

POTBELLY CORP  
Form S-8  
October 25, 2013

As filed with the Securities and Exchange Commission on October 25, 2013

File No. 333-

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

**FORM S-8**  
**REGISTRATION STATEMENT**  
***UNDER***  
***THE SECURITIES ACT OF 1933***

**Potbelly Corporation**

**(Exact name of registrant as specified in its charter)**

**Delaware**  
**(State or other jurisdiction of**  
**incorporation or organization)**

**222 Merchandise Mart Plaza, 23rd Floor**

**Chicago, Illinois 60654**

**36-4466837**  
**(IRS Employer**

**Identification No.)**

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

**Potbelly Corporation 2001 Equity Incentive Plan**

**Potbelly Corporation 2004 Equity Incentive Plan**

**Potbelly Corporation 2013 Long-Term Incentive Plan**

**(Full title of the plans)**

**Matthew J. Revord**

**Senior Vice President, General Counsel and Secretary**

**Potbelly Corporation**

**222 Merchandise Mart Plaza, 23rd Floor, Chicago, Illinois 60654**

**(312) 951-0600**

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

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of large accelerated filer, accelerated filer and smaller reporting company in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer  (Do not check if a smaller reporting company)

Smaller reporting company

**CALCULATION OF REGISTRATION FEE**

<b>Title of securities to be registered</b>	<b>Amount to be registered (1)</b>	<b>Proposed</b>	<b>Proposed</b>	<b>Amount of registration fee</b>
		<b>maximum offering price per share</b>	<b>maximum aggregate offering price</b>	
Common Stock, \$0.01 par value per share ( Common Stock ): To be issued under the 2013 Long-Term Incentive Plan	1,500,000	\$26.20(2)	\$39,300,000.00	\$5,061.84
To be issued upon exercise of options outstanding under the 2004 Equity Incentive Plan	4,142,249	\$8.82(3)	\$36,534,636.18	\$4,705.66
To be issued upon exercise of options outstanding under the 2001 Equity Incentive Plan	20,415	\$9.00(4)	\$183,735.00	\$23.67

- (1) Pursuant to Rule 416(c) of the Securities Act of 1933, as amended (the Securities Act ), this Registration Statement shall also cover an indeterminate amount of any additional shares of the Registrant s Common Stock that become issuable under any of the listed plans by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without receipt of consideration, which results in an increase in the number of the Registrant s outstanding shares of Common Stock.
- (2) Estimated in accordance with Rules 457(c) and (h) solely for the purpose of calculating the registration fee on the basis of \$26.20 per share, which represents the average of the high and low prices per share of the Registrant s Common Stock as reported on The Nasdaq Global Select Market on October 18, 2013.
- (3) Estimated in accordance with Rule 457(h) solely for the purpose of calculating the registration fee on the basis of the weighted average exercise price of \$8.82 per share for options outstanding under the 2004 Equity Incentive Plan.
- (4) Estimated in accordance with Rule 457(h) solely for the purpose of calculating the registration fee on the basis of the weighted average exercise price of \$9.00 per share for options outstanding under the 2001 Equity Incentive Plan.

**Part I**

**INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS**

**Item 1. Plan Information.\***

**Item 2. Registrant Information and Employee Program Annual Information.\***

\* The information specified in Item 1 and Item 2 of Part I of this Registration Statement on Form S-8 (this Registration Statement ) is omitted from this filing in accordance with the provisions of Rule 428 under the Securities Act of 1933, as amended (the Securities Act ) and the introductory note to Part I of this Registration Statement. The documents containing the information specified in Part I will be delivered to the participants in the plans covered by this Registration Statement as required by Rule 428(b)(1). These documents and the documents incorporated by reference into this Registration Statement pursuant to Item 3 of Part II of this Registration Statement, 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 Documents by Reference.**

Potbelly Corporation (the Registrant ) hereby incorporates by reference into this Registration Statement the following documents previously filed with the Securities and Exchange Commission (the Commission ):

- (a) The Registrant's Prospectus filed with the Commission on October 4, 2013, pursuant to Rule 424(b)(4) of the Securities Act, relating to the registration statement on Form S-1, as amended (File No. 333-190893), which contains the Registrant's audited financial statements for the latest fiscal year for which such statements have been filed;
- (b) The description of the Registrant's Common Stock contained in the Registrant's registration statement on Form 8-A (File No. 001-36104) filed with the Commission on September 30, 2013, pursuant to Section 12(b) of the Securities Exchange Act of 1934, as amended (the Exchange Act ), including any amendment or report filed for the purpose of updating such description; and
- (c) The Registrant's Current Report on Form 8-K filed with the Commission on October 11, 2013.

In addition, all documents subsequently filed with the Commission by the Registrant pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act, prior to the filing of a post-effective amendment which indicates that all securities offered herein 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. In no event, however, will any information that the Registrant discloses under Item 2.02 or 7.01 of any

Current Report on Form 8-K that the Registrant may from time to time furnish to the Commission be incorporated by reference into, or otherwise become a part of, this Registration Statement.

Any statement contained in this Registration Statement or 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 is inconsistent with or modifies or supersedes such statement. Any such statement so modified or superseded shall not be deemed to constitute a part of this Registration Statement, except as so modified or superseded.

