

DEPOMED INC  
Form S-3/A  
November 20, 2002

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As filed with the Securities and Exchange Commission on November 20, 2002

Registration No. 333-86542

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## SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

AMENDMENT NO. 4

TO

### FORM S-3

REGISTRATION STATEMENT

UNDER

THE SECURITIES ACT OF 1933

### DEPOMED, INC.

(Exact name of Registrant as specified in its charter)

**California**

(State or other jurisdiction of  
incorporation or organization)

**94-3229046**

(I.R.S. Employer  
Identification No.)

**1360 O'Brien Drive, Menlo Park, California 94025 (650) 462-5900**

(Address, including zip code, and telephone number, including area code, of Registrant's principal executive offices)

**John W. Fara, Ph.D.**

**Chairman, President and Chief Executive Officer**

**1360 O'Brien Drive, Menlo Park, California 94025 (650) 462-5900**

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

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**Copy to:**

**Stephen C. Ferruolo, Esq.**

**Heller Ehrman White & McAuliffe LLP**

**4350 La Jolla Village Drive, 7th Floor**

**San Diego, California 92122-1246**

**Telephone: (858) 450-8400**

**Facsimile: (858) 450-8499**

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**Approximate date of commencement of proposed sale to the public:**

**From time to time as soon as practicable after this Registration Statement become effective.**

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If the only securities being registered on this Form are being offered pursuant to dividend or interest reinvestment plans, please check the following box.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, other than securities offered only in connection with dividend or interest reinvestment plans, check the following box.

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If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act of 1933, please check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering: o

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act of 1933, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering: o

If delivery of the prospectus is expected to be made pursuant to Rule 434, please check the following box: o

**The Registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its Effective Date until the Registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the Registration Statement shall become effective on such date as the Securities and Exchange Commission, acting pursuant to said Section 8(a), may determine.**

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### PART II

#### INFORMATION NOT REQUIRED IN PROSPECTUS

##### Item 14. Other Expenses of Issuance and Distribution.

The following table sets forth various expenses in connection with the sale and distribution of the securities being registered. All of the amounts shown are estimates except for the Securities and Exchange Commission Registration Fee.

Securities and Exchange Commission Registration Fee	\$	1,308
Accounting Fees		45,000
Legal Fees and Disbursements		40,000
Printing and Engraving		15,000
Miscellaneous		2,692
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Total:	\$	104,000
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##### Item 15. Indemnification of Officers and Directors.

Pursuant to Section 204(a) and 317 of the California Corporations Code, as amended, the Registrant has included in its articles of incorporation and bylaws provisions regarding the indemnification of officers and directors of the Registrant. Article IV of Registrant's Amended and Restated Articles of Incorporation provides as follows:

"The liability of the directors of this corporation for monetary damages shall be eliminated to the fullest extent permissible under California law. This corporation is also authorized, to the fullest extent permissible under California law, to indemnify its agents (as defined in Section 317 of the California Corporations Code), whether by bylaw, agreement or otherwise, for breach of duty to this corporation and its shareholder in excess of the indemnification expressly permitted by Section 317 and to advance defense expenses to its agents in connection with such matters as they are incurred, subject to the limits on such excess indemnification set forth in Section 204 of the California Corporations Code. If, after the effective date of this Article, California law is amended in a manner which permits a corporation to limit the monetary or other liability of its directors or to authorize indemnification of, or advancement of such defense expense to, its directors or other persons, in any such case to a greater extent than is permitted on such effective date, the references in this Article to "California law" shall to that extent be deemed to refer to California law as so amended."

Section 29 of the Registrant's bylaws, as amended, provides as follows:

"29. Indemnification of Directors and Officers.

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(a) Indemnification. To the fullest extent permissible under California law, the corporation shall indemnify its directors and officers against all expenses, judgment, fines, settlement and other amounts actually and reasonably incurred by them in connection with any proceeding, including an action by or in the right of the corporation, by reason of the fact that such person is or was a director or officer of the corporation, or is or was serving at the request of the corporation as a director, officer, trustee, employee or agent of another corporation, or of a partnership, joint venture, trust or other enterprise (including service with respect to employee benefit plans). To the fullest extent permissible under California law, expenses incurred by a director or officer seeking indemnification under this bylaw in defending any proceeding shall be advanced by the corporation as they are incurred upon receipt by the corporation of an undertaking by or on behalf of the director or officer to repay such amount if it shall ultimately be determined that the director or officer is not entitled to be indemnified by the corporation for those expenses. If, after the effective date of this bylaw, California law is amended in a manner which permits the corporation to authorize indemnification of or advancement of expenses to

II-1

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its directors or officers, in any such case to a greater extent than is permitted on such effective date, the references in this bylaw to "California law" shall to that extent be deemed to refer to California law as so amended. The rights granted by this bylaw are contractual in nature and, as such, may not be altered with respect to any present or former director or officer without the written consent of that person.

