BANK OF MONTREAL /CAN/
Form FWP
September 04, 2018

Registration Statement No. 333-217200

Filed Pursuant to Rule 433

Subject to Completion, dated September 4, 2018

Pricing Supplement to the Prospectus dated April 27, 2017,
the Prospectus Supplement dated April 27, 2017 and the Product Supplement dated May 1, 2017

**US$**

**Autocallable Cash-Settled Notes with Conditional Interest Payments due September 30, 2022**

**Linked to the Lesser Performing of the SPDR® S&P®
Oil & Gas Exploration & Production ETF and the VanEck Vectors™ Gold Miners ETF**

- This pricing supplement relates an offering of Autocallable Cash-Settled Notes with Conditional Interest Payments linked to the Lesser Performing of the SPDR® S&P® Oil & Gas Exploration & Production ETF (the "XOP") and the VanEck Vectors™ Gold Miners ETF (the "GDX," and together with the XOP, the "Underlying Assets").
- The notes are designed for investors who are seeking conditional interest payments equal to 2.375% of the principal amount per quarter, as well as a return of principal if the Closing Level of each Underlying Asset on any Call Date beginning on June 21, 2019 is greater than or equal to 100% of its Initial Level (the "Call Level"). Investors should be willing to have their notes automatically redeemed prior to maturity and be willing to lose some or all of their principal at maturity.
- The notes will bear interest at a rate equal to 2.375% of the principal amount per quarter ($23.75 per $1,000 in principal amount or 9.50% per annum) if the price of each Underlying Asset is greater than or equal to its Coupon Barrier Level as of the applicable quarterly Observation Date. Any interest will be payable on the final business day of each quarter, beginning on December 31, 2018, and until the maturity date, subject to the automatic redemption feature.
- If on any Call Date beginning on June 21, 2019, the Closing Level of **each** Underlying Asset is greater than or equal to its Call Level, the notes will be automatically called. On the applicable Call Settlement Date, for each $1,000 principal amount, investors will receive the principal amount plus the applicable interest payment.
- The notes do not guarantee any return of principal at maturity. Instead, if the notes are not automatically called, the payment at maturity will be based on the Final Level of each Underlying Asset and whether the Closing Level of that Underlying Asset has declined from its Initial Level below its Trigger Level on the Valuation Date (a "Trigger Event"), as described below.
- If the notes are not automatically redeemed, and a Trigger Event occurs with respect to **any** Underlying Asset, investors will be subject to one-for-one loss of the principal amount of the notes for any percentage decrease in the Lesser Performing Underlying Asset from its Initial Level to its Final Level. In such a case, you will receive a cash amount at maturity that is less than the principal amount.
- The notes will not be listed on any securities exchange.
- All payments on the notes are subject to the credit risk of Bank of Montreal.

- The offering is expected to price on or about September 25, 2018, and the notes are expected to settle through the facilities of The Depository Trust Company on or about September 28, 2018.
- The notes are scheduled to mature on or about September 30, 2022.
- The notes will be issued in minimum denominations of $1,000 and integral multiples of $1,000.
- Our subsidiary, BMO Capital Markets Corp. ("BMOCM"), is the agent for this offering. See "Supplemental Plan of Distribution (Conflicts of Interest)" below.
- The notes will not be subject to conversion into our common shares or the common shares of any of our affiliates under subsection 39.2(2.3) of the Canada Deposit Insurance Corporation Act (the "CDIC Act").

| Autocallable Note Number | Underlying Assets | Ticker Symbols | Initial Levels | Coupon Barrier Levels and Trigger Levels (% of the Initial Levels) | CUSIP | Principal Amount | Price to Public[1] | Agent's Commission[1] | Proceeds to Bank of Montreal |
|---|---|---|---|---|---|---|---|---|---|
| ARC 426 | SPDR® S&P® Oil & Gas Exploration & Production ETF and VanEck Vectors™ Gold Miners ETF | XOP<br>GDX | | 65.00%<br>65.00% | 06367WBM4 | | 100.00% | 3.00%<br>US$ | 97.00%<br>US$ |

[1] Certain dealers who purchase the notes for sale to certain fee-based advisory accounts may forego some or all of their selling concessions, fees or commissions. The public offering price for investors purchasing the notes in these accounts may be between $970 and $1,000 per $1,000 in principal amount.

***Investing in the notes involves risks, including those described in the "Selected Risk Considerations" section beginning on page P-4 of this pricing supplement, the "Additional Risk Factors Relating to the Notes" section beginning on page PS-5 of the product supplement, and the "Risk Factors" sections beginning on page S-1 of the prospectus supplement and on page 8 of the prospectus.***

**Neither the Securities and Exchange Commission (the "SEC") nor any state securities commission has approved or disapproved of the notes or passed upon the accuracy of this pricing supplement, the product supplement, the prospectus supplement or the prospectus. Any representation to the contrary is a criminal offense.**

The notes will be our unsecured obligations and will not be savings accounts or deposits that are insured by the United States Federal Deposit Insurance Corporation, the Deposit Insurance Fund, the Canada Deposit Insurance Corporation or any other governmental agency or instrumentality or other entity.

On the date of this preliminary pricing supplement, based on the terms set forth above, the estimated initial value of the notes is $942.80 per $1,000 in principal amount. The estimated initial value of the notes on the Pricing Date may differ from this value but will not be less than $925 per $1,000 in principal amount. However, as discussed in more detail in this pricing supplement, the actual value of the notes at any time will reflect many factors and cannot be predicted with accuracy.

**BMO CAPITAL MARKETS**

**Key Terms of the Notes:**

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| Underlying Assets: | The SPDR® S&P® Oil & Gas Exploration & Production ETF (ticker symbol: XOP) and the VanEck Vectors™ Gold Miners ETF (ticker symbol: GDX). See the section below entitled "The Underlying Assets" for additional information about the Underlying Assets. |
| Conditional Coupon: | If the Closing Level of each Underlying Asset is greater than or equal to its respective Coupon Barrier Level as of the applicable quarterly Observation Date, investors will receive an interest payment for that quarter. Holders of the notes may not receive any interest payments during the term of the notes. |
| Interest Rate: | 2.375% of the principal amount per quarter, if payable, unless earlier redeemed. Accordingly, each interest payment, if payable, will equal $23.75 for each $1,000 in principal amount per quarter. The actual interest rate on the notes will be determined on the Pricing Date. |
| Observation Dates: | The fifth scheduled trading day prior to the applicable interest payment date. Each Observation Date is subject to postponement, as set forth in the product supplement in the section "General Terms of the Notes—Market Disruption Events." |
| Interest Payment Dates: | Interest, if payable, will be paid on the last business day of each December, March, June and September beginning on December 31, 2018, and until the maturity date, subject to the automatic redemption feature. |
| Automatic Redemption: | If, on any Call Date beginning on June 21, 2019, the Closing Level of **each** Underlying Asset is greater than or equal to its Call Level, the notes will be automatically redeemed. |
| Payment upon Automatic Redemption: | If the notes are automatically redeemed, then, on the applicable Call Settlement Date, for each $1,000 principal amount, investors will receive the principal amount plus the applicable interest payment. |
| Call Dates: | The fifth ($5^{th}$) business day prior to a Call Settlement Date. |
| Call Settlement Dates: | Quarterly, beginning on June 28, 2019. |
| Payment at Maturity: | If the notes are not automatically redeemed, the payment at maturity for the notes is based on the performance of the Underlying Assets. You will receive $1,000 for each $1,000 in principal amount of the note, unless a Trigger Event has occurred with respect to **any** Underlying Asset.<br><br>If a Trigger Event has occurred with respect to **any** Underlying Asset, you will receive at maturity, for each $1,000 in principal amount of your notes, a cash amount equal to: |

$1,000 + [$1,000 x (Percentage Change of the Lesser Performing Underlying Asset)]

**This amount will be less than the principal amount of your notes, and may be zero.**

You will also receive the final interest payment at maturity, if payable.

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| Trigger Event: | A Trigger Event will be deemed to occur with respect to an Underlying Asset if its Closing Level is less than its Trigger Level on the Valuation Date. |
| Lesser Performing Underlying Asset: | The Underlying Asset that has the lowest Percentage Change. |
| Percentage Changes: | With respect to each Underlying Asset, |

$\frac{\text{Final Level - Initial Level}}{\text{Initial Level}}$, expressed as a percentage

| | |
|---|---|
| Initial Levels: | With respect to each Underlying Asset, its Closing Level on the Pricing Date. |
| Call Levels: | With respect to each Underlying Asset, 100% of its Initial Level. |
| Final Levels: | With respect to each Underlying Asset, its Closing Level on the Valuation Date. |
| Coupon Barrier Levels: | With respect to each Underlying Asset, 65.00% of its Initial Level. |
| Trigger Levels: | With respect to each Underlying Asset, 65.00% of its Initial Level. |
| Pricing Date: | On or about September 25, 2018 |

Settlement Date: On or about September 28, 2018

Valuation Date: On or about September 23, 2022

Maturity Date: On or about September 30, 2022

Calculation Agent: BMOCM

Selling Agent: BMOCM

*The Pricing Date and the settlement date are subject to change. The actual Pricing Date, settlement date, Observation Dates, Interest Payment Dates, Call Dates, Valuation Date and maturity date for the notes will be set forth in the final pricing supplement.*

**Additional Terms of the Notes**

You should read this pricing supplement together with the product supplement dated May 1, 2017, the prospectus supplement dated April 27, 2017 and the prospectus dated April 27, 2017. This pricing supplement, together with the documents listed below, contains the terms of the notes and supersedes all other prior or contemporaneous oral statements as well as any other written materials including preliminary or indicative pricing terms, correspondence, trade ideas, structures for implementation, sample structures, fact sheets, brochures or other educational materials of ours or the agent. You should carefully consider, among other things, the matters set forth in "Additional Risk Factors Relating to the Notes" in the product supplement, as the notes involve risks not associated with conventional debt securities. We urge you to consult your investment, legal, tax, accounting and other advisers before you invest in the notes.

You may access these documents on the SEC website at www.sec.gov as follows (or if such address has changed, by reviewing our filings for the relevant date on the SEC website):

- Product supplement dated May 1, 2017:
  https://www.sec.gov/Archives/edgar/data/927971/000121465917002863/p427170424b5.htm

- Prospectus supplement dated April 27, 2017:
  https://www.sec.gov/Archives/edgar/data/927971/000119312517142764/d381374d424b5.htm

- Prospectus dated April 27, 2017:
  https://www.sec.gov/Archives/edgar/data/927971/000119312517142728/d254784d424b2.htm

Our Central Index Key ("CIK"), on the SEC website is 927971. As used in this pricing supplement, "we," "us" or "our" refers to Bank of Montreal.

We have filed a registration statement (including a prospectus) with the SEC for the offering to which this document relates. Before you invest, you should read the prospectus in that registration statement and the other documents that we have filed with the SEC for more complete information about us and this offering. You may obtain these documents free of charge by visiting the SEC's website at http://www.sec.gov. Alternatively, we will arrange to send to you the prospectus (as supplemented by the prospectus supplement and product supplement) if you request it by calling our agent toll-free at 1-877-369-5412.

**Selected Risk Considerations**

An investment in the notes involves significant risks. Investing in the notes is not equivalent to investing directly in the Underlying Assets or their components. These risks are explained in more detail in the "Additional Risk Factors Relating to the Notes" section of the product supplement.

- **Your investment in the notes may result in a loss.** — The notes do not guarantee any return of principal. If the notes are not automatically redeemed, the payment at maturity will be based on whether a Trigger Event has occurred with respect to **any** Underlying Asset. If a Trigger Event has occurred with respect to **any** Underlying Asset, because the Final Level of **any** Underlying Asset is less than its Initial Level, you will be subject to a one-for-one loss of the principal amount of the notes for any Percentage Change of the Lesser Performing Underlying Asset from its Initial Level. In such a case, you will receive at maturity a cash payment that is less than the principal amount of the notes and may be zero. **Accordingly, you could lose up to the entire principal amount of your notes.**

- **You may not receive any conditional interest payments with respect to your notes.** — If the Closing Level of either Underlying Asset is less than or equal to its respective Coupon Barrier Level as of the applicable quarterly Observation Date, you will not receive a quarterly interest payment on the applicable interest payment date. You may not receive any interest payments during the term of the notes.

- **Your notes are subject to automatic early redemption.** — We will redeem the notes if the Closing Level of **each** Underlying Asset on any Call Date specified above is greater than its Call Level. Following an automatic redemption, you will not receive any additional conditional interest payments on the notes, and you may not be able to reinvest your proceeds in an investment with returns that are comparable to the notes.

- **Your return on the notes is limited to the conditional interest payments, regardless of any appreciation in the value of any Underlying Asset.** — You will not receive a payment at maturity with a value greater than your principal amount plus the final interest payment, if payable. In addition, if the notes are automatically called, you will not receive a payment greater than the principal amount plus the applicable conditional interest payment, even if the Final Level of an Underlying Asset exceeds its Call Level by a substantial amount. Accordingly, your maximum return for each $1,000 in principal amount of the notes is equal to the 16 quarterly payments of $23.75, or $380, a 38.00% return.

- **Your investment is subject to the credit risk of Bank of Montreal.** — Our credit ratings and credit spreads may adversely affect the market value of the notes. Investors are dependent on our ability to pay all amounts due on the notes, and therefore investors are subject to our credit risk and to changes in the market's view of our creditworthiness. Any decline in our credit ratings or increase in the credit spreads charged by the market for taking our credit risk is likely to adversely affect the value of the notes.

**Whether interest is payable on the notes, and your payment at maturity may be determined solely by reference to the Lesser Performing Underlying Asset, even if the other Underlying Asset performs better. —** We will only make each interest payment on the notes if the Closing Level of both Underlying Assets on the applicable Observation Date exceeds the applicable Coupon Barrier, even if the price of the other Underlying Asset has increased significantly. Similarly, if a Trigger Event occurs with respect to any Underlying Asset, your payment at maturity will be determined by reference to the performance of the Lesser Performing Underlying Asset. Even if the other Underlying Asset has appreciated in value compared to its Initial Level, or has experienced a decline that is less than that of the Lesser Performing Underlying Asset, your return at maturity will only be determined by reference to the performance of the Lesser Performing Underlying Asset.

**The payments on the notes will be determined by reference to each Underlying Asset individually, not to a basket, and the payments on the notes will be based on the performance of the Lesser Performing Underlying Asset. —** Whether each interest payment is payable, and the payment at maturity if a Trigger Event occurs, will be determined only by reference to the performance of the Lesser Performing Underlying Asset, regardless of the performance of the other Underlying Asset. The notes are not linked to a weighted basket, in which the risk may be mitigated and diversified among each of the basket components. For example, in the case of notes linked to a weighted basket, the return would depend on the weighted aggregate performance of the basket components reflected as the basket return. As a result, the depreciation of one basket component could be mitigated by the appreciation of the other basket component, as scaled by the weighting of that basket component. However, in the case of the notes, the individual performance of each Underlying Asset would not be combined, and the depreciation of an Underlying Asset would not be mitigated by any appreciation of the other Underlying Asset. Instead, your receipt of interest payments on the notes will depend on the price of both Underlying Assets on each Observation Date, and your return at maturity will depend solely on the Final Level of the Lesser Performing Underlying Asset.

**Potential conflicts.** — We and our affiliates play a variety of roles in connection with the issuance of the notes, including acting as calculation agent. In performing these duties, the economic interests of the calculation agent and other affiliates of ours are potentially adverse to your interests as an investor in the notes. We or one or more of our affiliates may also engage in trading securities held by an Underlying Asset on a regular basis as part of our general broker-dealer and other businesses, for proprietary accounts, for other accounts under management or to facilitate transactions for our customers. Any of these activities could adversely affect the price of an Underlying Asset and, therefore, the market value of the notes. We or one or more of our affiliates may also issue or underwrite other securities or financial or derivative instruments with returns linked or related to changes in the performance of the Underlying Assets. By introducing competing products into the marketplace in this manner, we or one or more of our affiliates could adversely affect the market value of the notes.

**Our initial estimated value of the notes will be lower than the price to public. —** Our initial estimated value of the notes is only an estimate, and is based on a number of factors. The price to public of the notes will exceed our initial estimated value, because costs associated with offering, structuring and hedging the notes are included in the price to public, but are not included in the estimated value. These costs include the underwriting discount and selling concessions, the profits that we and our affiliates expect to realize for assuming the risks in hedging our obligations under the notes and the estimated cost of hedging these obligations. The initial estimated value may be as low as the amount indicated on the cover page of this pricing supplement.

**Our initial estimated value does not represent any future value of the notes, and may also differ from the estimated value of any other party.** — Our initial estimated value of the notes as of the date of this preliminary pricing supplement is, and our estimated value as determined on the Pricing Date will be, derived using our internal pricing models. This value is based on market conditions and other relevant factors, which include volatility of the Underlying Assets, dividend rates and interest rates. Different pricing models and assumptions could provide values for the notes that are greater than or less than our initial estimated value. In addition, market conditions and other relevant factors after the Pricing Date are expected to change, possibly rapidly, and our assumptions may prove to be incorrect. After the Pricing Date, the value of the notes could change dramatically due to changes in market conditions, our creditworthiness, and the other factors set forth in this pricing supplement and the product supplement. These changes are likely to impact the price, if any, at which we or BMOCM would be willing to purchase the notes from you in any secondary market transactions. Our initial estimated value does not represent a minimum price at which we or our affiliates would be willing to buy your notes in any secondary market at any time.

**The terms of the notes are not determined by reference to the credit spreads for our conventional fixed-rate debt.** — To determine the terms of the notes, we will use an internal funding rate that represents a discount from the credit spreads for our conventional fixed-rate debt. As a result, the terms of the notes are less favorable to you than if we had used a higher funding rate.

**Certain costs are likely to adversely affect the value of the notes.** — Absent any changes in market conditions, any secondary market prices of the notes will likely be lower than the price to public. This is because any secondary market prices will likely take into account our then-current market credit spreads, and because any secondary market prices are likely to exclude all or a portion of the agent's commission and the hedging profits and estimated hedging costs that are included in the price to public of the notes and that may be reflected on your account statements. In addition, any such price is also likely to reflect a discount to account for costs associated with establishing or unwinding any related hedge transaction, such as dealer discounts, mark-ups and other transaction costs. As a result,

the price, if any, at which BMOCM or any other party may be willing to purchase the notes from you in secondary market transactions, if at all, will likely be lower than the price to public. Any sale that you make prior to the maturity date could result in a substantial loss to you.

**Owning the notes is not the same as owning shares of the applicable Underlying Asset or a security directly linked to the applicable Underlying Asset.** — The return on your notes will not reflect the return you would realize if you actually owned shares of the applicable Underlying Asset or a security directly linked to the performance of the applicable Underlying Asset and held that investment for a similar period. Your notes may trade quite differently from the applicable Underlying Asset. Changes in the price of the applicable Underlying Asset may not result in comparable changes in the market value of your notes. Even if the price of the applicable Underlying Asset increases during the term of the notes, the market value of the notes prior to maturity may not increase to the same extent. It is also possible for the market value of the notes to decrease while the price of the applicable Underlying Asset increases. In addition, any dividends or other distributions paid on the applicable Underlying Asset will not be reflected in the amount payable on the notes. The return on each of the notes may be less than the return on an investment in the applicable Underlying Asset.

**You will not have any shareholder rights and will have no right to receive any shares of the applicable Underlying Asset at maturity.** — Investing in your notes will not make you a holder of any shares of the applicable Underlying Asset or any securities held by the applicable Underlying Asset. Neither you nor any other holder or owner of the notes will have any voting rights, any right to receive dividends or other distributions, or any other rights with respect to the applicable Underlying Asset or such other securities.

**Changes that affect the applicable Underlying Index will affect the market value of the notes and the amount you will receive at maturity.** — The policies of the applicable index sponsor, S&P Dow Jones Indices LLC ("S&P") for the Underlying Index of the XOP, and NYSE Arca for the Underlying Index of the GDX, concerning the calculation of the applicable Underlying Index, additions, deletions or substitutions of the components of the applicable Underlying Index and the manner in which changes affecting those components, such as stock dividends, reorganizations or mergers, may be reflected in the applicable Underlying Index and, therefore, could affect the share price of the applicable Underlying Asset, the amount payable on the notes at maturity, and the market value of the notes prior to maturity. The amount payable on the notes and their market value could also be affected if the applicable index sponsor changes these policies, for example, by changing the manner in which it calculates the applicable Underlying Index, or if the applicable index sponsor discontinues or suspends the calculation or publication of the applicable Underlying Index.

**We have no affiliation with the index sponsor of the applicable Underlying Index and will not be responsible for its actions.** — The sponsor of the applicable Underlying Index is not our affiliate and will not be involved in the offering of the notes in any way. Consequently, we have no control over the actions of the index sponsor of the applicable Underlying Index, including any actions of the type that would require the calculation agent to adjust the payment to you at maturity. The index sponsors have no obligation of any sort with respect to the notes. Thus, the applicable index sponsor has no obligation to take your interests into consideration for any reason, including in taking any actions that might affect the value of the notes. None of our proceeds from the issuance of the notes will be delivered to the index sponsor of the applicable Underlying Index.

**Adjustments to the applicable Underlying Asset could adversely affect the notes.** — The sponsor and advisor of the applicable Underlying Asset (which is Van Eck Associates Corporation ("Van Eck") for the GDX and SSgA Funds Management, Inc. ("SSFM") for the XOP) is responsible for calculating and maintaining the applicable Underlying Asset. The sponsor and advisor of the applicable Underlying Asset can add, delete or substitute the stocks held by the applicable Underlying Asset or make other methodological changes that could change the share price of the

applicable Underlying Asset at any time. If one or more of these events occurs, the calculation of the amount payable at maturity may be adjusted to reflect such event or events. Consequently, any of these actions could adversely affect the amount payable at maturity and/or the market value of the applicable notes.

**We and our affiliates do not have any affiliation with the applicable investment advisor of the applicable Underlying Asset and are not responsible for its public disclosure of information.** — The investment advisor of the applicable Underlying Asset advises the applicable Underlying Asset on various matters including matters relating to the policies, maintenance and calculation of the applicable Underlying Asset. We and our affiliates are not affiliated with the applicable investment advisor in any way and have no ability to control or predict its actions, including any errors in or discontinuance of disclosure regarding its methods or policies relating to the applicable Underlying Asset. The applicable investment advisor is not involved in the offerings of the notes in any way and has no obligation to consider your interests as an owner of the notes in taking any actions relating to the applicable Underlying Asset that might affect the value of the notes. Neither we nor any of our affiliates has independently verified the adequacy or accuracy of the information about the applicable investment advisor or the applicable Underlying Asset contained in any public disclosure of information. You, as an investor in the notes, should make your own investigation into the applicable Underlying Asset.

**The correlation between the performance of the applicable Underlying Asset and the performance of the applicable Underlying Index may be imperfect**. — The performance of the applicable Underlying Asset is linked principally to the performance of the applicable Underlying Index. However, because of the potential discrepancies identified in more detail in the product supplement, the return on the applicable Underlying Asset may correlate imperfectly with the return on the applicable Underlying Index.

**The applicable Underlying Asset is subject to management risks.** — The applicable Underlying Asset is subject to management risk, which is the risk that the applicable investment advisor's investment strategy, the implementation of which is subject to a number of constraints, may not produce the intended results. For example, the applicable investment advisor may invest a portion of the applicable Underlying Asset's assets in securities not included in the relevant industry or sector but which the applicable investment advisor believes will help the applicable Underlying Asset track the relevant industry or sector.

**Lack of liquidity.** — The notes will not be listed on any securities exchange. BMOCM may offer to purchase the notes in the secondary market, but is not required to do so. Even if there is a secondary market, it may not provide enough liquidity to allow you to trade or sell the notes easily. Because other dealers are not likely to make a secondary market for the notes, the price at which you may be able to trade the notes is likely to depend on the price, if any, at which BMOCM is willing to buy the notes.

**Hedging and trading activities.** — We or any of our affiliates may carry out hedging activities related to the notes, including purchasing or selling shares of an Underlying Asset or securities held by the applicable Underlying Asset, or futures or options relating to the applicable Underlying Asset, or other derivative instruments with returns linked or related to changes in the performance of the applicable Underlying Asset. We or our affiliates may also engage in trading of shares of the applicable Underlying Asset or securities held by the applicable Underlying Asset from time to time. Any of these hedging or trading activities on or prior to the Pricing Date and during the term of the notes could adversely affect our payment to you at maturity.

**Many economic and market factors will influence the value of the notes.** — In addition to the price of each Underlying Asset and interest rates on any trading day, the value of the notes will be affected by a number of economic and market factors that may either offset or magnify each other, and which are described in more detail in

the product supplement.

- **You must rely on your own evaluation of the merits of an investment linked to the Underlying Assets.** — In the ordinary course of their businesses, our affiliates from time to time may express views on expected movements in the prices of the Underlying Assets or the prices of the securities held by the Underlying Assets. One or more of our affiliates have published, and in the future may publish, research reports that express views on the Underlying Assets or these securities. However, these views are subject to change from time to time. Moreover, other professionals who deal in the markets relating to the Underlying Assets at any time may have significantly different views from those of our affiliates. You are encouraged to derive information concerning the Underlying Assets from multiple sources, and you should not rely on the views expressed by our affiliates.

Neither the offering of the notes nor any views which our affiliates from time to time may express in the ordinary course of their businesses constitutes a recommendation as to the merits of an investment in the notes.

- **Significant aspects of the tax treatment of the notes are uncertain.** — The tax treatment of the notes is uncertain. We do not plan to request a ruling from the Internal Revenue Service or from any Canadian authorities regarding the tax treatment of the notes, and the Internal Revenue Service or a court may not agree with the tax treatment described in this pricing supplement.

The Internal Revenue Service has released a notice that may affect the taxation of holders of "prepaid forward contracts" and similar instruments. According to the notice, the Internal Revenue Service and the U.S. Treasury are actively considering whether the holder of such instruments should be required to accrue ordinary income on a current basis. While it is not clear whether the notes would be viewed as similar to such instruments, it is possible that any future guidance could materially and adversely affect the tax consequences of an investment in the notes, possibly with retroactive effect.

Please read carefully the section entitled "Supplemental U.S. Federal Income Tax Considerations" in this pricing supplement, the section entitled "United States Federal Income Taxation" in the accompanying prospectus and the section entitled "Certain Income Tax Consequences" in the accompanying prospectus supplement. You should consult your tax advisor about your own tax situation.

**Additional Risks Relating to the SPDR® S&P® Oil & Gas Exploration & Production ETF**

- **The stocks included in the Underlying Index of the SPDR® S&P® Oil & Gas Exploration & Production ETF are concentrated in one sector.** — All of the stocks included in the applicable Underlying Index are issued by companies in the oil and gas exploration and production sector. As a result, the stocks that will determine the performance of the applicable Underlying Index, which the applicable Underlying Asset seeks to replicate, are concentrated in one sector. Although an investment in the notes will not give holders any ownership or other direct interests in the stocks comprising the applicable Underlying Index, the return on an investment in the notes will be subject to certain risks associated with a direct equity investment in companies in the oil and gas exploration and production sector. Accordingly, by investing in the notes, you will not benefit from the diversification which could result from an investment linked to companies that operate in multiple sectors.

The issuers of the stocks held by the applicable Underlying Asset and included in the applicable Underlying Index develop and produce, among other things, crude oil and natural gas, and provide, among other things, drilling services and other services related to oil and gas production and distribution. Stock prices for these types of companies are affected by supply and demand both for their specific product or service and for oil and gas products in general. The price of oil and gas, exploration and production spending, government regulation, world events and economic conditions will likewise affect the performance of these companies. Correspondingly, the stocks of companies in this sector are subject to swift price fluctuations caused by events relating to international politics, energy conservation, the success of exploration projects and tax and other governmental regulatory policies. Weak demand for the companies' products or services or for oil and gas products and services in general, as well as negative developments in these other areas, would adversely impact the value of the stocks held by the applicable Underlying Asset and included in the applicable Underlying Index, the market price of the applicable Underlying Asset, and the value of the notes.

**Additional Risks Relating to the VanEck Vectors™ Gold Miners ETF**

**The holdings of the VanEck Vectors™ Gold Miners ETF are concentrated in the gold and silver mining industries.** — All or substantially all of the equity securities held by the GDX are issued by gold or silver mining companies. An investment in the notes will be exposed to risks in the gold and silver mining industries. As a result of being linked to a single industry or sector, the notes may have increased volatility as the share price of the GDX may be more susceptible to adverse factors that affect that industry or sector. Competitive pressures may have a significant effect on the financial condition of companies in these industries.

In addition, these companies are highly dependent on the price of gold or silver, as applicable. These prices fluctuate widely and may be affected by numerous factors. Factors affecting gold prices include economic factors, including, among other things, the structure of and confidence in the global monetary system, expectations of the future rate of inflation, the relative strength of, and confidence in, the U.S. dollar (the currency in which the price of gold is generally quoted), interest rates and gold borrowing and lending rates, and global or regional economic, financial, political, regulatory, judicial or other events. Gold prices may also be affected by industry factors such as industrial and jewelry demand, lending, sales and purchases of gold by the official sector, including central banks and other governmental agencies and multilateral institutions which hold gold, levels of gold production and production costs, and short-term changes in supply and demand because of trading activities in the gold market. Factors affecting silver prices include general economic trends, technical developments, substitution issues and regulation, as well as specific factors including industrial and jewelry demand, expectations with respect to the rate of inflation, the relative strength of the U.S. dollar (the currency in which the price of silver is generally quoted) and other currencies, interest rates, central bank sales, forward sales by producers, global or regional political or economic events, and production costs and disruptions in major silver producing countries such as Mexico and Peru. The supply of silver consists of a combination of new mine production and existing stocks of bullion and fabricated silver held by governments, public and private financial institutions, industrial organizations and private individuals. In addition, the price of silver has on occasion been subject to very rapid short-term changes due to speculative activities. From time to time, above-ground inventories of silver may also influence the market.

