

NCI BUILDING SYSTEMS INC

Form S-8

April 22, 2005

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As filed with the Securities and Exchange Commission on April 22, 2005

Registration No. 333-

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

FORM S-8

**REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933**

NCI BUILDING SYSTEMS, INC.

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of
incorporation or organization)

04-3072771

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

**10943 North Sam Houston Parkway West
Houston, Texas 77064**

(Addresses of Principal Executive Offices)

77064

(Zip Code)

NCI Building Systems, Inc. 2003 Long-Term Incentive Plan

(As Amended and Restated March 11, 2005)

(Full title of the plan)

Todd R. Moore

Vice President and General Counsel

**10943 North Sam Houston Parkway West
Houston, Texas 77064**

(Name and address of agent for service)

(281) 897-7788

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

copy to:

Kelly B. Rose
Baker Botts L.L.P.
910 Louisiana
One Shell Plaza
Houston, Texas 77002-4995
(713) 229-1234

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, par value \$.01 per share	1,100,000	\$34.97	\$38,467,000	\$4,527.57
Rights to purchase Series A Junior Preferred Stock	1,100,000(3)	N/A	N/A	(4)

- (1) Pursuant to Rule 416(a), the number of shares of Common Stock registered hereunder includes such indeterminate number of additional shares of Common Stock as may be offered or issued to prevent dilution resulting from stock splits, stock dividends and similar transactions.
- (2) Estimated pursuant to Rules 457(c) and (h) solely for purposes of computing the registration fee and based upon the average of the high and low prices reported in the consolidated reporting system for the Common Stock on the New York Stock Exchange on April 18, 2005.
- (3) Each share of Common Stock includes one Right to purchase Series A Junior Preferred Stock.
- (4) Pursuant to Rule 457(i) under the Securities Act of 1933, no separate registration fee is required for the associated Rights to purchase Series A Junior Preferred Stock because no separate consideration is payable for the Rights.

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PART I

EXPLANATORY NOTE

This registration statement on Form S-8 registers additional securities of the same class as other securities for which a registration statement on Form S-8 relating to the NCI Building Systems, Inc. 2003 Long-Term Incentive Plan is effective. Accordingly, pursuant to General Instruction E to Form S-8, NCI Building Systems, Inc. hereby incorporates by reference herein the contents of such registration statement on Form S-8 (Registration No. 333-111139) and hereby deems such contents to be a part hereof, except as otherwise updated or modified by this registration statement.

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PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference

We are incorporating by reference into this registration statement the following documents filed with the SEC (excluding any portions of such documents that have been furnished but not filed for purposes of the Securities Exchange Act of 1934, as amended):

our annual report on Form 10-K for the fiscal year ended October 30, 2004, filed with the SEC on January 13, 2005;

our quarterly report on Form 10-Q for the fiscal quarter ended January 29, 2005, filed with the SEC on March 10, 2005;

our current reports on Form 8-K dated November 9, 2004, filed with the SEC on November 16, 2004; dated February 10, 2005, filed with the SEC on February 10, 2005; and dated March 11, 2005, filed with the SEC on March 14, 2005; and

all other documents filed by us under Section 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934, as amended, after the date of this registration statement and prior to the termination of the offering.

Any statement contained in this registration statement or a document incorporated or deemed to be incorporated by reference in this registration statement will be deemed to be modified or superseded for purposes of this registration statement to the extent that a statement contained in this registration statement or in any other subsequently filed document that is deemed to be incorporated by reference in this registration statement modifies or supersedes the statement. Any statement so modified or superseded will not be deemed, except as so modified or superseded, to constitute a part of this registration statement.

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 (DGCL) provides that a corporation may indemnify directors and officers as well as other employees and individuals against expenses, including attorneys fees, judgments, fines, and amounts paid in settlement in connection with specified actions, suits and proceedings whether civil, criminal, administrative, or investigative, other than a derivative action by or in the right of the corporation, if they acted in good faith and in a manner they 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 their conduct was unlawful. A similar standard is applicable in the case of derivative actions, except that indemnification extends only to expenses, including attorneys fees, incurred in connection with the defense or settlement of such action, and the statute requires court approval before there can be any indemnification where the person seeking indemnification has been found liable to the corporation. The statute provides that it is not exclusive of other indemnification that may be granted by a corporation s charter, by-laws, disinterested director vote, stockholder vote, agreement, or otherwise.

Section 102(b)(7) of the DGCL permits a corporation to provide in its certificate of incorporation 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 for:

any breach of the director's duty of loyalty to the corporation or its stockholders;

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acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;
 unlawful payment of dividends or unlawful stock purchases or redemptions; or
 any transaction from which the director derived an improper personal benefit.

