

AVI BIOPHARMA INC  
Form S-3/A  
May 16, 2008

As filed with the Securities and Exchange Commission on May 16, 2008

Registration No. 333-150021

# UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

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Amendment No.1  
to

## FORM S-3

REGISTRATION STATEMENT

UNDER

THE SECURITIES ACT OF 1933

**AVI BIOPHARMA, INC.**

(Exact name of registrant as specified in its charter)

**Oregon**

(State or other jurisdiction of incorporation or organization)

**93-0797222**

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

**One S.W. Columbia St., Suite 1105**

**Portland, OR 97258**

**(503) 227-0554**

(Address, including zip code, and telephone number, including area code,

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of registrant's principal executive offices)

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**Alan P. Timmins**  
**President and Chief Operating Officer**

**AVI BioPharma, Inc.**  
**One S.W. Columbia, Suite 1105, Portland, OR 97258**  
**(503) 227-0554**

(Name, address, including zip code, and telephone number,  
including area code, of agent for service)

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**Copies to:**  
**Michael C. Phillips, Esq.**

Davis Wright Tremaine LLP

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1300 S.W. Fifth Avenue

Portland, Oregon 97201

(503) 241-2300

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**Approximate date of proposed sale to the public: From time to time after the effective date of this Registration Statement.**

If the only securities being registered on this Form are being offered pursuant to dividend or interest reinvestment plans, please check the following box.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, other than securities offered only in connection with dividend or interest reinvestment plans, 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, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

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If this Form is filed as a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, please 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 registration statement pursuant to General Instruction I.D. or a post-effective amendment thereto that shall become effective upon filing with the Commission pursuant to Rule 462(e) under the Securities Act, check the following box.

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction I.D. filed to register additional securities or additional classes of securities pursuant to Rule 413(b) under the Securities Act, check the following box.

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

Accelerated filer

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

Smaller reporting company

### CALCULATION OF REGISTRATION FEE

Title of Class of Securities to be Registered	Amount to be Registered (1),(2)	Proposed Maximum Aggregate Offering Price per share (3)	Proposed Maximum Aggregate Offering Price (3)	Amount of Registration Fee (3),(4)
Common Stock, par value \$.0001 per share	5,647,016	\$ 1.5325	\$ 18,254	\$ 1

(1) Pursuant to Rule 416 under the Securities Act, includes such indeterminate amounts and numbers of common stock as may be issued upon a stock split, stock dividend or similar transaction

(2) 5,635,105 shares of common stock were covered by the Registration Statement on Form S-3 (File No. 333-150021) of AVI BioPharma, Inc., which was filed with the Securities and Exchange Commission on April 1, 2008. Under Amendment No. 1 to the Registration Statement, filed May 16, 2008, an additional 11,911 shares were registered, for a total of 5,647,016 shares.

(3) Estimated solely for purposes of calculating the additional registration fee payable on account of the 11,911 additional shares to be registered under this Amendment No.1 pursuant to Rule 457(c) and Section 6(b) of the Securities Act of 1933 using the average of the high and low prices of the registrant's common stock as reported on The Nasdaq Global Market on May 15, 2008.

(4) Represents the fee payable on the additional number of shares to be registered. Fee of \$407 was previously paid when the Registration Statement on Form S-3 (File No. 333-150021) of AVI BioPharma, Inc., was initially filed with the Securities and Exchange Commission on April 1, 2008.

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 Securities and Exchange Commission, acting pursuant to said Section 8(a), may determine.

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**The information in this prospectus is not complete and may be changed. The selling shareholders named in this prospectus may not sell these securities until the registration statement filed with the Securities and Exchange Commission becomes effective. This prospectus is not an offer to sell these securities and the selling shareholders named in this prospectus are not soliciting offers to buy these securities in any jurisdiction where the offer and sale is not permitted.**

**SUBJECT TO COMPLETION, DATED May 16, 2008**

**PROSPECTUS**

**AVI BIOPHARMA, INC.**

**5,647,016 Shares of Common Stock**

This prospectus relates to the offer and sale from time to time by the selling shareholders identified in this prospectus, and their pledgees, assignees and successors-in-interest, of 5,647,016 shares of our common stock. We are filing the registration statement of which this prospectus is a part in order to fulfill contractual obligations with the selling shareholders.

The prices at which such selling shareholders may sell the shares in this offering will be determined by the prevailing market price for the shares or in negotiated transactions. We will not receive any of the proceeds from the sale of the shares. See **Plan of Distribution** beginning on page **6**.

Our common stock is quoted on the Nasdaq Global Market under the symbol **AVII**. The closing sales price of our common stock on the Nasdaq Global Market on May 15, 2008 was \$1.53 per share.

