

NEW YORK MORTGAGE TRUST INC

Form S-3

February 02, 2012

As filed with the Securities and Exchange Commission on February 2, 2012

Registration No. 333-

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM S-3
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

New York Mortgage Trust, Inc.
(Exact name of registrant as specified in its charter)

Maryland
(State or other jurisdiction of
incorporation or organization)

47-0934168
(I.R.S. employer
identification number)

52 Vanderbilt Avenue, Suite 403
New York, New York 10017
(212) 792-0107
(Address, including Zip Code, and Telephone Number,
including Area Code, of Registrant's Principal Executive Offices)

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Approximate date of commencement of proposed sale to public: From time to time after the effective date of this registration statement.

If the only securities being registered on this form are being offered pursuant to dividend or interest reinvestment plans, please check the following box.

If any of the securities being registered on this form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, other than securities offered only in connection with dividend or interest reinvestment plans, please check the following box.

If this form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this form is a registration statement pursuant to General Instruction I.D. or a post-effective amendment thereto that shall become effective upon filing with the Securities and Exchange Commission pursuant to Rule 462(e) under the Securities Act, check the following box.

If this form is a post-effective amendment to a registration statement filed pursuant to General Instruction I.D. filed to register additional securities or additional classes of securities pursuant to Rule 413(b) under the Securities Act, check the following box.

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

Large accelerated filer

Accelerated filer

Non-accelerated filer

Smaller reporting company

(Do not check if a smaller reporting company)

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered(1)	Proposed maximum offering price per unit(2)	Proposed maximum aggregate offering price(3)	Amount of registration fee(4)
Common Stock, Preferred Stock, Debt Securities(1)(5),			\$250,000,000	\$28,650

(1) Subject to footnote (3), there is being registered hereunder such indeterminate number or amount of securities of each identified class of securities of New York Mortgage Trust, Inc. as may from time to time be issued or sold at indeterminate prices, with an aggregate initial public offering price not to exceed \$250,000,000. Pursuant to Rule 416(a) under the Securities Act of 1933, this registration statement shall be deemed to cover any additional number of securities as may be offered or issued from time to time upon stock splits, stock dividends, recapitalizations or similar transactions. No additional consideration will be received for such securities and, therefore, no registration fee is required pursuant to Rule 457(i) under the Securities Act of 1933. For debt securities issued with an original issue discount, the amount to be registered is calculated as the initial accreted value of such debt securities.

(2) Not required to be included in accordance with General Instruction II.D of Form S-3 under the Securities Act of 1933.

(3) Estimated solely for the purpose of calculating the registration fee. No separate consideration will be received for shares of common stock as may, from time to time, be issued upon conversion of shares of preferred stock or debt securities registered hereunder. No separate consideration will be received for shares of preferred stock as may, from time to time, be issued upon conversion, exchange or exercise of securities registered hereunder to the extent any such securities are, by their terms, convertible into, or exchangeable or exercisable for, preferred stock.

(4) The registration fee has been calculated in accordance with Rule 457(o) under the Securities Act of 1933. Pursuant to Rule 457(p) under the Securities Act of 1933, the registrant is offsetting the registration fee of \$28,650 due under this Registration Statement by the \$1,005 registration fee that was previously paid with respect to securities of the registrant with a maximum aggregate offering price of \$18,018,500 that were registered on the Registration Statement on Form S-3 (File No. 333-162654) originally filed by the registrant on October 23, 2009, which securities were not sold.

(5) In United States dollars or the equivalent thereof in any other currency, currency unit or units, or composite currency or currencies.

The Registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until the Registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933, as amended, or until the Registration Statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.

The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities, and we are not soliciting offers to buy these securities, in any state where the offer or sale is not permitted.