- **Relationship to gold and silver bullion.** — The GDX invests in shares of gold and silver mining companies, but not in gold bullion or silver bullion. The GDX may under- or over-perform gold bullion and/or silver bullion over the term of the notes.

**Additional Risks Relating to the Terms of the Indenture and the Notes**

- The notes will be subject to risks, including non-payment in full, under Canadian Bank Resolution Powers. — Under Canadian bank resolution powers, the Canada Deposit Insurance Corporation ("CDIC") may, in circumstances where we have ceased, or are about to cease, to be viable, assume temporary control or ownership of us and may be granted broad powers by one or more orders of the Governor in Council (Canada), each of which we refer to as an "Order," including the power to sell or dispose of all or a part of our assets, and the power to carry out or cause us to carry out a transaction or a series of transactions the purpose of which is to restructure our business. As part of the Canadian bank resolution powers, certain provisions of, and regulations under, the Bank Act (Canada) (the "Bank Act"), the CDIC Act and certain other Canadian federal statutes pertaining to banks, which we refer to collectively as the "bail-in regime," provide for a bank recapitalization regime for banks designated by the Superintendent of Financial Institutions (Canada) (the "Superintendent") as domestic systemically important banks, which include us.

If the CDIC were to take action under the Canadian bank resolution powers with respect to us, this could result in a write-off or write-down on the notes. As a result, you should consider the risk that you may lose all of your investment, including the principal amount [plus any accrued interest] *[include if applicable]*, if the CDIC were to take action under the Canadian bank resolution powers, and that any remaining outstanding notes may be of little value at the time of the exercise of these powers and thereafter.

There is no limitation on the type of Order that may be made where it has been determined that we have ceased, or are about to cease, to be viable. As a result, you may be exposed to losses through the use of Canadian bank resolution powers.

- **The indenture under which the notes will be issued will provide only limited acceleration and enforcement rights for the notes.** — Our indenture under which the notes will be issued will be amended to provide that acceleration of the notes will only be permitted (a) if we default in the payment of the principal of, or interest on, any of the notes and, in such case, the default continues for a period of 30 business days, or (b) certain bankruptcy, insolvency or reorganization events occur.

**Examples of the Hypothetical Payment at Maturity for a $1,000 Investment in the Notes**

The following table illustrates the hypothetical payments on a note at maturity, assuming that the notes are not automatically called. The hypothetical payments are based on a $1,000 investment in the note, a hypothetical Initial Level of 100.00 for each Underlying Asset, a hypothetical Trigger Level of $65.00 for each Underlying Asset (65.00% of its hypothetical Initial Level), a hypothetical Call Level of 100 for each Underlying Asset (100% of its hypothetical Initial Level), a range of hypothetical Final Levels of the Lesser Performing Underlying Asset and the effect on the payment at maturity.

The hypothetical examples shown below are intended to help you understand the terms of the notes. If the notes are not automatically called, the actual cash amount that you will receive at maturity will depend upon whether the Final Level of **any** Underlying Asset is below its Trigger Level on the Valuation Date. If the notes are automatically called prior to maturity, the hypothetical examples below will not be relevant, and you will receive on the applicable Call Settlement Date, for each $1,000 principal amount, the principal amount plus the applicable interest payment, if payable.

Your total return on the notes will also depend on the number of quarterly periods in which interest is payable, as set forth above.

| **Hypothetical Final Level of the Lesser Performing Underlying Asset** | **Hypothetical Final Level of the Lesser Performing Underlying Asset Expressed as a Percentage of the Initial Level** | **Payment at Maturity (Excluding Any Conditional Interest Payment)** |
|---|---|---|
| 150.00 | 150.00% | $1,000.00 |
| 125.00 | 125.00% | $1,000.00 |
| 110.00 | 110.00% | $1,000.00 |
| 100.00 | 100.00% | $1,000.00 |
| 90.00 | 90.00% | $1,000.00 |
| 85.00 | 85.00% | $1,000.00 |
| 75.00 | 75.00% | $1,000.00 |
| 70.00 | 70.00% | $1,000.00 |
| 65.00 | 65.00% | $1,000.00 |
| 60.00 | 60.00% | $600.00 |
| 50.00 | 50.00% | $500.00 |
| 25.00 | 25.00% | $250.00 |
| 0.00 | 0.00% | $0.00 |

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**Supplemental U.S. Federal Income Tax Considerations**

*The following, together with the discussion of U.S. federal income taxation in the accompanying prospectus and prospectus supplement, is a general description of the material U.S. tax considerations relating to the notes. It does not purport to be a complete analysis of all tax considerations relating to the notes. Prospective purchasers of the notes should consult their tax advisors as to the consequences under the tax laws of the country of which they are resident for tax purposes and the tax laws of Canada and the U.S. of acquiring, holding and disposing of the notes and receiving payments under the notes. This summary is based upon the law as in effect on the date of this pricing supplement and is subject to any change in law that may take effect after such date.*

The following section supplements the discussion of U.S. federal income taxation in the accompanying prospectus and prospectus supplement with respect to United States holders (as defined in the accompanying prospectus). It applies only to those holders who are not excluded from the discussion of U.S. federal income taxation in the accompanying prospectus. It does not apply to holders subject to special rules including holders subject to Section 451(b) of the Code. In addition, the discussion below assumes that an investor in the notes will be subject to a significant risk that it will lose a significant amount of its investment in the notes. Bank of Montreal intends to treat conditional interest payments with respect to the notes as U.S. source income for U.S. federal income tax purposes.

You should consult your tax advisor concerning the U.S. federal income tax and other tax consequences of your investment in the notes in your particular circumstances, including the application of state, local or other tax laws and the possible effects of changes in federal or other tax laws.

NO STATUTORY, JUDICIAL OR ADMINISTRATIVE AUTHORITY DIRECTLY DISCUSSES HOW THE NOTES SHOULD BE TREATED FOR U.S. FEDERAL INCOME TAX PURPOSES. AS A RESULT, THE U.S. FEDERAL INCOME TAX CONSEQUENCES OF AN INVESTMENT IN THE NOTES ARE UNCERTAIN. BECAUSE OF THE UNCERTAINTY, YOU SHOULD CONSULT YOUR TAX ADVISOR IN DETERMINING THE U.S. FEDERAL INCOME TAX AND OTHER TAX CONSEQUENCES OF YOUR INVESTMENT IN THE NOTES, INCLUDING THE APPLICATION OF STATE, LOCAL OR OTHER TAX LAWS AND THE POSSIBLE EFFECTS OF CHANGES IN FEDERAL OR OTHER TAX LAWS.

We will not attempt to ascertain whether either Underlying Asset or any of the entities whose stock is owned by either Underlying Asset would be treated as a “passive foreign investment company” within the meaning of Section 1297 of the Code or a “U.S. real property holding corporation” within the meaning of Section 897 of the Code. If either Underlying Asset or any of the entities whose stock is owned by either Underlying Asset were so treated, certain adverse U.S. federal income tax consequences could possibly apply. You should refer to any available information filed with the SEC by the Underlying Assets and the entities whose stock is owned by the Underlying Assets and consult your tax advisor regarding the possible consequences to you in this regard.

In the opinion of our counsel, Morrison & Foerster LLP, it would generally be reasonable to treat a note with terms described in this pricing supplement as a pre-paid cash-settled contingent income-bearing derivative contract in respect of the Underlying Assets for U.S. federal income tax purposes, and the terms of the notes require a holder and us (in the absence of a change in law or an administrative or judicial ruling to the contrary) to treat the notes for all tax purposes in accordance with such characterization. Although the U.S. federal income tax treatment of the conditional interest payments is uncertain, we intend to take the position, and the following discussion assumes, that such conditional interest payments (including any interest payment on or with respect to the maturity date) constitute taxable ordinary income to a United States holder at the time received or accrued in accordance with the holder's regular method of accounting. If the notes are treated as described above, it would be reasonable for a United States holder to take the position that it will recognize capital gain or loss upon the sale or maturity of the notes in an amount equal to the difference between the amount a United States holder receives at such time (other than amounts properly attributable to any interest payments, which would be treated, as described above, as ordinary income) and the United States holder's tax basis in the notes. In general, a United States holder's tax basis in the notes will be equal to the price the holder paid for the notes. Capital gain recognized by an individual United States holder is generally taxed at ordinary income rates where the property is held for one year or less. The deductibility of capital losses is subject to limitations.

**Alternative Treatments**

Alternative tax treatments of the notes are also possible and the Internal Revenue Service might assert that a treatment other than that described above is more appropriate. For example, it would be possible to treat the notes, and the Internal Revenue Service might assert that the notes should be treated, as a single debt instrument. If the notes are so treated, a United States holder would generally be required to accrue interest currently over the term of the notes irrespective of the conditional interest payments, if any, paid on the notes. In addition, any gain a United States holder might recognize upon the sale or maturity of the notes would be ordinary income and any loss recognized by a holder at such time would be ordinary loss to the extent of interest that same holder included in income in the current or previous taxable years in respect of the notes, and thereafter, would be capital loss.

Because of the absence of authority regarding the appropriate tax characterization of the notes, it is also possible that the Internal Revenue Service could seek to characterize the notes in a manner that results in other tax consequences that are different from those described above.

The Internal Revenue Service has released a notice that may affect the taxation of holders of the notes. According to the notice, the Internal Revenue Service and the Treasury Department are actively considering whether the holder of an instrument such as the notes should be required to accrue ordinary income on a current basis irrespective of any interest payments, and they sought taxpayer comments on the subject. It is not possible to determine what guidance they will ultimately issue, if any. It is possible, however, that under such guidance, holders of the notes will ultimately be required to accrue income currently and this could be applied on a retroactive basis. The Internal Revenue Service and the Treasury Department are also considering other relevant issues, including whether additional gain or loss from such instruments should be treated as ordinary or capital and whether the special "constructive ownership rules" of Section 1260 of the Code might be applied to such instruments. Holders are urged to consult their tax advisors concerning the significance, and the potential impact, of the above considerations. We intend to treat the notes for U.S. federal income tax purposes in accordance with the treatment described in this pricing supplement unless and until such time as the Treasury Department and Internal Revenue Service determine that some other treatment is more appropriate.

**Backup Withholding and Information Reporting**

Please see the discussion under "United States Federal Income Taxation—Other Considerations—Backup Withholding and Information Reporting" in the accompanying prospectus for a description of the applicability of the backup withholding and information reporting rules to payments made on your notes.

**Non-United States Holders**

The following discussion applies to non-United States holders of the notes. A non-United States holder is a beneficial owner of a note that, for U.S. federal income tax purposes, is a non-resident alien individual, a foreign corporation, or a foreign estate or trust.

While the U.S. federal income tax treatment of the notes (including proper characterization of the conditional interest payments for U.S. federal income tax purposes) is uncertain, U.S. federal income tax at a 30% rate (or at a lower rate under an applicable income tax treaty) will be withheld in respect of the conditional interest payments paid to a non-United States holder unless such payments are effectively connected with the conduct by the non-United States holder of a trade or business in the U.S. (in which case, to avoid withholding, the non-United States holder will be required to provide a Form W-8ECI). We will not pay any additional amounts in respect of such withholding. To claim benefits under an income tax treaty, a non-United States holder must obtain a taxpayer identification number and certify as to its eligibility under the appropriate treaty's limitations on benefits article, if applicable (which certification may generally be made on a Form W-8BEN or W-8BEN-E, or a substitute or successor form). In addition, special rules may apply to claims for treaty benefits made by corporate non-United States holders. A non-United States holder that is eligible for a reduced rate of U.S. federal withholding tax pursuant to an income tax treaty may obtain a refund of any excess amounts withheld by filing an appropriate claim for refund with the Internal Revenue Service. The availability of a lower rate of withholding or an exemption from withholding under an applicable income tax treaty will depend on the proper characterization of the conditional interest payments under U.S. federal income tax laws and whether such treaty rate or exemption applies to such payments. No assurance can be provided on the proper characterization of the conditional interest payments for U.S. federal income tax purposes and, accordingly, no assurance can be provided on the availability of benefits under any income tax treaty. Non-United States holders must consult their tax advisors in this regard.

Except as discussed below, a non-United States holder will generally not be subject to U.S. federal income or withholding tax on any gain (not including for the avoidance of doubt any amounts properly attributable to any interest which would be subject to the rules discussed in the previous paragraph) upon the sale or maturity of the notes, provided that (i) the holder complies with any applicable certification requirements (which certification may generally be made on a Form W-8BEN or W-8BEN-E, or a substitute or successor form), (ii) the payment is not effectively connected with the conduct by the holder of a U.S. trade or business, and (iii) if the holder is a non-resident alien individual, such holder is not present in the U.S. for 183 days or more during the taxable year of the sale or maturity of the notes. In the case of (ii) above, the holder generally would be subject to U.S. federal income tax with respect to any income or gain in the same manner as if the holder were a United States holder and, in the case of a holder that is a corporation, the holder may also be subject to a branch profits tax equal to 30% (or such lower rate provided by an applicable U.S. income tax treaty) of a portion of its earnings and profits for the taxable year that are effectively connected with its conduct of a trade or business in the U.S., subject to certain adjustments. Payments made to a non-United States holder may be subject to information reporting and to backup withholding unless the holder complies with applicable certification and identification requirements as to its foreign status.

A “dividend equivalent” payment is treated as a dividend from sources within the U.S. and such payments generally would be subject to a 30% U.S. withholding tax if paid to a non-United States holder. Under U.S. Treasury Department regulations, payments (including deemed payments) with respect to equity-linked instruments (“ELIs”) that are “specified ELIs” may be treated as dividend equivalents if such specified ELIs reference an interest in an “underlying security,” which is generally any interest in an entity taxable as a corporation for U.S. federal income tax purposes if a payment with respect to such interest could give rise to a U.S. source dividend. However, Internal Revenue Service guidance provides that withholding on dividend equivalent payments will not apply to specified ELIs that are not delta-one instruments and that are issued before January 1, 2019. Based on our determination that the notes are not “delta-one” instruments, non-United States holders should not be subject to withholding on dividend equivalent payments, if any, under the notes. However, it is possible that the notes could be treated as deemed reissued for U.S. federal income tax purposes upon the occurrence of certain events affecting the Underlying Assets or the notes, and following such occurrence the notes could be treated as delta-one specified ELIs that are subject to withholding on dividend equivalent payments. Non-United States holders that enter, or have entered, into other transactions in respect of the Underlying Assets or the notes should consult their tax advisors as to the application of the dividend equivalent withholding tax in the context of the notes and their other transactions. If any payments are treated as dividend equivalents subject to withholding, we (or the applicable paying agent) would be entitled to withhold taxes without being required to pay any additional amounts with respect to amounts so withheld.

As discussed above, alternative characterizations of the notes for U.S. federal income tax purposes are possible. Should an alternative characterization, by reason of change or clarification of the law, by regulation or otherwise, cause payments as to the notes to become subject to withholding tax in addition to the withholding tax described above, we will withhold tax at the applicable statutory rate. The Internal Revenue Service has also indicated that it is considering whether income in respect of instruments such as the notes should be subject to withholding tax. Prospective investors should consult their own tax advisors in this regard.

**Foreign Account Tax Compliance Act**

The Foreign Account Tax Compliance Act imposes a 30% U.S. withholding tax on certain U.S. source payments, including interest (and OID), dividends, other fixed or determinable annual or periodical gain, profits, and income, and on the gross proceeds from a disposition of property of a type which can produce U.S. source interest or dividends ("Withholdable Payments"), if paid to a foreign financial institution (including amounts paid to a foreign financial institution on behalf of a holder), unless such institution enters into an agreement with the Treasury Department to collect and provide to the Treasury Department substantial information regarding U.S. account holders, including certain account holders that are foreign entities with U.S. owners, with such institution. A note may constitute an account for these purposes. The legislation also generally imposes a withholding tax of 30% on Withholdable Payments made to a non-financial foreign entity unless such entity provides the withholding agent with a certification that it does not have any substantial U.S. owners or a certification identifying the direct and indirect substantial U.S. owners of the entity.

The U.S. Treasury Department and the Internal Revenue Service have announced that withholding on payments of gross proceeds from a sale or redemption of the notes will only apply to payments made after December 31, 2018. If we determine withholding is appropriate with respect to the notes, we will withhold tax at the applicable statutory rate, and we will not pay any additional amounts in respect of such withholding. Account holders subject to information reporting requirements pursuant to the Foreign Account Tax Compliance Act may include holders of the notes. Foreign financial institutions and non-financial foreign entities located in jurisdictions that have an intergovernmental agreement with the United States governing the Foreign Account Tax Compliance Act may be subject to different rules. Holders are urged to consult with their own tax advisors regarding the possible implications of this legislation on their investment in the notes.

**Supplemental Plan of Distribution (Conflicts of Interest)**

BMOCM will purchase the notes from us at a purchase price reflecting the commission set forth on the cover page of this pricing supplement. BMOCM has informed us that, as part of its distribution of the notes, it will reoffer the notes to other dealers who will sell them. Each such dealer, or each additional dealer engaged by a dealer to whom BMOCM reoffers the notes, will receive a commission from BMOCM, which will not exceed the commission set forth on the cover page.

Certain dealers who purchase the notes for sale to certain fee-based advisory accounts may forego some or all of their selling concessions, fees or commissions. The public offering price for investors purchasing the notes in these accounts may be less than 100% of the principal amount, as set forth on the cover page of this document. Investors that hold their notes in these accounts may be charged fees by the investment advisor or manager of that account based on the amount of assets held in those accounts, including the notes.

We will deliver the notes on a date that is greater than two business days following the pricing date. Under Rule 15c6-1 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), trades in the secondary market generally are required to settle in two business days, unless the parties to any such trade expressly agree otherwise. Accordingly, purchasers who wish to trade the notes more than two business days prior to the settlement date will be required to specify alternative settlement arrangements to prevent a failed settlement.

We own, directly or indirectly, all of the outstanding equity securities of BMOCM, the agent for this offering. In accordance with FINRA Rule 5121, BMOCM may not make sales in this offering to any of its discretionary accounts without the prior written approval of the customer.

We reserve the right to withdraw, cancel or modify the offering of the notes and to reject orders in whole or in part. You may cancel any order for the notes prior to its acceptance.

You should not construe the offering of the notes as a recommendation of the merits of acquiring an investment linked to any Underlying Asset or as to the suitability of an investment in the notes.

BMOCM may, but is not obligated to, make a market in the notes. BMOCM will determine any secondary market prices that it is prepared to offer in its sole discretion.

We may use the final pricing supplement relating to the notes in the initial sale of the notes. In addition, BMOCM or another of our affiliates may use the final pricing supplement relating to the notes in market-making transactions in any notes after their initial sale. Unless BMOCM or we inform you otherwise in the confirmation of sale, the final pricing supplement is being used by BMOCM in a market-making transaction.

For a period of approximately three months following issuance of the notes, the price, if any, at which we or our affiliates would be willing to buy the notes from investors, and the value that BMOCM may also publish for the notes through one or more financial information vendors and which could be indicated for the notes on any brokerage account statements, will reflect a temporary upward adjustment from our estimated value of the notes that would otherwise be determined and applicable at that time. This temporary upward adjustment represents a portion of (a) the hedging profit that we or our affiliates expect to realize over the term of the notes and (b) the underwriting discount and the selling concessions paid in connection with this offering. The amount of this temporary upward adjustment will decline to zero on a straight-line basis over the three-month period.

No Prospectus (as defined in Directive 2003/71/EC (as amended, the “Prospectus Directive”)) will be prepared in connection with the notes. Accordingly, the notes may not be offered to the public in any member state of the European Economic Area (the “EEA”), and any purchaser of the notes who subsequently sells any of the notes in any EEA member state must do so only in accordance with the requirements of the Prospectus Directive, as implemented in that member state.

The notes are not intended to be offered, sold or otherwise made available to, and should not be offered, sold or otherwise made available to, any retail investor in the EEA. For these purposes, the expression “offer" includes the communication in any form and by any means of sufficient information on the terms of the offer and the notes to be offered so as to enable an investor to decide to purchase or subscribe the notes, and a “retail investor” means a person who is one (or more) of: (a) a retail client, as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, “MiFID II”); or (b) a customer, within the meaning of Insurance Distribution Directive 2016/97/EU, as amended, where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or (c) not a qualified investor as defined in the Prospectus Directive. Consequently, no key information document required by Regulation (EU) No 1286/2014 (as amended, the “PRIIPs Regulation”) for offering or selling the notes or otherwise making them available to retail investors in the EEA has been prepared, and therefore, offering or selling the notes or otherwise making them available to any retail investor in the EEA may be unlawful under the PRIIPs Regulation.

**Additional Information Relating to the Estimated Initial Value of the Notes**

Our estimated initial value of the notes on the date of this preliminary pricing supplement, and that will be set forth on the cover page of the final pricing supplement relating to the notes, equals the sum of the values of the following hypothetical components:

- a fixed-income debt component with the same tenor as the notes, valued using our internal funding rate for structured notes; and
- one or more derivative transactions relating to the economic terms of the notes.

The internal funding rate used in the determination of the initial estimated value generally represents a discount from the credit spreads for our conventional fixed-rate debt. The value of these derivative transactions are derived from our internal pricing models. These models are based on factors such as the traded market prices of comparable derivative instruments and on other inputs, which include volatility, dividend rates, interest rates and other factors. As a result, the estimated initial value of the notes on the Pricing Date will be determined based on market conditions at that time.

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**The Underlying Assets**

We have derived the following information regarding each of the applicable Underlying Assets from publicly available documents. We have not independently verified the accuracy or completeness of the following information. We are not affiliated with any of the Underlying Assets and the Underlying Assets will have no obligations with respect to the applicable notes. This pricing supplement relates only to the applicable notes and does not relate to the shares of any of the Underlying Assets or to the securities in any of the Underlying Indices. Neither we nor BMOCM participates in the preparation of the publicly available documents described below. Neither we nor BMOCM has made any due diligence inquiry with respect to any of the Underlying Assets in connection with the offering of the notes. There can be no assurance that all events occurring prior to the date of this pricing supplement, including events that would affect the accuracy or completeness of the publicly available documents described below, that would affect the trading prices of the shares of any of the Underlying Assets have been or will be publicly disclosed. Subsequent disclosure of any events or the disclosure of or failure to disclose material future events concerning any of the Underlying Assets could affect the value of the shares of the applicable Underlying Asset and therefore could affect the Payment at Maturity.

The selection of the applicable Underlying Asset relating to any of the notes is not a recommendation to buy or sell the shares of the applicable Underlying Asset. Neither we nor any of our affiliates make any representation to you as to the performance of the shares of any of the Underlying Assets. Information provided to or filed with the SEC under the Exchange Act and the Investment Company Act of 1940 relating to each Underlying Asset may be obtained through the SEC's website at http://www.sec.gov.

***SPDR® S&P® Oil & Gas Exploration & Production ETF***

In this section, Underlying Asset Issuer refers to the XOP, Underlying Asset refers to the shares of the XOP, and Underlying Index refers to the S&P® Oil & Gas Exploration & Production Select Industry® Index.

The Underlying Asset is an investment portfolio maintained and managed by SSFM. The Underlying Asset trades on the NYSE Arca under the ticker symbol "XOP." The inception date of the Underlying Asset is June 19, 2006. Prior to January 8, 2007, the Underlying Asset was known as the SPDR® Oil & Gas Exploration & Production ETF.

Information provided to or filed with the SEC by the SPDR® Series Trust ("SPDR") under the Exchange Act can be located by reference to its CIK, 1064642 through the SEC's website at http://www.sec.gov. Additional information about SSFM and the Underlying Asset may be obtained from other sources including, but not limited to, press releases, newspaper articles and other publicly disseminated documents. We have not made any independent investigation as to the accuracy or completeness of such information.

The Underlying Asset seeks to provide investment results that correspond generally to the price and yield performance, before fees and expenses, of the Underlying Index. The Underlying Index represents the oil and gas exploration and production sub-industry portion of the S&P Total Market Index ("S&P TMI"), an index that measures the performance of the U.S. equity market. The Underlying Asset is composed of companies that are in the oil and gas sector exploration and production.

The Underlying Asset utilizes a sampling strategy, which means that it is not required to purchase all of the securities represented in its Underlying Index. Instead, it may purchase a subset of the securities in the Underlying Index in an effort to hold a portfolio of securities with generally the same risk and return characteristics of the Underlying Index. Under normal market conditions, the Underlying Asset will invest at least 80% of its total assets in common stocks that comprise the Underlying Index.

The information above was compiled from the SPDR® website. We have not independently investigated the accuracy of that information. Information contained in the SPDR® website is not incorporated by reference in, and should not be considered a part of, this document.

**The Underlying Index: S&P® Oil & Gas Exploration & Production Select Industry® Index**

We have derived all information contained in this document regarding the Underlying Index, including, without limitation, its make-up, method of calculation and changes in its components, from publicly available information. Such information reflects the policies of, and is subject to change by, S&P.

The Underlying Index is an equal-weighted index that is designed to measure the performance of the oil and gas exploration and production sub-industry portion of the S&P TMI. The S&P TMI includes all U.S. common equities listed on the NYSE (including NYSE Arca), the NYSE American, the Nasdaq Global Select Market, and the Nasdaq Capital Market. Each of the component stocks in the Underlying Index is a constituent company within the oil and gas exploration and production sub-industry portion of the S&P TMI.

To be eligible for inclusion in the Underlying Index, companies must be in the S&P TMI and must be included in the relevant Global Industry Classification Standard (the "GICS") sub-industry. The GICS was developed to establish a global standard for categorizing companies into sectors and industries. In addition to the above, companies must satisfy one of the two following combined size and liquidity criteria:

- float-adjusted market capitalization above US$500 million and float-adjusted liquidity ratio above 90%; or

- float-adjusted market capitalization above US$400 million and float-adjusted liquidity ratio above 150%.

All U.S. companies satisfying these requirements are included in the Underlying Index. The total number of companies in the Underlying Index should be at least 35. If there are fewer than 35 stocks, stocks from a supplementary list of highly correlated sub-industries that meet the market capitalization and liquidity thresholds above are included in order of their float-adjusted market capitalization to reach 35 constituents. Minimum market capitalization requirements may be relaxed to ensure there are at least 22 companies in the Underlying Index as of each rebalancing effective date.

Eligibility factors include:

- Market Capitalization: Float-adjusted market capitalization should be at least US$400 million for inclusion in the Underlying Index. Existing index components must have a float-adjusted market capitalization of US$300 million to remain in the Underlying Index at each rebalancing.

- Liquidity: The liquidity measurement used is a liquidity ratio, defined as dollar value traded over the previous 12-months divided by the float-adjusted market capitalization as of the Underlying Index rebalancing reference date. Stocks having a float-adjusted market capitalization above US$500 million must have a liquidity ratio greater than 90% to be eligible for addition to the Underlying Index. Stocks having a float-adjusted market capitalization between US$400 and US$500 million must have a liquidity ratio greater than 150% to be eligible for addition to the Underlying Index. Existing index constituents must have a liquidity ratio greater than 50% to remain in the Underlying Index at the quarterly rebalancing. The length of time to evaluate liquidity is reduced to the available trading period for IPOs or spin-offs that do not have 12 months of trading history.

- Takeover Restrictions: At the discretion of S&P, constituents with shareholder ownership restrictions defined in company bylaws may be deemed ineligible for inclusion in the Underlying Index. Ownership restrictions preventing entities from replicating the index weight of a company may be excluded from the eligible universe or removed from the Underlying Index.

Turnover: S&P believes turnover in index membership should be avoided when possible. At times, a company may appear to temporarily violate one or more of the addition criteria. However, the addition criteria are for addition to the Underlying Index, not for continued membership. As a result, an index constituent that appears to violate the criteria for addition to the Underlying Index will not be deleted unless ongoing conditions warrant a change in the composition of the Underlying Index.

***VanEck Vectors™ Gold Miners ETF***

In this section, Underlying Asset Issuer refers to the GDX, Underlying Asset refers to the shares of the GDX, and the Underlying Index refers to the NYSE Arca Gold Miners Index.

The Underlying Asset is an investment portfolio maintained, managed and advised by Van Eck. The Market Vectors® ETF Trust is a registered open-end investment company that consists of numerous separate investment portfolios, including the Underlying Asset.

The Underlying Asset is an exchange traded fund that trades on NYSE Arca under the ticker symbol "GDX."

The Underlying Asset seeks to provide investment results that correspond generally to the price and yield performance, before fees and expenses, of the Underlying Index. The Underlying Index was developed by the NYSE Amex and is calculated, maintained and published by NYSE Arca. The Underlying Index is a modified market capitalization-weighted index comprised of publicly traded companies involved primarily in mining for gold or silver.

The Underlying Asset utilizes a "passive" or "indexing" investment approach in attempting to track the performance of the Underlying Index. The Underlying Asset will invest in all of the securities which comprise the Underlying Index. The Underlying Asset will normally invest at least 95% of its total assets in common stocks that comprise the Underlying Index.

The notes are not sponsored, endorsed, sold or promoted by Van Eck. Van Eck makes no representations or warranties to the owners of the notes or any member of the public regarding the advisability of investing in the notes. Van Eck has no obligation or liability in connection with the operation, marketing, trading or sale of the notes.

*The Underlying Index*

We have derived all information contained in this pricing supplement regarding the Underlying Index, including, without limitation, its make-up, method of calculation and changes in its components, from publicly available information and information supplied by NYSE Arca. Such information reflects the policies of, and is subject to change by, NYSE Arca. The Underlying Index was developed by the NYSE Amex (formerly the American Stock Exchange) and is calculated, maintained and published by the NYSE Arca. The NYSE Arca has no obligation to

continue to publish, and may discontinue the publication of, the Underlying Index.

