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TRIARC COMPANIES INC
Form S-8
August 02, 2002

As filed with the Securities and Exchange Commission on August 2, 2002

Registration No. 333-

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

TRIARC COMPANIES, INC.
(Exact name of Registrant as specified in its charter)

DELAWARE
(State or other jurisdiction of
incorporation or organization)

38-0471180
(IRS Employer
Identification No.)

280 PARK AVENUE
NEW YORK, NEW YORK 10017
(212) 451-3000
(Address, including zip code, and telephone number,
including area code, of Registrant's principal executive offices)

TRIARC COMPANIES, INC. 2002 EQUITY PARTICIPATION PLAN
(Full title of the plan)

BRIAN L. SCHORR
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL
TRIARC COMPANIES, INC.
280 PARK AVENUE
NEW YORK, NEW YORK 10017
(212) 451-3000
(Name, address, including zip code, and telephone number,
including area code, of agent for service)

COPY TO:
PAUL D. GINSBERG, ESQ.
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064
(212) 373-3000

CALCULATION OF REGISTRATION FEE

| TITLE OF EACH CLASS OF SECURITIES TO BE REGISTERED | AMOUNT TO BE REGISTERED (1) | PROPOSED MAXIMUM OFFERING PRICE PER SHARE (2) | PROP AGGRE |
|---|--------------------------------|---|---------------|
|---|--------------------------------|---|---------------|

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| | | | |
|---|------------------|---------|-----|
| Class A common stock, par value \$.10 per share | 5,000,000 shares | \$25.35 | \$1 |
|---|------------------|---------|-----|

- (1) Pursuant to Rule 416 under the Securities Act of 1933, this registration statement shall be deemed to cover any additional securities to be offered or issued from stock splits, stock dividends or similar transactions.
- (2) Estimated solely for the purpose of calculating the registration fee in accordance with Rules 457(c) and 457(h) under the Securities Act of 1933, as amended. The Proposed Maximum Offering Price Per Share was determined by averaging the high and low prices of the Class A common stock, par value \$.10 per share, of Triarc Companies, Inc. as reported on the New York Stock Exchange composite tape on July 30, 2002.

EXPLANATORY NOTE

The Section 10(a) prospectus being delivered by Triarc Companies, Inc. (the "Company") (the "Plan"), as required by Rule 428 under the Securities Act of 1933, as amended (the "Securities Act"), has been prepared in accordance with the requirements of Form S-8 and relates to shares of Class A common stock, par value \$.10 per share, of the Company (the "Common Stock") which have been reserved for issuance pursuant to the Plan. The information regarding the Plan required in the Section 10(a) prospectus is included in documents being maintained and delivered by the Company as required by Rule 428 under the Securities Act. The Company shall provide to participants in the Plan a written statement advising them of the availability without charge, upon written or oral request, of documents incorporated by reference herein, as is required by Item 2 of Part I of Form S-8.

PART I

INFORMATION REQUIRED IN THE SECTION 10(A) PROSPECTUS

The documents containing the information specified in this Part I will be sent or given to employees as specified by Rule 428(b)(1). Such documents need not be filed with the Commission either as part of this Registration Statement or as prospectuses or prospectus supplements pursuant to Rule 424. Those documents and the documents incorporated by reference in this Registration Statement pursuant to Item 3 of Part II, 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

The following documents filed with the Commission by the Company (File No. 1-2207) are incorporated by reference in this Registration Statement:

1. The Company's Annual Report on Form 10-K for the fiscal year ended December 30, 2001 filed with the Commission on March 27, 2002;
2. The Company's Quarterly Report on Form 10-Q for the quarterly period ended March 31, 2002 filed with the Commission on May

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15, 2002;

3. The Company's Current Reports on Form 8-K filed with the Commission on March 27, 2002 and May 1, 2002; and
4. The description of the Class A Common Stock set forth in the Company's Registration Statement on Form 8-A filed pursuant to Section 12 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), on November 4, 1993, and any amendment or report filed for the purpose of updating any such description.

