

VERSICOR INC /CA
Form S-8
February 11, 2003

As filed with the Securities and Exchange Commission on February 10, 2003

Registration No. 333-_____

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-8

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

VERSICOR INC.

(Exact Name of Registrant as Specified in Its Charter)

Delaware
(State or Other Jurisdiction of
Incorporation or Organization)

04-3278032
(I.R.S. Employer
Identification No.)

455 South Gulph Road; King of Prussia, PA 19406

(Address, Including Zip Code, of Principal Executive Offices)

Versicor Inc. 2001 Stock Option Plan

(Full Title of the Plan)

George F. Horner III

President and Chief Executive Officer

Versicor Inc.

455 South Gulph Road; King of Prussia, PA 19406

(610) 491-2200

(Name, Address and Telephone Number, Including Area Code, of Agent For Service)

copy to:

Peter T. Healy
O Melveny & Myers LLP

275 Battery Street, 26th Floor

San Francisco, California 94111

(415) 984-8700

CALCULATION OF REGISTRATION FEE

| Title Of Securities To Be Registered | Amount To Be Registered | Proposed Maximum Offering Price Per Unit | Proposed Maximum Aggregate Offering Price | Amount Of Registration Fee |
|---|------------------------------------|---|--|---------------------------------------|
| Common Stock, par value \$0.001 per share | 6,600,737 ⁽¹⁾⁽²⁾ shares | \$10.62 ⁽³⁾ | \$70,099,826.94 ⁽³⁾ | \$6449.19 |

(1) This Registration Statement covers, in addition to the number of shares of Common Stock stated above, options and other rights to purchase or acquire the shares of Common Stock covered by the Prospectus and, pursuant to Rule 416(c) under the Securities Act of 1933, as amended (the Securities Act), an additional indeterminate number of shares, options and rights which by reason of certain events specified in the Versicor Inc. 2001 Stock Option Plan (the Plan), may become subject to the Plan.

(2) Each share is accompanied by a right (a Preferred Stock Purchase Right) to purchase 1/100th of a share of Series A Junior Participating Preferred Stock of Versicor Inc. (the Company) pursuant to a Stockholder Rights Agreement, dated as of June 28, 2001, as amended, between

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the Company and American Stock Transfer & Trust Company, as Rights Agent.

(3) Pursuant to Rule 457(h), the maximum offering price, per share and in the aggregate, and the registration fee were calculated based upon the average of the high and low prices of the Common Stock on February 5, 2003, as reported on the Nasdaq National Market System.

The Exhibit Index for this Registration Statement is at page 6.

PART I

INFORMATION REQUIRED IN THE

SECTION 10(a) PROSPECTUS

The document(s) containing the information specified in Part I of Form S-8 (plan information and registrant information) will be sent or given to employees as specified by Securities Act Rule 428(b)(1). Such documents need not be filed with the Securities and Exchange Commission (the Commission) either as part of this Registration Statement or as prospectuses or prospectus supplements pursuant to Securities Act Rule 424. These documents, which include the statement of availability required by Item 2 of Form S-8, and the documents incorporated by reference in this Registration Statement pursuant to Item 3 of Form S-8 (Part II hereof), taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act.

PART II

INFORMATION REQUIRED IN THE

REGISTRATION STATEMENT

Item 3. Incorporation of Certain Documents by Reference

The following documents of the Company filed with the Commission are incorporated herein by reference:

- (a) The Company's Annual Report on Form 10-K for its fiscal year ended December 31, 2001, filed with the Commission on March 12, 2002 (registration number 000 31145);
- (b) The Company's Quarterly Reports on Forms 10-Q for its fiscal quarters ended March 31, 2002, June 30, 2002 and September 30, 2002, filed with the Commission on May 13, 2002, July 31, 2002, and November 13, 2002, respectively (registration number 000 31145);
- (c) The Company's Current Reports on Forms 8-K filed with the Commission on March 22, 2002, April 10, 2002, and July 31, 2002 (registration number 000 31145);
- (d) The description of the Company's Common Stock contained in the Company's Registration Statement on Form 8-A filed with the Commission on July 25, 2000 (registration number 000 31145) (which incorporates the description of the Common Stock from the Company's Registration Statement on Form S-1, dated March 22, 2000, as subsequently amended (registration number 333 33022)), and any other amendment or report filed for the purpose of updating such description; and
- (e) The description of the Company's Preferred Stock Purchase Rights contained in the Company's Registration Statement on Form 8-A filed with the Commission on July 11, 2001 (registration number 000 31145), and any amendment or report filed for the purpose of updating such description.

All documents subsequently filed by the Company pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934, as amended (the Exchange Act), prior to the filing of a post-effective amendment 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 into this Registration Statement and to be a part hereof from the date of filing of such documents. Any statement contained herein or in a document, all or a portion of which is 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 which also is or 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 amended, to constitute a part of this Registration Statement.