SUBJECT TO COMPLETION, DATED FEBRUARY 2, 2012

PROSPECTUS

\$250,000,000

Common Stock
Preferred Stock
Debt Securities

We may offer and sell, from time to time, in one or more offerings, up to an aggregate of \$250,000,000 of the common stock, preferred stock and debt securities described in this prospectus. We may offer and sell these securities to or through one or more underwriters, dealers and agents, or directly to purchasers, on a continuous or delayed basis.

The specific terms of any securities to be offered, and the specific manner in which they may be offered, will be described in one or more supplements to this prospectus. This prospectus may not be used to consummate sales of any of these securities unless it is accompanied by a prospectus supplement. Before investing, you should carefully read this prospectus and any related prospectus supplement.

Our shares of common stock are listed on the Nasdaq Capital Market under the symbol "NYMT." The last reported sale price of our common stock on the Nasdaq Capital Market on February 1, 2012, was \$7.08 per share.

To preserve our qualification as a real estate investment trust, or REIT, for federal income tax purposes, we impose certain restrictions on the ownership and transfer of our capital stock. See "Description of Common Stock — Restrictions on Ownership and Transfer" and "Description of Preferred Stock — Restrictions on Ownership and Transfer; Change of Control Provisions."

Investing in our securities involves substantial risks. You should carefully read and consider the information under "Risk Factors" on page 5 of this prospectus supplement and any prospectus supplement before making a decision to purchase these securities.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

The date of this prospectus is _____, 2012.

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You should rely only on the information contained in this prospectus and the accompanying prospectus supplement or incorporated by reference in these documents. No dealer, salesperson or other person is authorized to give any information or to represent anything not contained or incorporated by reference in this prospectus or the accompanying prospectus supplement. If anyone provides you with different, inconsistent or unauthorized information or representations, you must not rely on them. This prospectus and the accompanying prospectus supplement are an offer to sell only the securities offered by these documents, but only under circumstances and in jurisdictions where it is lawful to do so. The information contained in this prospectus or any prospectus supplement is current only as of the date on the front of those documents.

ABOUT THIS PROSPECTUS

This prospectus is part of a shelf registration statement that we filed with the Securities and Exchange Commission, or the SEC. Under this shelf registration statement, we may offer and sell any combination of our common stock, preferred stock and debt securities in one or more offerings. This prospectus provides you with a general description of the securities we may offer. Each time we offer to sell securities under this shelf registration statement, we will provide a prospectus supplement that will contain specific information about the terms of that offering. The prospectus supplement may add, update or change information contained in this prospectus. Before you buy any of our securities, it is important for you to consider the information contained in this prospectus and any prospectus supplement together with additional information described under the headings “Incorporation By Reference Of Information Filed With The SEC” and “Where You Can Find More Information.”

The SEC allows us to incorporate by reference information that we file with them, which means that we can disclose important information to you by referring you to those documents. The information incorporated by reference is considered to be a part of this prospectus, and information that we file later with the SEC will automatically update and supersede this information. You should rely only on the information incorporated by reference or set forth in this prospectus or any prospectus supplement. We have not authorized anyone to provide you with information different from that contained in this prospectus. No dealer, salesperson or other person is authorized to give any information or to represent anything not contained in this prospectus. You must not rely on any unauthorized information or representation. This prospectus is an offer to sell only the securities offered hereby, but only under circumstances and in jurisdictions where it is lawful to do so. You should assume that the information in this prospectus or any prospectus supplement is accurate only as of the date of the document incorporated by reference. Our business, financial condition, results of operations and prospects may have changed since that date.

In this prospectus, we refer to New York Mortgage Trust, Inc., together with its consolidated subsidiaries, as “we,” “us,” “Company,” or “our,” unless we specifically state otherwise or the context indicates otherwise. We refer to Hypotheca Capital, LLC, one of our wholly-owned taxable REIT subsidiaries, as “Hypotheca,” New York Mortgage Funding, LLC, one of our wholly-owned taxable REIT subsidiaries, as “NYMF,” and RB Commercial Mortgage LLC, our wholly-owned subsidiary, as “RBCM.”

