

ATHEROGENICS INC
Form 10-K/A
April 06, 2005

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

**Form 10-K/A
(Amendment No. 1)**

(Mark One)

**ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE
SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2004

OR

**TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE
SECURITIES EXCHANGE ACT OF 1934**

For the transition period from _____ to _____

Commission file number 0-31261

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 Number)

**8995 Westside Parkway,
Alpharetta, Georgia 30004**

*(Address of principal executive offices, including zip
code)*

(678) 336-2500

(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Exchange Act:

None

Securities registered pursuant to Section 12(g) of the Exchange Act:

**Common Stock, No Par Value
Common Stock Purchase Rights**

Indicate by check mark whether the registrant: (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

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Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b-2 of the Act) Yes No

The aggregate market value of shares of voting stock held by nonaffiliates of the registrant, computed by reference to the closing price of \$19.03 as reported on the Nasdaq National Market as of the last business day of AtheroGenics most recently completed second fiscal quarter (June 30, 2004), was approximately \$422,239,543. AtheroGenics has no nonvoting common equity.

The number of shares outstanding of the registrant's common stock, as of March 8, 2005: 37,668,445.

Documents Incorporated by Reference:

Portions of the proxy statement filed pursuant to Regulation 14A under the Securities Exchange Act of 1934 with respect to the 2005 Annual Meeting of Shareholders are incorporated herein by reference in Part III.

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EXPLANATORY NOTE

AtheroGenics, Inc. is filing this Amendment No. 1 to its Annual Report on Form 10-K for the fiscal year ended December 31, 2004 solely to make corrections to the exhibit index and to add exhibits that were inadvertently omitted from the list of exhibits in Item 15 of Part IV of the Form 10-K. The complete text of Item 15 is included in this Amendment pursuant to Rule 12b-15 promulgated under the Securities and Exchange Act of 1934, as amended (the Exchange Act). In addition, Item 15 includes the certifications required pursuant to Rules 13a-14(a)/15d-14(a) of the Exchange Act, which have been re-executed and re-filed as of the date of this Amendment as Exhibits 31.3 and 31.4, respectively.

With the exception of the foregoing corrections, no other information in the Annual Report on Form 10-K for the fiscal year ended December 31, 2004 has been supplemented, updated or amended.

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EX-31.3 SECTION 302 CERTIFICATION OF THE CEO

EX-31.4 SECTION 302 CERTIFICATION OF THE CFO

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PART IV

Item 15. Exhibits and Financial Statement Schedules

(1) Financial Statements, filed as part of this report

Report of Independent Registered Public Accounting Firm

Balance Sheets as of December 31, 2004 and 2003

Statements of Operations for the years ended December 31, 2004, 2003 and 2002

Statements Shareholders' (Deficit) Equity for the years ended December 31, 2004, 2003 and 2002

Statements of Cash Flows for the years ended December 31, 2004, 2003 and 2002

Notes to Financial Statements

(2) Financial Statement Schedules

No financial statement schedules are provided, because the information called for is not required or is shown either in the financial statements or the notes thereto.

(3) Listing of Exhibits

| Exhibit No. | Description |
|--------------------|---|
| 3.01* | Fourth Amended and Restated Articles of Incorporation of AtheroGenics, Inc. |
| 3.02 | Third Amended and Restated Bylaws of AtheroGenics, Inc., as amended (filed as an exhibit of the same number with AtheroGenics' Annual Report on Form 10-K for the year ended December 31, 2001 and incorporated herein by reference). |
| 4.01 | Form of Common Stock Certificate (filed as Exhibit 4.01 to Amendment No. 4 to AtheroGenics' Registration Statement on Form S-1, Registration No. 333-31140, on August 4, 2000 and incorporated herein by reference). |
| 4.02 | Rights Agreement dated as of November 9, 2001 between AtheroGenics, Inc. and American Stock Transfer & Trust Company, as Rights Agent (filed as Exhibit 4.4 of AtheroGenics' Form 8-K on November 19, 2001 and incorporated herein by reference). |
| 4.03 | Indenture dated August 19, 2003 between AtheroGenics, Inc. and The Bank of New York Trust Company of Florida N.A., as Trustee (filed as Exhibit 4.1 to AtheroGenics' Registration Statement on Form S-3, Registration No. 333-110160, on October 31, 2003, and incorporated herein by reference). |

