

NETLIST INC

FORM S-8

(Securities Registration: Employee Benefit Plan)

Filed 12/18/2006

CIK	0001282631
Industry	Semiconductors
Sector	Technology

Powered By **EDGAR**Online

<http://www.edgar-online.com/>

© Copyright 2006. All Rights Reserved.

Distribution and use of this document restricted under EDGAR Online's Terms of Use.

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

FORM S-8

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

NETLIST, INC.

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of incorporation or organization)

95-4812784

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

475 Goddard

Irvine, CA 92618

(Address of Principal Executive Offices) (Zip Code)

**Amended and Restated 2000 Equity Incentive Plan of Netlist, Inc.
2006 Equity Incentive Plan of Netlist, Inc.**

(Full title of the plans)

Chun K. Hong

President, Chief Executive Officer and Chairman of the Board

475 Goddard, Irvine, CA 92618

(Name and address of agent for service)

(949) 435-0025

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

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	Amount of Registration Fee
Common Stock, par value \$0.001 per share, issuable under the Amended and Restated 2000 Equity Incentive Plan	5,750,000	\$ 8.96	\$ 51,520,000	\$ 5,512.64
Common Stock, par value \$0.001 per share, issuable under the 2006 Equity Incentive Plan	500,000	\$ 8.96	\$ 4,480,000	\$ 479.36

(1) Pursuant to Rule 416 under the Securities Act of 1933, as amended, this registration statement shall also cover any additional shares of Common Stock which become issuable upon exercise of options granted under the Amended and Restated 2000 Equity Incentive Plan and the 2006 Equity Incentive Plan by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without the receipt of consideration which results in an increase in the number of the outstanding shares of Common Stock of Netlist, Inc.

(2) Estimated solely for the purpose of calculating the registration fee pursuant to Rule 457(h)(1), based on the average of the high and low sales prices of the Company's Common Stock on December 13, 2006.

Part II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

Netlist, Inc. (the “Registrant”) hereby incorporates by reference into this Registration Statement the following documents previously filed with the Securities and Exchange Commission (the “SEC”):

- (a) The Registrant’s prospectus filed with the SEC pursuant to Rule 424(b) under the Securities Act of 1933, as amended (the “Securities Act”), in connection with Registration Statement No. 333-136735 on Form S-1 filed with the Commission on August 18, 2006, as amended (the “S-1 Registration Statement”);
- (b) The description of the Registrant’s common stock contained in the Registrant’s Registration Statement on Form 8-A filed with the SEC on November 27, 2006, including any amendments or reports filed for the purpose of updating such description.

All documents subsequently filed by the Company with the Commission pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act and prior to the filing of a post-effective amendment which indicates that all securities offered have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference in this registration statement and to be a part hereof from the date of filing of such documents. Any statement contained herein or in any 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 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 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 is incorporated under the laws of the State of Delaware. Section 145 of the Delaware General Corporation Law provides that a corporation may indemnify any persons who were, are or are threatened to be made, parties to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of such corporation), by reason of the fact that such person is or was an officer, director, employee or agent of such corporation, or is or was serving at the request of such corporation as 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 in connection with such action, suit or proceeding, provided such person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the corporation’s best interests and, with respect to any criminal action or proceeding, had no reasonable cause to believe that his or her conduct was unlawful.

Section 145 of the Delaware General Corporation Law further authorizes a corporation to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation or enterprise, against any liability asserted against him or her and incurred by him or her in any such capacity,

arising out of his or her status as such, whether or not the corporation would otherwise have the power to indemnify him or her under Section 145 of the Delaware Corporation Law.

The Registrant's restated certificate of incorporation eliminates the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liabilities arising (a) from any breach of the director's duty of loyalty to the corporation or its stockholders; (b) from acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (c) under Section 174 of the Delaware General Corporation Law; or (d) from any transaction from which the director derived an improper personal benefit. In addition, the Registrant's amended and restated bylaws provide for indemnification of directors, officers, employees and agents to the fullest extent permitted by Delaware law and authorize us to purchase and maintain insurance to protect itself and any director, officer, employee or agent of our company or another business entity against any expense, liability, or loss, regardless of whether we would have the power to indemnify such person under our bylaws or Delaware law.

The Registrant has entered into indemnification agreements with each of our current directors and executive officers (the form of which is filed as Exhibit 10.12 to the S-1 Registration Statement). These agreements will require us to indemnify these individuals to the fullest extent permitted under Delaware law against liabilities that may arise by reason of their service to the Registrant, and to advance expenses incurred as a result of any proceeding against them as to which they could be indemnified. The Registrant also intends to enter into indemnification agreements with our future directors and executive officers.