FORWARD-LOOKING INFORMATION

When used in this prospectus, in future filings with the Securities and Exchange Commission, or the SEC, or in press releases or other written or oral communications, statements which are not historical in nature, including those containing words such as “anticipate,” “believe,” “could,” “estimate,” “expect,” “intend,” “may,” “plan,” “goal,” “objective,” “project,” “should,” “will” and “would” or the negative of these terms or other comparable terminology, are intended to identify “forward-looking statements” within the meaning of Section 27A of the Securities Act of 1933, as amended, or the Securities Act, and Section 21E of the Securities Exchange Act of 1934, as amended, or the Exchange Act, and, as such, may involve known and unknown risks, uncertainties and assumptions. These forward-looking statements may relate to, among other things, our expectations, beliefs, projections, future plans and strategies, anticipated events or trends and similar expressions concerning matters that are not historical facts.

The forward-looking statements are based on our beliefs, assumptions and expectations of our future performance, taking into account information currently in our possession. These beliefs, assumptions and expectations may change as a result of many possible events or factors, not all of which are known to us or are within our control. If a change occurs, the performance of our portfolio and our business, financial condition, liquidity and results of operations may vary materially from those expressed, anticipated or contemplated in our forward-looking statements. You should carefully consider these risks, along with the following factors that could cause actual results to vary from our forward-looking statements, before making an investment in our securities:

- changes in our business and strategies;
- our ability to successfully diversify our investment portfolio and identify suitable assets to invest in;
- the effect of the Federal Reserve’s and the U.S. Treasury’s actions and programs, including future purchases or sales by the Federal Reserve or U.S. Treasury of residential adjustable-rate, hybrid adjustable-rate, or fixed-rate mortgage-backed securities, or RMBS, issued or guaranteed by a federally chartered corporation, or GSE, such as the Federal National Mortgage Association, or Fannie Mae, or the Federal Home Loan Mortgage Corporation, or Freddie Mac, or an agency of the U.S. government, such as the Government National Mortgage Association, or Ginnie Mae, on the liquidity of the capital markets and the impact and timing of any further programs or regulations implemented by the U.S. Government or its agencies;
- any changes in laws and regulations affecting the relationship between Fannie Mae, Freddie Mac or Ginnie Mae and the U.S. Government;
- increased prepayments of the mortgages and other loans underlying our investment securities;
 - the volatility of the markets for our targeted assets;
 - changes in the market value of our assets;
- increased rates of default and/or decreased recovery rates on our assets;
- mortgage loan modification programs and future legislative action, including actions that may lead to greater refinancings and higher prepayment spreads;
- the degree to which our hedging strategies may or may not protect us from, or expose us to, credit, prepayment or interest rate risk;

- changes in the availability, terms and deployment of capital;
- changes in interest rates and interest rate mismatches between our assets and related borrowings;

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- our ability to maintain existing financing agreements, obtain future financing arrangements and the terms of such arrangements;
- changes in economic conditions generally and the mortgage, real estate and debt securities markets specifically;
 - legislative or regulatory changes;
 - changes to United States generally accepted accounting principles, or GAAP; and
- the other important factors identified, or incorporated by reference in this prospectus or any accompanying prospectus supplement, including, but not limited to those under the captions “Management’s Discussion and Analysis of Financial Condition and Results of Operations” and “Quantitative and Qualitative Disclosures about Market Risk” in our most recent Annual Report on Form 10-K and any subsequent Quarterly Reports on Form 10-Q filed by us with the SEC, as well as those described under the caption “Risk Factors” in this prospectus and any accompanying prospectus supplement and in our most recent Annual Report on Form 10-K and any subsequent Quarterly Reports on Form 10-Q filed by us with the SEC.