Item 4. Description of Securities

The Company's Common Stock, par value \$0.001 per share (the "Common Stock"), and the attached Preferred Stock Purchase Rights are registered pursuant to Section 12 of the Exchange Act. Therefore, the description of securities is omitted.

Item 5. Interests of Named Experts and Counsel

Not applicable.

Item 6. Indemnification of Directors and Officers

Pursuant to Sections 102(b)(7) and 145 of the Delaware General Corporation Law, the Company's Restated Certificate of Incorporation and Amended and Restated Bylaws include provisions eliminating or limiting the personal liability of the members of the Company's board of directors to the Company and its stockholders for monetary damages for breach of their fiduciary duties as a director. This does not apply for any breach of a director's duty of loyalty to the Company or its stockholders for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law, for paying an unlawful dividend or approving an illegal stock repurchase, or for any transaction from which a director derived an improper personal benefit.

The Company's Restated Certificate of Incorporation and Amended and Restated Bylaws also provide that the Company has the power 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 (other than an action by or in the right of the Company) by reason of the fact that the person is or was a director, officer, employee or agent of any corporation, partnership, joint venture, trust or other enterprise, against any and all expenses (including attorneys' fees), judgments, fines and amounts paid in settlement and reasonably incurred in connection with such action, suit or proceeding. The Company's power to indemnify applies only if the person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful.

In the case of an action by or in the right of the Company, no indemnification may be made with respect to any claim, issue or matter as to which such person shall have been adjudged to be liable to the Company unless and only to the extent that the court in which such action or suit was brought shall determine that despite the adjudication of liability such person is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper. To the extent a director or officer of the Company has been successful in the defense of any action, suit or proceeding referred to above or in the defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorney's fees) actually and reasonably incurred by him in connection therewith.

The Company has the power to purchase and maintain insurance on behalf of any person covering any liability incurred by such person in his capacity as a director, officer, employee or agent of the Company, or arising out of his status as such, whether or not the Company would have the power to indemnify him against such liability.

The foregoing summaries are necessarily subject to the complete text of the Delaware General Corporation Law, the Company's Restated Certificate of Incorporation and Amended and Restated Bylaws and are qualified in their entirety by reference thereto.

Item 7. Exemption from Registration Claimed

Not applicable.

Item 8. Exhibits

See the attached Exhibit Index at page 6.

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 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; and

(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) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in periodic 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 this 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 annual report pursuant to Section 15(d) of the Exchange Act) 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 may be permitted to directors, executive officers and controlling persons of the registrant pursuant to the provisions described in Item 6 above, 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 Fremont, State of California, on February 9, 2003.

By: /s/ George F. Horner III
 George F. Horner III
 President and Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints George F. Horner III and Dov A. Goldstein, M.D., and each of them, acting individually and without the other, as 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, exhibits thereto and other documents in connection therewith) to this Registration Statement, and to file the same, with all exhibits thereto, and other documents in connection therewith, with the Commission, granting unto said attorneys-in-fact and agents, and each of them individually, or his or her substitute or substitutes, full power and authority to do and perform each and every act and thing requisite and necessary to be done in connection therewith, 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, and each of them individually, or his or her substitute or substitutes, may lawfully 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/ David V. Milligan | Chairman of the Board of Directors | February 7, 2003 |
| David V. Milligan, Ph.D | | |
| | President, Chief Executive Officer | February 10, 2003 |
| /s/ George F. Horner III | (and principal accounting officer) and Director | |
| George F. Horner III | | |
| | Director | February __, 2003 |
| Timothy J. Barberich | | |
| /s/ James H. Cavanaugh | Director | February 10, 2003 |
| James H. Cavanaugh, Ph.D | | |
| | Director | February __, 2003 |
| Mark Leschly | | |

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|----------------------------|--|-------------------|
| | | |
| /s/ Christopher T. Walsh | Director | February 10, 2003 |
| Christopher T. Walsh, Ph.D | | |
| | | |
| /s/ Dov A. Goldstein | Vice President, Finance and Chief Financial Officer | February 10, 2003 |
| Dov A. Goldstein, M.D. | | |

EXHIBIT INDEX

| Exhibit Number | Description of Exhibit |
|---------------------------|--|
| 4.1* | Versicor Inc. 2001 Stock Option Plan. |
| 5.1 | Opinion of O Melveny & Myers LLP (opinion re legality). |
| 23.1 | Consent of PricewaterhouseCoopers LLP (consent of independent accountants). |
| 23.2 | Consent of O Melveny & Myers LLP (included in Exhibit 5). |
| 24.1 | Power of Attorney (included in this Registration Statement under Signatures). |

* Previously filed as Appendix B to the Company's Proxy Statement/Prospectus comprising Part I of the Company's Registration Statement on Form S-4 filed with the Commission on August 29, 2002, as amended October 9, 2002, October 31, 2002, and November 5, 2002 (registration number 333-98935), and incorporated herein by this reference.