

Akebia Therapeutics, Inc.
Form S-8
January 26, 2018

As filed with the Securities and Exchange Commission on January 26, 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

AKEBIA THERAPEUTICS, INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation or organization)

245 First Street, Suite 1100, Cambridge, MA

20-8756903
(I.R.S. Employer

Identification No.)

02142

(Address of Principal Executive Offices)

(Zip Code)

2016 Inducement Award Program

2014 Incentive Plan

(Full titles of the plans)

Nicole R. Hadas

Senior Vice President, General Counsel and Secretary

245 First Street, Suite 1100

Cambridge, MA 02142

(Name and address of agent for service)

(617) 871-2098

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

Please send copies of all communications to:

Paul M. Kinsella

Ropes & Gray LLP

Prudential Tower

800 Boylston Street

Boston, MA 02199-3600

617-951-7000

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 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 |
|--|------------------------------------|--|--|-----------------------------------|
| Common Stock, \$0.00001 par value per share, under the 2014 Incentive Plan | 1,575,329 | \$15.08 | \$23,755,961.32 | \$2,957.62 |
| Common Stock, \$0.00001 par value per share, under the 2016 Inducement Award Program | 508,500 | \$15.08 | \$7,668,180.00 | \$954.69 |
| TOTALS | 2,083,829 | \$15.08 | \$31,424,141.32 | \$3,912.31 |

- (1) Pursuant to Rule 416 under the Securities Act of 1933, as amended (the Securities Act), this Registration Statement also covers such additional shares of Common Stock as may be issued as a result of stock splits, stock dividends and similar transactions.
- (2) Pursuant to Rules 457(c) and 457(h) of the Securities Act, the proposed maximum offering price is estimated solely for the purpose of calculating the registration fee and is based on the average of the high and low market prices for the Common Stock reported on The NASDAQ Global Market as of a date (January 22, 2018) within five business days prior to filing this Registration Statement.

EXPLANATORY NOTE

This Registration Statement is being filed in accordance with General Instruction E to Form S-8 and registers 2,083,829 additional shares of common stock, \$0.00001 par value per share (the Common Stock), the same class as other securities for which the registration statement filed on Form S-8 (SEC File No. 333-196748) of the Registrant is effective. In addition, on January 25, 2017, the Board of Directors of the Registrant authorized and reserved 700,000 shares of Common Stock for issuance pursuant to stock options to be granted during 2017 in accordance with Nasdaq Listing Rule 5635(c)(4), as inducement material to an individual's entering into employment with the Registrant (Inducement Awards). In 2017, the Registrant granted Inducement Awards consisting of options to purchase 508,500 shares of Common Stock.

PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

Information required by Part I to be contained in the Section 10(a) prospectus is omitted from this Registration Statement in accordance with Rule 428 under the Securities Act of 1933, as amended, and the Note to Part I of Form S-8.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents filed by the Registrant with the Securities and Exchange Commission (the Commission) are incorporated herein by reference:

- (a) The Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2016, as filed with the Commission on March 6, 2017.
- (b) The Registrant's Quarterly Reports on Form 10-Q for the quarterly periods ended March 31, 2017, June 30, 2017 and September 30, 2017, as filed with the Commission on May 9, 2017, August 8, 2017 and November 8, 2017, respectively, and the Registrant's Current Reports on Form 8-K filed with the Commission on February 13, 2017, April 25, 2017, May 15, 2017, May 25, 2017, June 21, 2017 and June 29, 2017.
- (c) The description of the Registrant's Common Stock, which is contained in the Registrant's registration statement on Form 8-A filed by the Registrant with the Commission under Section 12 of the Securities Exchange Act of 1934, as amended (the Exchange Act), on March 12, 2014, including any amendments or reports filed for the purpose of updating such description.

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 to this Registration Statement that indicates that all securities offered have been sold or that 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.

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 other subsequently filed document that also is incorporated or deemed to be incorporated by reference herein, modifies or supersedes such statement. Any 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.

The Registrant's ninth amended and restated certificate of incorporation contains provisions that eliminate, to the maximum extent permitted by the General Corporation Law of the State of Delaware, or DGCL, the personal liability of directors and executive officers for monetary damages for breach of their fiduciary duties as a director or officer. The Registrant's ninth amended and restated certificate of incorporation and amended and restated bylaws provide that the Registrant shall indemnify its directors and executive officers and may indemnify its employees and other agents to the fullest extent permitted by the DGCL.

