

AVI BIOPHARMA INC  
Form S-8  
June 20, 2011

As filed with the Securities and Exchange Commission on June 20, 2011

Registration No. 333-

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

**FORM S-8**  
**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.)

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3450 Monte Villa Parkway, Suite 101

Bothell, WA 98021

(425) 354-5038

(Address of Principal Executive Offices)(Zip Code)

**2011 EQUITY INCENTIVE PLAN**

**STAND ALONE STOCK OPTION GRANT TO EFFIE TOSHAV**

**STAND ALONE STOCK OPTION GRANT TO PETER LINSLEY**

**STAND ALONE STOCK OPTION GRANT TO EDWARD KAYE**

(Full title of the plan(s))

**Christopher Garabedian**

**President and Chief Executive Officer**

**AVI BioPharma, Inc.**

**3450 Monte Villa Parkway, Suite 101**

**Bothell, WA 98021**

**(425) 354-5038**

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

*Copy to:*

**Michael Nordtvedt**

**Wilson Sonsini Goodrich & Rosati**

**Professional Corporation**

**701 Fifth Avenue, Suite 5100**

**Seattle, Washington 98104**

(206) 883-2500

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 securities to be registered	Amount registered (1)(2)	Proposed	Proposed	Amount of registration fee
		maximum offering price per share	maximum aggregate offering price	
Common Stock \$0.0001 par value per share				
To be issued under the 2011 Equity Incentive Plan	13,000,000	\$1.39(3)	\$18,070,000	\$2,097.93
To be issued under the 2011 Equity Incentive Plan	2,072,457(4)	\$1.39(3)	\$2,880,716	\$334.46
To be issued under the 2011 Equity Incentive Plan	9,485,990(5)	\$1.39(3)	\$13,185,527	\$1,530.84
Outstanding under the Stand Alone Stock Option Grant to Effie Toshav	650,000	\$2.58(6)	\$1,677,000	\$194.70
Outstanding under the Stand Alone Stock Option Grant to Peter Linsley	800,000	\$1.76(6)	\$1,408,000	\$163.47
Outstanding under the Stand Alone Stock Option Grant to Edward Kaye	850,000	\$1.38(6)	\$1,173,000	\$136.19
<b>Total</b>	<b>26,858,447</b>		<b>\$38,394,243</b>	<b>\$4,457.59</b>

- (1) Pursuant to Rule 416(a) of the Securities Act of 1933, as amended (the Securities Act), this Registration Statement shall also cover any additional shares of the Registrant's common stock that become issuable under the 2011 Equity Incentive Plan, the Stand Alone Stock Option Grant to Effie Toshav, the Stand Alone Stock Option Grant to Peter Linsley or the Stand Alone Stock Option Grant to Edward Kaye by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without receipt of consideration that increases the number of the Registrant's outstanding shares of common stock.
- (2) For the sole purpose of calculating the registration fee, the number of shares to be registered under this Registration Statement has been broken down into six subtotals.
- (3) Offering prices of awards that have not yet been granted as of the date of this Registration Statement are computed in accordance with Rules 457(c) and 457(h) under the Securities Act solely for the purpose of calculating the registration fee based upon the price of \$1.39 per share, the average of the high and low prices of the common stock of the Registrant as reported on The NASDAQ Global Market on June 17, 2011.

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- (4) This subtotal represents the registration of 2,072,457 shares reserved but not issued under the Registrant's 2002 Equity Incentive Plan, which became issuable under the 2011 Equity Incentive Plan pursuant to its terms. No additional awards will be issued pursuant to the 2002 Equity Incentive Plan.
- (5) This subtotal represents the registration of up to a maximum of 9,485,990 shares subject to outstanding awards under the 2002 Equity Incentive Plan that expire or otherwise terminate without having been exercised in full, or are forfeited to or repurchased by the Registrant, which become issuable under the 2011 Equity Incentive Plan pursuant to its terms.
- (6) Calculated pursuant to Rule 457(h) under the Securities Act. The price of \$2.58 per share represents the exercise price per share for Ms. Toshav's option grant, the price of \$1.76 per share represents the exercise price per share for Dr. Linsley's option grant and the price of \$1.38 per share represents the exercise price per share for Dr. Kaye's option grant.

**PART I**

**Information Required in the Section 10(a) Prospectus**

The information specified in Part I of Form S-8 is omitted from this filing in accordance with the provisions of Rule 424 under the Securities Act and the introductory note to Part I of Form S-8. The documents containing the information specified in Part I will be delivered to the participants in the equity benefit plans covered by this Registration Statement as required by Rule 428(b)(1).