Our certificate of incorporation provides that a director will not be liable to us or our stockholders for acts or omissions as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the Delaware statutory or decisional law. Our Amended and Restated By-Laws provide that each current or former director, officer or employee of ours, or each such person who is or was serving or who had agreed to serve another corporation, trust or other enterprise in any capacity at our request, will be indemnified by us to the full extent permitted by law for liability arising from such service. Our Amended and Restated By-Laws require us to advance expenses incurred in defending a civil or criminal action, suit or proceeding, so long as the person undertakes in writing to repay such amounts if it is ultimately determined that such person is not entitled to indemnification. In addition, our By-laws authorize us to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of ours, or each such person who was serving at our request as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against and incurred by such person in any such capacity, or arising out of his status as such, whether or not we would have the power or the obligation to indemnify him against such liability.

We have entered into written indemnification agreements with our directors and certain of our officers. Under these agreements, if an officer or director makes a claim of indemnification to us, either a majority of the independent directors or independent legal counsel selected by the independent directors must review the relevant facts and make a determination, within 45 days of our receipt of such claim, whether the officer or director has met the standards of conduct under Delaware law that would permit (under Delaware law) and require (under the indemnification agreement) us to indemnify the officer or director.

Please read Item 9. Undertakings for a description of the Commission's position regarding such indemnification provisions.

Item 8. Exhibits

<u>Exhibit</u>	<u>Description</u>
*5.1	Opinion of Baker Botts L.L.P.
*23.1	Consent of Independent Registered Public Accounting Firm
*23.2	Consent of Baker Botts L.L.P. (included in Exhibit 5.1)
*24.1	Power of Attorney (included on signature page)

* Filed herewith

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:

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(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 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) of the Securities Act if, in the aggregate, the changes in volume and price represent no more than a 20% 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 this Registration Statement or any material change to such information in this Registration Statement;

provided, however, that the undertakings set forth in paragraphs (a)(1)(i) and (a)(1)(ii) above do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed by the registrant pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference in this Registration Statement.

Provided further, however, that paragraphs (a)(1)(i) and (a)(1)(ii) of this section do not apply if the registration statement is for an offering of asset-backed securities on Form S-1 or Form S-3, and the information required to be included in a post-effective amendment is provided pursuant to Item 1100(c) of Regulation AB.

(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 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.

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(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 of 1933, NCI Building Systems, Inc. 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 Houston, the State of Texas, on April 22, 2005.

NCI BUILDING SYSTEMS, INC.

By: /s/ A. R. Ginn
 A. R. Ginn
 Chairman of the Board and
 Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints A. R. Ginn, Norman C. Chambers and Todd R. Moore, and each of them severally, his or her true and lawful attorney or attorneys-in-fact and agents, with full power to act with or without the others and with full power of substitution and resubstitution, to execute in his name, place and stead, in any and all capacities, this Registration Statement and any or all amendments (including pre-effective and post-effective amendments) to this Registration Statement 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 and each of them full power and authority, to do and perform in the name and on behalf of the undersigned, in any and all capacities, each and every act and thing necessary or desirable to be done in and about the premises, to all intents and purposes and as fully as they might or could do in person, hereby ratifying, approving 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 dates indicated.

<u>Signature</u>	<u>Title</u>	<u>Date</u>
/s/ A.R. Ginn _____	Chairman of the Board, Chief Executive Officer and Director (Principal Executive	April 22, 2005

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A. R. Ginn /s/ Frances R. Powell	Officer) Executive Vice President, Chief Financial Officer and Treasurer (Principal Financial Officer)	April 22, 2005
Frances R. Powell /s/ William A. Lawrence	Vice President and Controller (Principal Accounting Officer)	April 22, 2005
William A. Lawrence		

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<u>/s/ Norman C. Chambers</u>	President, Chief Operating Officer and Director	April 22, 2005
<u>Norman C. Chambers /s/ William D. Breedlove</u>	Director	April 22, 2005
<u>William D. Breedlove /s/ Gary L. Forbes</u>	Director	April 22, 2005
<u>Gary L. Forbes /s/ Philip J. Hawk</u>	Director	April 22, 2005
<u>Philip J. Hawk /s/ Max L. Lukens</u>	Director	April 22, 2005
<u>Max L. Lukens /s/ George Martinez</u>	Director	April 22, 2005
<u>George Martinez /s/ W. Bernard Pieper</u>	Director	April 22, 2005
<u>W. Bernard Pieper /s/ John K. Sterling</u>	Director	April 22, 2005
John K. Sterling		

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