The Underlying Index includes common stocks, ADRs and GDRs of selected companies that are involved primarily in mining for gold or silver and that are listed for trading and electronically quoted on a major stock market that is accessible by foreign investors. Generally, this will include exchanges in most developed markets and major emerging markets, and will include companies that are cross-listed, e.g., both U.S. and Canadian listings. NYSE Arca will use its discretion to avoid exchanges and markets that are considered “frontier” in nature or have major restrictions to foreign ownership. The Underlying Index includes companies that derive at least 50% of their revenues from gold mining and related activities (40% for companies that were included in the Underlying Index prior to September 23, 2013). Also, the Underlying Index maintains exposure to companies with a significant revenue exposure to silver mining in addition to gold mining, which will not exceed 20% of the Underlying Index weight at each rebalance.

Only companies with market capitalizations greater than $750 million that have an average daily volume of at least 50,000 shares over the past three months and an average daily value traded of at least $1 million over the past three months are eligible for inclusion in the Underlying Index. Starting in December 2013, for companies that were included in the Underlying Index prior to September 23, 2013, the market capitalization requirement at each rebalance became $450 million, the average daily volume requirement will be at least 30,000 shares over the past three months and the average daily value traded requirement will be at least $600,000 over the past three months. NYSE Arca has the discretion to not include all companies that meet the minimum criteria for inclusion. The Underlying Index’s benchmark value was 500.00 at the close of trading on December 20, 2002.

*Calculation of the Underlying Index*. The Underlying Index is calculated by NYSE Arca on a price return basis. The calculation is based on the current modified market capitalization divided by a divisor. The divisor was determined on the initial capitalization base of the Underlying Index and the base level and may be adjusted as a result of corporate actions and composition changes, as described below.

*Index Maintenance*. The Underlying Index is reviewed quarterly to ensure that at least 90% of the index weight is accounted for by index components that continue to meet the initial eligibility requirements. NYSE Arca may at any time and from time to time change the number of securities comprising the group by adding or deleting one or more securities, or replacing one or more securities contained in the group with one or more substitute securities of its choice, if in NYSE Arca's discretion such addition, deletion or substitution is necessary or appropriate to maintain the quality and/or character of the Underlying Index. Components will be removed from the Underlying Index during the quarterly review if (1) the market capitalization falls below $450 million, or (2) the traded average daily shares for the previous three months is lower than 30,000 shares and the traded average daily value for the previous three months is less than $600,000.

At the time of the quarterly rebalance, the component security quantities will be modified to conform to the following asset diversification requirements:

(1) the weight of any single component security may not account for more than 20% of the total value of the Underlying Index;

(2) the component securities are split into two subgroups – large and small, which are ranked by market capitalization weight in the Underlying Index. Large securities are defined as having a starting index weight greater than or equal to 5%. Small securities are defined as having a starting index weight below 5%; and

(3) the final aggregate weight of those component securities which individually represent more than 4.5% of the total value of the Underlying Index may not account for more than 45% of the total index value.

The weights of the components securities (taking into account expected component changes and share adjustments) are modified in accordance with the Underlying Index's diversification rules.

Changes to the index composition and/or the component security weights in the Underlying Index are determined and announced prior to taking effect, which typically occurs after the close of trading on the third Friday of each calendar quarter month in connection with the quarterly index rebalance. The share quantities of each component security in the index portfolio remains fixed between quarterly reviews except in the event of certain types of corporate actions such as stock splits, reverse stock splits, stock dividends, or similar events. The share quantities used in the index calculation are not typically adjusted for shares issued or repurchased between quarterly reviews. However, in the

event of a merger between two components, the share quantity of the surviving entity may be adjusted to account for any stock issued in the acquisition. NYSE Arca may substitute securities or change the number of securities included in the Underlying Index, based on changing conditions in the industry or in the event of certain types of corporate actions, including mergers, acquisitions, spin-offs, and reorganizations. In the event of component or share quantity changes to the index portfolio, the payment of dividends other than ordinary cash dividends, spin-offs, rights offerings, re-capitalization, or other corporate actions affecting a component security of the Underlying Index, the index divisor may be adjusted to ensure that there are no changes to the index level as a result of nonmarket forces.

**Historical Performances of the Underlying Assets**

The following tables set forth the quarter-end high and low closing prices for each Underlying Asset from the first quarter of 2008 through August 28, 2018.

The historical prices of the Underlying Assets are provided for informational purposes only. You should not take the historical prices of the applicable Underlying Asset as an indication of its future performance, which may be better or worse than the prices set forth below.

**Closing Prices of the SPDR® S&P® Oil & Gas Exploration & Production ETF**

| | | High | Low |
|---|---|---|---|
| 2008 | First Quarter | 55.83 | 44.79 |
| | Second Quarter | 71.31 | 54.44 |
| | Third Quarter | 70.93 | 42.68 |
| | Fourth Quarter | 43.38 | 22.97 |
| 2009 | First Quarter | 33.48 | 23.41 |
| | Second Quarter | 38.25 | 27.54 |
| | Third Quarter | 39.61 | 28.51 |
| | Fourth Quarter | 43.36 | 36.91 |
| 2010 | First Quarter | 44.07 | 39.22 |
| | Second Quarter | 45.82 | 38.57 |
| | Third Quarter | 42.85 | 38.05 |
| | Fourth Quarter | 52.71 | 42.18 |
| 2011 | First Quarter | 64.50 | 52.75 |
| | Second Quarter | 64.97 | 54.71 |
| | Third Quarter | 65.24 | 42.80 |
| | Fourth Quarter | 57.56 | 39.99 |
| 2012 | First Quarter | 61.34 | 52.67 |
| | Second Quarter | 57.85 | 45.20 |
| | Third Quarter | 59.35 | 48.73 |
| | Fourth Quarter | 57.38 | 50.69 |
| 2013 | First Quarter | 62.10 | 55.10 |
| | Second Quarter | 62.61 | 54.71 |
| | Third Quarter | 66.47 | 58.62 |

| | | | |
|---|---|---|---|
| | Fourth Quarter | 72.74 | 65.02 |
| | | | |
| 2014 | First Quarter | 71.83 | 64.04 |
| | Second Quarter | 83.45 | 71.19 |
| | Third Quarter | 82.08 | 68.83 |
| | Fourth Quarter | 66.84 | 42.75 |
| | | | |
| 2015 | First Quarter | 53.94 | 42.55 |
| | Second Quarter | 55.63 | 46.43 |
| | Third Quarter | 45.22 | 31.71 |
| | Fourth Quarter | 40.53 | 28.64 |
| | | | |
| 2016 | First Quarter | 30.96 | 23.60 |
| | Second Quarter | 37.50 | 29.23 |
| | Third Quarter | 39.12 | 32.75 |
| | Fourth Quarter | 43.42 | 34.73 |
| | | | |
| 2017 | First Quarter | 42.21 | 35.17 |
| | Second Quarter | 37.89 | 30.17 |
| | Third Quarter | 34.37 | 29.09 |
| | Fourth Quarter | 37.64 | 32.25 |
| | | | |
| 2018 | First Quarter | 39.85 | 32.38 |
| | Second Quarter | 44.22 | 34.03 |
| | Third Quarter (through August 28, 2018) | 44.52 | 42.24 |

**Closing Prices of the VanEck Vectors™ Gold Miners ETF**

| | | High | Low |
|---|---|---|---|
| 2008 | First Quarter | 56.29 | 46.50 |
| | Second Quarter | 51.40 | 42.38 |
| | Third Quarter | 50.84 | 27.95 |
| | Fourth Quarter | 33.96 | 16.38 |
| 2009 | First Quarter | | |
| | Second Quarter | 38.57 | 28.20 |
| | Third Quarter | 44.55 | 30.95 |
| | Fourth Quarter | 48.00 | 35.14 |
| 2010 | First Quarter | 50.17 | 40.22 |
| | Second Quarter | 54.07 | 46.36 |
| | Third Quarter | 56.66 | 47.09 |
| | Fourth Quarter | 63.80 | 54.28 |
| 2011 | First Quarter | | |
| | Second Quarter | 60.79 | 53.12 |
| | Third Quarter | 63.95 | 51.80 |
| | Fourth Quarter | 66.69 | 53.75 |
| 2012 | First Quarter | 57.47 | 48.75 |
| | Second Quarter | 50.37 | 39.34 |
| | Third Quarter | 54.81 | 40.70 |
| | Fourth Quarter | 54.25 | 44.85 |
| 2013 | First Quarter | | |
| | Second Quarter | 47.09 | 35.91 |
| | Third Quarter | 37.45 | 22.22 |
| | Fourth Quarter | 30.43 | 22.90 |
| 2014 | First Quarter | 27.73 | 21.27 |
| | Second Quarter | 26.45 | 22.04 |
| | Third Quarter | 27.46 | 21.35 |
| | Fourth Quarter | 21.94 | 16.59 |
| 2015 | First Quarter | 22.94 | 17.67 |
| | Second Quarter | 20.82 | 17.76 |
| | Third Quarter | 17.85 | 13.04 |
| | Fourth Quarter | 16.90 | 13.08 |
| 2016 | First Quarter | 20.86 | 12.47 |
| | Second Quarter | 27.70 | 19.53 |
| | Third Quarter | 31.32 | 25.45 |

| | | | |
|---|---|---|---|
| | Fourth Quarter | 25.96 | 18.99 |
| | | | |
| 2017 | First Quarter | 25.57 | 21.14 |
| | Second Quarter | 24.57 | 21.10 |
| | Third Quarter | 25.49 | 21.21 |
| | Fourth Quarter | 23.84 | 21.42 |
| | | | |
| 2018 | First Quarter | 24.60 | 21.27 |
| | Second Quarter | 23.06 | 21.81 |
| | Third Quarter (through August 28, 2018) | 22.68 | 21.33 |

**Additional Information About the Notes, the Indenture and Canadian Bank Resolution Powers**

**Events of Default**

Under the indenture, as it will be amended prior to the issue date of the notes, the term "event of default" means *only* any of the following:

- we default in the payment of the principal of, or interest on, any of the notes and, in each case, the default continues for a period of 30 business days; or
- certain bankruptcy, insolvency or reorganization events occur.

**Canadian Bank Resolution Powers**

***General***

Under Canadian bank resolution powers, the CDIC may, in circumstances where we have ceased, or are about to cease, to be viable, assume temporary control or ownership of us and may be granted broad powers by one or more Orders, including the power to sell or dispose of all or a part of our assets, and the power to carry out or cause us to carry out a transaction or a series of transactions the purpose of which is to restructure our business. As part of the Canadian bank resolution powers, certain provisions of, and regulations under, the Bank Act, the CDIC Act and certain other Canadian federal statutes pertaining to banks, which we refer to collectively as the "*bail-in regime*," provide for a bank recapitalization regime for banks designated by the Superintendent as D-SIBs, which include us.

The expressed objectives of the bail-in regime include reducing government and taxpayer exposure in the unlikely event of a failure of a D-SIB, reducing the likelihood of such a failure by increasing market discipline and reinforcing that bank shareholders and creditors are responsible for the D-SIBs' risks and not taxpayers, and preserving financial stability by empowering the CDIC to quickly restore a failed D-SIB to viability and allow it to remain open and operating, even where the D-SIB has experienced severe losses.

Under the CDIC Act, in circumstances where the Superintendent is of the opinion that we have ceased, or are about to cease, to be viable and viability cannot be restored or preserved by exercise of the Superintendent's powers under the

Bank Act, the Superintendent, after providing us with a reasonable opportunity to make representations, is required to provide a report to CDIC. Following receipt of the Superintendent's report, CDIC may request the Minister of Finance for Canada (the "*Minister of Finance*") to recommend that the Governor in Council (*Canada*) make an Order and, if the Minister of Finance is of the opinion that it is in the public interest to do so, the Minister of Finance may recommend that the Governor in Council (Canada) make, and on that recommendation, the Governor in Council (*Canada*) may make, one or more of the following Orders:

- vesting in CDIC, our shares and subordinated debt specified in the Order, which we refer to as a "*vesting order*";

- appointing CDIC as receiver in respect of us, which we refer to as a "*receivership order*";

- if a receivership order has been made, directing the Minister of Finance to incorporate a federal institution designated in the Order as a bridge institution and specifying the date and time as of which our deposit liabilities are assumed, which we refer to as a "*bridge bank order*"; or

- if a vesting order or receivership order has been made, directing CDIC to carry out a conversion, by converting or causing us to convert, in whole or in part – by means of a transaction or series of transactions and in one or more steps – our shares and liabilities that are subject to the bail-in regime into our common shares or common shares of any of our affiliates, which we refer to as a "*conversion order*".

Following an Order, CDIC will assume temporary control or ownership of us and will be granted broad powers under that Order, including the power to sell or dispose of all or a part of our assets, and the power to carry out or cause us to carry out a transaction or a series of transactions the purpose of which is to restructure our business.

Under a bridge bank order, CDIC has the power to transfer certain of our assets and liabilities to a bridge institution. Upon the exercise of that power, any of our assets and liabilities that are not transferred to the bridge institution would remain with us, which would then be wound up. In such a scenario, any liabilities of ours, including any outstanding notes (whether or not such notes are bail-inable notes) that are not assumed by the bridge institution could receive only partial or no repayment in our ensuing wind-up.

The notes offered hereby are not bail-inable notes.



les set forth in the Code, as well as shares actually owned, must generally be taken into account. Because the determination as to whether any of the alternative tests of Section 302(b) of the Code are satisfied with respect to any particular stockholder of our shares will depend upon the facts and circumstances existing at the time the determination is made, prospective investors are advised to consult their own tax advisors to determine such tax treatment. If a redemption of our shares is treated as a distribution that is taxable as dividend, the amount of the distribution would be measured by the amount of cash and the fair market value of any property received by the stockholders. The stockholder s adjusted tax basis in such redeemed shares would be transferred to the stockholder s remaining stockholdings in us. If, however, the stockholder has no remaining stockholdings in us, such basis may, under certain circumstances, be transferred to a related person or it may be lost entirely.

***State and Local Taxes.*** We and you may be subject to state or local taxation in various jurisdictions, including those in which we transact business or reside. Our and your state and local tax treatment may not conform to the U.S. federal income tax consequences discussed above. Consequently, you should consult your own tax advisors regarding the effect of state and local tax laws on an investment in the common shares.

***Legislative Proposals.*** You should recognize that our and your present U.S. federal income tax treatment may be modified by legislative, judicial or administrative actions at any time, which may be retroactive in effect. The rules dealing with U.S. federal income taxation are constantly under review by Congress, the IRS and the

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Treasury Department, and statutory changes as well as promulgation of new regulations, revisions to existing statutes, and revised interpretations of established concepts occur frequently. We are not currently aware of any pending legislation that would materially affect our or your taxation as described in this prospectus. You should, however, consult your advisors concerning the status of legislative proposals that may pertain to a purchase of our common shares.

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# ERISA CONSIDERATIONS

The following is a summary of material considerations arising under ERISA and the prohibited transaction provisions of ERISA and of Section 4975 of the Code that may be relevant to a prospective purchaser of the shares. This discussion does not address all aspects of ERISA or Section 4975 of the Code or, to the extent not pre-empted by ERISA, state law that may be relevant to particular employee benefit plan stockholders (including plans subject to Title I of ERISA, other employee benefit plans and IRAs subject to the prohibited transaction provisions of Section 4975 of the Code, and governmental plans and church plans that are exempt from ERISA and Section 4975 of the Code but that may be subject to state law and other Code requirements) in light of their particular circumstances.

## General Investment Considerations

A plan fiduciary making the decision to invest in shares is advised to consult its own legal advisor regarding the specific considerations arising under ERISA, Section 4975 of the Code, and (to the extent not pre-empted by ERISA) state law with respect to the purchase, ownership, or sale of shares. Plan fiduciaries should also consider the entire discussion under the preceding section entitled Certain Material U.S. Federal Income Tax Considerations, as material contained therein is relevant to any decision by a plan to purchase our shares.

In considering whether to invest a portion of the assets of a plan in shares, plan fiduciaries should consider, among other things, whether the investment:

will be in accordance with the documents and instruments governing the plan;
will allow the plan to satisfy the diversification requirements of ERISA, if applicable;
will result in UBTI to the plan (see Certain Material U.S. Federal Income Tax Considerations Taxation of Stockholders Taxation of Tax-Exempt Stockholders );
will be sufficiently liquid;
is prudent under ERISA; and
is for the exclusive purpose of providing benefits to participants and their beneficiaries.

The fiduciary of a plan not subject to Title I of ERISA or Section 4975 of the Code, such as a governmental or church plan, should consider that such a plan may be subject to prohibitions against some related-party transactions under Section 503 of the Code, which operate similarly to the prohibited transaction rules of ERISA and Section 4975 of the Code. In addition, the fiduciary of any such plan must consider any applicable state or local laws and any restrictions and duties at common law imposed upon such plan. We express no opinion on whether an investment in shares is appropriate or permissible for any plan under Section 503 of the Code, or under any state, county, local, or other law respecting such plan.

## Regulation Under ERISA and the Code

Generally, both ERISA and the Code prohibit plans and IRAs from engaging in certain transactions involving Plan Assets (defined below) with specified parties, such as sales or exchanges or leasing of property, loans or other extensions of credit, furnishing goods or services, or transfers to, or use of, Plan Assets. The specified parties are referred to as parties-in-interest under ERISA and as disqualified persons under the Code. These definitions generally include both parties owning threshold percentage interests in an investment entity and persons providing services to the plan or IRA, as well as employer sponsors of the plan or IRA, fiduciaries and other individuals or entities affiliated with the foregoing. A person generally is a fiduciary with respect to a plan or IRA if, among other things, the person has discretionary authority or control with respect to Plan Assets or provides investment advice for a fee with respect

to Plan Assets. Under Department of Labor regulations, a person shall be deemed to be providing investment advice if that person renders advice as to the suitability of investing in our shares, and that person regularly provides investment advice to the plan or IRA pursuant to a mutual agreement or understanding that such advice will serve as the primary basis for investment decisions, and that the advice will be individualized for the plan or IRA based on its particular needs. Therefore, if we are deemed to hold Plan Assets, our management could be characterized as fiduciaries with respect to such assets, and each would be deemed to be a party-in-interest under ERISA and a disqualified person under the Code with respect to investing plans and IRAs. Moreover, certain contemplated transactions between us and our

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directors and other of our employees could be deemed to be prohibited transactions. Additionally, ERISA s fiduciary standards applicable to investments by plans would extend to our directors and possibly other employees as plan fiduciaries with respect to investments made by us, and the requirement that Plan Assets be held in trust could be deemed to be violated. Whether or not we are deemed to hold Plan Assets, if we or our affiliates are affiliated with a plan or IRA investor, we might be a disqualified person or party-in-interest with respect to such plan or IRA investor, resulting in a prohibited transaction merely upon investment by such plan or IRA in our shares.

## Plan Assets Definition

A definition of Plan Assets is not set forth in ERISA or the Code. The Department of Labor, however, provides guidance in a regulation (the Plan Asset Regulation ) as to whether, and under what circumstances, the underlying assets of an entity will be deemed Plan Assets. Under the Plan Asset Regulation, the assets of an entity in which a plan or IRA makes an equity investment will generally be deemed to be assets of such plan or IRA unless the entity satisfies one of the exceptions to this general rule. Generally, the exceptions require that the investment be:

in securities issued by an investment company registered under the Investment Company Act;
in publicly offered securities, defined generally as interests that are freely transferable, widely held and registered with the SEC;
in which equity participation by benefit plan investors is not significant; or
in an operating company, which includes venture capital operating companies and real estate operating companies.

The Plan Asset Regulation provides that equity participation in an entity by benefit plan investors is significant if at any time 25% or more of the value of any class of equity interest is held by benefit plan investors. The term benefit plan investors is defined for this purpose under ERISA Section 3(42), and in calculating the value of a class of equity interests, the value of any equity interests held by us or any of our affiliates must be excluded.

## Other Prohibited Transactions

In addition, a prohibited transaction may also occur under ERISA or the Code where there are circumstances indicating that:

investment in the shares is made or retained for the purposes of avoiding application of the fiduciary standard of ERISA;
the investment in the REIT constitutes an arrangement under which it is expected that the REIT will engage in transactions which would otherwise be prohibited if entered into directly by the plan purchasing the shares;
the investing plan, by itself, has the authority or influence to cause the REIT to engage in such transactions; or
the person who is prohibited from transacting with the investing plan may, but only with the aid of its affiliates and the investing plan, cause the REIT to engage in such transactions with such person.

# Annual Valuation Requirement

The fiduciaries of plans are required to determine the fair market value of Plan Assets on at least an annual basis. If the fair market value of any particular asset is not readily available, the fiduciary is required to make a good faith determination of that asset s value. Also, a trustee or custodian of a fiduciary account must provide participants of such accounts and the IRS with a statement of the value of the account each year. However, currently, neither the IRS nor the Department of Labor has promulgated regulations specifying how fair market value should be determined.

Unless and until our shares are listed on a national securities exchange or are included for quotation on a national market system, it is not expected that a public market for our shares will develop. To assist fiduciaries

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of plans subject to the annual reporting requirements of ERISA and trustees or custodians of fiduciary accounts to prepare reports relating to an investment in our shares, we intend to provide reports of our quarterly and annual determinations of the current value of our net assets per outstanding share to those fiduciaries (including trustees and custodians of fiduciary accounts) who identify themselves to us and request the reports. Until 18 months after the completion of the last offer to sell shares of our common stock pursuant to this offering (excluding offers to sell under our distribution reinvestment program), we intend to use the offering price of shares in our most recent offering as the per share net asset value (unless we have made a special distribution to stockholders of net sales proceeds from the sale of one or more properties prior to the date of determination of net asset value, in which case we will use the offering price less the per share amount of the special distribution). Beginning 18 months after the completion of the last offer to sell shares of our common stock pursuant to this offering, our board of directors will determine the value of the properties and our other assets based on such information as our board determines appropriate, which may or may not include independent valuations of our properties or of our enterprise as a whole.

We anticipate that we will provide annual reports of our determination of value (1) to trustees and custodians of fiduciary accounts not later than January 15 of each year, and (2) to other plan fiduciaries within 75 days after the end of each calendar year. Each determination may be based upon valuation information available as of October 31 of the preceding year, updated, however, for any material changes occurring between October 31 and December 31.

There can be no assurance, however, with respect to any estimate of value that we prepare, that:

the estimated value per share would actually be realized by our stockholders upon liquidation, because these estimates do not necessarily indicate the price at which properties can be sold;
our stockholders would be able to realize estimated net asset values if they were to attempt to sell their shares, because no public market for our shares exists or is likely to develop; or
that the value, or method used to establish value, would comply with ERISA or Code requirements described above.

# Insurance Companies

An insurance company considering an investment in shares should consider whether its general account may be deemed to include assets of the plans investing in the general account, for example, through the purchase of an annuity contract. In John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank, 510 U.S. 86 (1993), the U.S. Supreme Court held that assets held in an insurance company s general account may be deemed to be Plan Assets under certain circumstances. In that event, the insurance company might be treated as a party in interest under such plans. However, Prohibited Transaction Exemption 95-60 may exempt some or all of the transactions that could occur as the result of the acquisition of the common stock by an insurance company general account. Therefore, insurance company investors should analyze whether the John Hancock case and PTE 95-60 or any other exemption may have an impact with respect to their purchase of the shares.

In addition, the Small Business Job Protection Act of 1996 added a new Section 401(c) of ERISA relating to the status of the assets of insurance company general accounts under ERISA and Section 4975 of Code. Pursuant to Section 401(c), the Department of Labor issued final regulations effective January 5, 2000 with respect to insurance policies issued on or before December 31, 1998 that are supported by an insurer s general account. As a result of these regulations, assets of an insurance company general account will not be treated as Plan Assets for purposes of the fiduciary responsibility provisions of ERISA and Section 4975 of the Code to the extent such assets relate to contracts issued to employee plans on or before December 31, 1998 and the insurer satisfies various conditions. The assets of a plan invested in an insurance company separate account continue to be treated as the Plan Assets of any such plan.

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# DISTRIBUTION REINVESTMENT PROGRAM

We are registering 10,000,000 shares of our common stock to be sold pursuant to our distribution reinvestment program on the registration statement of which this prospectus is a part. We reserve the right to reallocate the common shares we are offering between the primary offering and our distribution reinvestment plan. Our distribution reinvestment program provides our stockholders with an opportunity to purchase additional shares of common stock by reinvesting distributions. Stockholders who elect to participate in the distribution reinvestment program will authorize us to use distributions payable to them to purchase additional shares of common stock. A participant will not be able to acquire common stock under the program if the purchase would cause it to exceed the 9.8% ownership limit or would violate any of the other share ownership restrictions imposed by our charter or securities laws. Participation in the distribution reinvestment program is limited to stockholders who purchase shares pursuant to this offering. Stockholders who have received a copy of this prospectus and participated in this offering may elect to participate in and purchase shares through the distribution reinvestment program at any time and do not need to receive a separate prospectus relating solely to such program.

As further explained below, purchases under the distribution reinvestment program are made at a price, initially $9.50 per share until the termination of this offering, equal to 95% of the net asset value of a share of common stock on the date of purchase until such time as our shares are listed on a national securities exchange or included for quotation on a national market system.

Participants in the distribution reinvestment program may also purchase fractional shares of common stock, so that 100% of distributions will be used to acquire common stock. Common stock will be purchased under the distribution reinvestment program on the record date for the distribution used to purchase the common stock. Distributions on common stock acquired pursuant to the distribution reinvestment program will be paid at the same time as distributions are paid on common stock purchased outside the program and are calculated with a daily record and distribution declaration date. Each participant agrees that he or she will promptly notify us in writing if his or her financial condition changes at any time prior to listing the common stock on a national securities exchange or inclusion of them for quotation on a national market system for the purpose of ascertaining whether the participant continues to satisfy the applicable investor suitability standards.

Beginning with the first distribution paid after the effective date of the offering, participants in the distribution reinvestment program will acquire our shares at $9.50 per share. This reduced price reflects a decrease in costs associated with these issuances. No selling commissions or dealer manager fees are payable in connection with any shares purchased pursuant to our distribution reinvestment program. This will continue until the earlier of (i) the increase of the public offering price per share of common stock in the offering from $10 per share, if there is an increase, and (ii) the termination of the offering. Thereafter, participants may acquire our shares at a price equal to 95% of the net asset value of a share until our shares are listed on a national stock exchange. In the event of listing, we will purchase shares for the distribution reinvestment program on the exchange or market at the prevailing market price. We will then sell the shares to stockholders at that price. The discount from the public offering price per share will not exceed 5% of the market price of a share on the date of purchase.

It is possible that a secondary market will develop for the shares, and that the prices on the secondary market will be lower or higher than the price of shares purchased through the distribution reinvestment program. Because we have no intention of establishing this secondary market for our shares, it is unlikely that one will develop unless we list the shares on a national stock exchange. If a secondary market does develop, we may purchase shares in this secondary market for sale under the distribution reinvestment program, and if we choose to do so, participants will pay the price we paid to purchase such shares, which may be higher or lower than otherwise set forth in this section. In the unlikely

event that we do purchase shares in the secondary market and we use the services of a broker, we will allocate the costs of such broker among all of the participants in the program. We will not charge these investors for any fees other than the actual third party out-of-pocket expenses that we would incur in the secondary market. Neither we nor our affiliates will receive a fee for selling shares through the distribution reinvestment program. We do not warrant or guarantee that participants will acquire shares at the lowest possible price through the program.

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A participant may stop participating in the distribution reinvestment program at any time without penalty, by delivering written notice to us. Prior to listing the shares on a national stock exchange, any transfer, of which we have knowledge, of shares by a participant to a non-participant will terminate participation in the distribution reinvestment program with respect to the transferred shares. Within 90 days after the end of our fiscal year, we will provide each participant with an individualized report on his or her investment, including the purchase date, purchase price and number of shares owned, as well as the dates of distribution and amount of distributions received during the prior fiscal year. Prior to listing the shares as described above, we will not issue share certificates except to stockholders who make a written request for such certificates, and ownership of these shares will be in book-entry form. The individualized statement to participants will include receipts and purchases relating to each participant s participation in the distribution reinvestment program including the tax consequences relative thereto.

The directors, including a majority of independent directors, by majority vote may amend or terminate the distribution reinvestment program upon 10 days notice to participants.

Stockholders who participate in the distribution reinvestment program will recognize dividend income, taxable to the extent of our current or accumulated earnings and profits (as determined for U.S. federal income tax purposes), in the amount and as though they had received the cash rather than purchased shares through the distribution reinvestment program. These deemed dividends will be treated as actual dividends and will retain the character and tax effects applicable to all dividends. In addition, the 5% discount applicable to shares purchased under the distribution reinvestment program will itself be treated as a deemed distribution to the purchaser. Shares received under the distribution reinvestment program will have a holding period, for tax purposes, beginning with the day after purchase, and a tax basis equal to their cost, which is the gross amount of the deemed distribution. See Certain Material U.S. Federal Income Tax Considerations Taxation of Stockholders for a full discussion of the tax effects of distributions.

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# SHARE REPURCHASE PROGRAM

Prior to the time that our shares are listed on a national securities exchange, our share repurchase program, as described below, may provide eligible stockholders with limited, interim liquidity by enabling them to sell shares back to us, subject to restrictions and applicable law. Specifically, state securities regulators impose investor suitability standards that establish specific financial thresholds that must be met by any investor in certain illiquid, long-term investments, including REIT shares. The prices at which stockholders who have held shares for the required one-year period may sell shares back to us are as follows:

For stockholders who have owned their shares for at least one year but less than two years, at a price equal to the lesser of 92.5% of (i) the then-current share value or (ii) the average purchase price per share paid by such stockholder.
For stockholders who have owned their shares for at least two years but less than three years, at a price equal to the lesser of 95% of (i) the then-current share value or (ii) the average purchase price per share paid by such stockholder.
For stockholders who have owned their shares for at least three years but less than four years, at a price equal to the lesser of 97.5% of (i) the then-current share value or (ii) the average purchase price per share paid by such stockholder.
For stockholders who have owned their shares for at least four years, at a price equal to the lesser of 100% of (i) the then-current share value or (ii) the average purchase price per share paid by such stockholder.
During the period of any public offering, the repurchase price will be equal to or below the price of the shares offered in the relevant offering. In the event that the board of directors makes a future determination regarding the estimated value of our shares, our board of directors, in its sole discretion, may change the repurchase prices listed above. We will report any new repurchase prices in the annual report and the three quarterly reports that we publicly file with the Securities and Exchange Commission.