In addition, all reports and documents filed by the Company pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act subsequent to the date hereof and 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 herein and made a part hereof from the date of the filing of such documents. Any statement contained in a document incorporated or deemed to be incorporated by reference herein and to be a part hereof shall be deemed to be

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modified or superseded for purposes of this Registration Statement to the extent that a statement contained herein or in any 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 certificate of incorporation of the Company, as amended to date (the "Triarc Charter"), provides indemnification to the extent not prohibited by Delaware law (including as such law may be amended in the future to be more favorable to directors and officers). Section 145 of the General Corporation Law of the State of Delaware (the "DGCL") provides that a corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed civil, criminal, administrative or investigative action, suit or proceeding (other than an action by or in the right of the corporation, such as a derivative action) by reason of the fact that he or she 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 for any corporation, partnership, joint venture, trust, employee benefit plan or other enterprise (an "Other Entity"). The Triarc Charter provides that its officers and directors, and any person serving in any capacity at the request of the Company for an Other Entity shall be entitled to such indemnification; however, the Board of Directors of the Company (the "Triarc Board") may specifically grant such indemnification to other persons in respect of service to the Company or an Other Entity. The Triarc Charter specifies that any director or officer of the Company serving in any capacity with a majority owned subsidiary or any employee benefit plan of

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the Company or of any majority owned subsidiary shall be deemed to be doing so at the request of the Company.

Under Section 145 of the DGCL, depending on the nature of the proceeding, a corporation may indemnify against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred in connection with such action, suit or proceeding if the person so indemnified acted in good faith and in a manner he or she 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 that his or her conduct was unlawful. In the case of a derivative action, no indemnification may be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation, unless and only to the extent that the Delaware Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability, such person is fairly and reasonably entitled to indemnity for such expenses as such court shall deem proper.

Section 145 further provides that to the extent that a director or officer of a corporation is 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 or she shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred in connection therewith. However, if such director or officer is not successful in the defense of any such action, suit or proceeding, or in the defense of any claim, issue or matter therein, he or she shall only be indemnified by the corporation as authorized in the specific case upon a determination that indemnification is proper because he or she met the applicable standard set

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forth above as determined by a majority of the disinterested directors, by independent legal counsel or by the stockholders.

The Triarc Charter provides that expenses are to be advanced prior to the final disposition of a proceeding upon the receipt by the Company of an undertaking, as required by the DGCL, that the director or officer or other indemnified person will repay such advances if he or she is ultimately found not to be entitled to indemnification under the DGCL.

The Triarc Charter permits a person entitled to indemnity to bring an action in court to obtain such indemnity and provides that, in any such action, the court will not be bound by a decision of the Triarc Board, independent counsel or stockholders that such person is not entitled to indemnification. Such person is also indemnified for any expenses incurred in connection with successfully establishing his or her right to indemnification in any such proceeding. The Triarc Charter expressly provides that the right to indemnification thereunder is a contract right and, therefore, cannot be retroactively eliminated by a later stockholder vote, and is not an exclusive right and, therefore, the Company may provide other indemnification, if appropriate.

The Company also enters into indemnification agreements with its directors and officers indemnifying them against liability they may incur in their capacity as such. The indemnification agreements do not provide indemnification to the extent that the indemnitee is indemnified by the Company under the Triarc Charter, its bylaws, its directors' and officers' liability insurance, or otherwise. Additionally, the indemnification agreements do not provide indemnification (i) for the return by the indemnitee of any illegal remuneration paid to him or her; (ii) for any profits payable by the indemnitee

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to the Company pursuant to Section 16(b) of the Exchange Act; (iii) for any liability resulting from the indemnitee's fraudulent, dishonest or willful misconduct; (iv) for any amount the payment of which is not permitted by applicable law; (v) for any liability resulting from conduct producing unlawful personal benefit; or (vi) if a final court adjudication determines such indemnification is not lawful.

Determinations as to whether an indemnitee is entitled to be paid under the indemnification agreements may be made by the majority vote of a quorum of disinterested directors, independent legal counsel selected by the Triarc Board, a majority of disinterested Company stockholders or by a final adjudication of a court of competent jurisdiction. In the event that the Company undergoes a "Change of Control" (as defined in the indemnification agreements) all such determinations shall be made by special independent counsel selected by the indemnitee and approved by the Company, which approval may not be unreasonably withheld. In certain circumstances, an indemnitee may require the Company to establish a trust fund to assure that funds will be available to pay any amounts which may be due such indemnitee under an indemnification agreement.

As permitted by Section 102(b)(7) of the DGCL, the Triarc Charter includes a provision which eliminates the personal liability of a director to the Company or its stockholders for monetary damages for breach of fiduciary duty as a director, other than liability (i) for the breach of a director's duty of loyalty to the Company and its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the DGCL (relating to unlawful payment of a dividend and unlawful stock purchase and redemption) or (iv) for any transaction from which the director derived any improper personal benefit.