We cannot guarantee future results, levels of activity, performance or achievements. You should not place undue reliance on forward-looking statements, which apply only as of the date on which they are made. Except as obligated by law, we do not intend and disclaim any duty or obligation to update or revise any industry information or forward-looking statements set forth or incorporated by reference in this prospectus or any accompanying prospectus supplement to reflect new information, future events or otherwise.

OUR COMPANY

General

We are a real estate investment trust, or REIT, in the business of acquiring, investing in, financing and managing primarily mortgage-related assets. Our principal business objective is to generate net income for distribution to our stockholders resulting primarily from the spread between the interest and other income we earn on our interest-earning assets and the interest expense we pay on the borrowings that we use to finance our leveraged assets plus our operating costs. We intend to achieve this objective by investing in a broad class of mortgage-related assets that in the aggregate will generate what we believe are attractive risk-adjusted total returns for our stockholders. Our targeted assets currently include:

- RMBS consisting of pass-through certificates, collateralized mortgage obligations, or CMOs, interest only and inverse interest only securities, which we collectively refer to as IOs, and principal-only securities, or POs, that are issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae. We refer to these securities as Agency RMBS;
- commercial mortgage-backed securities, or CMBS, comprised of mortgage loans backed by multi-family properties, which we refer to as multi-family CMBS; and
 - other commercial real estate-related debt investments.

Subject to maintaining our qualification as a REIT, we also may opportunistically acquire and manage various other types of financial assets that we believe will compensate us appropriately for the risks associated with them, including, without limitation, RMBS backed by prime jumbo and Alternative A-paper mortgage loans, which we refer to as non-Agency RMBS (which may include IOs and POs), and residential mortgage loans.

Prior to 2009, our investment portfolio was primarily comprised of Agency RMBS, certain non-Agency RMBS originally rated in the highest rating category by two rating agencies and prime credit quality residential adjustable-rate mortgage loans, or prime ARM loans, held in securitization trusts. Since 2009, we have repositioned our investment portfolio away from one primarily focused on leveraged Agency RMBS and prime ARM loans held in securitization trusts to a more diversified portfolio that includes elements of credit risk with reduced leverage, as evidenced by our investments in residential mortgage loans in 2010 and our establishment and initial funding of our Midway Residential Mortgage Portfolio and multi-family CMBS investments in 2011. We believe this strategy will enable us to construct a diversified investment portfolio designed to provide attractive risk-adjusted returns across a variety of market conditions and economic cycles.

We have elected to be taxed as a REIT and have complied, and intend to continue to comply, with the provisions of the Internal Revenue Code of 1986, as amended, or Internal Revenue Code, with respect thereto. Accordingly, we do not expect to be subject to federal income tax on our REIT taxable income that we currently distribute to our stockholders if certain asset, income and ownership tests and recordkeeping requirements are fulfilled. However, even if we maintain our qualification as a REIT, we may be subject to some federal, state and local taxes on our income generated in our taxable REIT subsidiaries, or TRSs.

Midway Residential Mortgage Portfolio

In February 2011, we established our Midway Residential Mortgage Portfolio, which is a separate account owned by us and managed by The Midway Group, LP, or Midway, that focuses on achieving long-term capital appreciation on our investments across various market cycles, including, various interest rate, yield curve, prepayment and credit market cycles, primarily through investments in a hedged portfolio of mortgage-related securities, contract rights and

derivatives. Midway, which is responsible for administering the business activities and day-to-day operations of the Midway Residential Mortgage Portfolio, is a private investment management group with an approximately 12-year history of investing in a broad spectrum of RMBS and derivatives.

The Midway Residential Mortgage Portfolio focuses primarily on investments in Agency RMBS, including significant investments in IOs issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae, and derivative instruments. To fund its investments, the Midway Residential Mortgage Portfolio will borrow money from banks and other financing counterparties and may trade on margin to leverage its investments, and in so doing, may pledge its assets as security for such borrowings. We generally anticipate targeting a leverage ratio of 3 to 1 for the Midway Residential Mortgage Portfolio; however, there may be occasional short-term increases or decreases in the amount of leverage used due to significant market events, and we may change our leverage strategy at any time.