**Investing in our common stock involves a high degree of risk. See Risk Factors beginning on page 3.**

**Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy or accuracy of this prospectus. Any representation to the contrary is a criminal offense.**

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The date of this prospectus is May 16, 2008.

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You should rely only on the information contained in this prospectus, including information incorporated by reference in this prospectus, or any supplement to which we have referred you. We have not authorized anyone else to provide you with different information. You should not assume that the information in this prospectus or any supplement is accurate as of any date other than the date on the front of those documents or that any document incorporated by reference is accurate as of any date other than its filing date. You should not consider this prospectus to be an offer or solicitation relating to the securities in any jurisdiction in which such an offer or solicitation relating to the securities is not authorized. Furthermore, you should not consider this prospectus to be an offer or solicitation relating to the securities if the person making the offer or solicitation is not qualified to do so, or if it is unlawful for you to receive such an offer or solicitation.

**PROSPECTUS SUMMARY**

*This summary highlights important features of this offering and the information included or incorporated by reference in this prospectus. This summary does not contain all of the information that you should consider before investing in our common stock. You should read this prospectus and the information and documents incorporated by reference carefully. Such documents contain important information you should consider when making your investment decision. See Incorporation of Certain Documents by Reference on page .*

*Unless the context otherwise requires, all references to we, our, our company, or the Company in this prospectus refer to AVI BioPharma, Inc., an Oregon corporation.*

**About AVI BioPharma, Inc.**

We are a biopharmaceutical company developing therapeutic products principally based on third-generation NEUGENE® antisense technology. Our principal products in development target life-threatening diseases, including cardiovascular, infectious, and genetic diseases. Currently approved drugs or other therapies for these diseases often prove to be ineffective or produce undesirable side effects. Our pre-clinical and clinical studies indicate that our technology may lead to development of drugs that we believe offer more effective treatment options with fewer side effects than currently approved products. A patent estate including 186 patents (foreign and domestic) issued or licensed to us and 192 pending patent applications (domestic and foreign) protects our technologies. Our lead product candidate, Resten-NG®, which is targeted at cardiovascular disease, addresses a market we believe may exceed \$3 billion worldwide.

Our executive offices are located at One S.W. Columbia, Suite 1105, Portland, OR 97258. Our telephone number is (503) 227-0554, fax number is (503) 227-0751, and our website address is www.avibio.com. The information on our website is not incorporated by reference into this prospectus.

This prospectus includes our trademarks and registered trademarks, including NeuGene®, Avicine®, Resten-NG®, Resten-CP , and Oncomyc-NG . Each other trademark, trade name or service mark appearing in this annual report belongs to its holder.

**The Offering**

Common stock offered by selling shareholders	5,647,016 shares
Use of proceeds	We will not receive any proceeds from the sale of shares in this offering. See Selling Shareholders.
Nasdaq National Market symbol	AVII





## **RISK FACTORS**

Investment in our securities involves a high degree of risk. You should carefully consider the risks described in the section entitled **Risk Factors** in any prospectus as well as in the section entitled **Risk Factors** contained in our most recent annual report on Form 10-K, which has been filed with the SEC and are incorporated herein by reference in their entirety, as well as other information in this prospectus and any other documents or reports incorporated by reference herein before purchasing any of our securities. Each of the risks described in these sections and documents could materially and adversely affect our business, financial condition, results of operations and prospects, and could result in a loss of your investment.

## **SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS**

This prospectus and the information incorporated by reference herein and therein contain forward-looking statements regarding our plans, expectations, estimates and beliefs. Our actual results could differ materially from those discussed in, or implied by, these forward-looking statements. Forward-looking statements are identified by words such as *believe, anticipate, expect, intend, plan, will, may, and other* expressions. In addition, any statements that refer to expectations, projections or other characterizations of future events or circumstances are forward-looking statements. We have based these forward-looking statements largely on our expectations. Forward-looking statements in this report include, but are not necessarily limited to, those relating to:

- our intention to introduce new products;
- receipt of any required FDA or other regulatory approval for our products;
- our expectations about the markets for our products;
- acceptance of our products, when introduced, in the marketplace;
- our future capital needs;
- results of our research and development efforts, and
- success of our patent applications.

Forward-looking statements are subject to risks and uncertainties, certain of which are beyond our control. Actual results could differ materially from those anticipated as a result of the factors described in the **Risk Factors** and detailed herein and in our other Securities and Exchange Commission filings, including among others:

- the effect of regulation by the FDA and other governmental agencies;
- delays in obtaining, or our inability to obtain, approval by the FDA or other regulatory authorities for our products;

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- research and development efforts, including delays in developing, or the failure to develop, our products;
- the development of competing or more effective products by other parties;
- the results of pre-clinical and clinical testing;
- uncertainty of market acceptance of our products;
- problems that we may face in manufacturing, marketing, and distributing our products;
- our inability to raise additional capital when needed;
- delays in the issuance of, or the failure to obtain, patents for certain of our products and technologies; and
- problems with important suppliers and business partners.