The terms on which we may repurchase shares may differ between repurchases upon the death of a stockholder (referred to herein as exceptional repurchases ) and all other repurchases (referred to herein as ordinary repurchases ).

In the case of ordinary repurchases, we may repurchase shares beneficially owned by a stockholder continuously for at least one year. However, in the event a stockholder is having all his or her shares repurchased, our board may waive the one-year holding requirement for shares originally purchased under our distribution reinvestment plan. We may make ordinary repurchases only if we have sufficient funds available to complete the repurchase. In any given calendar month, we are authorized to use only the proceeds from our distribution reinvestment plan during that month to make ordinary repurchases; provided that, if we have excess funds during any particular month, we may, but are not obligated to, carry those excess funds to the subsequent calendar month for the purpose of making ordinary repurchases. Subject to funds being available, in the case of ordinary repurchases, we will limit the number of shares repurchased during any calendar year to 5.0% of the number of shares of common stock outstanding on December 31st of the previous calendar year. In the event that we determine not to repurchase all of the shares presented during any month, including as a result of having insufficient funds or satisfying the 5.0% limit, to the extent we decide to repurchase shares, shares will be repurchased on a pro rata basis up to the limits described above. Any stockholder whose ordinary repurchase request has been partially accepted in a particular calendar month will have the remainder of his or her request included with all new repurchase requests we have received in the immediately following calendar month, unless he or she chooses to withdraw that request.

In the case of exceptional repurchases, we may repurchase shares upon the death of a stockholder who is a natural person, including shares held by the stockholder through a trust, or an IRA or other retirement or profit-sharing plan, after receiving a written request from (1) the estate of the stockholder, (2) the recipient of the shares through bequest

or inheritance, even where the recipient has registered the shares in his or her own name or (3) in the case of the death of a settlor of a trust, the beneficiary of the trust, even where the beneficiary has registered the shares in his or her own name. We must, however, receive the written request within one year after the death of the stockholder. If spouses are joint registered holders of shares, the request to repurchase the shares

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may be made if either of the registered holders dies. If the stockholder is not a natural person, such as a partnership, corporation or other similar entity, the right to an exceptional repurchase upon death does not apply.

We are authorized to use any funds to make exceptional repurchases. In addition, there is no one-year holding period applicable to exceptional purchases, and any shares held for less than one year by the deceased will be repurchased at a price equal to the lesser of 100% of the then-current share value or the purchase price paid per share paid by such stockholder. Further, the 5.0% limit described above will not apply to exceptional repurchases.

To request repurchase, the stockholder must submit a repurchase request to the repurchase agent at least five days prior to the repurchase date. The request must state the name of the person/entity who owns the shares and the number of shares to be repurchased, and must be properly executed. The stockholder must notify us in writing if the stockholder wishes to withdraw a pending request to have shares repurchased. We will not repurchase that stockholder s shares so long as we receive the written request to withdraw at least five days prior to the repurchase date. We will effect all repurchases on the last business day of the calendar month or any other business day that may be established by the board. Accordingly, we may grant or reject requests for repurchase up to one business day prior to the repurchase date. Following the repurchase, we will send the stockholder of record the cash proceeds of the repurchase.

All shares requested to be repurchased must be beneficially owned by the stockholder of record making the request, or the party presenting the shares must be authorized to do so by the owner of record of the shares, and must be fully transferable and not subject to any liens or encumbrances. In certain cases, we may ask the requesting stockholder to provide evidence satisfactory to us that the shares requested for repurchase are not subject to any liens or encumbrances. If we determine that a lien exists against the shares, we will not be obligated to repurchase any shares subject to the lien.

The share repurchase program will immediately terminate if our shares are listed on any national securities exchange. In addition, our board of directors, in its sole discretion, may amend, suspend (in whole or in part), or terminate our share repurchase program, without prior notice to stockholders. Further, our board reserves the right in its sole discretion at any time and from time to time to reject any requests for repurchases. See Risk Factors for additional discussion regarding the amendment of our share repurchase program.

Shares we purchase under the share repurchase program will be canceled, and will have the status of authorized but unissued shares. The repurchased shares will not be reissued unless they are first registered with the Securities and Exchange Commission under the Securities Act and under appropriate state securities laws or otherwise issued in compliance with exemptions from the registration provisions contained in these laws.

We may appoint a repurchase agent to effect all repurchases of shares and to disburse funds to the stockholders in accordance with the share repurchase program. The repurchase agent will perform all recordkeeping and administrative functions involved in the program, and we will bear all costs involved in organizing, administering and maintaining the program. No fees will be paid to our dealer manager, our directors or any of their affiliates in connection with the repurchase of shares by us pursuant to the share repurchase program.

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# MANAGEMENT S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

## General

As of the date of this prospectus, we have not yet commenced active operations. Subscription proceeds will be released to us after the minimum offering is achieved and will be applied to investment in properties and the payment or reimbursement of selling commissions and other fees, expenses and uses as described throughout this prospectus. We will experience a relative increase in liquidity as we receive additional subscriptions for shares and a relative decrease in liquidity as we spend net offering proceeds in connection with the acquisition and operation of our properties or the payment of distributions.

Further, we have not entered into any arrangements creating a reasonable probability that we will acquire a specific property or other asset. The number of properties and other assets that we will acquire will depend upon the number of shares sold and the resulting amount of the net proceeds available for investment in properties and other assets. Until required for the acquisition or operation of assets or used for distributions, we will keep the net proceeds of this offering in short term, low risk, highly liquid, interest bearing investments.

We intend to make reserve allocations as necessary to aid our objective of preserving capital for our investors by supporting the maintenance and viability of properties we acquire in the future. If reserves and any other available income become insufficient to cover our operating expenses and liabilities, it may be necessary to obtain additional funds by borrowing, refinancing properties or liquidating our investment in one or more properties. There is no assurance that such funds will be available, or if available, that the terms will be acceptable to us.

We intend to make an election to be taxed as a REIT under Section 856(c) of the Code. In order to qualify as a REIT, we must distribute to our stockholders each calendar year at least 90% of our taxable income (excluding net capital gain). If we qualify as a REIT for U.S. federal income tax purposes, we generally will not be subject to U.S. federal income tax on income that we distribute to our stockholders. If we fail to qualify as a REIT in any taxable year, we will be subject to U.S. federal income tax on our taxable income at regular corporate rates and will not be permitted to qualify as a REIT for four years following the year in which our qualification is denied. Such an event could materially adversely affect our net income and results of operations.

## Results of Operations

Currently, we have not commenced business operations. Because we have not acquired any properties or other assets, our management is not aware of any material trends or uncertainties, favorable or unfavorable, other than national economic conditions affecting our targeted portfolio, the multifamily housing industry and real estate generally, which may be reasonably anticipated to have a material impact on the capital resources and the revenue or income to be derived from the operation of our assets.

# Liquidity and Capital Resources

We are offering and selling to the public in our primary offering up to 100,000,000 shares of our common stock, $.01 par value per share, at $10 per share (subject to certain volume discounts). We are also offering up to 10,000,000 shares of our common stock to be issued pursuant to our distribution reinvestment program pursuant to which our stockholders may elect to have distributions reinvested in additional shares at $9.50 per share. We reserve the right to reallocate the shares of common stock between the primary offering and our distribution reinvestment plan.

Our principal demands for cash will be for acquisition costs, including the purchase price of any properties, loans and securities we acquire, improvement costs, the payment of our operating and administrative expenses, continuing debt service obligations and distributions to our stockholders. Generally, we will fund our acquisitions from the net proceeds of this offering. We intend to acquire our assets with cash and mortgage or other debt, but we also may acquire assets free and clear of permanent mortgage or other indebtedness by paying the entire purchase price for the asset in cash or in units of limited partnership interest in our operating partnership.

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We anticipate that adequate cash will be generated from operations to fund our operating and administrative expenses, continuing debt service obligations and the payment of distributions. However, our ability to finance our operations is subject to some uncertainties. Our ability to generate working capital is dependent on our ability to attract and retain tenants and the economic and business environments of the various markets in which our properties are located. Our ability to sell our assets is partially dependent upon the state of real estate markets and the ability of purchasers to obtain financing at reasonable commercial rates. In general, our policy will be to pay distributions from cash flow from operations. We generally do not intend to fund such distributions from offering proceeds, however, if we have not generated sufficient cash flow from our operations and other sources, such as from borrowings, advances from our advisor, our advisor s deferral, suspension and/or waiver of its fees and expense reimbursements, to fund distributions, we may use the offering proceeds. Moreover, our board of directors may change this policy, in its sole discretion, at any time.

Potential future sources of capital include secured or unsecured financings from banks or other lenders, establishing additional lines of credit, proceeds from the sale of properties and undistributed cash flow. Note that, currently, we have not identified any additional sources of financing and there is no assurance that such sources of financings will be available on favorable terms or at all.

# Distributions

We have not paid any distributions as of the date of this prospectus. After we achieve the minimum offering, we intend to make regular cash distributions to our stockholders on a monthly basis. Our board of directors will determine the amount of the distributions to our stockholders. The board s determination will be based on a number of factors, including funds available from operations, our capital expenditure requirements, the annual distribution requirements necessary to maintain our REIT status under the Code and applicable law. As a result, our distribution rate and payment frequency may vary from time to time. However, to qualify as a REIT for tax purposes, we must make distributions equal to at least 90% of our REIT taxable income (excluding net capital gain) each year. During the early stages of our operations, we may declare distributions in excess of FFO (as defined below).

# Funds from Operations

One of our objectives is to provide cash distributions to our stockholders from cash generated by our operations and funds from operations ( FFO ). FFO is not equivalent to our net operating income or loss as determined under GAAP, but rather it is a measure promulgated by NAREIT, an industry trade group. The NAREIT s belief is that FFO is a more accurate reflection of the operating performance of a REIT because of certain unique operating characteristics of real estate companies. We define FFO, consistent with the NAREIT s definition, as net income (computed in accordance with GAAP), excluding gains (or losses) from sales of property, plus depreciation and amortization of real estate assets, and after adjustments for unconsolidated partnerships and joint ventures. Adjustments for unconsolidated partnerships and joint ventures will be calculated to reflect FFO on the same basis.

The real estate industry, including us, consider FFO to be an appropriate supplemental measure of a REIT s operating performance because it is based on a net income analysis of property portfolio performance that excludes non-cash items such as depreciation. The historical accounting convention used for real estate assets requires straight-line depreciation of buildings and improvements, which implies that the value of real estate assets diminishes predictably over time. Since real estate values historically rise and fall with market conditions, presentations of operating results for a REIT using historical accounting for depreciation could be less informative.

Presentation of this information is intended to assist the reader in comparing the operating performance of different REITs, although it should be noted that not all REITs calculate FFO the same way, therefore comparisons with other REITs may not be meaningful. Further, FFO is not necessarily indicative of cash flow available to fund cash needs and should not be considered as an alternative to net income as an indication of our performance.

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# DESCRIPTION OF SECURITIES

## General

The following description of our capital stock highlights material provisions of our charter and bylaws as in effect as of the date of this prospectus. Because it is only a summary of what is contained in our charter and bylaws, it may not contain all the information that is important to you.

Our charter will be reviewed and ratified, and our bylaws will be adopted, by at least a majority vote of the directors (including at least a majority of independent directors) at, or before, the first meeting of the board of directors immediately prior to the initial effective date of this prospectus.

## Common Stock

Our charter provides for the issuance of up to 300,000,000 shares of common stock and we have authorized the issuance of up to 110,000,000 shares of common stock in connection with this offering. The common stock offered by this prospectus, when issued, will be duly authorized, fully paid and nonassessable. The common stock is neither convertible nor subject to redemption.

Holders of our common stock:

are entitled to receive distributions authorized by our board of directors and declared by us out of legally available funds after payment of, or provision for, full cumulative distributions on and any required redemptions of shares of preferred stock then outstanding;
in the event of any voluntary or involuntary liquidation or dissolution of our company, are entitled to share ratably in the distributable assets of our company remaining after satisfaction of the prior preferential rights of the preferred stock and the satisfaction of all of our debts and liabilities; and
do not have preference, conversion, exchange, sinking fund, redemption rights or preemptive rights to subscribe for any of our securities and generally have no appraisal rights unless our board of directors determines that appraisal rights apply, with respect to all or any classes or series of shares, to one or more transactions occurring after the date of such determination in connection with which holders of such shares would otherwise be entitled to exercise appraisal rights.

Shares of our common stock will be held in uncertificated form, which will eliminate the physical handling and safekeeping responsibilities inherent in owning transferable stock certificates and eliminate the need to return a duly executed stock certificate to effect a transfer. DST Systems, Inc. acts as our registrar and as the transfer agent for our shares. Transfers can be effected simply by mailing to DST Systems, Inc. a transfer and assignment form, which we will provide to you upon written request.

## Stockholder Voting

Except as otherwise provided, all shares of common stock will have equal voting rights. Because stockholders do not have cumulative voting rights, holders of a majority of the outstanding shares of common stock can elect our entire board of directors. The voting rights per share of our equity securities issued in the future will be established by our board of directors; provided, however, that the voting rights per share sold in a private offering will not exceed the voting rights which bear the same relationship to the voting rights of a publicly held share as the consideration paid to

us for each privately offered share.

Our charter provides that generally we may not, without the affirmative vote of stockholders entitled to cast at least a majority of all the votes entitled to be cast on the matter:

amend our charter, including without limitation, amendments to provisions relating to director qualifications, fiduciary duty, liability and indemnification, conflicts of interest, investment policies or investment restrictions, except for amendments with respect to increases or decreases in the number of shares of stock of any class or series or the aggregate number of shares of stock, a change of our name, a change of the name or other designation or the par value of any class or series of stock and the aggregate par value of our stock and certain reverse stock splits;

sell all or substantially all of our assets other than in the ordinary course of our business or in connection with our liquidation or dissolution;

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cause a merger or consolidation of our company; or
dissolve or liquidate our company.

Our charter further provides that, without the necessity for concurrence by our board of directors, holders of a majority of voting shares who are present in person or by proxy at an annual meeting at which a quorum is present may vote to elect a director and that any or all of our directors may be removed from office at any time by the affirmative vote of at least a majority of the votes entitled to be cast generally in the election of directors. With respect to shares owned by our advisor, any of our directors, or any of their affiliates, neither our advisor, nor such director(s), nor any of their affiliates may vote or consent on matters submitted to the stockholders regarding the removal of our advisor, such director(s) or any of their affiliates or any transaction between us and any of them. In determining the requisite percentage in interest of shares necessary to approve a matter on which our advisor, such director(s) and any of their affiliates may not vote or consent, any shares owned by any of them will not be included.

Each stockholder entitled to vote on a matter may do so at a meeting in person or by proxy directing the manner in which he or she desires that his or her vote be cast or without a meeting by a consent in writing or by electronic transmission. Any proxy must be received by us prior to the date on which the vote is taken. Pursuant to Maryland General Corporation Law and our charter, if no meeting is held, 100% of the stockholders must consent in writing or by electronic transmission to take effective action on behalf of our company.

# Preferred Stock

Our charter authorizes our board of directors, without further stockholder action, to provide for the issuance of up to 50,000,000 shares of preferred stock, in one or more series, with such terms, preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications and terms or conditions of redemption, as our board of directors shall approve. As of the date of this prospectus, there are no preferred shares outstanding and we have no present plans to issue any preferred shares. The issuance of preferred stock must also be approved by a majority of our independent directors not otherwise interested in the transaction, who will have access, at our expense, to our legal counsel or to independent legal counsel.

# Issuance of Additional Securities and Debt Instruments

Our board of directors is authorized to issue additional securities, including common stock, preferred stock, convertible preferred stock and convertible debt, for cash, property or other consideration on such terms as it may deem advisable and to classify or reclassify any unissued shares of capital stock of our company without approval of the holders of the outstanding securities. We may issue debt obligations with conversion privileges on such terms and conditions as the directors may determine, whereby the holders of such debt obligations may acquire our common stock or preferred stock. We may also issue warrants, options and rights to buy shares on such terms as the directors deem advisable, despite the possible dilution in the value of the outstanding shares which may result from the exercise of such warrants, options or rights to buy shares, as part of a ratable issue to stockholders, a private or public offering or another financial arrangement. Our board of directors, without any action by stockholders, may also amend our charter from time to time to increase or decrease the aggregate number of shares of our stock or the number of shares of stock of any class or series that we have authority to issue.

# Restrictions on Ownership and Transfer

In order to qualify as a REIT, we must meet several requirements concerning the ownership of our outstanding capital stock. Specifically, no more than 50% in value of our outstanding capital stock may be owned, directly or indirectly,

by five or fewer individuals, as defined in the Code to include specified private foundations, employee benefit plans and trusts, and charitable trusts, during the last half of a taxable year, other than our first REIT taxable year. Moreover, 100 or more persons must own our outstanding shares of capital stock during at least 335 days of a taxable year of 12 months or during a proportionate part of a shorter taxable year, other than our first REIT taxable year.

Because our board of directors believes it is essential for our company to qualify and continue to qualify as a REIT and for other corporate purposes, our charter, subject to the exceptions described below, provides that no person may own, or be deemed to own by virtue of the attribution provisions of U.S. federal income tax laws,

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more than 9.8% in value or in number, whichever is more restrictive, of outstanding shares of any class or series of our stock.

Our charter provides for certain circumstances where our board of directors may except a holder of our shares from the 9.8% ownership limitation and impose other limitations and restrictions on ownership. Additionally, our charter prohibits, subject to the exceptions described below, any transfer of capital stock that would:

result in any person owning, directly or indirectly, shares of our capital stock in excess of the foregoing ownership limitations;
result in our capital stock being owned by fewer than 100 persons, determined without reference to any rules of attribution;
result in our company being closely held under U.S. federal income tax laws (regardless of whether the ownership interest is held during the last half of a taxable year);
cause our company to own, actually or constructively, 9.8% or more of the ownership interests in a tenant of our real property; or
cause us to fail to qualify, under U.S. federal income tax laws or otherwise, as a REIT.

Any attempted transfer of our stock which, if effective, would result in our stock being beneficially owned by fewer than 100 persons will be null and void, with the intended transferee acquiring no rights in such shares of stock, and any other prohibited transfer of shares of our stock described above will, result in such shares being designated as shares-in-trust and transferred automatically to a trust effective on the day before the purported transfer of such shares. The record holder of the shares that are designated as shares-in-trust, or the prohibited owner, will be required to submit such number of shares of capital stock to our company for registration in the name of the trust. We will designate the trustee, but it will not be affiliated with our company. The beneficiary of the trust will be one or more charitable organizations that are named by our company.

Shares-in-trust will remain shares of issued and outstanding capital stock and will be entitled to the same rights and privileges as all other stock of the same class or series. The trust will receive all dividends and other distributions on the shares-in-trust and will hold such dividends or other distributions in trust for the benefit of the beneficiary. The trust will vote all shares-in-trust. The trust will designate a permitted transferee of the shares-in-trust, provided that the permitted transferee purchases such shares-in-trust for valuable consideration and acquires such shares-in-trust without such acquisition resulting in a transfer to another trust.

Our charter requires that the prohibited owner of the shares-in-trust pay to the trust the amount of any dividends or other distributions received by the prohibited owner that are attributable to any shares-in-trust and the record date of which was on or after the date that such shares of stock became shares-in-trust. The prohibited owner generally will receive from the trust the lesser of:

the price per share such prohibited owner paid for the shares of capital stock that were designated as shares-in-trust or, in the case of a gift or devise, the market price per share on the date of such transfer; or
the price per share received by the trust from the sale of such shares-in-trust.

The trust will distribute to the beneficiary any amounts received by the trust in excess of the amounts to be paid to the prohibited owner. The shares-in-trust will be deemed to have been offered for sale to our company, or our designee, at a price per share equal to the lesser of:

the price per share in the transaction that created such shares-in-trust or, in the case of a gift or devise, the market price per share on the date of such transfer; or
the market price per share on the date that our company, or our designee, accepts such offer.

We will have the right to accept such offer for a period of 90 days after the later of the date of the purported transfer which resulted in such shares-in-trust or the date we determine in good faith that a transfer resulting in such shares-in-trust occurred.

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Market price on any date means, with respect to any class or series of outstanding shares, the closing price for such shares on such date. The closing price refers to the last quoted price as reported by the primary securities exchange or market on which our stock is then listed or quoted for trading. If our stock is not so listed or quoted at the time of determination of the market price, our board of directors will determine the market price in good faith.

Any person who (a) acquires or attempts to acquire shares in violation of the foregoing restrictions on ownership and transfer of our stock, transfers or receives shares subject to such limitations, or would have owned shares that resulted in a transfer to a beneficial trust, or (b) proposes or attempts any of the transactions in clause (a), is required to give us 15 days written notice prior to such transaction. In both cases, such persons must provide to us such other information as we may request in order to determine the effect, if any, of such transfer on our status as a REIT.

If you own, directly or indirectly, more than 5%, or such lower percentages as required under U.S. federal income tax laws, of our outstanding shares of stock, then you must, within 30 days after January 1st of each year, provide to us a written statement or affidavit stating your name and address, the number of shares of capital stock owned directly or indirectly, and a description of how such shares are held. In addition, each direct or indirect stockholder shall provide to us such additional information as we may request in order to determine the effect, if any, of such ownership on our status as a REIT and to ensure compliance with the ownership limit.

The ownership limit generally will not apply to the acquisition of shares of capital stock by an underwriter that participates in a public offering of such shares. In addition, our board of directors, upon receipt of a ruling from the IRS or an opinion of counsel and upon such other conditions as our charter or board of directors may direct, may exempt a person (prospectively or retroactively) from the ownership limit. However, the ownership limit will continue to apply until our board of directors determines that it is no longer in the best interests of our company to attempt to qualify, or to continue to qualify, as a REIT.

All certificates, if any, representing our common or preferred stock, will bear a legend referring to the restrictions described above.

The ownership limit in our charter may have the effect of delaying, deferring or preventing a takeover or other transaction or change in control of our company that might involve a premium price for your shares or otherwise be in your interest as a stockholder.

# Distributions

Generally, our policy will be to pay distributions, at the discretion of our board of directors, from cash flow from operations. We generally do not intend to fund such distributions from offering proceeds, however, if we have not generated sufficient cash flow from our operations and other sources, such as from borrowings, advances from our advisor, our advisor s deferral, suspension and/or waiver of its fees and expense reimbursements, to fund distributions, we may use the offering proceeds. Moreover, our board of directors may change this policy, in its sole discretion, at any time. We have not established any limit on the amount of proceeds from this offering that may be used to fund distributions, except that, in accordance with our organizational documents and Maryland law, we may not make distributions that would (1) cause us to be unable to pay our debts as they become due in the usual course of business; (2) cause our total assets to be less than the sum of our total liabilities plus senior liquidation preferences, if any; or (3) jeopardize our ability to qualify as a REIT. Further, because we may receive income from interest or rents at various times during our fiscal year and because we may need cash flow from operations during a particular period to fund capital expenditures and other expenses, we expect that, at least during the early stages of our development and from time to time during our operational stage, we will declare distributions in anticipation of cash flow that we expect to

receive during a later period and we will pay these distributions in advance of our actual receipt of these funds. In these instances, we may look to third-party borrowings to fund our distributions. In addition, from time to time, our advisor and its affiliates may, but are not required to, agree to waive or defer all or a portion of the acquisition, asset management or other fees or other incentives due to them, enter into lease agreements for unleased space, pay general administrative expenses or otherwise supplement investor returns in order to increase the amount of cash available to make distributions to our stockholders. Thus, our ability to make distributions, especially during our early periods of operation, may be negatively impacted by one or more of the factors mentioned above. We will provide stockholders with a statement that will accompany each distribution that will disclose the sources of the distribution. Distributions

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made from offering proceeds are a return of capital to stockholders upon which we will have used to pay offering and organization expenses in connection with this offering. Please see Risk Factors Distributions paid from sources other than our cash flow from operations will result in us having fewer funds available for the acquisition of properties and other real estate-related investments, which may adversely affect our ability to fund future distributions with cash flow from operations and may adversely affect your overall return.

Once our board of directors has begun to authorize distributions, we intend to declare and pay distributions on a monthly basis. We intend to calculate these distributions based on daily record and distribution declaration dates so our investors will become eligible for distributions immediately upon the purchase of their shares. Distributions will be paid to stockholders as of the daily record dates on the payment dates selected by the directors.

We are required to make distributions sufficient to satisfy the requirements for qualification as a REIT under the Code. Generally, distributed income will not be taxable to us under the Code if we distribute at least 90% of our REIT taxable income (excluding net capital gain). Distributions will be authorized at the discretion of our board of directors, in accordance with our earnings, cash flow, anticipated cash flow and general financial condition and applicable law. The board s discretion will be directed, in substantial part, by its intention to cause us to comply with the REIT requirements. We intend to make distributions sufficient to meet the annual distribution requirements and to avoid U.S. federal income and excise taxes on our earnings; however, it may not always be possible to do so.

Many of the factors that can affect the availability and timing of cash distributions to stockholders are beyond our control, and a change in any one factor could adversely affect our ability to pay future distributions. There can be no assurance that future cash flow will support distributions at the rate that such distributions are paid in any particular distribution period.

Distributions in kind will not be permitted, except for:

distributions of readily marketable securities or our own securities;
distributions of beneficial interests in a liquidating trust established for our dissolution and the liquidation of our assets in accordance with the terms of the charter; or
distributions of in-kind property, so long as, with respect to such in-kind property, the board of directors advises each stockholder of the risks associated with direct ownership of the property, offers each stockholder the election of receiving in-kind property distributions, and distributes in-kind property only to those stockholders who accept the directors offer.

# Relationship to Operating Partnership

## Exchange Rights

Pursuant to the terms of, and subject to the conditions in, the operating partnership agreement, each holder of a limited partnership common unit (but not the holder of the associate limited partner interests) will have the right, commencing one year from the issuance of the limited partner common units (except in connection with a business combination), to cause the operating partnership to redeem their units for cash equal to the value of an equivalent number of our common shares or, at our option, we may purchase such units for cash or by issuing one share of our common stock for each unit redeemed. We will make the decision whether to exercise our right to exchange cash in lieu of shares on a case by case basis at our sole and absolute discretion. However, we cannot pay a limited partnership common unit holder in shares of our common stock if the issuance of shares to such holder would:

be prohibited under our charter; for example, if the issuance would (i) violate the 9.8% ownership limit or (ii) result in our being closely held within the meaning of Section 856(h) of the Code. See Description of Securities Restrictions on Ownership and Transfer herein;

cause us to no longer qualify, or create a material risk that we may no longer qualify, as a REIT in the opinion of our counsel; or

cause the acquisition of shares by the limited partner to be integrated with any other distribution of shares for purposes of complying with the registration provisions of the Securities Act.

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See also Operating Partnership Agreement Extraordinary Transactions for a discussion of exchange rights triggered by mergers and other major transactions.

Similar exchange rights may be given to holders of other classes of units in the operating partnership and to holders of interests in other companies we control, if any.

Any common stock issued to a limited partner upon exchange of limited partnership units may be sold only pursuant to an effective registration under the Securities Act or pursuant to any available exemption from such registration, such as Rule 144 promulgated under the Securities Act.

Limited partnership unit holders cannot exchange units for our shares within one year of issuance.

## Registration Rights

In the future we expect to grant demand and/or piggyback registration rights to (i) stockholders receiving our common stock directly for their equity interests in our assets, (ii) limited partners receiving units of limited partnership interest in the operating partnership for their interests in properties, and (iii) persons receiving interests in the operating partnership for their interests in real properties. These rights will be for registration under the Securities Act of any of our common stock acquired by them directly or upon exchange of their units or interests in the applicable partnership. The terms and conditions of any agreements for registration rights will be negotiated and determined at such future time as we determine advisable in connection with the acquisition of one or more properties.

# Provisions of Maryland Law and of Our Charter and Bylaws

## Business Combinations

Under Maryland law, business combinations between a Maryland corporation and an interested stockholder or an affiliate of an interested stockholder are prohibited for five years after the most recent date on which the interested stockholder becomes an interested stockholder. These business combinations include a merger, consolidation, share exchange, or, in circumstances specified in the statute, an asset transfer or issuance or reclassification of equity securities. An interested stockholder is defined as:

any person who beneficially owns 10% or more of the voting power of the corporation s voting stock; or
an affiliate or associate of the corporation who, at any time within the two-year period prior to the date in question, was the beneficial owner of 10% or more of the voting power of the then outstanding voting stock of the corporation.

A person is not an interested stockholder under the statute if the board of directors approved in advance the transaction by which the person otherwise would have become an interested stockholder. However, in approving a transaction, the board of directors may provide that its approval is subject to compliance, at or after the time of approval, with any terms and conditions determined by the board.

After the five-year prohibition, any business combination between the Maryland corporation and an interested stockholder generally must be recommended by the board of directors of the corporation and approved by the affirmative vote of at least:

80% of the votes entitled to be cast by holders of outstanding shares of voting stock of the corporation; and
two-thirds of the votes entitled to be cast by holders of voting stock of the corporation other than shares held by the interested stockholders with whom or with whose affiliate the business combination is to be effected or held by an

affiliate or associate of the interested stockholder.