Subject to our intention to maintain our qualification as a REIT, we will use hedging instruments to reduce our risk associated with changes in interest rates, mortgage spreads, swap spreads, yield curve shapes, and market volatility and to protect long-term returns. These hedging instruments may include mortgage derivatives and forward-settling purchases and sales of Agency RMBS where the underlying pools of mortgage loans are "To-Be-Announced," or TBAs, Euro-dollar futures, interest rate options, swaps and U.S. treasuries. Pursuant to our TBA transactions, we agree to purchase or sell, for future delivery, Agency RMBS with certain principal and interest terms and certain types of underlying collateral, but the particular Agency RMBS to be delivered or received, as applicable, is not identified until shortly before the TBA settlement date. We typically do not take delivery of TBAs, but rather settle with our trading counterparties on a net basis. Although TBAs are liquid and have quoted market prices and represent the most actively traded class of RMBS, the use of TBAs exposes us to increased market value risk. We may conduct TBA transactions through one of our TRSs.

Multi-Family CMBS Investments

In April 2011, we formed a relationship with RiverBanc LLC, or RiverBanc, a privately owned investment management and specialty finance company, for the purpose of investing in multi-family CMBS, such as Freddie Mac Multifamily Loan Securitization 2011 K-Series' assets, and, to a lesser extent, other commercial real estate-related debt investments, such as mezzanine loans and preferred equity investments in commercial properties. We intend to finance our investment in these assets through working capital and, subject to market conditions, both short- and long-term borrowings or any combination thereof.

Pursuant to an investment management agreement between RiverBanc and us, RiverBanc will source, structure and manage our investments in these asset classes. Under the terms of RiverBanc's operating agreement, we may acquire up to 17% of the limited liability company interests of RiverBanc, upon satisfying certain funding thresholds. As of December 31, 2011, we owned none of the outstanding limited liability company interests of RiverBanc.

Corporate Offices

We are a Maryland corporation that was formed in 2003. Our principal executive offices are located at 52 Vanderbilt Avenue, Suite 403, New York, New York 10017, and our telephone number is (212) 792-0107. Our website is www.nymtrust.com. Our website and the information contained at or connected to our website do not constitute a part of this prospectus or any accompanying prospectus supplement.

RISK FACTORS

Investing in our securities involves substantial risks, including the risk that you might lose your entire investment. Before making an investment decision, you should carefully read and consider the information set forth under the heading “Risk Factors” in our most recent Annual Report on Form 10-K and any subsequent Quarterly Reports on Form 10-Q (which information is incorporated by reference in this prospectus), as well as the other information contained or incorporated by reference in this prospectus or in any prospectus supplement hereto. See “Where You Can Find More Information” below. Any one of the risks discussed could cause actual results to differ materially from expectations and could adversely affect our business, financial condition and results of operations. Additional risks and uncertainties not presently known to us or not identified, may also materially and adversely affect our business, financial condition and results of operations.

USE OF PROCEEDS

Unless otherwise indicated in an accompanying prospectus supplement, we intend to use the net proceeds from the sale of securities offered by this prospectus and the accompanying prospectus supplement to acquire our target assets and for general corporate purposes, including the repayment of indebtedness.

DESCRIPTION OF THE SECURITIES WE MAY OFFER

This prospectus contains a summary description of the common stock, preferred stock and debt securities that we may offer from time to time. As further described in this prospectus, these summary descriptions are not meant to be complete descriptions of each security. The particular terms of any security will be described in the accompanying prospectus supplement and other offering material. The accompanying prospectus supplement may update, change or add to the terms and conditions of the securities as described in this prospectus.