**PART II**

**Information Required in the Registration Statement**

**Item 3. Incorporation of Documents by Reference.**

AVI BioPharma, Inc. (the Registrant) hereby incorporates by reference into this Registration Statement the following documents previously filed with the Securities and Exchange Commission (the Commission):

- (a) The Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2010 filed with the Commission on March 15, 2011, as amended by Amendment No. 1 to the Registrant's Annual Report on Form 10-K filed with the Commission on May 2, 2011.
- (b) The Registrant's Quarterly Report on Form 10-Q for the fiscal quarter ended March 31, 2011 filed with the Commission on May 10, 2011.
- (c) All other reports filed with the Commission pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the Exchange Act) since the end of the fiscal year covered by the Registrant's Annual Report referred to in (a) above.
- (d) The description of the Registrant's common stock contained in its registration statement on Form 8-A12G, filed May 29, 1997, pursuant to Section 12(g) of the Exchange Act.

All documents subsequently filed by the Registrant pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act, prior to the filing of a post-effective amendment which indicates that all securities registered 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 part hereof from the date of filing of such documents.

The Registrant is not incorporating any information from any filed documents furnished under either Item 2.02 or Item 7.01 of any Current Report on Form 8-K. Unless expressly incorporated into this Registration Statement, a Current Report furnished on Form 8-K subsequent to the date hereof shall not be incorporated by reference into this Registration Statement, except as to specific sections of such statements as set forth therein.

Any statement contained in a document incorporated or deemed to be incorporated by reference herein shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that a statement contained herein or in any subsequently filed document which also is deemed to be incorporated by reference herein 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 of this Registration Statement.

**Item 4. Description of Securities.**

Not applicable.

**Item 5. Interests of Named Experts and Counsel.**

Not applicable.

**Item 6. Indemnification of Directors and Officers.**

Under the Oregon Business Corporation Act (the Oregon Act ) and the Registrant's Articles of Incorporation, the Registrant has broad powers to indemnify directors and officers against liabilities that they may incur in such capacities.

Section 60.391 of the Oregon Act authorizes the indemnification of an individual made a party to a proceeding because the individual is or was an officer or director against certain liability incurred in the proceeding if:

- (a) the conduct of the individual was in good faith;
- (b) the individual reasonably believed that his or her conduct was in the best interests of the corporation or at least not opposed to its best interests;
- (c) in the case of any criminal proceeding, the individual had no reasonable cause to believe his or her conduct was unlawful;
- (d) in the case of any proceeding by or in the right of the corporation, the individual was not adjudged liable to the corporation; and
- (e) in connection with any proceeding (other than a proceeding by or in the right of the corporation) charging improper personal benefit to the individual, the individual was not adjudged liable on the basis that he or she improperly received personal benefit.

Section 60.401 of the Oregon Act also authorizes a court to order indemnification, whether or not the above standards of conduct have been met, if the court determines that the officer or director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances. In addition, the Oregon Act provides that the indemnification described above is not exclusive of any other rights to which officers or directors may be entitled under the corporation's articles of incorporation or bylaws, or under any agreement, action of its board of directors, vote of shareholders or otherwise.

Section 60.047(2)(d) of the Oregon Act also authorizes a corporation to include in its articles of incorporation a provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for conduct as a director, except that such a provision cannot affect the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) for any unlawful corporate distribution as defined in the Oregon Act or (iv) for any transaction from which the director derived an improper personal benefit.

The Registrant's Articles of Incorporation provide that it is required to indemnify its directors and officers, in each case to the fullest extent permitted by Oregon law. No amendment to the Articles of Incorporation that limits the Registrant's obligation to indemnify any person shall have any effect for any act or omission that occurs prior to the later of the effective date of such amendment and the date notice of such amendment is given to the person.

The Registrant has entered into and expects to continue to enter into agreements to indemnify its executive officers and directors. With certain exceptions, these agreements require the Registrant to indemnify each indemnitee to the fullest extent permitted by applicable law, against all expenses, judgments, fines and amounts paid in settlement incurred by the indemnitee in connection with any proceeding, whether of a civil, criminal, administrative or investigative nature, in which the indemnitee may be or may have been involved as a party, witness or otherwise, by reason of the fact that the indemnitee was one of the Registrant's directors or officers, or by reason of any action or inaction on indemnitee's part while acting as one of the Registrant's directors or officers, or by reason of the fact that indemnitee was serving, at the Registrant's request, in certain capacities for other entities.