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| Exhibit No. | Description |
|--------------------|--|
| 10.03+ | License Agreement dated January 11, 1995 between Emory University and AtheroGenics, Inc. (filed as Exhibit 10.03 to Amendment No. 2 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on July 13, 2000 and incorporated herein by reference). |
| 10.04+ | Patent Purchase Agreement dated April 26, 1995 between AtheroGenics, Inc. and Sampath Parthasarathy, together with Services Agreement dated April 26, 1995 between AtheroGenics, Inc. and Sampath Parthasarathy (filed as Exhibit 10.04 to Amendment No. 2 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on July 13, 2000 and incorporated herein by reference). |
| 10.05+ | Sponsored Research Agreement dated October 14, 1996 between Emory University and AtheroGenics, Inc. (filed as Exhibit 10.05 to Amendment No. 2 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on July 13, 2000 and incorporated herein by reference). |
| 10.06# | AtheroGenics, Inc. 1995 Stock Option Plan, together with form of nonqualified stock option agreement (filed as Exhibit 10.07 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on February 25, 2000 and incorporated herein by reference). |
| 10.07# | AtheroGenics, Inc. 1997 Equity Ownership Plan, as amended by Amendment No. 1 and Amendment No. 2 (filed as Exhibit 10.08 to Amendment No. 2 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on July 13, 2000 and incorporated herein by reference). |
| 10.08 | Preferred Shares Purchase Warrant dated August 24, 1998 between AtheroGenics, Inc. and certain Lenders named therein (filed as Exhibit 10.09 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on February 25, 2000 and incorporated herein by reference). |
| 10.09 | Series C Convertible Preferred Stock Purchase Warrants of AtheroGenics, Inc. (filed as Exhibit 10.10 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on February 25, 2000 and incorporated herein by reference). |
| 10.10 | Promissory Note dated April 1, 1999 between Inhibitex, Inc. and AtheroGenics, Inc. (filed as Exhibit 10.11 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on February 25, 2000 and incorporated herein by reference). |
| 10.11++ | Lease Agreement dated June 19, 1998 between Cousins Properties, Inc. and AtheroGenics, Inc. (filed as Exhibit 10.12 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-31140, on February 25, 2000 and incorporated herein by reference). |
| 10.12# | Employment Agreement dated March 1, 2001 between AtheroGenics, Inc. and Russell M. Medford (filed as Exhibit 10.14 to AtheroGenics Annual Report on Form 10-K for the year ended December 31, 2000, and incorporated herein by reference). |
| 10.13 | Amendment dated January 1, 2001 to Promissory Note dated April 1, 1999 between Inhibitex, Inc. and AtheroGenics, Inc. (filed as Exhibit 10.15 to AtheroGenics Annual Report on Form 10-K |

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for the year ended December 31, 2000, and incorporated herein by reference).

- 10.14+ Exclusive License Agreement dated as of June 29, 2001 between AtheroGenics, Inc. and National Jewish Medical and Research Center (filed as Exhibit 10.17 to Amendment No. 1 to AtheroGenics Registration Statement on Form S-1, Registration No. 333-64228, on July 23, 2001 and incorporated herein by reference).
- 10.15# AtheroGenics, Inc. 2001 Equity Ownership Plan (filed as Appendix B to the proxy statement on Schedule 14A for AtheroGenics 2001 Annual Shareholders Meeting as filed on March 22, 2001 and incorporated herein by reference).
- 10.16 Equipment Term Note dated March 6, 2002 between AtheroGenics, Inc. and Silicon Valley Bank (filed as Exhibit 10.20(b) to AtheroGenics Quarterly Report on Form 10-Q for the quarter ended March 31, 2002 and incorporated herein by reference).
- 10.17 Loan and Security Agreement dated March 6, 2002 between AtheroGenics, Inc. and Silicon Valley Bank (filed as Exhibit 10.20(c) to AtheroGenics Quarterly Report on Form 10-Q for the quarter ended March 31, 2002 and incorporated herein by reference).

