

BIOLASE, INC
Form S-8
May 10, 2018

As filed with the Securities and Exchange Commission on May 10, 2018

Registration No. 333-

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

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

BIOLASE, INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

87-0442441
(I.R.S. Employer
Identification No.)

4 Cromwell

Irvine, California
(Address of principal executive offices)

92618
(Zip Code)

BIOLASE, INC. 2018 LONG-TERM INCENTIVE PLAN

(Full title of the plan)

John R. Beaver

Interim Chief Executive Officer and Chief Financial Officer

4 Cromwell

Irvine, California 92618

(949) 361-1200

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

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of large accelerated filer, accelerated filer, smaller reporting company, and emerging growth 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

Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act.

CALCULATION OF REGISTRATION FEE

Title of	Amount	Proposed	Proposed	Amount of
		maximum	maximum	
securities to be registered	to be	offering price	aggregate	registration fee
	registered(1)	per share(2)	offering price(2)	
Common Stock, \$0.001 par value	11,602,736	\$0.32	\$3,712,875.52	\$462.25

- (1) Biolase, Inc., a Delaware corporation (the Registrant), is filing this Registration Statement to register 10,602,736 shares of Common Stock, par value \$0.001 per share (the Common Stock), for issuance under the Biolase, Inc. 2018 Long-Term Incentive Plan (the 2018 Plan), plus an additional 1,000,000 shares of Common Stock underlying equity awards issued under a Prior Plan (as defined in the 2018 Plan) that were outstanding as of the effective date of the 2018 Plan and that may be available for future awards under the 2018 Plan pursuant to Section 1.5 thereof. Pursuant to Rule 416 under the Securities Act of 1933, as amended (the Securities Act), this Registration Statement also covers such additional and indeterminate number of shares as may become issuable pursuant to the provisions of the 2018 Plan relating to adjustments for changes resulting from a stock dividend, stock split, recapitalization or other similar transactions.
- (2) Estimated in accordance with Rules 457(c) and (h) under the Securities Act solely for the purposes of calculating the registration fee. The price \$0.32 per share represents the average high and low sales prices of the Common Stock as reported on the NASDAQ Global Select Market on May 4, 2018.

The Registration Statement shall become effective upon filing in accordance with Rule 462 under the Securities Act.

PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

The document(s) containing the information specified in Part I are not required to be filed with the Securities and Exchange Commission (the "Commission") as part of this Form S-8 Registration Statement in accordance with Rule 428 of the Securities Act, and will be delivered to participants in accordance with such rule.

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 and information previously filed with the Commission:

- (1) The Registrant's annual report on Form 10-K for the fiscal year ended December 31, 2017, filed with the Commission on March 14, 2018;
- (2) The Registrant's quarterly report on Form 10-Q for the quarterly period ended March 31, 2018, filed with the Commission on May 4, 2018;
- (3) The Registrant's current reports on Form 8-K and related amendments, filed with the Commission on March 12, 2018, April 10, 2018, April 13, 2018, May 3, 2018 and May 10, 2018;
- (4) The description of the Registrant's Common Stock contained in the Registrant's registration statement on Form 8-A, as filed with the Commission on December 29, 1998, and any amendments or reports filed for the purpose of updating such description, including any subsequent amendment or any report filed for the purpose of updating such description.

All documents subsequently filed by the Registrant with the Commission pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), after the date of this Registration Statement and prior to the filing of a post-effective amendment to this Registration Statement which indicates that all securities offered hereby have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference herein and to be a part hereof from the respective dates of filing of such documents (such documents, and the documents enumerated above, being hereinafter referred to as "Incorporated Documents"). Any statement contained in an Incorporated Document 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 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 of this Registration Statement.

Notwithstanding the foregoing, unless specifically stated to the contrary, none of the information disclosed by the Registrant under Items 2.02 or 7.01 of any current report on Form 8-K, including the related exhibits under Item 9.01, that the Registrant may from time to time furnish to the Commission will be incorporated by reference into, or otherwise included in, 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.

Section 145 of the Delaware General Corporation Law (the "DGCL") authorizes and empowers a Delaware corporation to indemnify its directors, officers, employees and agents against liabilities incurred in connection with, and related expenses resulting from, any claim, action or suit brought against any such person as a result of his or her relationship with the corporation, provided that such persons acted in good faith and in a manner such person reasonably believed to be in, and not opposed to, the best interests of the corporation in connection with the acts or events on which such claim, action or suit is based. Section 145 of the DGCL also authorizes corporations to purchase and maintain insurance on behalf of such persons so indemnified. The finding of either civil or criminal liability on the part of such person in connection with such acts or events is not necessarily determinative of the question of whether such person has met the required standard of conduct and is, accordingly, entitled to be indemnified.