The Registrant believes that the provisions in the Articles of Incorporation and indemnification agreements are necessary to attract and retain qualified persons as directors and officers. The Registrant also maintains directors' and officers' liability insurance.

**Item 7. Exemption from Registration Claimed.**

Not applicable.

**Item 8. Exhibits.**

Exhibit Number	Description
4.1	Fourth Restated and Amended Articles of Incorporation of AVI BioPharma, Inc.
4.2 (1)	Amended and Restated Bylaws of AVI BioPharma, Inc.
4.3 (2)	Form of Specimen Certificate for Common Stock.
4.4 (3)	AVI BioPharma, Inc. 2011 Equity Incentive Plan.
4.5 (4)	Form of Stock Option Award Agreement under the 2011 Equity Incentive Plan.
4.6 (5)	Form of Notice of Grant of Restricted Stock under the 2011 Equity Incentive Plan.
4.7 (6)	Stand Alone Stock Option Grant between the Registrant and Effie Toshav dated January 10, 2011.
4.8	Stand Alone Stock Option Grant between the Registrant and Peter Linsley dated May 16, 2011.
4.9	Stand Alone Stock Option Grant between the Registrant and Edward Kaye dated June 20, 2011.
5.1	Opinion of White & Lee LLP.
23.1	Consent of KPMG LLP, Independent Registered Public Accounting Firm.
23.2	Consent of White & Lee LLP (included in Exhibit 5.1).
24.1	Power of Attorney (included on signature page).

- (1) Incorporated by reference to Exhibit 3.4 to Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2010, filed on March 15, 2011.
- (2) Incorporated by reference to Exhibit 4.1 to Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2010, filed on March 15, 2011.
- (3) Incorporated by reference to Exhibit 10.1 to Registrant's Current Report on Form 8-K, filed on June 16, 2011.

- (4) Incorporated by reference to Exhibit 10.2 to Registrant's Current Report on Form 8-K, filed on June 16, 2011.
- (5) Incorporated by reference to Exhibit 10.3 to Registrant's Current Report on Form 8-K, filed on June 16, 2011.
- (6) Incorporated by reference to Exhibit 10.2 to Registrant's Quarterly Report on Form 10-Q for the fiscal quarter ended March 31, 2011, filed on May 10, 2011.

**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 of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of this 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 this 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 percent change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective registration statement.

(iii) To include any material information with respect to the plan of distribution not previously disclosed in this registration statement or any material change to such information in this registration statement;

*Provided, however*, that paragraphs (a)(1)(i) and (a)(1)(ii) of this section do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the Registrant pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in this 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 this 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.

**SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933, AVI BioPharma, Inc., a corporation organized and existing under the laws of the State of Oregon, 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 Bothell, State of Washington, on this 20<sup>th</sup> day of June, 2011.

AVI BIOPHARMA, INC.

By: /s/ CHRISTOPHER GARABEDIAN  
**Christopher Garabedian**  
**President and Chief Executive Officer**

**(Principal Executive Officer)**

**POWER OF ATTORNEY**

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints Christopher Garabedian and Effie Toshav, and each of them, as his or her attorney-in-fact, with full power of substitution in each, for him or her 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 all 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 or her 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 dates indicated.

Signature	Title	Date
/s/ CHRISTOPHER GARABEDIAN  <b>Christopher Garabedian</b>	President, Chief Executive Officer and Director (Principal Executive Officer)	June 20, 2011
/s/ J. DAVID BOYLE II  <b>J. David Boyle II</b>	Senior Vice President and Chief Financial Officer  (Principal Financial Officer and Principal Accounting Officer)	June 20, 2011
/s/ WILLIAM GOOLSBEE  <b>William Goolsbee</b>	Chairman and Director	June 20, 2011
/s/ M. KATHLEEN BEHRENS  <b>M. Kathleen Behrens</b>	Director	June 20, 2011
/s/ ANTHONY CHASE  <b>Anthony Chase</b>	Director	June 20, 2011
/s/ JOHN HODGMAN  <b>John Hodgman</b>	Director	June 20, 2011
/s/ GIL PRICE  <b>Gil Price</b>	Director	June 20, 2011

/s/ HANS WIGZELL

Director

June 20, 2011

**Hans Wigzell**

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