(b) Procedure. Upon written request to the Board of Directors by a person seeking indemnification under this bylaw, the Board shall promptly determine in accordance with Section 317(e) of the California Corporations Code whether the applicable standard of conduct has been met and, if so, the Board shall authorize indemnification. If the Board cannot authorize indemnification because the number of directors who are parties to the proceeding with respect to which indemnification is sought prevents the formation of a quorum of directors who are not parties to the proceeding, then, upon written request by the person seeking indemnification, independent legal counsel (by means of a written opinion obtained at the corporation's expense) or the corporation's shareholders shall determine whether the applicable standard of conduct has been met and, if so, shall authorize indemnification.

(c) Definitions. The term "proceeding" means any threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative. The term "expenses" includes, without limitation, attorney's fees and any expenses of establishing a right to indemnification." The Registrant has entered into indemnification agreements with each of its current directors and officers pursuant to the foregoing provisions."

### Item 16. Exhibits.

The following documents are filed herewith (unless otherwise indicated) and made a part of this registration statement.

<b>Exhibit Number</b>	<b>Description of Exhibit</b>
4.1*	Form of Subscription Agreement
4.2*	Placement Agent Warrant
4.3(1)	Registration Rights Agreement dated January 21, 2000 between the Registrant and Elan International Services, Ltd.
5.1*	Opinion of Heller Ehrman White & McAuliffe LLP
10.1(1)	Securities Purchase Agreement dated January 21, 2000 between the Registrant and Elan International Services, Ltd.
23.1*	Consent of Heller Ehrman White & McAuliffe LLP (filed as part of Exhibit 5.1)
23.2	Consent of Ernst & Young LLP, Independent Auditors

\*  
Previously filed as an exhibit to this registration statement.

(1)

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Incorporated by reference to the Registrant's Form 8-K filed on February 18, 2000.

### Item 17. 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;

II-2

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(i) To include any prospectus required by section 10(a)(3) of the Securities Act of 1933, as amended;

(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 the 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 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 (i) and (ii) do not apply if the registration statement is on Form S-3, Form S-8 or Form F-3, and 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 section 15(d) of the Securities Exchange Act of 1934, as amended, that are incorporated by reference in the 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. 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 the registration statement shall be deemed to be a new registration statement relating to the securities offering 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 of 1933 may be permitted to directors, officers and controlling persons of the Registrant pursuant to the provisions described under Item 14 above, or otherwise, Registrant has been advised that in the opinion of the Securities and Exchange Commission, such indemnification is against public policy as expressed in the Securities Act of 1933 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 against the Registrant 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 of 1933 and will be governed by the final adjudication of such issue.

II-3

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**SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933, as amended, Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-3 and has duly caused this Amendment No. 4 to Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized in Menlo Park, California, on November 20, 2002.

**DepoMed, Inc.**

By     
/s/ JOHN W. FARA

John W. Fara, Ph.D.  
*Chairman, President and  
Chief Executive Officer*

Pursuant to the requirements of the Securities Act of 1933, as amended, this Amendment No. 4 to Registration Statement on Form S-3 has been signed by the following persons on behalf of the Registrant and in the capacities and on the dates indicated:

Signature	Title	Date
<u>  </u> /s/ JOHN W. FARA	Chairman, President and Chief Executive Officer (Principal Executive Officer)	November 20, 2002
<u>  </u> John W. Fara, Ph.D.		
<u>  </u> /s/ JOHN N. SHELL*	Vice President, Operations and Director	November 20, 2002
<u>  </u> John N. Shell		
<u>  </u> /s/ JOHN F. HAMILTON	Vice President, Finance and Chief Financial Officer (Principal Accounting and Financial Officer)	November 20, 2002
<u>  </u> John F. Hamilton		
<u>  </u> /s/ G. STEVEN BURRILL*	Director	November 20, 2002
<u>  </u> G. Steven Burrill		
<u>  </u> /s/ JOHN W. SHELL*	Director	November 20, 2002
<u>  </u> John W. Shell, Ph.D.		
<u>  </u> /s/ JULIAN N. STERN*	Director	November 20, 2002
<u>  </u> Julian N. Stern		
<u>  </u> /s/ W. LEIGH THOMPSON*	Director	November 20, 2002
<u>  </u> W. Leigh Thompson, M.D., Ph.D.		
<u>  </u> /s/ JOHN W. FARA		
<u>  </u> John W. Fara, Ph.D. *(Attorney-in-fact)		

II-4

**DEPOMED, INC.**

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QuickLinks

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