Because of these risks and uncertainties, the forward-looking events and circumstances discussed in this prospectus or incorporated by reference might not occur. Factors that cause actual results or conditions to differ from those anticipated by these and other forward-looking statements

include those more fully described in the Risk Factors section and elsewhere in this prospectus. Except for our ongoing obligations to disclose material information as required by the federal securities laws, we undertake no obligation to release publicly any revisions to any forward-looking statements to reflect events or circumstances after the date hereof or to reflect the occurrence of unanticipated events. All of the above factors are difficult to predict, contain uncertainties that may materially affect our actual results and may be beyond our control. New factors emerge from time to time, and it is not possible for our management to predict all of such factors or to assess the effect of each factor on our business.

#### USE OF PROCEEDS

The proceeds from the sale of the selling shareholders' shares of common stock will belong to the selling shareholders. We will not receive any proceeds from the sale by the selling shareholders of these shares of common stock. See Selling Shareholders.

#### DESCRIPTION OF TRANSACTION

On March 12, 2008, we entered into an Agreement and Plan of Merger (the Merger Agreement) with Ercole Biotech, Inc., a privately held Delaware corporation (Ercole). Under the terms of the Merger Agreement, a wholly-owned subsidiary of AVI merged with and into Ercole, with Ercole surviving the merger as a wholly-owned subsidiary of the Company (the Merger). Under the terms of the Merger Agreement, AVI issued 5,647,016 shares of AVI Common Stock to shareholders of Ercole other than AVI in exchange for all of the issued and outstanding shares of Ercole's common stock and preferred stock held by such holders, and, subject to receipt of information required by applicable law from each such holder, we agreed to register those 5,647,016 shares of AVI Common Stock for resale by the Ercole shareholders. AVI also held shares of Ercole preferred stock, but received no portion of the merger consideration for the shares it held.

#### SELLING SHAREHOLDERS

This prospectus relates to the resale from time to time of up to a total of 5,647,016 shares of our common stock by the selling shareholders. The shares were issued in a private placement exempt from registration requirements under the Securities Act of 1933, as amended (the Securities Act). Under the Merger Agreement, we agreed to file a registration statement, of which this prospectus is a part, with the SEC to register the resale of these shares and to keep the registration statement effective until September 20, 2009.

The following table, based upon information currently known by us, sets forth as of May 16, 2008: (i) the number of shares held of record or beneficially by each selling shareholder as of such date and (ii) the number of shares that may be offered under this prospectus. Beneficial ownership is determined in accordance with the rules of the SEC, and includes voting or investment power with respect to shares, and includes shares of common stock plus any securities held by the holder exercisable for or convertible into shares of common stock within sixty (60) days after May 16, 2008, in accordance with Rule 13d-3(d)(1) under the Securities Exchange Act of 1934, as amended. None of the selling shareholders are a broker-dealer or an affiliate of a broker-dealer.

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<b>Name of Selling Shareholder</b>	<b>Common Stock Beneficially owned prior to the offering</b>	<b>Common stock owned upon completion of the offering (2)</b>	<b>Percentage of common stock owned upon completion of this offering</b>
Altman, Sidney	4,270	0	*
ARBA Partners, LP (3)	20,118	0	*
Bebenek, Tadeusz	500,279	0	*
Blass, Josef and Ewa, JTROS	85,631	0	*
Bocckino, Stephen B.	74,446	0	*
Brostoff, Steven W.	29,778	0	*

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Buckley, Brian	15,484	0	*
Dominski, Zbigniew	6,321	0	*
Duncan, Clayton I.	997,138	229,846	*
Gorlach, Jorn and Jenifer, JTROS	104,224	0	*
Graziewicz, Maria	74,446	0	*
H&M Holdings, LLC (4)	62,019	33,432	*
Juliano, Rudolph L.	5,878	0	*
Kenan - Flagler Business School Foundation (5)	11,911	0	*
Kole, Ryszard	94,919	0	*
Kole, Ryszard and Jolanta, JTROS	1,865,623	0	*
Kopczynski, Casey	14,889	0	*
Kouri, Richard E.	205,471	0	*
Love, W. Bennett	745,960	147,412	*
Maroglou, Athanasios	107,202	0	*
Mitchell, Beverly S.	5,189	0	*
North Carolina Biotechnology Center (6)	120,167	0	*
Patterson, Winston Campbell	5,878	0	*
Redick, Ann	59,557	0	*
Reichow, Richard W.	422,767	118,158	*
Roberts, Jennifer Dillman	1,191	0	*
Sazani, Peter	233,265	0	