Section 102(b)(7) of the DGCL enables a corporation in its certificate of incorporation or an amendment thereto to eliminate or limit the personal liability of a director to the corporation or its stockholders of monetary damages for violations of the directors' fiduciary

duty of care, except (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (iii) pursuant to Section 174 of the DGCL (providing for liability of directors for unlawful payment of dividends or unlawful stock purchases or redemptions) or (iv) for any transaction from which a director derived an improper personal benefit.

The Registrant's Restated Certificate of Incorporation, as amended (the "charter") provides that, to the extent permitted by applicable law, the Registrant's directors shall not be personally liable to the registrant or its stockholders for monetary damages for any breach of fiduciary duty as directors of the registrant. The charter eliminates the personal liability of directors to the fullest extent permitted by the DGCL. The Registrant's bylaws provide that each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he or she, or a person of whom he or she is the legal representative, is or was a director or officer of the registrant shall be indemnified and held harmless by the Registrant to the fullest extent authorized by the DGCL, against all costs, charges, expenses, liabilities and losses (including attorneys' fees, judgments, fines, ERISA excise taxes or penalties and amounts paid or to be paid in settlement) reasonably incurred or suffered by such person in connection therewith, and such indemnification shall continue as to a person who has ceased to be a director or officer and shall inure to the benefit of his or her heirs, executors and personal or legal representatives. The Registrant has also obtained liability insurance for its officers and directors and has entered into indemnification agreements with its directors and officers.

The foregoing statements are subject to the provisions of Sections 145 and 102(b)(7) of the DGCL, the Registrant's bylaws and the charter, which bylaws and charter have been filed as exhibits to this Registration Statement.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

Exhibit	Description	Filed Herewith	Form	Incorporated by Reference		
				Period Ending/Date of Report	Exhibit	Filing Date
4.1	<u>Restated Certificate of Incorporation</u>		S-1,	12/23/2005	3.1	12/23/2005
			Amendment No. 1			
4.2	<u>Amendment to Restated Certificate of Incorporation</u>		8-K	05/10/2012	3.1	05/16/2012
4.3	<u>Second Amendment to Restated Certificate of Incorporation</u>		8-A/A	11/04/2014	3.1.3	11/04/2014
4.4	<u>Third Amendment to Restated Certificate of Incorporation</u>		S-3	07/21/2017	3.4	07/21/2017
4.5	<u>Sixth Amended and Restated Bylaws of the Registrant, adopted on June 26, 2014</u>		8-K	06/26/2014	3.1	06/30/2014
4.6			DEF 14A		A	04/05/2018

BIOLASE, Inc. 2018 Long-Term
Incentive Plan

5.1	<u>Opinion of Sidley Austin LLP</u>	X
23.1	<u>Consent of Independent Registered Public Accounting Firm, BDO USA, LLP</u>	X
23.2	<u>Consent of Sidley Austin LLP (included in Exhibit 5.1)</u>	X
24.1	<u>Powers of Attorney (included on the signature page of the Registration Statement)</u>	X

Item 9. Undertakings.

(a) The 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 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 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 Exchange Act that are incorporated by reference in the 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.

(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 Registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the Registrant's annual report pursuant to Section 13(a) or Section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit 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 that 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 has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities 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 Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act, 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 Irvine, State of California on May 10, 2018.

BIOLASE, INC.

By /s/ John R. Beaver
John R. Beaver
Interim Chief Executive Officer and Chief
Financial Officer

POWER OF ATTORNEY AND ADDITIONAL SIGNATURES

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below hereby constitutes and appoints John R. Beaver and Michael C. Carroll, or any one of them, his attorneys-in-fact and agents, each with full power of substitution and re-substitution for him in any and all capacities, to sign any or all amendments or post-effective amendments to this Registration Statement and other documents in connection therewith, with the Commission, granting unto each of such attorneys-in-fact and agents full power to do and perform each and every act and thing requisite and necessary in connection with such matters and hereby ratifying and confirming all that each of such attorneys-in-fact and agents or his substitutes may do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act, this Registration Statement has been signed below by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ John R. Beaver	Interim Chief Executive Officer and Chief	May 10, 2018
John R. Beaver	Financial Officer (Principal Executive Officer, Principal Financial Officer and Principal Accounting Officer)	
/s/ Jonathan T. Lord	Director and Chairman of the Board	May 10, 2018
Jonathan T. Lord		
/s/ Richard B. Lanman	Director	May 10, 2018
Richard B. Lanman		
/s/ James R. Talevich	Director	May 10, 2018
James R. Talevich		
/s/ Garrett Sato	Director	May 10, 2018

Garrett Sato