These super-majority vote requirements do not apply if the corporation s common stockholders receive a minimum price, as defined under Maryland law, for their shares in the form of cash or other consideration in the same form as previously paid by the interested stockholder for his or her shares. Maryland law also permits various exemptions from these provisions, including business combinations that are exempted by the board of

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directors before the time that the interested stockholder becomes an interested stockholder. The business combination statute may discourage others from trying to acquire control of us and increase the difficulty of consummating any offer.

## Control Share Acquisitions

Maryland law provides that control shares of a Maryland corporation acquired in a control share acquisition have no voting rights except to the extent approved by a vote of two-thirds of the votes entitled to be cast on the matter. Shares owned by the acquirer, by officers or by employees who are directors of the corporation are excluded from the vote on whether to accord voting rights to the control shares. Control shares are voting shares of stock which, if aggregated with all other shares of stock owned by the acquirer or in respect of which the acquirer is able to exercise or direct the exercise of voting power (except solely by virtue of a revocable proxy), would entitle the acquirer to exercise voting power in electing directors within one of the following ranges of voting power: (i) one-tenth or more but less than one-third; (ii) one-third or more but less than a majority; or (iii) a majority or more of all voting power.

Control shares do not include shares the acquiring person is entitled to vote as a result of having previously obtained stockholder approval. A control share acquisition means the acquisition of control shares, subject to certain exceptions. A person who has made or proposes to make a control share acquisition may compel the board of directors of the corporation to call a special meeting of stockholders to be held within 50 days of demand to consider the voting rights of the shares. The right to compel the calling of a special meeting is subject to the satisfaction of certain conditions, including an undertaking to pay the expenses of the meeting. If no request for a meeting is made, the corporation may itself present the question at any stockholders meeting.

If voting rights are not approved at the meeting or if the acquiring person does not deliver a statement as required by the statute, then the corporation may redeem for fair value any or all of the control shares, except those for which voting rights have previously been approved. The right of the corporation to redeem control shares is subject to certain conditions and limitations. Fair value is determined, without regard to the absence of voting rights for the control shares, as of the date of the last control share acquisition by the acquirer or of any meeting of stockholders at which the voting rights of the shares are considered and not approved. If voting rights for control shares are approved at a stockholders meeting and the acquirer becomes entitled to vote a majority of the shares entitled to vote, all other stockholders may exercise appraisal rights. The fair value of the shares as determined for purposes of appraisal rights may not be less than the highest price per share paid by the acquirer in the control share acquisition.

The control share acquisition statute does not apply to (a) shares acquired in a merger, consolidation or share exchange if the corporation is a party to the transaction, or (b) acquisitions approved or exempted by our charter or bylaws.

Our bylaws contain a provision exempting from the control share acquisition statute any and all acquisitions of shares of our stock by any person. We can offer no assurance that this provision will not be amended or eliminated at any time in the future.

## Tender Offers by Stockholders

In order for any person to conduct a tender offer, including a mini-tender offer, our charter requires that the person comply with Regulation 14D of the Exchange Act and provide the Company notice of such tender offer at least 10 business days before initiating the tender offer. Pursuant to our charter, Regulation 14D would require any person initiating a tender offer to provide:

Specific disclosure to stockholders focusing on the terms of the offer and information about the bidder;

The ability to allow stockholders to withdraw tendered shares while the offer remains open;

The right to have tendered shares accepted on a pro rata basis throughout the term of the offer if the offer is for less than all of our shares; and

That all stockholders of the subject class of shares be treated equally.

In addition to the foregoing, there are certain ramifications to persons should they attempt to conduct a noncompliant tender offer. If any person initiates a tender offer without complying with the provisions set forth

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above, in our sole discretion, we shall have the right to redeem such noncompliant person s shares and any shares acquired in such tender offer. The noncomplying person shall also be responsible for all of our expenses in connection with that person s noncompliance.

## Subtitle 8

Subtitle 8 of Title 3 of the MGCL permits a Maryland corporation with a class of equity securities registered under the Exchange Act and at least three independent directors to elect to be subject, by provision in its charter or bylaws or a resolution of its board of directors and notwithstanding any contrary provision in the charter or bylaws, to any or all of the following provisions:

a classified board;
a two-thirds vote requirement for removing a director;
a requirement that the number of directors be fixed only by vote of the directors;
a requirement that a vacancy on the board be filled only by the remaining directors and for the remainder of the full term of the directorship in which the vacancy occurred; and
a majority requirement for the calling of a special meeting of stockholders.

We have elected, at such time as we are eligible to make the election provided for under Subtitle 8, to provide that vacancies on our board of directors may be filled only by the remaining directors and for the remainder of the full term of the directorship in which the vacancy occurred. Through provisions in our charter and bylaws unrelated to Subtitle 8, we already vest in our board of directors the exclusive power to fix the number of directorships.

## Advance Notice of Director Nominations and New Business

Our bylaws provide that, with respect to an annual meeting of stockholders, nominations of individuals for election to the board of directors and the proposal of business to be considered by stockholders may be made only (i) pursuant to our notice of the meeting, (ii) by or at the direction of the board of directors or (iii) by a stockholder who is a stockholder of record both at the time of giving the advance notice required by our bylaws and at the time of the meeting who is entitled to vote at the meeting and who has complied with the advance notice procedures of the bylaws. With respect to special meetings of stockholders, only the business specified in our notice of the meeting may be brought before the meeting. Nominations of individuals for election to the board of directors at a special meeting may be made only (1) by or at the direction of the board of directors or (2) provided that the meeting has been called in accordance with our bylaws for the purpose of electing directors, by a stockholder who is a stockholder of record both at the time of giving the advance notice required by our bylaws and at the time of the meeting who is entitled to vote at the meeting and who has complied with the advance notice provisions of the bylaws. The advance notice provisions of our bylaws could delay, defer or prevent a transaction or a change in control of us that might involve a premium price for holders of our common stock.

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# PLAN OF DISTRIBUTION

## The Offering

We are offering a maximum of 100,000,000 shares of our common stock to the public in our primary offering through our dealer manager, Empire American Realty, LLC, an affiliate of our advisor. The shares are being offered at a price of $10.00 per share with discounts available to certain categories of purchasers as described below. Because this is a best efforts offering, the dealer manager must use only its best efforts to sell the shares and it has no firm commitment or obligation to purchase any of the shares. We are also offering 10,000,000 shares of our common stock pursuant to our distribution reinvestment program at a price of $9.50 per share. Therefore, a total of 110,000,000 shares are being registered in this offering. We reserve the right to reallocate the shares of common stock registered in this offering between the primary offering and the distribution reinvestment program.

This offering will end no later than May 14, 2012, unless we elect to extend it to a date no later than May 14, 2013 in the states that permit us to make this one-year extension. If we extend the offering for another year and file another registration statement during the one-year extension in order to sell additional shares, we could continue to sell shares in this offering until the earlier of 180 days after the third anniversary of the commencement of this offering or the effective date of the subsequent registration statement. If we decide to extend the primary offering beyond two years from the date of this prospectus, we will provide that information in a prospectus supplement. If we file a subsequent registration statement, we could continue offering shares with the same or different terms and conditions. Nothing in our organizational documents prohibits us from engaging in additional subsequent public or private offerings of our stock. Although we could continue public offerings indefinitely, and although we have not set a date or an aggregate amount of offering proceeds beyond which we must stop offering shares, we do not expect to continue offering shares beyond three years from the effective date of the registration statement of which this prospectus is a part. Our board of directors has the discretion to extend the offering period for the shares being sold pursuant to our distribution reinvestment program up to the sixth anniversary of the termination of the primary offering, in which case we will notify participants in the plan of such extension. Our board of directors may terminate this offering at any time prior to the termination date. Unless an exemption from a state s registration requirements is available, this offering must be registered in every state in which we offer or sell shares. Generally, such registrations are for a period of one year. Thus, we may have to stop selling shares in any state in which the registration is not renewed annually.

## Dealer Manager and Other Compensation We Will Pay for the Sale of Our Shares

Our dealer manager was organized on March 26, 2009 for the purpose of participating in and facilitating the distribution of securities being offered in this offering. Except as provided below, our dealer manager will receive selling commissions of 7% of the gross offering proceeds. The dealer manager will also receive a dealer manager fee in the amount of 3% of the gross offering proceeds as compensation for acting as the dealer manager and for reimbursement of expenses incurred in connection with marketing our shares. In addition to the dealer manager fee and selling commission, and subject to the limits on organization and offering expenses described below, we may reimburse the dealer manager for its reasonable *bona fide* due diligence expenses and reimburse it for reimbursements it may make to broker-dealers for reasonable *bona fide* due diligence expenses which must be included in a detailed and itemized invoice. We will not pay selling commissions or a dealer manager fee for shares sold pursuant to the distribution reinvestment program. We will not pay referral or similar fees to any accountants, attorneys or other persons in connection with the distribution of the shares.

As required by the rules of FINRA, total underwriting compensation will not exceed 10.0% of the gross proceeds from shares sold in our primary offering. Additionally, the dealer manager undertakes that it will repay to us any excess over FINRA s 10% underwriting compensation limit in the event that the offering is abruptly terminated after reaching the minimum amount of offering proceeds, but before reaching the maximum amount of offering proceeds. FINRA and many states also limit our total organization and offering expenses, which include underwriting compensation, reimbursement of *bona fide* due diligence expenses included in a detailed and itemized invoice and issuer expenses, to 15.0% of the gross proceeds from shares sold in our primary offering. We will reimburse our advisor for actual organization and offering expenses incurred by our advisor, which such amount, including underwriting compensation and reimbursement of due diligence expenses, shall not exceed the 15.0% FINRA limitation. To show the maximum amount of dealer manager and participating

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broker-dealer compensation that we may pay in this offering, this table assumes that all shares of our common stock are sold through distribution channels associated with the highest possible selling commissions and dealer manager fees.

| | Price | Selling Commissions | Dealer Manager Fee | Net Proceeds (Before Expenses)[1] |
|---|---|---|---|---|
| Primary Offering | | | | |
| Per Share | $ 10.00 | $ 0.70 | $ 0.30 | $ 9.00 |
| Total Maximum | $ 1,000,000,000 | $ 70,000,000 | $ 30,000,000 | $ 900,000,000 |
| Distribution Reinvestment Program | | | | |
| Per Share | $ 9.50 | $ | $ | $ 9.50 |
| Total Maximum | $ 95,000,000 | $ | $ | $ 95,000,000 |
| Total | $ 1,095,000,000 | $ 70,000,000 | $ 30,000,000 | $ 995,000,000 |

(1) Organization and offering expenses consist of reimbursement of actual legal, accounting, printing and other accountable offering expenses, including amounts to reimburse our advisor for marketing, salaries and direct expenses of its employees, and employees of its affiliates while engaged in registering and marketing the shares (including, without limitation, reimbursement of *bona fide* due diligence expenses of broker-dealers included in a detailed and itemized invoice, reimbursement of our advisor for costs in connection with preparing supplemental sales materials, the cost of *bona fide* training and education meetings held by us (primarily the travel, meal and lodging costs of registered representatives of broker-dealers), attendance and sponsorship fees and cost reimbursement for employees of our affiliates to attend retail seminars conducted by broker-dealers) and other marketing, coordination, administrative oversight and organization costs, other than selling commissions and the dealer manager fee. Our advisor and its affiliates are responsible for the payment of organization and offering expenses, other than selling commissions and the dealer manager fee, to the extent they exceed 1.5% of gross offering proceeds, without recourse against or reimbursement by us; provided, however, that in no event will we pay or reimburse organization and offering expenses in excess of 15% of the gross offering proceeds. We currently estimate that approximately $11,150,000 of organization and offering costs will be incurred if the maximum offering of 100,000,000 shares is sold.

We will not pay any selling commissions to our dealer manager in connection with:

the sale of the shares to one or more select dealers and their respective officers and employees and their approved respective affiliates;

the sale of the shares to investors whose contracts for investment advisory and related brokerage services include a fixed or wrap fee feature or other asset fee arrangement;

sales by us directly to certain institutional investors (in accordance with the volume discounts set forth above);

if the investor has engaged the services of a registered investment adviser or other financial advisor, who will be paid other compensation by the investor for investment advisory services or other financial or investment advice; or

if the investor is investing in a bank trust account with respect to which the investor has delegated the decision-making authority for investments made in the account to a bank trust department.

The net proceeds to us will not be affected by reducing the selling commissions payable in connection with such transactions. Neither our dealer manager nor its affiliates will directly or indirectly compensate any person engaged as an investment adviser or a bank trust department by a potential investor as an inducement for such investment adviser or a bank trust department to advise favorably for an investment in our shares.

Our dealer manager will authorize certain broker-dealers or authorized representatives who are members of FINRA to sell shares of our common stock. In the event of the sale of shares by such broker-dealers, the dealer manager will reallow its selling commissions in the aggregate amount of up to 7% of the gross offering proceeds to such participating broker-dealers. In addition, our dealer manager may reallow a portion of its dealer manager fee in the aggregate amount of up to 3% of gross offering proceeds to be paid to such participating dealers. The amount of the reallowance and reimbursement for bona fide, separately invoiced due diligence expenses incurred

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under arrangements with third parties shall be limited to the amount so invoiced. Additionally, our dealer manager may make unsolicited retail sales. If our dealer manager makes a retail sale, it will receive the selling commission of 7% of the gross offering proceeds and retain the dealer manager fee of 3% of gross offering proceeds. We will not pay selling commissions or dealer manager fees for sales pursuant to our distribution reinvestment program.

We or an affiliate of our advisor may also provide non-cash compensation for registered representatives of our dealer manager and participating broker-dealers that in no event will exceed the limits set forth in the FINRA Rules. Non-cash compensation may include: a de minimis amount of gifts (currently $100 per person, per year), an occasional meal or ticket to a sporting or entertainment event and payment or reimbursement of costs of attending bona fide training and education meetings. Such non-cash compensation will not be preconditioned on achievement of sales targets. The value of any such items will be considered underwriting compensation in connection with this offering.

We have agreed to indemnify the participating broker-dealers, including our dealer manager and selected registered investment advisers, against certain liabilities arising under the Securities Act. However, the SEC and some state securities commissions take the position that indemnification against liabilities arising under the Securities Act is against public policy and is unenforceable.

The participating broker-dealers and registered investment advisers are not obligated to obtain any subscriptions on our behalf, and we cannot assure you that any shares will be sold.

# Shares Purchased by Affiliates

Our executive officers and directors, as well as officers and employees of our sponsor and their family members (including spouses, parents, grandparents, children and siblings) or other affiliates and friends, may purchase shares offered in this offering at a discount. Friends means individuals who have a prior business relationship with officers of our sponsor and individuals who have a prior personal relationship with officers of our sponsor. The purchase price for such shares will be $9.00 per share, reflecting the fact that selling commissions to any person or entity in the amount of $0.70 per share and a dealer manager fee in the amount of $0.30 per share will not be payable in connection with such sales. The net offering proceeds we receive will not be affected by such sales of our shares at a discount. Our executive officers, directors and other affiliates will be expected to hold the shares of our stock purchased by them as stockholders for investment and not with a view towards resale. In addition, shares purchased by our advisor or its affiliates will not be entitled to vote on matters presented to the stockholders for a vote relating to the removal of our advisor, the removal of any director that is an affiliate of our advisor or any transaction between us and our advisor or any of its affiliates. Proceeds raised in connection with the sale of shares to our officers, directors, our sponsor and its affiliates and their family members and friends will count towards achieving the minimum offering. Further, from and after the commencement of this offering, our directors, officers, advisor and their respective affiliates are subject to the restrictions on ownership and transfer of our stock, including the restriction that prohibits any person from owning more than 9.8% in value of the aggregate of our outstanding stock or more than 9.8% (in value or number of shares, whichever is more restrictive) of the outstanding shares of any class or series of our stock.

Resales of our common stock purchased by our affiliates are subject to Rule 144. Generally, a person (or persons whose shares are aggregated) who is deemed to be an affiliate and who has beneficially owned restricted securities within the meaning of Rule 144 for at least six months would be entitled to sell within any three-month period a number of shares that does not exceed the greater of 1% of the then outstanding shares of common stock or the average weekly trading volume of common stock during the four calendar weeks preceding such sale. As a result, our affiliates are subject to limitations on the amount of our securities that they may resell. Such sales are also subject to

certain manner of sale provisions (which provide that securities must be sold in unsolicited brokers transactions or in transactions directly with a market maker), notice requirements (which provide that notice of a sale on Form 144 must be filed at the time the order to sell is placed with the broker or the securities are sold to a market maker) and the availability of current public information about us (which requires that we are current in our periodic reports under the Exchange Act).

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# Other Discounts

In addition, our dealer manager may sell shares to retirement plans of broker-dealers participating in this offering, to broker-dealers in their individual capacities, to IRAs and qualified plans of their registered representatives or to any one of their registered representatives in their individual capacities net of the selling commissions of $0.70, for a purchase price of $9.30, in consideration of the services rendered by such broker-dealers and registered representatives in the distribution. The net proceeds of these sales to our company also will be the same as our net proceeds from other sales of shares.

# Subscription Process

We will sell shares of our common stock when subscriptions to purchase shares are received and accepted by us. If you meet our suitability standards, you may subscribe for shares by completing and signing a subscription agreement (attached to this prospectus as Appendix C), according to its instructions for a specific number of shares and delivering to us a check for the full purchase price of the shares. Until we achieve the minimum offering, you should make your check payable to UMB Bank, N.A., Escrow Agent for Empire REIT, except investors from Tennessee and Pennsylvania should continue to make checks payable to UMB Bank, N.A., Escrow Agent for Empire REIT until we raise $25,000,000 and $50,000,000, respectively. After we achieve the minimum offering checks should be made payable to Empire American Realty Trust, Inc. You should exercise care to ensure that the subscription agreement is filled out correctly and completely. The subscription agreement requires you to make the following representations and agreements:

you have received this prospectus;
you meet the minimum income and net worth standards established for us;
you are purchasing the shares for your own account;
you acknowledge that there is no public market for our shares; and
you are in compliance with the USA PATRIOT Act and are not on any governmental authority watch list.

We include these representations in our subscription agreement in order to prevent persons who do not meet our suitability standards or other investment qualifications from subscribing to purchase our shares. These representations are included in order to help satisfy our responsibility, which our broker dealers will undertake as our agents, to make every reasonable effort to determine that the purchase of our common stock is a suitable and appropriate investment for you and that appropriate tax reporting information is obtained. By executing the subscription agreement, you will not be waiving any rights under federal or state law.

Subscriptions will be effective upon our (i) acceptance and countersigning of the subscription agreement and (ii) admission of the investor as a stockholder, which will be evidenced by sending a confirmation of our acceptance to the investor. In the event we evidence our acceptance of a subscription by sending a confirmation, the date of acceptance will be the date that we admit the investor as a stockholder, which may or may not be the date on which the corresponding confirmation is sent. We reserve the right, in our sole and absolute discretion, to reject any subscription in whole or in part, notwithstanding our deposit of the subscription proceeds in a company account. We may not accept a subscription for shares until at least five business days after the date you receive this prospectus. Subject to compliance with Rule 15c2-4 of the Exchange Act, our dealer manager and the broker-dealers participating in the offering will submit an investor s check promptly to the escrow agent until the minimum subscription amount is received.

We will accept or reject subscriptions within 30 days after we receive them. If your subscription agreement is rejected, your funds (including interest, to the extent earned and if such funds have been held for more than 35 days) will be

returned to you within ten business days after the date of such rejection. If your subscription is accepted, you will receive a confirmation of your purchase after you have been admitted as an investor. We expect to admit new investors at least monthly.

## Special Notice to Pennsylvania Investors

Subscription proceeds received from residents of Pennsylvania will be placed in a separate interest-bearing escrow account with the escrow agent until subscriptions for shares aggregating at least $50,000,000 have been

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received and accepted by us. If we have not raised a minimum of $50,000,000 in gross offering proceeds (including sales made to residents of other jurisdictions) by the end of each 120-day escrow period (with the initial 120-day escrow period commencing upon the effectiveness of this offering), we will notify Pennsylvania investors in writing by certified mail within ten calendar days after the end of each 120-day escrow period that they have a right to have their investments returned to them. If a Pennsylvania investor requests the return of his or her subscription funds within ten calendar days after receipt of the notification, we must return those funds to the investor, together with any interest earned on the funds for the time those funds remain in escrow subsequent to the initial 120-day escrow period, within ten calendar days after receipt of the investor s request.

# Admission of Stockholders

Investors may be admitted as stockholders at any time, and we expect to admit stockholders on at least a monthly basis. The proceeds of this offering will be received and held in trust for the benefit of the investors to be used for the purposes set forth in the Estimated Use of Proceeds section of this prospectus.

# Investments by IRAs and Qualified Plans

State Street Bank and Trust Company has agreed to act as an IRA custodian for investors of our common stock who desire to establish an IRA, SEP or certain other tax-deferred accounts or transfer or rollover existing accounts. We will not pay the fees related to the establishment of investor accounts with State Street Bank and Trust Company, nor will we pay the fees related to the maintenance of any such account for the first year following its establishment. State Street Bank and Trust Company has agreed to provide this service to our stockholders with annual maintenance fees charged at a discounted rate. In the future, we may make similar arrangements for our investors with other custodians. Further information as to custodial services is available through your broker or may be requested from us.

# Volume Discounts

In connection with sales of certain minimum numbers of shares to a single purchaser (as defined below), the purchaser will receive a volume discount resulting in a reduction in selling commissions payable with respect to such sale. In such event, any such reduction will be credited to the investor by reducing the purchase price per share payable by the investor. The following table illustrates the various discount levels available for qualifying purchases:

| For a Single Purchaser | | Purchase Price per Share for Incremental Share in Volume Discount Range | Selling Commission per Share for Incremental Share in Volume Discount Range |
|---|---|---|---|
| $2,000 | $250,000 | $ 10.00 | $ 0.70 |
| 250,001 | 500,000 | 9.85 | 0.55 |
| 500,001 | 750,000 | 9.70 | 0.40 |
| 750,001 | 1,000,000 | 9.60 | 0.30 |
| 1,000,001 | 5,000,000 | 9.50 | 0.20 |

As an example, a single purchaser would receive 50,380 shares rather than 50,000 shares for an investment of $500,000 and the selling commission would be $31,459. The discount would be calculated as follows: on the first $250,000 of the investment there would be no discount and the purchaser would receive 25,000 shares at $10 per share; on the remaining $250,000, the per share price would be $9.85 and the purchaser would receive 25,380 shares.

Selling commissions for purchases of $5,000,000 or more may, in our sole discretion, be reduced to $0.20 per share or less. Selling commissions paid will in all cases be the same for the same level of sales, and once a price is negotiated with the initial purchaser, this will be the price for all purchasers at that volume. In the event of a sale of $5,000,000 or more, we will supplement this prospectus to include: (i) the aggregate amount of the sale, (ii) the price per share paid by the purchaser and (iii) a statement that other investors wishing to purchase at least the amount described in (i) will pay no more per share than the initial purchaser.

Because all investors will be deemed to have contributed the same amount per share to us for purposes of declaring and paying distributions, investors qualifying for a volume discount will receive a higher return on their investment than investors who do not qualify for such discount.

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Subscriptions may be combined for the purpose of determining volume discounts in the case of subscriptions made by any single purchaser (defined below), provided all such shares are purchased through the same broker-dealer. The volume discount shall be prorated among the separate investors considered to be a single purchaser. Any request to combine more than one subscription must be made in writing, submitted simultaneously with the subscription for shares, and must set forth the basis for such request. Any such request will be subject to verification by our advisor that all such subscriptions were made by a single purchaser.

For the purpose of such volume discounts, the term single purchaser includes:

an individual, his or her spouse and their children, grandchildren, nieces and nephews and any other members of their extended family who purchase the shares for his, her and/or their own accounts;
any one of the following entities: a corporation, partnership, association, joint-stock company, trust fund or limited liability company;
any group of entities owned or controlled by the same beneficial owner or owners;
any individuals or entities acquiring shares as joint purchasers;
an employees trust, pension, profit-sharing or other employee benefit plan qualified under Section 401(a) of the Code;
all employees trust, pension, profit-sharing or other employee benefit plans maintained by a given corporation, partnership or other entity; or
all commingled trust funds maintained by a given bank.

Notwithstanding the above, in connection with volume sales made to investors in our common stock, investors may request in writing to aggregate subscriptions for additional shares with previous subscriptions by the same investor as part of a combined order for purposes of determining the number of shares purchased, provided that any aggregate group of subscriptions must be received from the same broker-dealer, including our dealer manager. An investor may reduce the amount of his or her purchase price to the net amount shown in the foregoing table, if applicable. As set forth above, all requests to aggregate subscriptions must be made in writing, and except as provided in this paragraph, separate subscriptions will not be cumulated, combined or aggregated.

California residents should be aware that volume discounts will not be available in connection with the sale of shares made to California residents to the extent such discounts do not comply with the provisions of Rule 260.140.51 adopted pursuant to the California Corporate Securities Law of 1968. Pursuant to this rule, volume discounts can be made available to California residents only in accordance with the following conditions:

there can be no variance in the net proceeds to us from the sale of the shares to different purchasers of the same offering;
all purchasers of the shares must be informed of the availability of quantity discounts;
the same volume discounts must be allowed to all purchasers of shares that are part of the offering;
the minimum amount of shares as to which volume discounts are allowed cannot be less than $10,000;
the variance in the price of the shares must result solely from a different range of commissions, and all discounts allowed must be based on a uniform scale of commissions; and
no discounts are allowed to any group of purchasers.

Accordingly, volume discounts for California residents will be available in accordance with the foregoing table of uniform discount levels based on dollar volume of shares purchased, but no discounts are allowed to any group of purchasers, and no subscriptions of any group of purchasers may be aggregated as part of a combined order for purposes of determining the number of shares purchased.

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# SUMMARY OF OUR ORGANIZATIONAL DOCUMENTS

Each stockholder is deemed to have agreed to the terms of our organizational documents by virtue of the election to become a stockholder. Our organizational documents consist of our charter and bylaws. The following is a summary of material provisions of our organizational documents and does not purport to be complete. Our organizational documents are filed as exhibits to our registration statement of which this prospectus is part. See Where You Can Find Additional Information.

Our amended and restated charter will be filed with the State Department of Assessments and Taxation of Maryland, after it is approved by our board of directors and our initial stockholder, which we expect to occur concurrently with the commencement of this offering. Neither our charter nor bylaws have an expiration date, and therefore, both documents remain effective in their current form throughout our existence, unless they are amended.

# CHARTER AND BYLAW PROVISIONS

The stockholders rights and related matters are governed by our charter, our bylaws and Maryland law. Some provisions of our charter and bylaws, summarized below, may make it more difficult to change the composition of our board of directors and could have the effect of delaying, deferring or preventing a change in control of us, including an extraordinary transaction (such as a merger, tender offer or sale of all or substantially all of our assets) that might provide a premium price for holders of our common stock.

## Stockholders Meetings

Our bylaws provide that an annual meeting of the stockholders will be held on a date that the board of directors may determine, but not less than 30 days after the delivery of our annual report to stockholders. It is the duty of our directors, including the independent directors, to take reasonable steps to insure that the foregoing requirement is met. The purpose of each annual meeting of the stockholders is to elect directors and to transact any other proper business.

The chairman, the president, the chief executive officer, a majority of the directors or a majority of the independent directors may call a special meeting of the stockholders. The secretary must call a special meeting when stockholders holding 10% or more of all the votes entitled to be cast at such meeting make a written request for the meeting. The written request may be delivered in person or by mail and must state the purpose(s) of, and matters proposed to be acted upon at, the meeting. Any special meeting will be held on a date not less than 15 nor more than 60 days after the distribution of the notice for such meeting, at the time and place specified in the notice. With respect to special meetings, the notice will state the purpose of the meeting and the matters to be acted upon. In general, the presence, in person or by proxy, of 50% of all the votes entitled to be cast at such meeting will constitute a quorum.

## Board of Directors

Our business and affairs will be managed under the direction of our board of directors. Our charter provides that we may not have less than three, nor more than ten, directors. Upon commencement of this offering, a majority of the directors must be independent directors. Any vacancy on the board of directors may be filled only by a majority of the remaining directors, whether or not the remaining directors constitute a quorum, except that upon a vacancy created by the death, resignation or incapacity of an independent director, the remaining independent directors must nominate a replacement. Any director may resign at any time by written notice to the board of directors. Further, any director

may be removed, with or without cause, at a meeting called for that purpose by the affirmative vote of stockholders entitled to cast not less than a majority of the votes entitled to be cast generally in the election of directors.

A director must have at least three years of relevant experience and demonstrate the knowledge required to successfully acquire and manage the type of assets we are acquiring. At least one of the independent directors must have at least three years of relevant real estate experience. At least one of the independent directors must be a financial expert with at least three years of financial experience.

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# Stockholder Liability

Our stockholders are not liable in any manner whatsoever for any debt, claim, demand, judgment or obligation of any kind of, against or with respect to us, nor subject to any personal liability whatsoever in connection with our assets or affairs, by reason of being a stockholder.

# Stockholder Voting Rights

Each share of our common stock is entitled to one vote on each matter submitted to a vote of stockholders. Shares of common stock do not have cumulative voting rights nor preemptive rights. Stockholders may vote in person or by proxy.

Directors are elected when they receive the affirmative vote of a majority of the shares entitled to vote, present in person or by proxy, at a stockholders meeting, provided there was a quorum present when the meeting commenced. A quorum is obtained when the stockholders entitled to cast at least 50% of all the votes entitled to be cast at the meeting on any matter are present in person or by proxy. Any or all directors may be removed, with or without cause, at a meeting called for that purpose, by the affirmative vote of the holders of not less than a majority of the outstanding shares entitled to vote generally in the election of directors. A majority of all the votes cast at a meeting of stockholders at which a quorum is present is sufficient to approve any other matter unless our charter or the MGCL require otherwise. Unless otherwise provided in a corporation s charter (which our charter does not), Maryland law provides that any action required or permitted to be taken at a meeting of stockholders may be taken without a meeting only by the unanimous written or electronic consent of all stockholders entitled to vote.