DESCRIPTION OF COMMON STOCK

The following summary description of our common stock does not purport to be complete and is subject to and qualified in its entirety by reference to Maryland law, our charter and our bylaws, copies of which are filed as exhibits to the registration statement of which this prospectus is a part. See “Where You Can Find More Information.”

General

Our charter provides that we may issue up to 400,000,000 shares of common stock, par value \$0.01 per share. As of December 31, 2011, 13,938,273 shares of common stock were issued and outstanding. Under Maryland law, our stockholders are not generally liable for our debts or obligations. Our charter authorizes our board of directors to amend our charter to increase or decrease the aggregate number of shares of capital stock of any class or series that we have the authority to issue, without stockholder approval.

Voting Rights of Common Stock

Subject to the provisions of our charter regarding restrictions on the transfer and ownership of shares of common stock, each outstanding share of common stock entitles the holder to one vote on all matters submitted to a vote of stockholders, including the election of directors, and, except as provided with respect to any other class or series of shares of our stock, the holders of our common stock possess the exclusive voting power. There is no cumulative voting in the election of directors, which means that the holders of a majority of our outstanding shares of common stock can elect all of the directors then standing for election. Under Maryland law, a Maryland corporation generally cannot dissolve, amend its charter, merge, sell all or substantially all of its assets, or engage in a share exchange or engage in similar transactions outside the ordinary course of business unless approved by the affirmative vote of stockholders holding at least two-thirds of the shares entitled to vote on the matter, unless a lesser percentage (but not less than a majority of all the votes entitled to be cast on the matter) is set forth in the corporation’s charter. Our charter provides for approval by a majority of all the votes entitled to be cast on the matter for the matters described in the preceding sentence.

Dividends, Liquidation and Other Rights

All of our outstanding shares of common stock are duly authorized, fully paid and nonassessable. Holders of our shares of common stock are entitled to receive dividends when authorized by our board of directors and declared by us out of assets legally available for the payment of dividends. They also are entitled to share ratably in our assets legally available for distribution to our stockholders in the event of our liquidation, dissolution or winding up, after payment of or adequate provision for all of our known debts and liabilities. These rights are subject to the preferential rights of any other class or series of our stock and to the provisions of our charter regarding restrictions on transfer and ownership of our stock.

Holders of our shares of common stock have no appraisal, preference, conversion, exchange, sinking fund or redemption rights and have no preemptive rights to subscribe for any of our securities. Subject to the restrictions on transfer of capital stock contained in our charter and to the ability of the board of directors to create shares of common stock with differing voting rights, all shares of common stock have equal dividend, liquidation and other rights.

Power to Issue Additional Shares of Common Stock and Preferred Stock

Our charter also authorizes our board of directors to amend our charter to increase or decrease the aggregate number of shares of capital stock of any class or series that we have the authority to issue, to classify and reclassify any unissued shares of our common stock and preferred stock into any other classes or series of classes of our stock, to

establish the number of shares in each class or series and to set the terms, preferences, conversion and other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications and terms or conditions of redemption for each such class or series. We believe that the power of our board of directors to take these actions provides us with increased flexibility in structuring possible future financings and acquisitions and in meeting other needs which might arise. The additional classes or series, as well as our common stock, are available for issuance without further action by our stockholders, unless stockholder action is required by applicable law or the rules of any stock exchange or automated quotation system on which our securities may be listed or traded. Although our board of directors has no intention at the present time of doing so, it could authorize us to issue a class or series that could, depending upon the terms of such class or series, 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 that our common stockholders or otherwise believe to be in their best interest.