Section 145 of the DGCL empowers a Delaware corporation to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the rights of the corporation) by reason of the fact that such person is or was a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise. The indemnity may include expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person. The statute provides that it is not exclusive of other rights to which those seeking indemnification may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise.

Section 102(b)(7) of the DGCL permits a corporation to provide in its charter that a director of the corporation will not be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (1) for any breach of the director's duty of loyalty to the corporation or its stockholders, (2) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (3) for payments of unlawful dividends or unlawful stock purchases or redemptions, or (4) for any transaction from which the director derived an improper personal benefit.

The Registrant has entered into indemnification agreements with each of its directors and certain officers, in addition to the indemnification provided for in the Registrant's ninth amended and restated certificate of incorporation and amended and restated bylaws.

The Registrant maintains insurance on behalf of any person who is or was a director or officer of the Registrant against any loss arising from any claim asserted against him or her and incurred by him or her in any such capacity, subject to certain exclusions.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

The exhibits filed herewith or incorporated by reference herein are set forth in the Exhibit Index filed as part of this Registration Statement.

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;

(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 a prospectus filed with the SEC 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 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) above shall 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 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 undersigned 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 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 SEC 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 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 Cambridge, Commonwealth of Massachusetts, on this 26th day of January, 2018.

AKEBIA THERAPEUTICS, INC.

By: /s/ John P. Butler
 Name: John P. Butler
 Title: President and Chief Executive Officer

POWER OF ATTORNEY

Each person whose signature appears below constitutes and appoints John P. Butler and Jason A. Amello, and each of them acting individually, his or her true and lawful attorney-in-fact and agent with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement on Form S-8 to be filed by Akebia Therapeutics, Inc., and to file the same, with all exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents full power and authority to be done in and about the premises, as fully to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or their substitutes, may lawfully 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 |
|--|---|------------------|
| /s/ John P. Butler John P. Butler | President, Chief Executive Officer (Principal Executive Officer) and Director | January 26, 2018 |
| /s/ Jason A. Amello Jason A. Amello | Senior Vice President, Chief Financial Officer and Treasurer (Principal Financial and Accounting Officer) | January 26, 2018 |
| /s/ Muneer A. Satter Muneer A. Satter | Chairman and Director | January 26, 2018 |
| /s/ Scott A. Canute | Director | January 26, 2018 |

Scott A. Canute

/s/ Michael D. Clayman

Director

January 26, 2018

Michael D. Clayman

/s/ Maxine Gowen

Director

January 26, 2018

Maxine Gowen

/s/ Duane Nash

Director

January 26, 2018

Duane Nash

/s/ Ronald C. Renaud, Jr.

Director

January 26, 2018

Ronald C. Renaud, Jr.

/s/ Michael S. Wyzga

Director

January 26, 2018

Michael S. Wyzga

EXHIBIT INDEX

Exhibit

| No. | Description |
|------------|---|
| 4.1 | <u>Ninth Amended and Restated Certificate of Incorporation (previously filed as Exhibit 3.1 to the current report on Form 8-K filed on March 28, 2014 (File No. 001-36352) and incorporated herein by reference).</u> |
| 4.2 | <u>Amended and Restated By-laws (previously filed as Exhibit 3.2 to the current report on Form 8-K filed on March 28, 2014 (File No. 001-36352) and incorporated herein by reference).</u> |
| 4.3 | <u>2014 Incentive Plan (previously filed as Exhibit 10.29 to Amendment No. 1 to the Registration Statement on Form S-1 (File No. 333-193969) filed on March 4, 2014 and incorporated herein by reference).</u> |
| 4.4 | <u>Form of Officer Inducement Award Non-Statutory Stock Option Agreement (filed herewith).</u> |
| 4.5 | <u>Form of Inducement Award Non-Statutory Stock Option Agreement (filed herewith).</u> |
| 5.1 | <u>Opinion of Ropes & Gray LLP (filed herewith).</u> |
| 23.1 | <u>Consent of Ernst & Young LLP (filed herewith).</u> |
| 23.2 | <u>Consent of Ropes & Gray LLP (included in the opinion filed as Exhibit 5.1).</u> |
| 24.1 | <u>Power of attorney (included on the signature page of this Registration Statement under the caption <u>Power of Attorney</u>).</u> |