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| Exhibit No. | Description |
|--------------------|--|
| 10.18# | Promissory Note and Stock Pledge Agreement dated as of April 15, 2002 between AtheroGenics, Inc. and Mark P. Colonnese (filed as Exhibit 10.21 to AtheroGenics Quarterly Report on Form 10-Q for the quarter ended June 30, 2002 and incorporated herein by reference). |
| 10.19# | Separation and Consulting Agreement and General Release dated as of October 3, 2002 between AtheroGenics, Inc. and Mitchell Glass, M.D. (filed as Exhibit 10.22 to AtheroGenics Quarterly Report on Form 10-Q for the quarter ended September 30, 2002 and incorporated herein by reference). |
| 10.20 | First Loan Modification dated June 20, 2003 between AtheroGenics, Inc. and Silicon Valley Bank. (filed as Exhibit 10.23 to AtheroGenics Quarterly Report on Form 10-Q for the quarter ended June 30, 2003 and incorporated herein by reference). |
| 10.21 | Purchase Agreement dated August 19, 2003 between AtheroGenics, Inc. and the Initial Purchasers named therein (filed as Exhibit 10.24 to AtheroGenics Quarterly Report on Form 10-Q for the quarter ended September 30, 2003 and incorporated herein by reference). |
| 10.22 | Registration Rights Agreement dated as of August 19, 2003 among AtheroGenics, Inc., as Issuer, and Morgan Stanley & Co., Incorporated, Lehman Brothers, Inc., and Adams, Harkness & Hill, Inc., as Initial Purchasers (filed as Exhibit 4.2 to AtheroGenics Registration Statement on Form S-3, Registration No. 333-110160, on October 31, 2003, and incorporated herein by reference). |
| 10.23 | Second Loan Modification dated August 13, 2003 between AtheroGenics, Inc. and Silicon Valley Bank (filed as Exhibit 10.25 to AtheroGenics Annual Report on Form 10-K for the year ended December 31, 2003 and incorporated herein by reference). |
| 10.24 | Third Loan Modification dated December 29, 2003 between AtheroGenics, Inc. and Silicon Valley Bank (filed as Exhibit 10.26 to AtheroGenics Annual Report on Form 10-K for the year ended December 31, 2003 and incorporated herein by reference). |
| 10.25 | Negative Pledge Agreement dated December 29, 2003 between AtheroGenics, Inc. and Silicon Valley Bank (filed as Exhibit 10.27 to AtheroGenics Annual Report on Form 10-K for the year ended December 31, 2003 and incorporated herein by reference). |
| 10.26# | Employment Agreement dated December 22, 2004 between AtheroGenics, Inc. and Mark P. Colonnese (filed as Exhibit 10.28 to AtheroGenics Form 8-K on December 22, 2004 and incorporated herein by reference). |
| 10.27# | Employment Agreement dated December 22, 2004 between AtheroGenics, Inc. and Martin A. Wasserman (filed as Exhibit 10.29 to AtheroGenics Form 8-K on December 22, 2004 and incorporated herein by reference). |
| 10.28# | Employment Agreement dated December 22, 2004 between AtheroGenics, Inc. and Robert A. D. Scott (filed as Exhibit 10.30 to AtheroGenics Form 8-K on December 22, 2004 and incorporated herein by reference). |