Finally, the Triarc Charter authorizes the Company, as permitted by the DGCL, to purchase directors' and officers' liability insurance. The Company carries directors' and officers' liability insurance covering losses up to specified amounts.

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The foregoing statements are subject to the detailed provisions of Sections 145 and 102 of the DGCL, the Triarc Charter and the referenced indemnification agreements.

ITEM 7. EXEMPTION FROM REGISTRATION CLAIMED

Not Applicable.

ITEM 8. EXHIBITS

EXHIBITS

- 4.1 Certificate of Incorporation of the Company, as currently in effect, incorporated herein by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated November 9, 2001 (SEC file no. 1-2207).
- 4.2 By-laws of the Company, as currently in effect, incorporated herein by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K dated March 30, 2001 (SEC file no. 1-2207).
- 4.3 Triarc Companies, Inc. 2002 Equity Participation Plan, incorporated herein by reference to Exhibit A to the Company's

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Schedule 14A filed with the Commission on April 26, 2002 (SEC file No. 2-2207).

- 4.4* Form of Non-Incentive Stock Option Agreement.
- 5.1* Opinion of Paul, Weiss, Rifkind, Wharton & Garrison, counsel to the Company, regarding the legality of the Class A common stock being registered.
- 23.1* Consent of Deloitte & Touche LLP.
- 23.2* Consent of Ernst & Young LLP.
- 23.3* Consent of BDO Seidman, LLP.
- 23.4* Consent of Paul, Weiss, Rifkind, Wharton & Garrison (included in Exhibit 5.1).
- 24.1 Power of Attorney (included on signature page).

* Filed herewith.

ITEM 9. UNDERTAKINGS

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 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;

(ii) 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; and

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(iii) 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 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 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.

(c) Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and

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controlling persons of the registrant pursuant to the registrant's Certificate of Incorporation or by-laws, by contract, 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 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 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, 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 New York, State of New York, on August 2, 2002.

TRIARC COMPANIES, INC.
(Registrant)

By: /s/ Nelson Peltz

Chairman and Chief Executive
Officer

POWER OF ATTORNEY

The officers and directors of Triarc Companies, Inc. whose signatures appear below hereby constitute and appoint Nelson Peltz and Peter W. May and each of them (with full power to each of them to act alone), their true and lawful attorneys-in-fact, with full powers of substitution and resubstitution, to sign and execute on behalf of the undersigned any and all amendments, including any post-effective amendments, to this Registration Statement, and to file the same, with exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, and each of the undersigned does hereby ratify and confirm all that said attorneys-in-fact shall do or cause to be done by virtue thereof.

Pursuant to the requirements of the Securities Act, this Registration Statement has been signed below on August 2, 2002 by the following persons in the capacities indicated.

| SIGNATURE ----- | TITLES ----- |
|---|--|
| /s/ Nelson Peltz ----- Nelson Peltz | Chairman and Chief Executive Officer and Director (Principal Executive Officer) |

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| | |
|---|---|
| /s/ Peter W. May ----- Peter W. May | President and Chief Operating Officer and Director (Principal Operating Officer) |
| /s/ Francis T. McCarron ----- Francis T. McCarron | Senior Vice President and Chief Financial Officer (Principal Financial Officer) |
| /s/ Fred H. Schaefer ----- Fred H. Schaefer | Senior Vice President and Chief Accounting Officer (Principal Accounting Officer) |
| /s/ Hugh L. Carey ----- Hugh L. Carey | Director |
| /s/ Clive Chajet ----- Clive Chajet | Director |

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| SIGNATURE ----- | TITLES ----- |
|---|-----------------|
| /s/ Joseph A. Levato ----- Joseph A. Levato | Director |
| /s/ David E. Schwab II ----- David E. Schwab II | Director |
| /s/ Jeffrey S. Silverman ----- Jeffrey S. Silverman | Director |
| /s/ Raymond S. Troubh ----- Raymond S. Troubh | Director |
| /s/ Gerald Tsai, Jr. ----- Gerald Tsai, Jr. | Director |

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INDEX TO EXHIBITS

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- 4.3 Triarc Companies, Inc. 2002 Equity Participation Plan, incorporated herein by reference to Exhibit A to the Company's Schedule 14A filed with the Commission on April 26, 2002 (SEC file No. 2207).
- 4.4* Form of Non-Incentive Stock Option Agreement.
- 5.1* Opinion of Paul, Weiss, Rifkind, Wharton & Garrison, counsel to the Company, regarding the legality of the Class A common stock being registered.
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