Our charter provides that our board of directors may not, without the affirmative vote of stockholders entitled to cast at least a majority of all the votes entitled to cast on the matter:

amend our charter, including, without limitation, amendments to provisions relating to director qualifications, fiduciary duty, liability and indemnification, conflicts of interest, investment policies or investment restrictions, except for amendments with respect to increases or decreases in the number of shares of stock of any class or series or the aggregate number of shares of stock, a change of our name, a change of the name or other designation or the par value of any class or series of stock and the aggregate par value of our stock and certain reverse stock splits;

sell all or substantially all of our assets other than in the ordinary course of our business or in connection with our liquidation or dissolution;

cause a merger or consolidation of our company; or

dissolve or liquidate our company.

Our charter further provides that, without the necessity for concurrence by our board of directors, holders of a majority of voting shares may vote to amend our charter, dissolve or liquidate our company or remove the directors.

Neither our advisor, our directors, nor any of their affiliates may vote their shares regarding, or consent to, matters submitted to the stockholders pertaining to the removal of our advisor, such directors or any of their affiliates, or any transaction between us and any of them. For purposes of determining the necessary percentage in interest of shares needed to approve a matter on which our advisor, our directors or any of their affiliates are prohibited from voting or consenting, the shares of our common stock owned by any of the foregoing will not be included.

# Stockholder Lists; Inspection of Books and Records

A stockholder, or its designated representative, will be permitted, at reasonable times, to access all of our records to which it is entitled by applicable law, and it may inspect and copy any of such records for a reasonable charge for the purposes specified below. At our principal office, we maintain an alphabetical list of names, record addresses and telephone numbers, if any, of all stockholders, along with the number of shares held by each stockholder. The stockholder list is updated at least quarterly to reflect changes in the information contained therein. A stockholder, or its designated representative, may request a copy of the stockholder list to inquire about, without limitation, matters relating to the stockholder s voting rights and its exercise of such rights under federal proxy laws. We will mail the stockholder list, printed in alphabetical order, on white paper, and in a

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readily readable type size (in no event smaller than 10-point type), to any stockholder requesting such within 10 days of receiving the request. We may impose a reasonable charge for expenses incurred in reproducing the list.

If our advisor or board of directors neglect, or refuse, to exhibit, produce or mail a copy of the stockholder list if requested in accordance with the foregoing, then in accordance with applicable law and our charter, our advisor and directors will be liable to the stockholder who made the request. The advisor s and/or directors liability may include the costs, including reasonable attorneys fees, incurred by the stockholder in compelling the production of the list and actual damages suffered by the stockholder because of the refusal or neglect. Our advisor and board of directors may, however, refuse to supply the list without any liability to the stockholder if the advisor or board of directors reasonably believe that the stockholder s actual purpose for the request is to secure the list for the purpose of selling it or using it for a commercial purpose unrelated to such stockholder s interest in us. We may require the stockholder requesting the list to represent that the stockholder list is not requested for one of the foregoing restricted purposes. The foregoing stockholder remedies are in addition to, and in no way limit, other remedies available to stockholders under federal law, or the laws of any state.

## Amendment of the Organizational Documents

Our charter may be amended, after a declaration by the board of directors that the amendment is advisable and approval by the affirmative vote of holders of a majority of all votes entitled to be cast on the matter. Our bylaws may be amended in a manner not inconsistent with our charter by a majority vote of the directors.

## Dissolution

We may be dissolved after a declaration by a majority of the entire board of directors that dissolution is advisable and the approval by stockholders entitled to cast a majority of all the votes entitled to be cast on the matter. If our shares are listed on a national stock exchange or traded in the over-the-counter market by the tenth anniversary of completion of our initial public offering, we will continue perpetually unless dissolved pursuant to any applicable provision of the MGCL. If in seven years after the completion of our offering we are not listed on a national stock exchange or traded in the over-the-counter market and we are not dissolved, our board of directors must either (a) adopt a resolution that proposes an extension or elimination of this deadline by amendment to our charter, declaring that such amendment is advisable and directing that the proposed amendment be submitted for consideration at a stockholder meeting, or (b) adopt a resolution declaring that a proposed liquidation and dissolution is advisable and mandating submission of the proposed plan of liquidation for consideration at a stockholder meeting. If our stockholders do not approve the amendment sought by our board of directors, then our board of directors will seek the plan of liquidation mentioned above. If our stockholders do not then approve the plan of liquidation, we will continue our business until dissolved in accordance with the foregoing. If our board of directors initially seeks the plan of liquidation and our stockholders do not approve the resolution, then our board of directors will seek the charter amendment extending the ten year deadline. If our stockholders do not then approve the amendment, we will continue our business until dissolved in accordance with the foregoing.

## Advance Notice of Director Nominations and New Business

Our bylaws provide that, with respect to our annual meeting of stockholders, nominations for election to our board of directors and the proposal of business to be considered by stockholders may be made only: pursuant to notice of the meeting;

pursuant to notice of the meeting;

by or at the direction of our board of directors; or

by a stockholder who was a stockholder of record both at the time of giving notice of such nomination or proposal of business and at the time of the meeting, who is entitled to vote at the meeting and who has complied with the advance notice procedures set forth in our bylaws.

Our bylaws also provide that, with respect to special meetings of stockholders, only the business specified in the notice of meeting may be brought before the meeting of stockholders and nominations for election to the board of directors may be made only:

by or at the direction of the board of directors; or

provided that the meeting has been called in accordance with our bylaws for the purpose of electing

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directors, by a stockholder who was a stockholder of record both at the time of giving notice of such nomination and at the time of the meeting, who is entitled to vote at the meeting and who complied with the advance notice procedures set forth in our bylaws.

A stockholder nomination or proposal of business in connection with an annual meeting must provide the information required in our bylaws and be delivered to our secretary at our principal executive offices:

not earlier than the 150th day or later than 5:00 p.m., Eastern Time, on the 120th day before the first anniversary of the meeting of the proxy statement for the prior year s annual meeting; or

in the event that the number of directors is increased and there is no public announcement of such action, at least 130 days before the first anniversary of the date of the mailing of the proxy statement for the preceding year s annual meeting, and with respect to nominees for any new positions created by such increase, not later than 5:00 p.m., Eastern Standard Time, on the tenth day following the day on which such public announcement is first made.

A stockholder nomination for a special meeting must provide the information required in our bylaws and be delivered to our secretary at our principal executive offices:

not earlier than the 120th day prior to the special meeting; and

not later than 5:00 p.m., Eastern Time, on the later of the 90th day prior to the special meeting or the 10th day following the first public announcement of the special meeting and the nominees proposed by the board of directors to be elected at the meeting.

# Restrictions on Conversion and Roll-Up Transactions

A roll-up transaction, in general terms, is any transaction involving the acquisition, merger, conversion or consolidation, directly or indirectly, of our company and the issuance of securities of a roll-up entity. A roll-up entity is a partnership, REIT, corporation, trust or similar entity that would be created or would survive after the successful completion of a proposed roll-up transaction. A roll-up transaction does not include a transaction involving (a) securities that have been listed on a national securities exchange for at least 12 months, or (b) our conversion to a trust or association form if, as a consequence of the transaction, there will be no significant adverse change in any of the following:

stockholders voting rights;
our term of existence;
sponsor or advisor compensation; or
our investment objectives.

In the event of a proposed roll-up transaction, an appraisal of all our assets must be obtained from a competent independent appraiser, that is, a person with no current or prior business or personal relationship with our advisor or directors and who is a qualified appraiser of real estate of the type held by us or of other assets determined by our board of directors. Further, that person must be substantially engaged in the business of rendering valuation opinions of assets of the kind we hold. If the appraisal will be included in a prospectus used to offer the securities of a roll-up entity, the appraisal must be filed with the SEC and the states as an exhibit to the registration statement for the offering. Accordingly, an issuer using the appraisal will be subject to liability for violation of Section 11 of the Securities Act and comparable provisions under state laws for any material misrepresentations or material omissions in the appraisal. The assets must be appraised on a consistent basis, and the appraisal shall be based on the evaluation of all relevant information and shall indicate the value of the properties as of a date immediately prior to the announcement of the proposed roll-up transaction. The appraisal shall assume an orderly liquidation of our properties over a 12-month period. The terms of the engagement of the independent appraiser must clearly state that the engagement is for our benefit and that of our stockholders. A summary of the appraisal, indicating all material assumptions underlying the appraisal, shall be included in a report to our stockholders in connection with any

proposed roll-up transaction. We will include a summary of the appraisal, indicating all material assumptions underlying it, in a report to our stockholders in connection with a proposed roll-up transaction. We may not participate in any proposed roll-up transaction which would:

result in the common stockholders having rights which are more restrictive to them than those provided in our charter, including any restriction on the frequency of meetings;

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result in the common stockholders having less voting rights than are provided in our charter;
result in the common stockholders having greater liability than provided in our charter;
result in the common stockholders having fewer rights to receive reports than those provided in our charter;
result in the common stockholders having access to records that are more limited than those provided for in our charter;
include provisions which would operate to materially impede or frustrate the accumulation of shares by any purchaser of the securities of the roll-up entity, except to the minimum extent necessary to preserve the tax status of the roll-up entity;
limit the ability of an investor to exercise its voting rights in the roll-up entity on the basis of the number of the shares held by that investor; or
place any of the costs of the transaction on us if the roll-up transaction is rejected by the common stockholders.

Common stockholders who vote no on the proposed roll-up transaction will have the choice of:

accepting the securities of the roll-up entity offered; or
either remaining as our stockholders and preserving their interests on the same terms and conditions as previously existed or receiving cash in an amount equal to their pro rata share of the appraised value of our net assets.

These provisions in our charter could have the effect of delaying, deferring or preventing a change in control of us, including an extraordinary transaction (such as a merger, tender offer or sale of all or substantially all of our assets) that might provide a premium price for holders of our common stock.

# Limitation on Total Operating Expenses

Our charter provides that, subject to the conditions described herein, reimbursement to our advisor for total operating expenses (excluding property level operating expenses) in any four consecutive fiscal quarters shall not exceed the greater of 2% of our average invested assets or 25% of our net income. Our independent directors have the responsibility to limit our annual total operating expenses to amounts that do not exceed these limits. Our independent directors may, however, determine that a higher level of total operating expenses is justified for such period because of unusual and non-recurring expenses. Such a finding by our independent directors and the reasons supporting it shall be recorded in the minutes of meetings of our board of directors. If, at the end of any fiscal quarter our total operating expenses for the 12 months then ended exceed the greater of the foregoing limit, we will disclose such in writing to the stockholders within 60 days of the end of such fiscal quarter. If our independent directors conclude that higher total operating expenses are justified, the disclosure will also contain an explanation of the reasons for such conclusion. If total operating expenses exceed the limitations described above and our directors are unable to conclude that the excess was justified, then our advisor will reimburse us the amount by which the aggregate annual total operating expenses we paid or incurred exceed the limitation. Our advisor must make the reimbursement within 60 days after the end of such fiscal quarter.

# Transactions With Affiliates

Our charter prohibits us from entering into certain transactions to purchase or lease an asset from, or sell or lease an asset to, our directors, our advisor or any of its affiliates. For purposes of this prospectus, an affiliate of any natural person, partnership, corporation, association, trust, limited liability company or other legal entity (a person ) includes any of the following:

any person directly or indirectly owning, controlling or holding, with power to vote 10% or more of the outstanding voting securities of such other person;

any person 10% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held, with power to vote, by such other person;

any person directly or indirectly controlling, controlled by, or under common control with, such other person;

any executive officer, director, trustee or general partner of such other person; and

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and any legal entity for which such person acts as an executive officer, director, trustee or general partner. However, while we and our advisor have no current plans to do so, we may enter into joint ventures and preferred equity investments to co-invest with our sponsor or its affiliates for the acquisition of properties. See Investment Strategy, Objectives and Policies Joint Venture Investments.

# Restrictions on Borrowing

Our aggregate borrowings, secured and unsecured, will be reasonable in relation to our net assets and will be reviewed by our board of directors at least quarterly. We anticipate that, in general, aggregate long-term permanent borrowings will not exceed 50% of the aggregate fair market value of all properties. This anticipated amount of leverage will be achieved over time. We may also incur short-term indebtedness, having a maturity of two years or less. Any such short-term indebtedness would involve a line of credit from a potential seller of a property or properties, with the expectation that such short-term indebtedness would be refinanced with long-term indebtedness. In addition, our charter provides that the aggregate amount of borrowing (both long- and short-term) in relation to our net assets will, in the absence of a satisfactory showing that a higher level of borrowing is appropriate, not exceed 300% of net assets. Any excess in borrowing over the foregoing limitations will be:

approved by a majority of our independent directors; and
disclosed to stockholders in the immediately following quarterly report, along with justification for such excess.

In addition, our charter prohibits us from making or investing in mortgage loans, including construction loans, on any one property if the aggregate amount of all mortgage loans outstanding on the property, including our loans, would exceed 85% of the property s appraised value, unless substantial justification exists and the loans would not exceed the property s appraised value. See Investment Strategy, Objectives and Policies Borrowing.

# Restrictions on Investments

In addition to other investment restrictions imposed by our directors from time to time consistent with our objective to continue to qualify as a REIT, we will observe the following restrictions on our investments as set forth in our charter:

(i) Not more than ten percent (10%) of our total assets shall be invested in unimproved real property or mortgage loans on unimproved real property.

(ii) We will not invest in commodities or commodity future contracts. This limitation is not intended to apply to futures contracts, when used solely for hedging purposes in connection with our ordinary business of investing in real estate assets and mortgages.

(iii) We will not invest in any mortgage unless an appraisal is obtained concerning the underlying property except for those loans insured or guaranteed by a government or government agency. In cases in which a majority of independent directors so determine, and in all cases in which the transaction is with the advisor, the sponsor, any director or any affiliates thereof, such appraisal of the underlying property must be obtained from an independent appraiser. Such appraisal shall be maintained in our records for at least five (5) years and shall be available for inspection and duplication by any stockholder for a reasonable charge. In addition to the appraisal, a mortgagee s or owner s title insurance policy or commitment as to the priority of the mortgage or condition of the title must be obtained.

(iv) We will not invest in any mortgage, including a construction loan, on any one (1) property if the aggregate amount of all mortgage loans outstanding on the property, including our loans, would exceed an amount equal to eighty-five percent (85%) of the appraised value of the property as determined by appraisal unless substantial

justification exists because of the presence of other underwriting criteria. For purposes of this subsection, the aggregate amount of all mortgage loans outstanding on the property, including our loans shall include all interest (excluding contingent participation in income and/or appreciation in value of

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the mortgaged property), the current payment of which may be deferred pursuant to the terms of such loans, to the extent that deferred interest on each loan exceeds five percent (5%) per annum of the principal balance of the loan.

(v) We will not invest in indebtedness secured by a mortgage on real property which is subordinate to liens or other indebtedness of the advisor, the sponsor, any director or any affiliate thereof.

(vi) We will not issue equity securities redeemable solely at the option of the holder (except that stockholders may offer their common shares to us pursuant to the share repurchase program);

(vii) We will not issue debt securities unless the historical debt service coverage (in the most recently completed fiscal year) as adjusted for known changes is sufficient to properly service that higher level of debt;

(viii) We will not issue equity securities on a deferred payment basis or under similar arrangements;

(ix) We will not issue options or warrants to purchase shares to the advisor, the directors, the sponsor or any affiliate thereof except on the same terms as such options or warrants, if any, are sold to the general public. Options or warrants may be issued to persons other than the advisor, the directors, the sponsor or any affiliate thereof, but not at exercise prices less than the fair market value of the underlying securities on the date of grant and not for consideration (which may include services) that in the judgment of the independent directors has a market value less than the value of such option or warrant on the date of grant. Options or warrants issuable to the advisor, the directors, the sponsor or any affiliate thereof shall not exceed ten percent (10%) of the outstanding shares on the date of grant. The voting rights per share (other than any publicly held share) sold in a private offering shall not exceed the voting rights which bear the same relationship to the voting rights of a publicly held share as the consideration paid to us for each privately offered share bears to the book value of each outstanding publicly held share.

(x) Our aggregate leverage shall be reasonable in relation to our net assets as defined in our charter and shall be reviewed by our Board of Directors at least quarterly.

(xi) We will not make any investment that we believe will be inconsistent with our objectives of qualifying and remaining qualified as a REIT unless and until the Board of Directors determines, in its sole discretion, that REIT qualification is not in our best interests.

(xii) We will not invest in real estate contracts of sale unless such contracts are in recordable form and appropriately recorded in the chain of title.

(xiii) We will not, directly or indirectly, including through any subsidiary, extend or maintain credit, arrange for the extension of credit, or renew an extension of credit, in the form of a personal loan to or for any of the directors or any of our executive officers.

(xiv) We will not invest in any equity securities unless a majority of disinterested directors, including a majority of disinterested independent directors, approves the transaction as being fair, competitive and commercially reasonable, however, this restriction will not apply to purchases by us of: (i) our own securities through our share repurchase program or when traded on a secondary market or national securities exchange if a majority of the directors, including a majority of the independent directors, determines that the purchase is in our best interests; (ii) the securities of a publicly-traded entity if the purchases are otherwise approved by a majority of our disinterested directors, including a majority of our disinterested independent directors; or (iii) the securities of a REIT or other real estate operating company.

(xv) We will not engage in any short sale.

(xvi) The value of all investments in debt secured by a mortgage on real property that is subordinate to the lien of other debt shall not exceed twenty five percent (25%) of our tangible assets.

(xvii) We will not engage in trading, as opposed to investment activities.

(xviii) We will not engage in underwriting activities or distribute, as agent, securities issued by others.

(xix) We will not invest in foreign currency or bullion.

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(xx) The aggregate amount of borrowing shall not exceed three hundred percent (300%) of our net assets as defined in our charter as of the date of the borrowing unless the excess is approved by a majority of the independent directors and disclosed to the stockholders in the next quarterly report following such borrowing along with justification for such excess.

(xxi) We will not acquire securities in any entity holding investments or engaging in activities prohibited by the restrictions on investments set forth in sentences (i) through (xx) above.

Subject to the above restrictions, a majority of our directors, including a majority of our independent directors, may alter our investment strategies or objectives if they determine that a change is in our best interests.

We intend to invest in a manner so that we are not considered an investment company as defined in the Investment Company Act. See Investment Strategy, Objectives and Policies Investment Company Act of 1940 Considerations.

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# HOW TO SUBSCRIBE

Investors who meet the minimum income and net worth standards established for us may purchase shares of common stock. See Who May Invest and the page following the cover page for the suitability standards. Investors who want to purchase shares should proceed as follows:

Read the entire final prospectus and the current supplement(s), if any, accompanying the final prospectus.
Complete the execution copy of the subscription agreement. A specimen copy of the subscription agreement, including instructions for completing it, is included as Appendix C.
Until we achieve the minimum offering, deliver a check for the full purchase price of the shares being subscribed for, payable to UMB Bank, N.A., escrow agent for Empire REIT along with the completed subscription agreement to the soliciting dealer. The name of the soliciting dealer appears on the subscription agreement. After we achieve the minimum offering, your check should be made payable to Empire American Realty Trust, Inc. , except that investors from Tennessee and Pennsylvania should make checks payable to UMB Bank, N.A., escrow agent for Empire REIT until we have received and accepted subscriptions for $25 million and $50 million, respectively, in the aggregate.

The subscription agreement requires you to make the following factual representations:

Your tax identification number set forth in the subscription agreement is accurate and you are not subject to backup withholding;
You received a copy of our final prospectus not less than five business days prior to signing the subscription agreement;
You meet the minimum income and net worth standards established for us;
You are purchasing our common stock for your own account; and
You acknowledge that our common stock is illiquid.

Each of the above representations is included in the subscription agreement in order to help satisfy our responsibility, which our broker dealer will undertake as our agent, to make every reasonable effort to determine that the purchase of our common stock is a suitable and appropriate investment for you and that appropriate income tax reporting information is obtained. We will not sell any common stock to you unless you are able to make the above factual representations by executing the subscription agreement. You must separately sign or initial each representation made in the subscription agreement and, except in the case of fiduciary accounts, you may not grant any person a power of attorney to make such representations on your behalf.

By executing the subscription agreement, you will not be waiving any rights under federal or state law.

A sale of the shares may not be completed until at least five business days after the subscriber receives our final prospectus as filed with the SEC pursuant to Rule 424(b) of the Securities Act. Within ten business days of our receipt of each completed subscription agreement, we will accept or reject the subscription. If we accept the subscription, we will mail a confirmation within three days. If for any reason we reject the subscription, we will promptly return the check and the subscription agreement, without interest (unless we reject your subscription because we fail to achieve the minimum offering) or deduction, within ten business days after rejecting it.

An approved trustee must process through, and forward to, us subscriptions made through individual retirement accounts, Keogh plans and 401(k) plans. In the case of individual retirement accounts, Keogh plans and 401(k) plan stockholders, we will send the confirmation or, upon rejection, refund check to the trustee.

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# SALES LITERATURE

In addition to and apart from this prospectus, we may use supplemental sales material in connection with the offering. This material may consist of a brochure describing our advisor and its affiliates and our investment objectives. The material may also contain pictures and summary descriptions of properties similar to those that we intend to acquire which our affiliates have previously acquired. This material may also include audiovisual materials and taped presentations highlighting and explaining various features of the offering, properties of prior real estate programs and real estate investments in general, and articles and publications concerning real estate. Further, business reply cards, introductory letters and seminar invitation forms may be sent to the dealer members of FINRA designated by us and prospective investors. No person has been authorized to prepare for, or furnish to, a prospective investor any sales literature other than that described herein and tombstone newspaper advertisements or solicitations of interest that are limited to identifying the offering and the location of sources of further information.

The use of any sales materials is conditioned upon filing with, and if required, clearance by appropriate regulatory agencies. Such clearance (if provided), however, does not indicate that the regulatory agency allowing the use of such materials has passed on the merits of the offering or the adequacy or accuracy of such materials.

This offering is made only by means of this prospectus. Except as described herein, we have not authorized the use of other supplemental literature or sales material in connection with this offering.

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# REPORTS TO STOCKHOLDERS

Our advisor will keep, or cause to be kept, full and true books of account on an accrual basis of accounting, in accordance with GAAP. All of these books of account, together with a copy of our charter, will at all times be maintained at our principal office, and will be open to inspection, examination and duplication at reasonable times by the stockholders or their agents.

We will cause to be prepared and mailed or delivered to each stockholder, as of a record date after the end of the fiscal year, and to each holder of our other publicly held securities, within 120 days after the end of the fiscal year to which it relates, an annual report for each fiscal year ending after the commencement of this offering. The annual reports will contain the following:

audited financial statements prepared in accordance with GAAP which are reported on by independent certified public accountants;

the ratio of the costs of raising capital during the period to the capital raised;

the aggregate amount of advisory fees and the aggregate amount of fees paid to the advisor and any affiliate of the advisor, including fees or charges paid to our advisor and to any affiliate of our advisor by third parties doing business with us;

our total operating expenses, stated as a percentage of the average invested assets and as a percentage of net income;

a report from the independent directors that the policies, objectives and strategies we follow are in the best interests of our stockholders and the basis for such determination; and

separately stated, full disclosure of all material terms, factors and circumstances surrounding any and all transactions involving us, our directors, our advisor and any of their affiliates occurring in the year for which the annual report is made. Independent directors are specifically charged with the duty to examine and comment in the report on the fairness of such transactions.

It is the duty of our directors, including the independent directors, to take reasonable steps to insure that the foregoing requirements are met.

We will provide stockholders with a statement that accompanies each distribution disclosing the source or sources of the funds distributed and the amount provided from each source. The report will include the amount and percentage of offering proceeds and other sources used to fund distributions, among other things. If the information is not available, we will provide a statement setting forth the reasons why the information is not available.

Within 60 days following the end of any calendar quarter during the period of the offering in which we have closed an acquisition of a property, we will submit a report to each stockholder containing:

the location and a description of the general character of the property acquired during the quarter;

the present or proposed use of the property and its suitability and adequacy for that use;

the terms of any material leases affecting the property;

the proposed method of financing, if any, including estimated down payment, leverage ratio, prepaid interest, balloon payment(s), prepayment penalties, due-on-sale or encumbrance clauses and possible adverse effects thereof and similar details of the proposed financing plan; and

a statement that title insurance has been or will be obtained on the property acquired.

In addition, while this offering is pending, if we believe that a reasonable probability exists that we will acquire a property or group of properties, this prospectus will be supplemented to disclose the probability of acquiring such property or group of properties. A supplement to this prospectus will describe any improvements proposed to be constructed thereon and other information that we consider appropriate for an understanding of the transaction.

Further data will be made available after any pending acquisition is consummated, also by means of a supplement to this prospectus, if appropriate. Note that the disclosure of any proposed acquisition cannot be

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relied upon as an assurance that we will ultimately consummate such acquisition or that the information provided concerning the proposed acquisition will not change between the date of the supplement and any actual purchase.

After the completion of the last acquisition, our advisor will, upon request, send a schedule of acquisition to the Commissioner of Corporations of the State of California. The schedule, verified under the penalty of perjury will reflects each acquisition made, the purchase price paid, the aggregate of all acquisition expenses paid on each transaction, and a computation showing compliance with our charter. We will, upon request, submit to the Commissioner of Corporations of the State of California or to any of the various state securities administrators, any report or statement required to be distributed to stockholders pursuant to our charter or any applicable law or regulation.

Within 90 days following the close of each of our fiscal years, each stockholder that is an ERISA Plan will be furnished with an annual statement of share valuation to enable it to file annual reports required by ERISA as they relate to its investment in us. For any period during which we are making a public offering of shares, the statement will report an estimated value of each share at the then public offering price per share. If no public offering is ongoing, and until we list the shares of our common stock on a national securities exchange, no later than 18 months after the closing of the offering, we will provide a statement that will report an estimated value of each share, based on (i) appraisal updates performed by us based on a review of the existing appraisal and lease of each property, focusing on a re-examination of the capitalization rate applied to the rental stream to be derived from that property, (ii) and a review of the outstanding loans and other investments, focusing on a determination of present value by a re-examination of the capitalization rate applied to the stream of payments due under the terms of each loan. We may elect to deliver such reports to all stockholders. Stockholders will not be forwarded copies of appraisals or updates. In providing such reports to stockholders, neither we nor our affiliates thereby make any warranty, guarantee or representation that (i) we or our stockholders, upon liquidation, will actually realize the estimated value per share or (ii) our stockholders will realize the estimated net asset value if they attempt to sell their shares.

The accountants we regularly retain will prepare our U.S. federal tax return and any applicable state income tax returns. We will submit appropriate tax information to the stockholders within 30 days following the end of each of our fiscal years. We will not provide a specific reconciliation between GAAP and our income tax information to the stockholders. However, the reconciling information will be available in our office for inspection and review by any interested stockholder. Annually, at the same time as the dissemination of appropriate tax information (including a Form 1099) to stockholders, we will provide each stockholder with an individualized report on his or her investment, including the purchase date(s), purchase price(s), and number of shares owned, as well as the dates and amounts of distributions received during the prior fiscal year. The individualized statement to stockholders will include any purchases of shares under the distribution reinvestment program. Stockholders requiring individualized reports on a more frequent basis may request these reports. We will make every reasonable effort to supply more frequent reports, as requested, but we may, at our sole discretion, require payment of an administrative charge either directly by the stockholder, or through pre-authorized deductions from distributions payable to the stockholder making the request.

We may deliver to the stockholders each of the reports discussed in this section, as well as any other communications that we may provide them with, by e-mail or by any other means.

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# LITIGATION

We are not subject to any material pending legal proceedings.

# RELATIONSHIPS AND RELATED TRANSACTIONS

Our advisor has purchased 20,000 shares of our common stock for $10.00 per share in connection with our organization. Our advisor also made a capital contribution of $2,000 to our operating partnership in exchange for 200 limited partnership units of the operating partnership. The 200 limited partnership units received by our advisor may be exchanged, at its option, for 200 shares identical to those being offered pursuant to the prospectus included in this registration statement, subject to our option to pay cash in lieu of such shares. No sales commission or other consideration was paid in connection with such sales, which were consummated without registration under the Securities Act, in reliance upon the exemption from registration in Section 4(2) of the Securities Act because the transactions did not involve any public offering. Resales of our common stock by our advisor are subject to Rule 144. Generally, a person (or persons whose shares are aggregated) who is deemed to be an affiliate (such as our advisor) and who has beneficially owned restricted securities within the meaning of Rule 144 for at least six months would be entitled to sell within any three-month period a number of shares that does not exceed the greater of 1% of the then outstanding shares of common stock or the average weekly trading volume of common stock during the four calendar weeks preceding such sale. As a result, our advisor is subject to limitations on the amount of our securities that it may resell. Such sales are also subject to certain manner of sale provisions (which provide that securities must be sold in unsolicited brokers transactions or in transactions directly with a market maker), notice requirements (which provide that notice of a sale on Form 144 must be filed at the time the order to sell is placed with the broker or the securities are sold to a market maker) and the availability of current public information about us (which requires that we are current in our periodic reports under the Exchange Act).

Since our inception through December 31, 2009, we made five separate short term loans to our sponsor in the principal aggregate amount of $985,500. These loans had an average interest rate of 5.8% and were made to pay for certain expenses in connection with our organization and offering while maintaining our minimum capitalization of $200,000. Each of these loans were timely repaid by the sponsor during the period through December 31, 2009. Interest income related to these loans was $2,227.

We have entered into agreements to pay our advisor, our property manager, our dealer manager and their affiliates fees or other compensation for providing services to us, as more fully described in Compensation Table. See the section of this prospectus titled Operating Partnership Agreement for information about the partnership agreement among us, our advisor and Empire American ALP, LLC.