**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 governed by the Delaware General Corporation Law, or DGCL. Section 145 of the DGCL provides that a corporation may indemnify any person, including an officer or director, who was or is, or is threatened to be made, a party to any threatened, pending or completed legal 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 was or is 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 or 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 officer, director, employee or agent acted in good faith and in a manner such person reasonably believed to be in, or not opposed to, the corporation's best interest and, for criminal proceedings, had no reasonable cause to believe that such person's conduct was unlawful. A Delaware corporation may indemnify any person, including an officer or director, who was or is, or is threatened to be made, a party to any threatened, pending or contemplated action or suit by or in the right of such corporation, under the same conditions, except that such indemnification is limited to expenses (including attorneys' fees) actually and reasonably incurred by such person, and except that no indemnification is permitted without judicial approval if such person is adjudged to be liable to such corporation. Where an officer or director of a corporation is successful, on the merits or otherwise, in the defense of any action, suit or proceeding referred to above, or any claim, issue or matter therein, the corporation must indemnify that person against the expenses (including attorneys' fees) which such officer or director actually and reasonably incurred in connection therewith.

The Registrant's amended and restated by-laws authorize the indemnification of its officers and directors, consistent with Section 145 of the Delaware General Corporation Law, as amended. The Registrant has entered into indemnification agreements with each of its directors and executive officers. These agreements, among other things, require the Registrant to indemnify each director and executive officer to the fullest extent permitted by Delaware law, including advancement of expenses such as attorneys' fees, judgments, fines and settlement amounts incurred by the director or executive officer in any action or proceeding, including any action or proceeding by or in right of the Registrant, arising out of the person's services as a director or executive officer.

Reference is made to Section 102(b)(7) of the DGCL, which enables a corporation in its original certificate of incorporation or an amendment thereto to eliminate or limit the personal liability of a director for violations of the director's fiduciary duty, except (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (iii) pursuant to Section 174 of the DGCL, which provides for liability of directors for unlawful payments of dividends or unlawful stock purchases or redemptions or (iv) for any transaction from which a director derived an improper personal benefit.

The Registrant maintains standard policies of insurance that provide coverage (i) to its directors and officers against loss arising from claims made by reason of breach of duty or other wrongful act and (ii) to the Registrant with respect to indemnification payments that it may make to such directors and officers.

The form of Underwriting Agreement filed as Exhibit 1.1 to the Registrant's Amendment No. 1 to Form S-1, Commission File No. 333-190893, as filed on September 23, 2013, provides for indemnification of directors and officers of the Registrant by the underwriters against certain liabilities.

**Item 7. Exemption from Registration Claimed.**

Not applicable.

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**Item 8. Exhibits.**

**Exhibit**

<b>No.</b>	<b>Description</b>
4.1	Seventh Amended and Restated Certificate of Incorporation of Potbelly Corporation*
4.2	Amended and Restated By-laws of Potbelly Corporation*
4.3	Potbelly Corporation 2001 Equity Incentive Plan
4.4	Potbelly Corporation 2004 Equity Incentive Plan, as amended*
4.5	Potbelly Corporation 2013 Long-Term Incentive Plan*
5.1	Opinion of Mayer Brown LLP
23.1	Consent of Deloitte & Touche LLP
23.2	Consent of Mayer Brown LLP (included in the opinion filed as Exhibit 5.1 hereto)
24.1	Power of Attorney (included on the signature page to this Registration Statement)

\* Previously filed with the Securities and Exchange Commission as an exhibit to the Registrant's Registration Statement on Form S-1, as amended (File No. 333-190893), and incorporated herein by reference.

**Item 9. Undertakings.**

1. The undersigned Registrant hereby undertakes:

- (a) 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. 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) if, in the aggregate, the changes in volume and price represent no more than a 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



this Registration Statement or any material change to such information in this Registration Statement; *Provided, however*, that paragraphs (a)(i) and (a)(ii) of this section do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the Registrant pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference in this Registration Statement.

- (b) 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.
- (c) 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.

2. 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 (and, where applicable, each filing of an employee benefit plan's 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.

3. 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.

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**SIGNATURES**

Pursuant to the requirements of the Securities Act of 1933, as amended, 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 Chicago, State of Illinois, on October 25, 2013.

**POTBELLY CORPORATION**

By: /s/ Aylwin Lewis

Aylwin Lewis

*Chief Executive Officer and President***POWER OF ATTORNEY**

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below hereby constitutes and appoints Aylwin Lewis, Charles Talbot and Matthew Revord, and each of them, as such person's true and lawful attorney in fact and agent with full power of substitution, for such person in any and all capacities, to sign any and all amendments to this Registration Statement on Form S-8 (including post-effective amendments), and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorney in fact, proxy and agent 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 for all intents and purposes as such person might or could do in person, hereby ratifying and confirming all that said attorney in fact, proxy and agent, or such person's substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement on Form S-8 has been signed by the following persons in the capacities and on the dates indicated.

<b>Signature</b>	<b>Title</b>	<b>Date</b>
/s/ Aylwin Lewis	Director, Chief Executive Officer and President	October 25, 2013
Aylwin Lewis	(Principal Executive Officer)	
/s/ Charles Talbot	Senior Vice President and Chief Financial Officer	October 25, 2013
Charles Talbot	(Principal Financial and Principal Accounting Officer)	
/s/ Bryant Keil	Director	October 25, 2013
Bryant Keil		
/s/ Vann Avedisian	Director	October 25, 2013
Vann Avedisian		
/s/ Peter Bassi	Director	October 25, 2013

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Peter Bassi

/s/ Gerald Gallagher

Director

October 25, 2013

Gerald Gallagher

/s/ Marla Gottschalk

Director

October 25, 2013

Marla Gottschalk

/s/ Dan Levitan

Director

October 25, 2013

Dan Levitan

**INDEX TO EXHIBITS**

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