Restrictions on Ownership and Transfer

In order to qualify as a REIT under the Internal Revenue Code, our shares of stock must be beneficially owned by 100 or more persons during at least 335 days of a taxable year of 12 months or during a proportionate part of a shorter taxable year. Also, no more than 50% of the value of our outstanding shares of capital stock may be owned, directly or constructively, by five or fewer individuals (as defined in the Internal Revenue Code to include certain entities) during the last half of any taxable year. In addition, if certain “disqualified organizations” hold our stock, although the law on the matter is unclear, a tax might be imposed on us if a portion of our assets is treated as a taxable mortgage pool. In addition, a tax will be imposed on us if certain disqualified organizations hold our stock and we hold a residual interest in a real estate mortgage investment conduit, or REMIC.

To help us to qualify as a REIT, our charter, subject to certain exceptions, contains restrictions on the number of shares of our capital stock that a person may own and prohibits certain entities from owning our stock. Our charter was amended in June 2009 to reduce the aggregate stock ownership limit and common stock ownership limit from 9.9% to 5%. As amended, our charter provides that generally no person may own, or be deemed to own by virtue of the attribution provisions of the Internal Revenue Code, either (i) more than 5% in value of the aggregate of our outstanding shares of capital stock or (ii) more than 5% in value or in number of shares, whichever is more restrictive, of the aggregate of our outstanding common stock. However, to the extent that any person’s “beneficial ownership” or “constructive ownership” of our stock immediately prior to the effectiveness of the June 2009 charter amendment exceeded the 5% ownership limit described in the preceding sentence, the ownership limit is not effective for such person until that person’s ownership percentage falls below the 5% ownership limit; provided, however, that until such time as the person’s ownership percentage falls below the 5% ownership limit, any further acquisition of our capital stock by such person will be in violation of the ownership limits established by our charter. Our board of directors is permitted under our charter to increase or decrease the common stock ownership limit and the aggregate stock ownership limit from time to time, and to waive these ownership limits on a case by case basis so long as the waiver will not allow five or fewer individuals to beneficially own more than 49.9% in value of our outstanding capital stock or otherwise cause us to fail to comply with applicable REIT ownership requirements under the Internal Revenue Code. Our charter prohibits the following “disqualified organizations” from owning our stock: the United States; any state or political subdivision of the United States; any foreign government; any international organization; any agency or instrumentality of any of the foregoing; any other tax-exempt organization, other than a farmer’s cooperative described in Section 521 of the Internal Revenue Code, that is exempt from both income taxation and from taxation under the unrelated business taxable income provisions of the Internal Revenue Code and any rural electrical or telephone cooperative.

Our charter also prohibits any person from (a) beneficially or constructively owning shares of our capital stock that would result in our being “closely held” under Section 856(h) of the Internal Revenue Code, and (b) transferring shares of our capital stock if such transfer would result in our capital stock being beneficially owned by fewer than 100 persons. Any person who acquires or attempts or intends to acquire beneficial ownership of shares of our capital stock that will or may violate any of the foregoing restrictions on transferability and ownership will be required to give notice immediately to us and provide us with such other information as we may request in order to determine the effect of such transfer on our status as a REIT. The foregoing restrictions on transferability and ownership will not apply if our board of directors determines that it is no longer in our best interests to attempt to qualify, or to continue to qualify, as a REIT.

Our board of directors, in its sole discretion, may exempt a person from the above ownership limits and any of the restrictions described in the first sentence of the paragraph directly above. However, the board of directors may not grant an exemption to any person unless the board of directors obtains such representations, covenants and undertakings as the board of directors may deem appropriate in order to determine that granting the exemption would not result in our losing our status as a REIT. As a condition of granting the exemption, our board of directors may

require a ruling from the Internal Revenue Service, or IRS, or an opinion of counsel, in either case in form and substance satisfactory to the board of directors, in its sole discretion, in order to determine or ensure our status as a REIT. Our board of directors has granted exemptions from the ownership limits from time to time in the past, including the grant of a waiver to allow Joseph A. Jolson, an affiliate of Harvest Capital Strategies LLC and JMP Group Inc., to own up to 25% of the aggregate value of our outstanding stock.