Item 7. Exemptions from Registration Claimed.

Not applicable.

Item 8. Exhibits.

- 4.1 Restated Certificate of Incorporation of the Registrant, incorporated by reference to Exhibit 3.1 of the S-1 Registration Statement.
- 4.2 Amended and Restated Bylaws of the Registrant, incorporated by reference to Exhibit 3.2 of the S-1 Registration Statement.
- 4.3 Amended and Restated 2000 Equity Incentive Plan of the Registrant, incorporated by reference to Exhibit 10.7 of the S-1 Registration Statement.
- 4.4 2006 Equity Incentive Plan of the Registrant, incorporated by reference to Exhibit 10.16 of the S-1 Registration Statement.
- 5.1 Opinion of Bingham McCutchen LLP as to the legality of the common stock registered hereby.
- 23.1 Consent of Corbin & Company, LLP.
- 23.2 Consent of Deloitte & Touche LLP.
- 23.3 Consent of Bingham McCutchen LLP (included in Exhibit 5.1).
- 24.1 Power of Attorney (included on signature page hereto).

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;

(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) 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 with or furnished to the SEC by the Registrant pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 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.

(4) That, for the purpose of determining liability of the registrant under the Securities Act to any purchaser in the initial distribution of the securities, the undersigned registrant undertakes that in a primary offering of securities of the undersigned registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned registrant will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:

(i) Any preliminary prospectus or prospectus of the undersigned registrant relating to the offering required to be filed pursuant to Rule 424;

(ii) Any free writing prospectus relating to the offering prepared by or on behalf of the undersigned registrant or used or referred to by the undersigned registrant;

(iii) The portion of any other free writing prospectus relating to the offering containing material information about the undersigned registrant or its securities provided by or on behalf of the undersigned registrant; and

(iv) Any other communication that is an offer in the offering made by the undersigned registrant to the purchaser.

(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 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 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 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, 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 Irvine, State of California, on this 15th day of December, 2006.

NETLIST, INC.

By: /s/ Lee Kim
Lee Kim
Vice President, Chief Financial Officer
and Secretary

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below hereby severally constitute and appoint Chun K. Hong and Lee Kim and each of them singly, his true and lawful attorneys-in-fact and agents with full power of substitution and resubstitution, for him and in his name, place and stead, in any and all capacities, to sign any and all amendments (including post effective amendments) to this registration statement, and to file the same, with all exhibits thereto, and other documents in connection therewith, with the SEC, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite or necessary to be done, as fully to all intents and purposes as he might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them, or their 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 by the following persons in the capacities and on the dates indicated.

<u>Signature</u>	<u>Title(s)</u>	<u>Date</u>
<u>/s/ Chun K. Hong</u> Chun K. Hong	President, Chief Executive Officer and Chairman of the Board (Principal Executive Officer)	December 15, 2006
<u>/s/ Lee Kim</u> Lee Kim	Vice President, Chief Financial Officer (Principal Financial and Accounting Officer) and Secretary	December 15, 2006
<u>/s/ Nam Ki Hong</u> Nam Ki Hong	Director	December 15, 2006
<u>/s/ Thomas F. Lagatta</u> Thomas F. Lagatta	Director	December 15, 2006
<u>/s/ Alan H. Portnoy</u> Alan H. Portnoy	Director	December 15, 2006
<u>/s/ David M. Rickey</u> David M. Rickey	Director	December 15, 2006
<u>/s/ Preston Romm</u> Preston Romm	Director	December 15, 2006

INDEX TO EXHIBITS

- 4.1 Restated Certificate of Incorporation of the Registrant, incorporated by reference to Exhibit 3.1 of the Registrant's Registration Statement No. 333-136735 on Form S-1 filed with the Securities and Exchange Commission on August 18, 2006, as amended (the "S-1 Registration Statement").
- 4.2 Amended and Restated Bylaws of the Registrant, incorporated by reference to Exhibit 3.2 of the S-1 Registration Statement.
- 4.3 Amended and Restated 2000 Equity Incentive Plan of the Registrant, incorporated by reference to Exhibit 10.7 of the S-1 Registration Statement.
- 4.4 2006 Equity Incentive Plan of the Registrant, incorporated by reference to Exhibit 10.16 of the S-1 Registration Statement.
- 5.1 Opinion of Bingham McCutchen LLP as to the legality of the common stock registered hereby.
- 23.1 Consent of Corbin & Company, LLP.
- 23.2 Consent of Deloitte & Touche LLP.
- 23.3 Consent of Bingham McCutchen LLP (included in Exhibit 5.1).
- 24.1 Power of Attorney (included on signature page hereto).

