXHIBITS

| Exhibit Number | Description |
|---------------------------|--|
| 4.1 | Form of Fourth Amended and Restated Articles of Incorporation, as amended (incorporated by reference to Exhibit 3.01 to Amendment No. 2 of the Registration Statement on Form S-1, Registration No. 333-31140, filed July 13, 2000 declared effective on August 8, 2000). |
| 4.2 | Form of Third Amended and Restated Bylaws of AtheroGenics, Inc., as amended (incorporated by reference to Exhibit 3.02 to our Annual Report on Form 10-K filed March 29, 2002). |
| 4.3 | Rights Agreement dated as of November 9, 2001 between AtheroGenics, Inc. and American Stock Transfer & Trust Company, as Rights Agent (incorporated by reference to the AtheroGenics, Inc. s Current Report on Form 8-K dated November 9, 2001, as filed November 19, 2001). |
| 4.4* | AtheroGenics, Inc. 2004 Equity Ownership Plan. |
| 5.1* | Opinion of McKenna Long & Aldridge LLP. |
| 23.1* | Consent of Ernst & Young LLP. |
| 23.2* | Consent of McKenna Long & Aldridge LLP (included in its opinion filed as Exhibit 5.1 hereto). |
| 24.1 | Powers of Attorney (see signature pages to this registration statement). |

*Filed herewith

ITEM 9. UNDERTAKINGS

A. Rule 415 Offering.

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 of 1933;

(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

Table of Contents

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 20 percent 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 registration statement is on Form S-3, Form S-8 or Form F-3, and 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 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference 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. Subsequent Documents Incorporated by Reference.

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 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.

C. Indemnification of Officers, Directors and Controlling Persons.

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 Securities Act of 1933 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 Securities Act of 1933 and will be governed by the final adjudication of such issue.

Table of Contents

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 Alpharetta, State of Georgia, on April 28, 2004.

ATHEROGENICS, INC.

(Registrant)

By: /s/RUSSELL M. MEDFORD

Russell M. Medford

President and Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints Russell M. Medford and Mark P. Colonnese, and each of them, as his true and lawful attorneys-in-fact, each acting alone, with full power of substitution and resubstitution, for him and in his name, place and stead, in any and all capacities, to sign any and all amendments (including any post-effective amendments) to this Registration Statement on Form S-8, and to file the same, with all exhibits thereto and any 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 and necessary to be done, as fully to all intents and purposes as he 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 substitute or substitutes, may lawfully do or cause to be done by virtue thereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities indicated as of April 28, 2004.

| Signatures | Title |
|-----------------------|---|
| /s/RUSSELL M. MEDFORD | President, Chief Executive Officer and Director (Principal Executive Officer) |
| Russell M. Medford | |
| /s/MARK P. COLONNESE | Senior Vice President of Finance and Administration, Chief Financial Officer and Secretary (Principal Financial Officer and Principal Accounting Officer) |
| Mark P. Colonnese | |
| /s/MICHAEL A. HENOS | Chairman of the Board of Directors |
| Michael A. Henos | |

(Signatures continued on following page)

Table of Contents

| Signatures | Title |
|---|--------------|
| <hr/> <u>/s/R. WAYNE ALEXANDER</u> <hr/> R. Wayne Alexander | Director |
| <hr/> <u>/s/DAVID BEARMAN</u> <hr/> David Bearman | Director |
| <hr/> <u>/s/VAUGHN D. BRYSON</u> <hr/> Vaughn D. Bryson | Director |
| <hr/> <u>/s/T. FORCHT DAGI</u> <hr/> T. Forcht Dagi | Director |
| <hr/> <u>Arthur M. Pappas</u> | Director |
| <hr/> <u>/s/WILLIAM A. SCOTT</u> <hr/> William A. Scott | Director |
| <hr/> <u>/s/STEVEN G. SUDOVAR</u> <hr/> Steven G. Sudovar | Director |

Table of Contents

EXHIBIT INDEX

| Exhibit Number | Description |
|---------------------------|--|
| 4.1 | Form of Fourth Amended and Restated Articles of Incorporation, as amended (incorporated by reference to Exhibit 3.01 to Amendment No. 2 of the Registration Statement on Form S-1, Registration No. 333-31140, filed July 13, 2000 declared effective on August 8, 2000). |
| 4.2 | Form of Third Amended and Restated Bylaws of AtheroGenics, Inc., as amended (incorporated by reference to Exhibit 3.02 to our Annual Report on Form 10-K filed March 29, 2002). |
| 4.3 | Rights Agreement dated as of November 9, 2001 between AtheroGenics, Inc. and American Stock Transfer & Trust Company, as Rights Agent (incorporated by reference to the AtheroGenics, Inc. s Current Report on Form 8-K dated November 9, 2001, as filed November 19, 2001). |
| 4.4* | AtheroGenics, Inc. 2004 Equity Ownership Plan. |
| 5.1* | Opinion of McKenna Long & Aldridge LLP. |
| 23.1* | Consent of Ernst & Young LLP. |
| 23.2* | Consent of McKenna Long & Aldridge LLP (included in its opinion filed as Exhibit 5.1 hereto). |
| 24.1 | Powers of Attorney (see signature pages to this registration statement). |

*Filed herewith