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| | |
|---------|---|
| 10.29# | Employment Agreement dated December 22, 2004 between AtheroGenics, Inc. and W. Charles Montgomery (filed as Exhibit 10.31 to AtheroGenics Form 8-K on December 22, 2004 and incorporated herein by reference). |
| 10.30# | AtheroGenics, Inc. 2004 Equity Ownership Plan (filed as Appendix B to the proxy statement on Schedule 14A for AtheroGenics 2004 Annual Shareholders Meeting as filed on March 26, 2004 and incorporated herein by reference). |
| 10.31# | AtheroGenics, Inc. 2004 Equity Ownership Plan form of incentive equity ownership agreement and form of directors nonqualified equity ownership agreement (filed as Exhibit 10.33 to AtheroGenics Annual Report on Form 10-K for the year ended December 31, 2004 on March 16, 2005 and incorporated herein by reference). |
| 10.32# | Summary of non-employee director compensation (filed as the first paragraph under the caption Director Compensation in the proxy statement on Schedule 14A for AtheroGenics 2005 Annual Meeting of Shareholders as filed with the SEC on March 28, 2005 and incorporated herein by reference). |
| 23.01** | Consent of Ernst & Young LLP. |
| 24.01** | Powers of Attorney. |
| 31.1** | Certifications of Chief Executive Officer under Rule 13a-14(a). |
| 31.2** | Certifications of Chief Financial Officer under Rule 13a-14(a). |
| 31.3* | Certifications of Chief Executive Officer under Rule 13c-14(a). |
| 31.4* | Certifications of Chief Financial Officer under Rule 13a-14(a). |
| 32** | Certifications of Chief Executive Officer and Chief Financial Officer under Section 1350. |

* Filed herewith.

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- ** Filed as the exhibit of the same number with AtheroGenics Annual Report on Form 10-K for the year ended December 31, 2004 on March 16, 2005 and incorporated herein by reference.
- + Certain confidential information contained in this document has been omitted and filed separately with the Commission pursuant to a request for confidential treatment under Rule 406 of the Securities Act of 1933, as amended.
- ++ We agree to furnish supplementally to the Commission a copy of any omitted schedule or exhibit to this agreement upon request by the Commission.
- # Management contract or compensatory plan or arrangement.

Table of Contents**SIGNATURES**

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized, on April 5, 2005.

ATHEROGENICS, INC.

By: /s/RUSSELL M. MEDFORD
Russell M. Medford, M.D., Ph.D.
President and Chief Executive Officer

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

| Name | Title | Date |
|--|---|---------------|
| Principal Executive Officer: | | |
| /s/RUSSELL M. MEDFORD Russell M. Medford | President and Chief Executive Officer, Director | April 5, 2005 |
| Principal Financial and Principal Accounting Officer: | | |
| /s/MARK P. COLONNESE Mark P. Colonnese | Senior Vice President of Finance and Administration and Chief Financial Officer | April 5, 2005 |
| Additional Directors: | | |
| * Michael A. Henos | Director | April 5, 2005 |
| * R. Wayne Alexander | Director | April 5, 2005 |
| * David Bearman | Director | April 5, 2005 |
| * Vaughn D. Bryson | Director | April 5, 2005 |
| * T. Forcht Dagi | Director | April 5, 2005 |
| * Arthur M. Pappas | Director | April 5, 2005 |
| * | Director | April 5, 2005 |

William A. Scott

*

Director

April 5, 2005

Stephen G. Sudovar

*By: /s/MARK P. COLONNESE

Mark P. Colonnese

Attorney-in-fact

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+ Certain confidential information contained in this document has been omitted and filed separately with the Commission pursuant to a request for confidential treatment under Rule 406 of the Securities Act of 1933, as amended.

- ++ We agree to furnish supplementally to the Commission a copy of any omitted schedule or exhibit to this agreement upon request by the Commission.
- # Management contract or compensatory plan or arrangement.