Any transfer that results in our shares of stock being owned by fewer than 100 persons will be void. However, if any transfer of our shares of stock occurs which, if effective, would result in any person beneficially or constructively owning shares of stock in excess or in violation of the above transfer or ownership limitations, known as a prohibited owner, then that number of shares of stock, the beneficial or constructive ownership of which otherwise would cause such person to violate the transfer or ownership limitations (rounded up to the nearest whole share), will be automatically transferred to a charitable trust for the exclusive benefit of a charitable beneficiary, and the prohibited owner will not acquire any rights in such shares. This automatic transfer will be considered effective as of the close of business on the business day before the violative transfer. If the transfer to the charitable trust would not be effective for any reason to prevent the violation of the above transfer or ownership limitations, then the transfer of that number of shares of stock that otherwise would cause any person to violate the above limitations will be void. Shares of stock held in the charitable trust will continue to constitute issued and outstanding shares of our stock. The prohibited owner will not benefit economically from ownership of any shares of stock held in the charitable trust, will have no rights to dividends or other distributions and will not possess any rights to vote or other rights attributable to the shares of stock held in the charitable trust. The trustee of the charitable trust will be designated by us and must be unaffiliated with us or any prohibited owner and will have all voting rights and rights to dividends or other distributions with respect to shares of stock held in the charitable trust, and these rights will be exercised for the exclusive benefit of the trust's charitable beneficiary. Any dividend or other distribution paid before our discovery that shares of stock have been transferred to the trustee will be paid by the recipient of such dividend or distribution to the trustee upon demand, and any dividend or other distribution authorized but unpaid will be paid when due to the trustee. Any dividend or distribution so paid to the trustee will be held in trust for the trust's charitable beneficiary. Subject to Maryland law, effective as of the date that such shares of stock have been transferred to the trustee, the trustee, in its sole discretion, will have the authority to:

- rescind as void any vote cast by a prohibited owner prior to our discovery that such shares have been transferred to the trustee; and
- recast such vote in accordance with the desires of the trustee acting for the benefit of the trust's beneficiary.

However, if we have already taken irreversible corporate action, then the trustee will not have the authority to rescind and recast such vote.

Within 20 days of receiving notice from us that shares of stock have been transferred to the charitable trust, and unless we buy the shares first as described below, the trustee will sell the shares of stock held in the charitable trust to a person, designated by the trustee, whose ownership of the shares will not violate the ownership limitations in our charter. Upon the sale, the interest of the charitable beneficiary in the shares sold will terminate and the trustee will distribute the net proceeds of the sale to the prohibited owner and to the charitable beneficiary. The prohibited owner will receive the lesser of:

- the price paid by the prohibited owner for the shares or, if the prohibited owner did not give value for the shares in connection with the event causing the shares to be held in the charitable trust (for example, in the case of a gift or devise), the market price of the shares on the day of the event causing the shares to be held in the charitable trust; and
- the price per share received by the trustee from the sale or other disposition of the shares held in the charitable trust (less any commission and other expenses of a sale).

The trustee may reduce the amount payable to the prohibited owner by the amount of dividends and distributions paid to the prohibited owner that are owed by the prohibited owner to the trustee. Any net sale proceeds in excess of the amount payable to the prohibited owner will be paid immediately to the charitable beneficiary. If, before our discovery that shares of stock have been transferred to the charitable trust, such shares are sold by a prohibited owner, then:

- such shares will be deemed to have been sold on behalf of the charitable trust; and
- to the extent that the prohibited owner received an amount for such shares that exceeds the amount that the prohibited owner was entitled to receive as described above, the excess must be paid to the trustee upon demand.

In addition, shares of stock held in the charitable trust will be deemed to have been offered for sale to us, or our designee, at a price per share equal to the lesser of:

- the price per share in the transaction that resulted in such transfer to the charitable trust (or, in the case of a gift or devise, the market price at the time of the gift or devise); and