December 15, 2006

Netlist, Inc.
475 Goddard
Irvine, CA 92618

Re: Registration Statement on Form S-8

Ladies and Gentlemen:

This opinion is furnished in connection with the registration, pursuant to a Registration Statement on Form S-8 under the Securities Act of 1933, as amended (the “Securities Act”), to be filed with the Securities and Exchange Commission on or about December 15, 2006 (the “Registration Statement”), of an aggregate of 11,250,000 shares (the “Shares”) of common stock, par value \$0.001 per share (the “Common Stock”), of Netlist, Inc., a Delaware corporation (the “Company”), 5,750,000 of which are or will be issuable to employees, directors and consultants of the Company upon the exercise of options granted pursuant to the Company’s Amended and Restated 2000 Equity Incentive Plan, (the “2000 Plan”), and 5,500,000 of which are or will be issuable to employees, directors and consultants of the Company upon the exercise of options granted pursuant to the Company’s 2006 Equity Incentive Plan (the “2006 Plan” and collectively with the 2000 Plan, the “Plans”) or which the Company may issue as restricted stock or pursuant to awards of restricted stock units under the 2006 Plan.

We have acted as counsel to the Company in connection with the foregoing registration of the Shares. We have examined and relied upon originals or copies of such records, instruments, certificates, memoranda, and other documents as we have deemed necessary or advisable for purposes of this opinion and have assumed, without independent inquiry, the accuracy of those documents. In that examination, we have assumed the genuineness of all signatures, the conformity to the originals of all documents reviewed by us as copies, the authenticity and completeness of all original documents reviewed by us in original or copy form, and the legal competence of each individual executing such documents. We have further assumed that all options granted or to be granted pursuant to the Plans were or will be validly granted in accordance with the terms of the respective Plan, that all Shares to be issued upon exercise of such options will be issued in accordance with the terms of such options and the respective Plan, and that all Shares sold or granted as restricted stock or pursuant to awards of restricted stock units will be sold or granted in accordance with the terms of the 2006 Plan.

This opinion is limited solely to the Delaware General Corporation Law, as applied by courts located in Delaware, the applicable provisions of the Delaware Constitution and the reported judicial decisions interpreting those laws.

Based upon and subject to the foregoing, we are of the opinion that:

1. Upon the issuance and the delivery of the Shares upon the exercise of options granted pursuant to the Plans in accordance with the terms of such options and the respective Plan, and upon the Company's receipt of the full exercise price therefor, as determined by the Board of Directors of the Company and as specified in the documents governing such grants and the respective Plan, the Shares will be validly issued, fully paid, and nonassessable.
2. Upon the issuance and delivery of the Shares in the form of restricted stock in accordance with the terms of the 2006 Plan, and upon the Company's receipt of consideration therefor, as determined by the Board of Directors of the Company and as specified in the documents governing such awards and the 2006 Plan, the Shares will be validly issued, fully paid, and nonassessable.
3. Upon the issuance and delivery of the Shares pursuant to awards of restricted stock units in accordance with the terms of the awards of such restricted stock units and the 2006 Plan, and upon the company's receipt of consideration therefor, as determined by the Board of Directors of the Company and as specified in the documents governing such awards and the 2006 Plan, the Shares will be validly issued, fully paid, and nonassessable.

We consent to the filing of a copy of this opinion as an exhibit to the Registration Statement and to the reference to this firm under the caption .

Very truly yours,

/s/ BINGHAM McCUTCHEN LLP

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We consent to the incorporation by reference in this Registration Statement on Form S-8 of our report dated May 11, 2006, relating to the consolidated financial statements of Netlist, Inc. and its subsidiaries as of December 31, 2005 and for the year then ended, which report is included in the Registration Statement of Netlist, Inc. on Form S-1 (No. 333-136735) and related Prospectus, filed with the Securities and Exchange Commission.

/s/ CORBIN & COMPANY, LLP

Irvine, California

December 15, 2006

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We consent to the incorporation by reference in this Registration Statement on Form S-8 of our report relating to the consolidated financial statements and financial statement schedule of Netlist, Inc. and subsidiaries dated March 1, 2006, appearing in the Prospectus dated November 29, 2006 filed by Netlist, Inc. and subsidiaries with the Securities and Exchange Commission on November 30, 2006 pursuant to Rule 424(b) of the Securities Act of 1933, as amended, in connection with the Registration Statement of Netlist, Inc., on Form S-1 (333-136735).

/s/ DELOITTE & TOUCHE LLP
Costa Mesa, California
December 15, 2006