## Statement Regarding Transactions with Affiliates

Concurrently with, or prior to, the commencement of this offering, we will adopt a policy regarding the approval of any transaction or series of transactions in which we or any of our subsidiaries is a participant, the amount involved exceeds $120,000, and a related person (as defined under SEC rules) has a direct or indirect material interest. Under the policy, a related person must promptly disclose to our general counsel any related person transaction (defined as any transaction that is required to be disclosed under Item 404(a) of Regulation S-K in which we were or are to be a participant and the amount involved exceeds $120,000 and in which any related person had or will have a direct or indirect material interest) and all material facts about the transaction. The general counsel will then assess and promptly communicate that information to our board of directors. Based on its consideration of all of the relevant facts

and circumstances, the board of directors will decide whether or not to approve such transaction and will generally approve only those transactions that do not create a conflict of interest. If we become aware of an existing related person transaction that has not been pre-approved under this policy, the transaction will be referred to this board committee, which will evaluate all options available, including ratification, revision or termination of such transaction. Our policy requires any director who may be interested in a related person transaction to recuse himself or herself from any consideration of such related person transaction.

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# LEGAL MATTERS

Proskauer Rose LLP, will pass upon the legal matters in connection with our status as a REIT for U.S. federal income tax purposes. Proskauer Rose LLP does not purport to represent our stockholders or potential investors, who should consult their own counsel. Proskauer Rose LLP also provides legal services to our sponsor, advisor and their affiliates.

Proskauer Rose LLP has reviewed the statements in the section of the prospectus titled Certain Material U.S. Federal Income Tax Considerations and elsewhere as they relate to U.S. federal income tax matters and the statements in the section in the prospectus titled ERISA Considerations.

Venable LLP will pass upon the legality of the common stock and certain matters of Maryland law in connection with our organization. Venable LLP does not purport to represent our stockholders or potential investors, who should consult their own counsel.

# EXPERTS

The consolidated financial statements of Empire American Realty Trust, Inc. and Subsidiary at December 31, 2009, and for the period March 26, 2009 (date of inception) through December 31, 2009, appearing in this prospectus and registration statement have been audited by Ernst & Young LLP, independent registered public accounting firm, as set forth in their report thereon appearing elsewhere herein, and is included in reliance upon such report given on the authority of such firm as experts in accounting and auditing.

# CHANGE IN AUDITORS

Our audit committee approved the dismissal of Amper, Politziner & Mattia, LLP as auditor for Empire American Realty Trust, Inc. and Subsidiary as of February 18, 2010. The report of Amper, Politziner & Mattia, LLP on our consolidated financial statements for the period March 26, 2009 (date of inception) through October 31, 2009 did not contain an adverse opinion or a disclaimer of opinion nor was it qualified or modified as to uncertainty, audit scope or accounting principles. In connection with the audit for the period March 26, 2009 (date of inception) through October 31, 2009, there were no (i) disagreements with Amper, Politziner & Mattia, LLP on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreements, if not resolved to the satisfaction of Amper, Politziner & Mattia, LLP, would have caused it to make reference to the subject matter of the disagreements in connection with its report or (ii) reportable events as such term is used in Item 304(a)(1)(v) of Regulation S-K under the Exchange Act. Ernst & Young LLP was engaged by us as independent registered public accounting firm to audit the consolidated financial statements of Empire American Realty Trust, Inc. and Subsidiary on February 19, 2010 and currently serves in that role. During the period from March 26, 2009 (date of inception) through February 18, 2010, we did not consult with Ernst & Young LLP regarding the application of accounting principles to a specified transaction, either completed or proposed, or the type of audit opinion that might be rendered on our financial statements.

# WHERE YOU CAN FIND ADDITIONAL INFORMATION

We have filed a registration statement on Form S-11 with the SEC in connection with this offering. This prospectus is part of the registration statement and does not contain all of the information included in the registration statement and

all of its exhibits, certificates and schedules. Whenever a reference is made in this prospectus to any contract or other document of ours, the reference may not be complete and you should refer to the exhibits that are a part of the registration statement for a copy of the contract or document.

You may read and copy our registration statement and all of its exhibits and schedules which we have filed with the SEC, any of which may be inspected and copied at the Public Reference Room at 100 F. Street, N.E., Washington, D.C. 20549. This material, as well as copies of all other documents filed with the SEC, may be obtained from the Public Reference Section of the SEC, 100 F. Street, N.E., Washington D.C. 20549 upon payment of the fee prescribed by the SEC. The public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. The SEC maintains a web site that contains reports, proxies, information statements and other information regarding registrants that file electronically with the SEC, including us. The address of this website is *http://www.sec.gov*.

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# INDEX TO FINANCIAL STATEMENTS OF EMPIRE AMERICAN REALTY TRUST, INC. (A Maryland Corporation)

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# REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

The Board of Directors and Stockholder
Empire American Realty Trust, Inc. and Subsidiary

We have audited the accompanying consolidated balance sheet of Empire American Realty Trust, Inc. and Subsidiary (the Company ) as of December 31, 2009, and the related consolidated statements of operations, stockholder's equity, and cash flows for the period from March 26, 2009 (date of inception) through December 31, 2009. These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. We were not engaged to perform an audit of the Company s internal control over financial reporting. Our audit included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the consolidated financial position of Empire American Realty Trust, Inc. and Subsidiary at December 31, 2009, and the consolidated results of their operations and their cash flows for the period March 26, 2009 (date of inception) through December 31, 2009, in conformity with U.S. generally accepted accounting principles.

/s/ Ernst & Young LLP

New York, New York
April 15, 2010

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# CONSOLIDATED BALANCE SHEET

| | December 31, 2009 |
|---|---|
| ASSETS | |
| Cash | $ 205,667 |
| Total Assets | $ 205,667 |
| LIABILITIES AND STOCKHOLDER S EQUITY | |
| Related party payable, net | $ 1,440 |
| Accrued expense | 300 |
| Income taxes payable | 731 |
| **Total Liabilities** | 2,471 |
| | |
| Stockholder s equity | |
| Common stock, $0.01 par value; 200,000 shares authorized, 20,000 shares issued and outstanding | 200 |
| Additional paid-in-capital | 199,800 |
| Retained earnings | 1,196 |
| Total Company s Stockholder s equity | 201,196 |
| Non-controlling interest | 2,000 |
| Total Stockholder s equity | $ 203,196 |
| **Total Liabilities and Stockholder s equity** | $ 205,667 |

*See Accompanying Notes to These Consolidated Financial Statements.*

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# CONSOLIDATED STATEMENT OF OPERATIONS
# For the Period March 26, 2009 (Date of Inception) Through December 31, 2009

| | |
|---|---|
| Revenue: | |
| Interest Income | $ 2,227 |
| Total Revenue | 2,227 |
| Expense: | |
| Filing Fees | 300 |
| Total Expense | 300 |
| Net income before income taxes | 1,927 |
| Income tax provision | 731 |
| Net income | 1,196 |
| Less, net income attributable to non-controlling interest | |
| Net income attributable to the Company | $ 1,196 |
| Earnings per common share: | |
| Basic earnings per share | $ 0.06 |
| Diluted earnings per share | $ 0.06 |
| Basic and diluted weighted-average common shares | 20,000 |

*See Accompanying Notes to These Consolidated Financial Statements.*

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# CONSOLIDATED STATEMENT OF STOCKHOLDER S EQUITY
# For the Period March 26, 2009 (Date of Inception) Through December 31, 2009

*See Accompanying Notes to These Consolidated Financial Statements.*

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# CONSOLIDATED STATEMENT OF CASH FLOWS
# For the Period March 26, 2009 (Date of Inception) Through December 31, 2009

| | |
|---|---|
| Cash Flows From Operating Activities: | |
| Net income | $ 1,196 |
| Adjustments to reconcile net income to net cash provided by operating activities: | |
| Related party receivable-interest on short term notes | (560 ) |
| Accrued expense | 300 |
| Accrued income taxes payable | 731 |
| Net cash provided by operating activities | 1,667 |
| Cash Flows From Investing Activities: | |
| Net cash provided by investing activities | |
| Cash Flows From Financing Activities: | |
| Proceeds from repayment of short term notes | 985,000 |
| Issuance of short term notes | (985,000 ) |
| Proceeds from issuance of common stock | 200,000 |
| Related party payable | 2,000 |
| Proceeds from issuance of limited partnership units | 2,000 |
| Net cash provided by financing activities | 204,000 |
| Net change in cash | 205,667 |
| Cash, beginning of period | |
| Cash, end of period | 205,667 |

*See Accompanying Notes to These Consolidated Financial Statements.*

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
# December 31, 2009

## 1. Organization

Empire American Realty Trust, Inc. (the Company ) was formed on March 26, 2009 as a Maryland corporation that intends to qualify as a real estate investment trust ( REIT ) beginning with the taxable year ending December 31, 2010. The Company intends to offer (the Offering ) a minimum of 250,000 shares and a maximum of 100,000,000 shares of common stock for sale to the public at a price of $10 per share (exclusive of the 10,000,000 shares available pursuant to the Company s distribution reinvestment program and 300,000 shares reserved for issuance under the Company s Employee and Director Incentive Restricted Share Plan). The Company sold 20,000 shares to Empire American Advisors, LLC (the Advisor ) on April 30, 2009, for $10 per share. The Company invested the proceeds from this sale in partnership units of Empire American Realty Operating Partnership, L.P. (the Operating Partnership ) and, as a result, holds a 99.01% interest in the Operating Partnership. The Operating Partnership is the sole subsidiary of the Company. The Advisor contributed $2,000 to the Operating Partnership in exchange for 200 limited partner units in the Operating Partnership. The holders of limited partnership units have the right to redeem these units for cash equal to the value of an equivalent number of the Company s common shares, or, at the option of the Company, the Company may purchase such units for cash or by issuing an equal number of common shares of the Company, as permitted by the limited partnership agreement of the Operating Partnership. The Company has not commenced operations, and therefore, is in its development stage.

Subject to certain restrictions and limitations, the business of the Company will be externally managed by the Advisor pursuant to an advisory agreement between the Company and the Advisor. The Company intends to use substantially all of the net proceeds from the Offering to acquire a diversified portfolio of real estate and real estate-related securities. Empire American Management, LLC (the Property Manager ), a Delaware limited liability company formed on April 21, 2009, will provide property management services to the Company under the terms of a management agreement. The Property Manager will provide services in connection with the rental, leasing, operation and management of the Company s properties.

The Company intends to retain Empire American Realty, LLC (the Dealer Manager ) to serve as the dealer manager of the Offering. The Dealer Manager will be responsible for marketing the Company s shares being offered pursuant to the Offering. The Advisor, the Property Manager and the Dealer Manager are indirectly owned and controlled by the Company s sponsor and are affiliates of the Company. The Advisor, the Property Manager and the Dealer Manager, all of which are considered related parties, will receive compensation and fees for services related to the Offering and for the investment and management of the Company s assets. The compensation levels during the Offering, the acquisition and the operational stages are based on percentages of the offering proceeds sold, the cost of the acquired properties and the annual revenue earned from such properties, respectively. (See Note 4 Related Party Transactions, for a summary of the related party fees.)

As of December 31, 2009, neither the Company nor the Operating Partnership had acquired or contracted to make any investments. The Advisor had not identified any assets in which there is a reasonable probability that the Company or the Operating Partnership will invest.

# 2. Summary of Significant Accounting Policies

Below is a discussion of the accounting policies that the Company s management believes will be significant once the Company commences operations. The Company s management considers these policies significant because they contribute to the understanding and evaluation of the Company s reported financial results.

## Principles of Consolidation and Basis of Presentation

The consolidated financial statements include the accounts of the Company and the Operating Partnership. All significant intercompany, balances and transactions are eliminated in consolidation. The consolidated financial statements of the Company and its subsidiary are prepared in conformity with U.S. generally accepted accounting principles ( GAAP ).

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
# December 31, 2009

## 2. Summary of Significant Accounting Policies (continued)

### Cash

Cash is comprised of cash held in a major banking institution.

### Marketable Securities

Marketable securities will be recorded at fair value, in accordance with FASB ASC Topic 320 Investments Debt and Equity Securities . Unrealized holding gains or losses will be reported as a component of accumulated other comprehensive income (loss). Realized gains or losses resulting from the sale of these securities will be determined based on the specific identification of the securities sold. An impairment charge will be recognized when the decline in the fair value of a security below the amortized cost basis is determined to be other-than-temporary. We will consider various factors in determining whether to recognize an impairment charge, including the duration and severity of any decline in fair value below the Company s amortized cost basis, any adverse changes in the financial condition of the issuers and the Company s intent and ability to hold the investment for a period of time sufficient to allow for any anticipated recovery in market value.

### Revenue Recognition

Minimum rents will be recognized on an accrual basis, over the terms of the related leases on a straight-line basis. The capitalized above-market lease values and the capitalized below-market lease values will be amortized as an adjustment to rental income over the lease term. Recoveries from residential tenants for utility costs will be recognized as revenues in the period that the applicable costs are incurred.

### Accounts Receivable

The Company will make estimates of the uncollectability of its accounts receivable related to base rents, expense reimbursements and other revenues. The Company will analyze accounts receivable and historical bad debt levels, customer credit worthiness and current economic trends when evaluating the adequacy of the allowance for doubtful accounts. In addition, tenants experiencing financial difficulties will be analyzed and estimates will be made in connection with the expected uncollectible receivables. The Company s reported operating results will be directly affected by management s estimate of the collectability of accounts receivable.

# Investment in Real Estate

## Accounting for Acquisitions

The Company will account for acquisitions of properties in accordance with FASB ASC Topic 805 Business Combinations . The fair value of the real estate acquired will be allocated to the acquired tangible assets, consisting of land, building and tenant improvements, and identified intangible assets and liabilities, consisting of the value of above-market and below-market leases for acquired in-place leases and the value of tenant relationships, based in each case on their fair values. Purchase accounting will be applied to assets and liabilities related to real estate entities acquired. Transaction costs and fees incurred related to acquisitions will be expensed as incurred. Transaction costs and fees incurred related to the acquisition of a joint venture interest, accounted for under the equity method of accounting, will be capitalized as part of the cost of the investment.

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
# December 31, 2009

## 2. Summary of Significant Accounting Policies (continued)

Upon the acquisition of real estate operating properties, the Company will estimate the fair value of acquired tangible assets (consisting of land, building and improvements) and identified intangible assets and liabilities (consisting of above and below-market leases, in-place leases and tenant relationships), and assumed debt at the date of acquisition, based on evaluation of information and estimates available at that date. Based on these estimates, the Company will allocate the initial purchase price to the applicable assets and liabilities. As final information regarding fair value of the assets acquired and liabilities assumed is received and estimates are refined, appropriate adjustments will be made to the purchase price allocation, in no case later than within twelve months of the acquisition date.

In determining the fair value of the identified intangible assets and liabilities of an acquired property, above-market and below-market in-place lease values will be recorded based on the present value (using an interest rate which reflects the risks associated with the leases acquired) of the difference between (i) the contractual amounts to be paid pursuant to the in-place leases and (ii) management s estimate of fair market lease rates for the corresponding in-place leases, measured over a period equal to the remaining term of the lease. The capitalized above-market lease values and the capitalized below-market lease values will be amortized as an adjustment to rental income over the lease term.

The aggregate value of in-place leases will be determined by evaluating various factors, including an estimate of carrying costs during the expected lease-up periods, current market conditions and similar leases. In estimating carrying costs, management includes real estate taxes, insurance and other operating expenses, and estimates of lost rental revenue during the expected lease-up periods based on current market demand. Management also estimates costs to execute similar leases including leasing commissions, legal and other related costs. The value assigned to this intangible asset will be amortized over the remaining lease terms.

### Carrying Value of Assets

The amounts to be capitalized as a result of periodic improvements and additions to real estate property, and the periods over which the assets are depreciated or amortized, will be determined based on the application of accounting standards that may require estimates as to fair value and the allocation of various costs to the individual assets. Differences in the amount attributed to the assets can be significant based upon the assumptions made in calculating these estimates.

**Impairment Evaluation**

Management will evaluate the recoverability of its investment in real estate assets, including related identifiable intangible assets, in accordance with FASB ASC Topic 360 Property, Plant and Equipment . This statement requires that long-lived assets be reviewed for impairment whenever events or changes in circumstances indicate that recoverability of the asset is not assured.

The Company will evaluate the long-lived assets on an ongoing basis and will record an impairment charge when there is an indicator of impairment and the undiscounted projected cash flows are less than the carrying amount for a particular property. The estimated cash flows used for the impairment analysis and the determination of estimated fair value are based on the Company s plans for the respective assets and the Company s views of market and economic conditions. The estimates consider matters such as current and historical rental rates, occupancies for the respective properties and comparable properties, and recent sales data for comparable properties. Changes in estimated future cash flows due to changes in the Company s plans or views of market and economic conditions could result in recognition of impairment losses, which, under the applicable accounting guidance, could be substantial.

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
# December 31, 2009

## 2. Summary of Significant Accounting Policies (continued)

### Depreciation and Amortization

Depreciation expense for real estate assets will be computed using a straight-line method using a weighted average composite life of thirty-nine years for buildings and improvements and five to ten years for equipment and fixtures. Expenditures for tenant improvements will be capitalized and amortized over the initial term of each lease. Maintenance and repairs will be charged to expense as incurred.

### Deferred Costs

The Company will capitalize initial direct costs in accordance with FASB ASC Topic 310 Receivables . The costs will be capitalized upon the execution of the loan or lease and amortized over the initial term of the corresponding loan or lease. Amortization of deferred loan costs begins in the period during which the loan was originated. Deferred leasing costs are not amortized to expense until the date the tenant s lease obligation begins.

### Income Taxes

The Company will make an election to be taxed as a REIT beginning with the year ending December 31, 2010. The Company has recorded a corporate income tax provision for the tax period ending December 31, 2009 of $731.

The Company will elect and plan to qualify to be taxed as a REIT under sections 856 through 860 of the Internal Revenue Code, in conjunction with the filing of its 2010 federal tax return. To qualify and maintain its status as a REIT, the Company must meet certain organizational and operational requirements, including a requirement to distribute at least 90% of its ordinary taxable income to stockholders. As a REIT, the Company generally will not be subject to federal income tax on taxable income that it distributes to its stockholders. If the Company fails to qualify as a REIT in any taxable year, it will then be subject to federal income taxes on its taxable income at regular corporate rates and will not be permitted to qualify for treatment as a REIT for federal income tax purposes for four years following the year during which qualification is lost unless the Internal Revenue Service grants the Company relief under certain statutory provisions. Such an event could materially adversely affect the Company s net income and net cash available for distribution to stockholders. However, the Company believes that it will be organized and operate in such a manner as to qualify and maintain treatment as a REIT and intends to operate in such a manner so that the Company will qualify and remain qualified as a REIT for federal income tax purposes.

The Company will follow a two step approach for evaluating uncertain tax positions. Recognition (step one) occurs when an enterprise concludes that a tax position, based solely on its technical merits, is more-likely-than-not to be sustained upon examination. Measurement (step two) determines the amount of benefit that more-likely-than-not will be realized upon settlement. Derecognition of a tax position that was previously recognized would occur when a company subsequently determines that a tax position no longer meets the more-likely-than-not threshold of being sustained. The use of a valuation allowance as a substitute for derecognition of tax positions is prohibited. The Company has not identified any uncertain tax positions requiring accrual.

### Financial Instruments

The carrying amounts of cash, related party payable, net, accrued expense and income taxes payable, approximate its fair value because of the short maturity of these instruments.

### Use of Estimates

The preparation of financial statements in conformity with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting periods. Actual results could differ from those estimates.

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
# (A Development Stage Company)

# NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
# December 31, 2009

## 2. Summary of Significant Accounting Policies (continued)

### Concentration of Risk

The Company maintains its cash in bank deposit accounts which, at times, may exceed federally insured limits. The Company has not experienced any losses in such accounts. The Company believes it is not exposed to any significant credit risk on its cash.

### Net Income/Loss per Share

Net income/loss per share is computed in accordance with FASB ASC Topic 260 Earnings per Share , by dividing the net income/loss by the weighted average number of shares of common stock outstanding. For the period March 26, 2009 (date of inception) through December 31, 2009, the Company had net income attributable to the Company of $1,196 and basic and diluted weighted average shares outstanding of 20,000 with no exercisable options or warrants. The resulted basic and diluted earnings per share were $0.06.

### Organization and Offering Costs

The Advisor may advance or reimburse all of the organization and offering costs incurred on the Company s behalf. These costs are not included in the consolidated financial statements of the Company because such costs are not a liability of the Company until the subscriptions for the minimum number of shares of common stock are received and accepted by the Company. Organization and offering costs include items such as legal and accounting fees, marketing, promotional and printing costs. All organization and offering costs will be recorded as a reduction of additional paid in capital. Total organization and offering costs incurred through December 31, 2009 by the Advisor are $850,965.

### New Accounting Pronouncements

In May 2009, the FASB issued guidance now codified as FASB ASC Topic 855 Subsequent Events, which establishes general standards of accounting for, and disclosures of, events that occur after the balance sheet date but before financial statements are issued or are available to be issued. This pronouncement is effective for interim or fiscal periods ending after June 15, 2009. The adoption of this pronouncement did not have a material impact on the Company s consolidated financial position, results of operations or cash flows. However, the provisions of FASB ASC Topic 855 resulted in additional disclosures with respect to subsequent events. The Company evaluated all events or transactions that occurred after December 31, 2009 up through April 15, 2010. During this period no material subsequent events came to the Company s attention.

The FASB has issued updated consolidation accounting guidance for determining whether an entity is a variable interest entity, or VIE, and requires the performance of a qualitative rather than a quantitative analysis to determine the primary beneficiary of a VIE. The updated guidance requires an entity to consolidate a VIE if it has (i) the power to direct the activities that most significantly impact the entity s economic performance and (ii) the obligation to absorb losses of the VIE or the right to receive benefits from the VIE that could be significant to the VIE. The updated guidance is effective for the first annual reporting period that begins after November 15, 2009, with early adoption prohibited. While the Company is currently evaluating the effect of adoption of this guidance, it currently believes that its adoption has not had a material impact on its consolidated financial statements

The Company has considered all other pronouncements that have been issued but are not yet effective which were not listed above. The Company believes that these other pronouncements will not have any future impact on the Company s financial statements.

# 3. Stockholder s Equity

## Preferred Shares

Shares of preferred stock may be issued in the future in one or more series as authorized by the Company s board of directors. Prior to the issuance of shares of any series, the board of directors is required by the Company s charter to fix the number of shares to be included in each series and the terms, preferences,

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## 3. Stockholder s Equity (continued)

conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications and terms or conditions of redemption for each series. Because the Company s board of directors has the power to establish the preferences, powers and rights of each series of preferred stock, it may provide the holders of any series of preferred stock with preferences, powers and rights, voting or otherwise, senior to the rights of holders of the Company s common stock. The issuance of preferred stock could have the effect of delaying, deferring or preventing a change in control of the Company, including an extraordinary transaction (such as a merger, tender offer or sale of all or substantially all of the Company s assets) that might provide a premium price for holders of the Company s common stock. To date, the Company had no outstanding preferred shares.

### Common Shares

All of the common stock being offered by the Company will be duly authorized, fully paid and nonassessable. Subject to the preferential rights of any other class or series of stock and to the provisions of its charter regarding the restriction on the ownership and transfer of shares of the Company s stock, holders of the Company s common stock will be entitled to receive distributions if authorized by the board of directors and to share ratably in the Company s assets available for distribution to the stockholders in the event of a liquidation, dissolution or winding-up.

Each outstanding share of the Company s common stock entitles the holder to one vote on all matters submitted to a vote of stockholders, including the election of directors. There is no cumulative voting in the election of directors, which means that the holders of a majority of the outstanding common stock can elect all of the directors then standing for election, and the holders of the remaining common stock will not be able to elect any directors.

Holders of the Company s common stock have no conversion, sinking fund, redemption or exchange rights, and have no preemptive rights to subscribe for any of its securities. Maryland law provides that a stockholder has appraisal rights in connection with some transactions. However, the Company s charter provides that the holders of its stock do not have appraisal rights unless a majority of the board of directors determines that such rights shall apply. Shares of the Company s common stock have equal dividend, distribution, liquidation and other rights.

Under its charter, the Company cannot make some material changes to its business form or operations without the approval of stockholders holding at least a majority of the shares of the Company s stock entitled to vote on the matter. These include (1) amendment of its charter, (2) its liquidation or dissolution, (3) its reorganization, and (4) its merger, consolidation or the sale or other disposition of its assets. Share exchanges in which the Company is the acquirer, however, do not require stockholder approval. The Company had 20,000 shares of common stock outstanding as of

December 31, 2009.

## Equity Compensation Plans

The Company plans to adopt its Employee and Director Incentive Restricted Share Plan to provide for grants of awards to its directors, officers and full-time employees (in the event we ever have employees), full-time employees of its Advisor and its affiliates, full-time employees of entities that provide services to it, directors of its Advisor or of entities that provide services to it, certain of its consultants and certain consultants to the Advisor and its affiliates or to entities that provide services to it. Such awards shall consist of restricted shares.

Restricted share awards entitle the recipient to common shares from the Company under terms that provide for vesting over a specified period of time or upon attainment of pre-established performance objectives. Such awards would typically be forfeited with respect to the unvested shares upon the termination of the recipient s employment or other relationship with the Company. Restricted shares may not, in general, be sold or otherwise transferred until restrictions are removed and the shares have vested. Holders of restricted shares may receive

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## 3. Stockholder s Equity (continued)

cash dividends prior to the time that the restrictions on the restricted shares have lapsed. Any dividends payable in common shares shall be subject to the same restrictions as the underlying restricted shares.

The Company will account for stock-based compensation in accordance with FASB ASC Topic 718 Compensation Stock Compensation . Under the fair value recognition provisions of this statement, stock-based compensation cost is measured at the grant date based on the fair value of the award and is recognized as expense over the requisite service period, which is the vesting period. There were no restricted shares granted to date. Stock-based compensation will be classified within general and administrative expense in the consolidated statements of operations. As stock-based compensation expense recognized in the consolidated statement of operations will be based on awards ultimately expected to vest, the amount of expense will be reduced for estimated forfeitures. Forfeitures will be estimated at the time of grant and revised, if necessary, in subsequent periods if actual forfeitures differ from those estimates. Forfeitures will be estimated on experience of other companies in the same industry until entity-specific information is available.

### Distribution Reinvestment Program

The Company has adopted a distribution reinvestment program (the DRP ) through which common stockholders may elect to reinvest an amount equal to the distributions declared on their shares in additional shares of the Company s common stock in lieu of receiving cash distributions. No selling commissions or dealer manager fees will be paid on shares sold under the DRP. The board of directors of the Company may amend or terminate the DRP for any reason, provided that any amendment that adversely affects the rights or obligations of a participant shall only take effect upon 10 day s written notice to participants.

### Share Repurchase Plan

The Company s board of directors has approved a share repurchase plan. The share repurchase plan allows for share repurchases by the Company when certain criteria are met. Share repurchases will be made at the sole discretion of the board of directors.

## 4. Related-Party Transactions

The Company anticipates executing an advisory agreement with the Advisor, a management agreement with the Property Manager and a dealer manager agreement with the Dealer Manager. These agreements will entitle the Advisor, the Property Manager and the Dealer Manager to specified fees upon the provision of certain services with regard to the Offering and the investment of proceeds in real estate assets, among other services, as well as reimbursement of organization and offering costs incurred by the Advisor and the Dealer Manager on behalf of the Company (as discussed in Note 2) and certain costs incurred by the Advisor in providing services to the Company. The fees and reimbursement obligations are as follows:

| Form of Compensation | Amount |
|---|---|
| Selling Commissions | Payable to the Dealer Manager up to 7% of gross offering proceeds before reallowance of commissions earned by participating broker-dealers. The Dealer Manager intends to reallow 100% of commissions earned for those transactions that involve participating broker dealers. |
| Dealer Manager Fee | Payable to the Dealer Manager up to 3% of gross proceeds of the Offering before reallowance to participating broker-dealers. The Dealer Manager, in its sole discretion, may reallow a portion of its dealer manager fee of up to 3% of the gross offering proceeds to be paid to such participating broker-dealers. |

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# NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
# December 31, 2009

## 4. Related-Party Transactions (continued)

| Form of Compensation | Amount |
|---|---|
| Organization and Offering Expenses | The Company will pay its Advisor up to 1.5% of the gross offering proceeds for organizational and offering expenses (other than dealer manager fees and selling commissions). The Advisor and its affiliates are responsible for the payment of organization and offering expenses, other than selling commissions and the dealer manager fee, to the extent they exceed 1.5% of gross offering proceeds, without recourse against or reimbursement by the Company; provided, however, that in no event will the Company pay or reimburse organization and offering expenses (including dealer manager fees and selling commissions) in excess of 15% of the gross offering proceeds. |
| ***Operational Stage*** | |
| Acquisition Fees | Fees payable to the Advisor in the amount of 2.5% of the gross contract purchase price (including any mortgage assumed) of the property, loans or other real estate-related assets purchased. The acquisition fees and expenses for any particular asset, including amounts payable to affiliates, will not exceed, in the aggregate, 6% of the gross contract purchase price (including any mortgage assumed) of the asset. The Advisor will be paid acquisition fees and the Company will reimburse the Advisor for acquisition expenses only to the extent that acquisition fees and acquisition expenses collectively do not exceed 6% of the contract purchase price of the Company s assets. |
| Acquisition Expenses | Expenses reimbursed to the Advisor incurred in connection with the purchase of property, loans or other real estate-related assets. The acquisition fees and expenses for any particular asset, including amounts payable to affiliates, will not exceed, in the aggregate, 6% of the gross contract purchase price (including any mortgage assumed) of the asset. The Advisor will be paid acquisition fees and the Company will reimburse |

| | |
|---|---|
| | the Advisor for acquisition expenses only to the extent that acquisition fees and acquisition expenses collectively do not exceed 6% of the contract purchase price of the Company s assets. |
| Asset Management Fees | Payable to the Advisor in the amount of 0.75% of average invested assets. Average invested assets means the average of the aggregate book value of the Company s assets invested in interests in, and loans secured by, real estate before reserves for depreciation or bad debt or other similar non-cash reserves. The Company will compute the average invested assets by taking the average of these book values at the end of each month during the quarter for which the Company will calculate the fee. |

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## 4. Related-Party Transactions (continued)

| Form of Compensation | Amount |
|---|---|
| Property Management and Leasing Fees | Payable to the Property Manager on a monthly basis in the amount of 5.0% of the gross revenues. Additionally, the Company may pay the Property Manager a separate fee for the one-time initial rent-up or leasing-up of newly constructed properties in an amount not to exceed the fee customarily charged in arm s length transactions by others rendering similar services in the same geographic area for similar properties as determined by a survey of brokers and agents in such area. |
| Operating Expenses | The Company will reimburse the Advisor for all expenses paid or incurred by the Advisor in connection with the services provided to the Company, subject to the limitation that the Company will not reimburse the Advisor for any amount by which the Company s operating expenses (including the asset management fee, the financing coordination fee and disposition fees paid in connection with the sale of real estate-related assets other than real property interests) at the end of the four preceding fiscal quarters exceeds the greater of: (A) 2% of the Company s average invested assets, or (B) 25% of the Company s net income determined without reduction for any additions to reserves for depreciation, bad debts or other similar non-cash reserves and excluding any gain from the sale of the Company s assets for that period. Notwithstanding the above, the Company may reimburse the Advisor for expenses in excess of this limitation if a majority of the independent directors determines that such excess expenses are justified based on unusual and non-recurring factors. The Company will not reimburse the Advisor or its affiliates for personnel employment costs incurred by the Advisor or its affiliates in performing services under the Advisory Agreement to the extent that such employees perform services for which the Advisor receives a separate fee. |

| | |
|---|---|
| Financing Coordination Fee | If the Advisor provides services in connection with the refinancing of any debt that the Company obtains, the Advisor will be paid a financing coordination fee equal to 1% of the amount available and/or outstanding under such financing, subject to certain limitations. |

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## 4. Related-Party Transactions (continued)

| Form of Compensation | Amount |
|---|---|
| Disposition Fee | The Company may pay the Advisor a commission upon the sale of one of more of the Company s properties or other real estate related assets in an amount equal to the lesser of (a) one-half of the commission that would be reasonable, customary and competitive in light of the size, type and location of the asset or (b) 1% of the sale price of the asset. Payment of such fee may be made only if the Advisor provides a substantial amount of services in connection with the sale of the asset. In addition, the amount paid when added to all other commissions paid to unaffiliated parties in connection with such sale shall not exceed the lesser of the commission that would be reasonable, customary and competitive in light of the size, type and location of the asset or an amount equal to 6% of the sale price of such asset.<br><br>The Company will not pay a disposition fee upon the maturity, prepayment or workout of a loan or other debt-related investment, provided that if the Company take ownership of a property as a result of a workout or foreclosure of a loan the Company will pay a disposition fee upon the sale of such property.<br><br>Any disposition fees paid on assets other than real property interests will be included in the calculation of operating expenses for purposes of the limitation on total operating expenses. |
| Subordinated Incentive Listing Fee | Upon listing the Company s common stock on a national securities exchange, Empire American ALP, LLC, an indirect wholly owned subsidiary of the Sponsor, is entitled to a fee equal to 10% of the amount, if any, by which (a) the market value of the Company s outstanding stock plus distributions |

| | |
|---|---|
| | paid by the Company prior to listing, exceeds (b) the aggregate capital contributed by investors plus an amount equal to an 8% annual cumulative, non-compounded return to investors on their aggregate capital contributed. |
| Subordinated Participation in Net Sale Proceeds | After investors have received a return of their capital contributions invested and a 8% annual cumulative, noncompounded return, then Empire American ALP, LLC is entitled to receive 10% of the remaining net sale proceeds. |

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# EMPIRE AMERICAN REALTY TRUST, INC. AND SUBSIDIARY
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## 4. Related-Party Transactions (continued)

| Form of Compensation | Amount |
|---|---|
| Subordinated Termination Fee | Upon termination of the advisory agreement, Empire American ALP, LLC, an affiliate of the Advisor, will be entitled to a subordinated termination fee payable in the form of an interest bearing promissory note. The subordinated termination fee, if any, will be equal to the sum of (a) 10% of the amount, if any, by which (1) the appraised value of the Company s assets on the termination date, less any indebtedness secured by such assets, plus total distributions paid through the termination date, less any amounts distributable as of the termination date to limited partners who received units in the operating partnership in connection with the acquisition of any assets upon the liquidation or sale of such assets (assuming the liquidation or sale of such assets on the termination date) exceeds (2) the sum of the total amount of capital raised from stockholders (less amounts paid to repurchase shares of the Company s common stock pursuant to the Company s share repurchase plan) and the total amount of cash that, if distributed to them as of the termination date, would have provided them an 8% annual cumulative, pre-tax, non-compounded return on the gross proceeds from the sale of shares of the Company s common stock through the termination date. |

During the period March 26, 2009 (Date of Inception) through December 31, 2009, the Company made five separate short term loans, bearing an average interest rate of 5.8%, to the Company s sponsor in the principal aggregate amount of $985,000. These loans were made to pay for certain expenses in connection with the Company s organization and offering while maintaining the Company s minimum capitalization of $200,000. Each of these loans were repaid by the sponsor during the period through December 31, 2009. Interest income related to these loans was $2,227.

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# APPENDIX A

## Prior Performance Tables for Program Properties

The following introduction and tables below provide information relating to the non-public real estate investment program sponsored by our sponsor and its affiliates which raised funds from outside investors (the Program ). The investments made under the Program are referred to as the Program Properties. The Program is substantially similar to our program because the Program (i) invested in multifamily properties, (ii) had investment objectives to realize growth in the value of its properties, generate cash flows from operations and to invest in a diversified portfolio of multifamily properties and (iii) consisted mostly of value-added and opportunistic multifamily properties. The tables below provide information for use in evaluating the Program, the results of the operations of the Program, and compensation paid by the Program. The tables are included solely to provide prospective investors with background to be used to evaluate the real estate experience of our sponsor and its affiliates. Please see the section of this prospectus titled Prior Performance of Affiliates of our Sponsor Non-Program Properties for information regarding our Sponsor s non-program properties.

Our sponsor presents the data in Prior Performance Table III for the Program on a tax basis for the years ended December 31, 2005 through December 31, 2008 and on a modified accrual basis for the year ended December 31, 2009. In compliance with the SEC reporting requirements, Table III s presentation of Revenues, Expenses and Net Income has been prepared in accordance with accounting principles generally accepted in the United States of America, or GAAP, which incorporate tax basis accounting. However, Table III is not presented on a GAAP basis.

While SEC rules and regulations allow our sponsor to record and report results for its non-public programs on an income tax basis, investors should understand that the results of these non-public programs may be different if they were reported on a GAAP basis. Some of the major differences between GAAP accounting and income tax accounting (and, where applicable, between cash basis and accrual basis income tax accounting) that impact the accounting for investments in real estate generally are described in the following paragraphs:

The primary difference between the cash methods of accounting and accrual methods (both GAAP and the accrual method of accounting for income tax purposes) is that the cash method of accounting generally reports income when received and expenses when paid while the accrual method generally requires income to be recorded when earned and expenses recognized when incurred.

GAAP requires that, when reporting lease revenue, the minimum annual rental revenue be recognized on a straight-line basis over the term of the related lease, whereas the cash method of accounting for income tax purposes requires recognition of income when cash payments are actually received from tenants, and the accrual method of accounting for income tax purposes requires recognition of income when the income is earned pursuant to the lease contract.

GAAP requires that when an asset is considered held for sale, depreciation ceases to be recognized on that asset, whereas for income tax purposes, depreciation continues until the asset either is sold or is no longer in service.

GAAP requires that when a building is purchased certain intangible assets and liabilities (such as above- and below-market leases, tenant relationships and in-place lease costs) are allocated separately from the building and are amortized over significantly shorter lives than the depreciation recognized on the building. These intangible assets and liabilities are not recognized for income tax purposes and are not allocated separately from the building for purposes of tax depreciation.

GAAP requires that an asset is considered impaired when the carrying amount of the asset is greater than the sum of the future undiscounted cash flows expected to be generated by the asset, and an impairment loss must then be

recognized to decrease the value of the asset to its fair value. For income tax purposes, losses are generally not recognized until the asset has been sold to an unrelated party or otherwise disposed of in an arm s length transaction.

The operating results for the Program Properties set forth in Table III would differ if such operating results were presented on a GAAP basis. Specifically, if Table III were presented on a GAAP basis the Program Properties would be considered impaired assets and, accordingly, an impairment loss would be recognized to

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decrease the value of the properties to their fair value. Additionally, although under GAAP all costs associated with the acquisition of assets are written off, under the tax method of accounting the costs incurred in connection with our acquisitions were capitalized and were recovered, either in whole or in part, from depreciation.

Prospective investors should read these tables carefully together with the summary information concerning the Program as set forth in Prior Performance of Affiliates of our Sponsor elsewhere in this Prospectus.

INVESTORS IN EMPIRE AMERICAN REALTY TRUST, INC. WILL NOT OWN ANY INTEREST IN THE PROGRAM PROPERTIES AND SHOULD NOT ASSUME THAT THEY WILL EXPERIENCE RETURNS, IF ANY, COMPARABLE TO THOSE EXPERIENCED BY INVESTORS IN THE PROGRAM.

Additional information about these tables can be obtained by calling us at (201) 326-3300.

The following tables use certain financial terms. The following briefly describes the meanings of these terms.

Acquisition Costs means fees related to the purchase of property, cash down payments, acquisition fees, and legal and other costs related to property acquisitions.

Cash Generated From Operations means the excess (or the deficiency in the case of a negative number) of operating cash receipts, including interest on investments, over operating cash expenditures, including debt service payments.

GAAP refers to Generally Accepted Accounting Principles in the United States.

Recapture means the portion of taxable income from property sales or other dispositions that is taxed as ordinary income.

Reserves refers to offering proceeds designated for repairs and renovations to properties and offering proceeds not committed for expenditure and held for potential unforeseen cash requirements.

Return of Capital refers to distributions to investors in excess of net income.

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# TABLE I

# EXPERIENCE IN RAISING AND INVESTING FUNDS FOR PROGRAM PROPERTIES

Table I provides a summary of the experience of Empire American Holdings, LLC and its predecessor entities and affiliates as a sponsor in raising and investing funds in non-public programs for the five years ended December 31, 2009. Information is provided as to the manner in which the proceeds of the offerings have been applied, the timing and length of this offering and the time period over which the proceeds have been invested. Table I does not include information regarding Empire American Group, LLC, a new program that commenced in January of 2009 and has not yet begun operations or completed its offering or Gibraltar Group, LLC, a new program that commenced operations in July of 2009 and has not completed its offering.

| | Empire Asset Group, LLC | % | Empirian Bay Investors, LLC | % |
|---|---|---|---|---|
| Dollar Amount Raised from Investors | $164,141,973 | | $2,218,779 | |
| Less offering expenses:[(i)] | | | | |
| Selling commissions and discounts | $919,070 | 0.60 % | $ | 0.00 % |
| Retained by affiliates | $ | 0.00 % | $ | 0.00 % |
| Organizational expenses | $124,485 | 0.08 % | $ | 0.00 % |
| Other wages and commissions[(ii)] | $7,570,348 | 4.89 % | $ | 0.00 % |
| Available for investment | $144,728,387 | 94.43 % | $2,218,779 | 100.00% |
| Acquisition costs: | | | | |
| Prepaid items and fees related to purchase of property | $14,311,386 | 9.34 % | | 0.00 % |
| Cash down payment (deposit) | $21,628,654 | 14.11 % | $300,000 | 13.52 % |
| Capital contributed from investors[(iii)] | $87,493,457 | 57.0 % | $500,000 | $22.5 % |
| Proceeds from mortgage financing | $860,859,630 | 561.66% | $16,400,000 | 739.15% |
| Total Acquisition Costs | $984,293,127 | 642.20% | $17,200,000 | 775.20% |
| Percent leverage (mortgage financing divided by total) | 88.75 % | | 95.00 % | |
| Date Offering Began | 11/26/2003 | | 4/8/2003 | |
| Length of Offering (in months) | 73 | | 13 | |
| Month(s) to invest 90% of amount available for investment | N/A | | 1 | |

(i) All offering expenses of Empirian Bay Investors, LLC were attributed to Empire Asset Group, LLC because the programs were offered to the same investors during the same time period.

(ii) Includes wages for Empire Asset Group, LLC employees for the reported period of $1,928,036 and purchase commissions of $5,642,312.

(iii) Excludes cash down payment.

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# TABLE II

# COMPENSATION TO SPONSOR FROM PROGRAM PROPERTIES

Table II summarizes the amount and type of compensation paid to Empire American Holdings, LLC and its predecessor entities and affiliates from its non-public program during the five years ended December 31, 2009.(i)

| | Empire Asset Group, LLC | Empirian Bay Investors, LLC |
|---|---|---|
| Date offering commenced | 2003 | 2003 |
| Dollar amount raised | $162,141,973 | $2,218,779 |
| Amount paid to sponsor from proceeds of offering | | |
| Underwriting fees | $ | $1,000 |
| Acquisition fees | N/A | N/A |
| Real estate commissions | $5,642,487 | $ |
| Advisory fees acquisition fees | $272,432 | $977 |
| Other (identify and quantify) | | $ |
| Dollar amount of cash generated from operations before deducting payments to sponsor | $9,937,263 | $1,354,138 |
| Actual amount paid to sponsor from operations: | | |
| Property management fees | $ | $ |
| Partnership management fees | $ | $ |
| Reimbursements | $ | $ |
| Leasing commissions | $ | $ |
| Other (explain) | $ | $ |
| Total amount paid to sponsor from operations | $ | $ |
| Dollar amount of property sales and refinancing before deducting payment to sponsor | | |
| Cash | $73,834,889 | $ |
| Notes | | $ |
| Amount paid to sponsor: | | |
| Real estate commissions | $ | $ |
| Incentive fees | $ | $ |
| From property sales and refinancing | $14,008,153 | $ |

(i) This Table II does not include information regarding Empire American Group, LLC, a new program that commenced in January of 2009 and has not yet begun operations or completed its offering or Gibraltar Group, LLC, a new program that commenced operations in July of 2009 and has not completed its offering.

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# TABLE III

# OPERATING RESULTS OF PROGRAM PROPERTIES

# EMPIRE ASSET GROUP, LLC

Table III summarizes the operating results of Empire Asset Group, LLC, which holds rental apartments.

(i) Reported on Modified Accrual Basis. The tax returns have not been filed.

(ii) Represents amounts paid to investors who elected to have their interests redeemed.

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# TABLE III

# OPERATING RESULTS OF PRIOR PROGRAM PROPERTIES
# EMPIRIAN BAY INVESTORS, LLC
# (Unaudited)

Table III summarizes the operating results of Empirian Bay Investors, LLC[(i)], which holds rental apartments.

| | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Gross revenues | $3,445,545 | $ | $ | $ | $ |
| Profit (loss) on sales of properties | | | | | |
| Less: | | | | | |
| Operating expenses | $1,648,808 | $ | $ | $ | $ |
| Interest expense | $1,344,211 | $ | $ | $ | $ |
| Depreciation | $752,244 | $ | $ | $ | $ |
| Amortization | $65,517 | $ | $ | $ | $ |
| Net income Tax Basis | $(365,235 ) | $ | $ | $ | $ |
| Taxable income (loss) from: | | | | | |
| operations | $(365,235 ) | $ | $ | $ | $ |
| gain (loss) on sale | $ | $ | $ | $ | $ |
| Cash generated from operations | $452,526 | $ | $ | $ | $ |
| Cash generated from sales | $ | $ | $ | $ | $ |
| Cash generated from refinancing | $ | $ | $ | $ | $ |
| Cash generated from operations, sales and refinancing | $452,526 | $ | $ | $ | $ |
| Less: Cash distribution to investors from: | | | | | |
| operating cash flow | $22,235 | $ | $ | $ | $ |
| sales and refinancing | $ | $ | $ | $ | $ |
| other[(ii)] | $1,220,176 | $ | $ | $ | $ |
| Cash generated after cash distributions | $(790,326 ) | $ | $ | $ | $ |
| Less: Special items | $ | $ | $ | $ | $ |
| Cash generated after cash distributions and special items | $430,291 | $ | $ | $ | $ |
| Tax and distribution data per $1,000 invested | | | | | |
| Federal income tax results: | | | | | |
| Ordinary income (loss) from: | | | | | |
| operations | $(369 ) | $ | $ | $ | $ |
| recapture | $ | $ | $ | $ | $ |
| capital gain (loss) | $ | $ | $ | $ | $ |
| Cash distributions to investors | | | | | |
| Source (on Tax Basis) | | | | | |
| Investment income | $22 | $ | $ | $ | $ |

| | | | | | |
|---|---|---|---|---|---|
| Return of capital | $ | $ | $ | $ | $ |
| Source (on cash basis) | | | | | |
| Sales | $ | $ | $ | $ | $ |
| Refinancing | $ | $ | $ | $ | $ |
| Operations | $22 | $ | $ | $ | $ |
| Other | | | | | |
| Amount (in percentage terms) remaining invested in program properties at the end of the last year reported in the table (original total acquisition cost of properties retained divided by original total acquisition cost of all properties in program) | | | | | 0.00% |

(i) During 2005, all the investors of this program transferred their investment interest to another program, Empire Asset Group, LLC.

(ii) Return of Capital.

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# TABLE IV

# RESULTS OF COMPLETED PROGRAMS OF THE SPONSOR AND ITS AFFILIATES

Table IV presents the results of the completed program, Empirian Bay Investors, LLC, which has sold its property and completed operations during the four years prior to December 31, 2006[(1)].

| | |
|---|---|
| Dollar amount raised | $2,218,779 |
| Number of Properties Purchased | 1 |
| Date of Closing of Offering | 4/8/2004 |
| Date of First Sale of Property | 3/21/2006 |
| Date of Final Sale of Property | 3/21/2006 |
| Tax and Distribution Data Per $1,000 Invested | |
| Federal income tax results: | |
| Ordinary income (loss) | |
| from operations | $(277) |
| from recapture | $ |
| Capital gain (loss) | $ |
| Cash Distributions to Investors | |
| Sources (on Tax Basis) | |
| Investment Income | $68 |
| Return of Capital | $ |
| Sources (on Cash Basis) | |
| Sales | $ |
| Refinancing | $ |
| Operations | $68 |

(1) The investors in this program elected to have their funds rolled over to another program (Empire Asset Group, LLC) during 2005. Investors participated in this program from April, 2003 until June, 2005. Empirian Bay Investors, LLC retained no investor funds during the year it was sold.

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# TABLE V

# SALES OR DISPOSALS OF PROGRAM PROPERTIES

This table provides summary information on the results of sales or disposals of properties by non-public prior programs having similar investment objectives to ours. All figures below are through December 31, 2009.

| ty | Date Acquired | Date Sold | Selling Price, Net of Closing Costs and GAAP Adjustments | | | | Costs of Properties Including Closing and Soft Costs | | | Excess (Defici of Prop Operati Cash Receip Over C Expend |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Cash Received Net of Closing Costs | Mortgage Balance at Time of Sale | Purchase Money Mortgage Taken Back By Program | Adjustments Resulting From Application of GAAP | Original Mortgage Financing | Total Acquisition Cost, Capital Improvements, Closing and Soft Costs | Total | |
| r Oaks | 5/12/2004 | 2/16/2006 | $5,134,951 | $23,000,000 | $ | $ 28,134,951 | $12,328,630 | $2,520,425 | $14,849,055 | $1,512 |
| lerce | 6/3/2004 | 2/16/2006 | $1,322,167 | $5,760,000 | $ | $ 7,082,167 | $5,760,000 | $903,673 | $6,663,673 | $55,31 |
| npoint | 6/3/2004 | 2/9/2006 | $2,583,640 | $8,480,000 | $ | $ 11,063,640 | $8,480,000 | $1,308,596 | $9,788,596 | $(69,0 |
| urne | 6/3/2004 | 2/9/2006 | $5,008,504 | $11,480,000 | $ | $ 16,488,504 | $11,480,000 | $1,751,330 | $13,231,330 | $(35,1 |
| ewood | 6/3/2004 | 2/9/2006 | $812,005 | $5,140,000 | $ | $ 5,952,005 | $5,140,000 | $814,186 | $5,954,186 | $(46,4 |
| over | 6/3/2004 | 2/16/2006 | $3,174,561 | $9,320,000 | $ | $ 12,494,561 | $9,320,000 | $1,434,386 | $10,754,386 | $(155, |
| lo | 11/10/2004 | 9/30/2005 | $10,215,924 | $28,205,360 | $ | $ 38,421,284 | $23,512,500 | $7,550,698 | $31,063,198 | $(836, |
| ay ian | 3/14/2003 | 3/21/2006 | $4,953,303 | $21,992,526 | $ | $ 26,945,829 | $16,400,000 | $800,000 | $17,200,000 | $706,5 |

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# APPENDIX B

# DISTRIBUTION REINVESTMENT PROGRAM

# EMPIRE AMERICAN REALTY TRUST, INC.

Empire American Realty Trust, Inc., a Maryland corporation ( ***Empire*** ), has adopted this Distribution Reinvestment Program (the ***Program*** ), to be administered by Empire, Empire American Realty, LLC ( the ***Dealer Manager*** ) or an unaffiliated third party (the ***Administrator*** ) as agent for participants in the Program ( ***Participants*** ), on the terms and conditions set forth below.

1. *Election to Participate.* Any purchaser of shares of common stock of Empire, par value $.01 per share (the ***Shares*** ), may become a Participant by making a written election to participate on such purchaser s subscription agreement at the time of subscription for Shares. Any stockholder who has not previously elected to participate in the Program may so elect at any time by completing and executing an authorization form obtained from the Administrator or any other appropriate documentation as may be acceptable to the Administrator. Participants are generally required to have the full amount of their cash distributions with respect to their Shares (the ***Distributions*** ) reinvested pursuant to the Program. However, the Administrator shall have the sole discretion, upon request by the Participant, to accommodate the Participant s request for less than all of the Participant s Shares to be subject to participation in the Program.

2. *Distribution Reinvestment.* The Administrator will receive all Distributions paid by Empire. Participation will commence with the next Distribution payable after receipt of the Participant s election pursuant to Paragraph 1 hereof, provided it is received at least ten (10) days prior to the last day of the period to which such Distribution relates. Subject to the preceding sentence, regardless of the date of such election, a stockholder will become a Participant effective on the first day of the period following such election, and the election will apply to all Distributions attributable to such period and to all periods thereafter.

3. *General Terms of Program Investments.*

(a) Distributions reinvested pursuant to the Program will be applied to the purchase of Shares at a price equal to $9.50 per share until the termination of the initial public offering. Thereafter, Distributions reinvested pursuant to the Program will be applied to the purchase of Shares at a price equal to the higher of (i) 95% of the then current net asset value as estimated by Empire s board of directors or (ii)$9.50 per share, regardless of the price per Share paid by the Participant. A stockholder may not participate in the Program through distribution channels that would be eligible to purchase shares in the public offering of shares pursuant to Empire s prospectus outside of the Program at prices below $9.50 per share.

(b) Selling commissions will not be paid for the Shares purchased pursuant to the Program.

(c) Dealer manager fees will not be paid for the Shares purchased pursuant to the Program.

(d) For each Participant, the Administrator will maintain an account which shall reflect for each period in which Distributions are paid (a ***Distribution Period*** ) the Distributions received by the Administrator on behalf of such

Participant. A Participant s account shall be reduced as purchases of Shares are made on behalf of such Participant.

(e) Distributions shall be invested in Shares by the Administrator promptly following the payment date with respect to such Distributions to the extent Shares are available for purchase under the Program. If sufficient Shares are not available, any such funds that have not been invested in Shares within 30 days after receipt by the Administrator and, in any event, by the end of the fiscal quarter in which they are received, will be distributed to Participants. Any interest earned on such accounts will be paid to Empire and will become property of the company.

(f) Participants may acquire fractional Shares, computed to four decimal places. The ownership of the Shares shall be reflected on the books of Empire or its transfer agent.

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(g) A Participant will not be able to acquire Shares under the Program to the extent such purchase would cause it to exceed the Ownership Limit or other Share ownership restrictions imposed by Empire s Amended and Restated Charter. For purposes of this Program, Ownership Limit shall mean the prohibition on beneficial ownership of no more than 9.8%, in number of shares or value, of any class or series outstanding equity securities of Empire.

4. *Absence of Liability.* Empire, the Dealer Manager and the Administrator shall not have any responsibility or liability as to the value of the Shares or any change in the value of the Shares acquired for the Participant s account. Empire, the Dealer Manager and the Administrator shall not be liable for any act done in good faith, or for any good faith omission to act hereunder.

5. *Suitability.* Each Participant shall notify the Administrator in the event that, at any time during his participation in the Program, there is any material change in the Participant s financial condition or inaccuracy of any representation under the subscription agreement for the Participant s initial purchase of Shares. A material change shall include any anticipated or actual decrease in net worth or annual gross income or any other change in circumstances that would cause the Participant to fail to meet the suitability standards set forth in Empire s prospectus for the Participant s initial purchase of Shares.

6. *Reports to Participants.* Within ninety (90) days after the end of each calendar year, the Administrator will mail to each Participant a statement of account describing, as to such Participant, the Distributions received, the number of Shares purchased and the per Share purchase price for such Shares pursuant to the Program during the prior year. Each statement also shall advise the Participant that, in accordance with Paragraph 5 hereof, the Participant is required to notify the Administrator in the event there is any material change in the Participant s financial condition or if any representation made by the Participant under the subscription agreement for the Participant s initial purchase of Shares becomes inaccurate. Tax information regarding a Participant s participation in the Program will be sent to each Participant by the company or the Administrator at least annually.

7. *Taxes.* Taxable Participants may incur a tax liability for Distributions even though they have elected not to receive their Distributions in cash but rather to have their Distributions reinvested in Shares under the Program.

8. *Termination.*

(a) A Participant may terminate or modify his participation in the Program at any time by written notice to the Administrator. To be effective for any Distribution, such notice must be received by the Administrator at least ten (10) days prior to the last day of the Distribution Period to which it relates.

(b) Prior to the listing of the Shares on a national securities exchange, a Participant s transfer of Shares will terminate participation in the Program with respect to such transferred Shares as of the first day of the Distribution Period in which such transfer is effective, unless the transferee of such Shares in connection with such transfer demonstrates to the Administrator that such transferee meets the requirements for participation hereunder and affirmatively elects participation by delivering an executed authorization form or other instrument required by the Administrator.

9. *State Regulatory Restrictions.* The Administrator is authorized to deny participation in the Program to residents of any state or foreign jurisdiction that imposes restrictions on participation in the Program that conflict with the general terms and provisions of this Program, including, without limitation, any general prohibition on the payment of broker-dealer commissions for purchases under the Program.

10. *Amendment to or Termination of the Program.*

(a) The terms and conditions of this Program may be amended by Empire at any time, including but not limited to an amendment to the Program to substitute a new Administrator to act as agent for the Participants, by mailing an appropriate notice at least ten (10) days prior to the effective date thereof to each Participant.

(b) The Administrator may terminate a Participant s individual participation in the Program and Empire may terminate the Program itself, at any time by providing ten (10) days prior written notice to a Participant, or to all Participants, as the case may be.

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(c) After termination of the Program or termination of a Participant s participation in the Program, the Administrator will send to each Participant a check for the amount of any Distributions in the Participant s account that have not been invested in Shares. Any future Distributions with respect to such former Participant s Shares made after the effective date of the termination of the Participant s participation will be sent directly to the former Participant.

11. *Governing Law.* This Program and the Participants election to participate in the Program shall be governed by the laws of the State of Maryland.

12. *Notice*. Any notice or other communication required or permitted to be given by any provision of this Program shall be in writing and, if to the Administrator, addressed to , or such other address as may be specified by the Administrator by written notice to all Participants. Notices to a Participant may be given by letter addressed to the Participant at the Participant s last address of record with the Administrator. Each Participant shall notify the Administrator promptly in writing of any changes of address.

13. *Certificates.* The ownership of the Shares will be in book-entry form prior to the issuance of certificates. Empire will not issue share certificates except to stockholders who make a written request to the Administrator.

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# APPENDIX C

# EMPIRE AMERICAN REALTY TRUST, INC.

# SUBSCRIPTION AGREEMENT

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# EMPIRE AMERICAN REALTY TRUST, INC.

## Common Stock

## 250,000 SHARES MINIMUM OFFERING

## 110,000,000 SHARES MAXIMUM OFFERING

# PROSPECTUS

May 14, 2010

You should rely only on the information contained in this prospectus. No dealer, salesperson or other person is authorized to make any representations other than those contained in the prospectus and supplemental literature authorized by Empire American Realty Trust, Inc. and referred to in this prospectus, and, if given or made, such information and representations must not be relied upon. This prospectus is not an offer to sell nor is it seeking an offer to buy these securities in any jurisdiction where the offer or sale is not permitted. The information contained in this prospectus is accurate only as of the date of this prospectus, regardless of the time of delivery of this prospectus or any sale of these securities. You should not assume that the delivery of this prospectus or that any sale made pursuant to this prospectus implies that the information contained in this prospectus will remain fully accurate and correct as of any time subsequent to the date of this prospectus.

**Until August 12, 2010 (90 days after the date of this prospectus), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealer s obligation to deliver a prospectus when acting as soliciting dealers with respect to their unsold allotments or subscriptions.**

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