

SPIRIT REALTY CAPITAL, INC.

Form S-8

December 14, 2016

As filed with the Securities and Exchange Commission on December 14, 2016

Registration No. 333-

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

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

Spirit Realty Capital, Inc.

(Exact name of registrant as specified in its charter)

Maryland
(State or other jurisdiction of
incorporation or organization)

2727 North Harwood Drive

20-1676382
(I.R.S. Employer

Identification No.)

Suite 300

Dallas, Texas 75201

(Address of Principal Executive Offices) (Zip Code)

Amended and Restated Spirit Realty Capital, Inc. and Spirit Realty, L.P. 2012 Incentive Award Plan

(Full title of the plan)

Thomas H. Nolan, Jr.

Chief Executive Officer

Spirit Realty Capital, Inc.

2727 North Harwood Drive

Suite 300

Dallas, Texas 75201

(Name and address of agent for service)

(972) 476-1900

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

Copy to:

Julian T.H. Kleindorfer, Esq.

Lewis W. Kneib, Esq.

Latham & Watkins LLP

355 South Grand Avenue

Los Angeles, California 90071

(213) 485-1234

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 or a smaller reporting company in Rule 12-b2 of the Exchange Act.

Large accelerated filer Accelerated filer
 Non-accelerated filer (Do not check if smaller reporting company.) Smaller reporting company

CALCULATION OF REGISTRATION FEE

Title of securities to be registered	Amount to be registered⁽¹⁾⁽²⁾	Proposed maximum offering price per share⁽³⁾	Proposed maximum aggregate offering price⁽³⁾	Amount of registration fee⁽³⁾
Common Stock, \$0.01 par value	5,680,944	\$10.78	\$61,212,172	\$7,094.49

- (1) Pursuant to Rule 416(a) under the Securities Act of 1933, as amended (the Securities Act), this registration statement shall also cover any additional shares of the registrant's common stock (the Common Stock) that become issuable under the Amended and Restated Sprit Realty Capital, Inc. and Spirit Realty, L.P. 2012 Incentive Award Plan (the Plan) by reason of any stock dividend, stock split, recapitalization or similar transaction effected without the registrant's receipt of consideration that would increase the number of outstanding shares of Common Stock.
- (2) Covers 5,680,944 additional shares of Common Stock available for issuance under the Plan, which was approved by the stockholders of the registrant on May 11, 2016. The Plan authorizes the issuance of a maximum of 11,438,497 shares of Common Stock. The offer and sale of 3,065,644 shares of Common Stock issued or issuable under the Plan have previously been registered pursuant to a Registration Statement on Form S-8 (No. 333-190001) filed on July 18, 2013, which represented the number of shares of Common Stock reserved for future issuance pursuant to the Plan as of July 17, 2013 (the effective date of the Registrant's merger with Spirit Realty Capital, Inc., in which the Registrant was the surviving entity (the Merger)). Prior to the effectiveness of the Merger, shares issued under the Plan were registered pursuant to a Registration Statement on Form S-8 (No. 333-184057) filed on September 24, 2012.
- (3) Estimated solely for the purpose of calculating the registration fee pursuant to Rules 457(c) and 457(h) of the Securities Act and computed on the basis of the average of the high and low sales prices per share of Common Stock as reported on the New York Stock Exchange on December 12, 2016.

INTRODUCTION

This Registration Statement on Form S-8 (this Registration Statement) is filed by Spirit Realty Capital, Inc. (referred to herein as our, we or us) relating to an additional 5,680,944 shares of Common Stock issuable to our eligible employees, directors and consultants under the Plan. The contents of the Registration Statement on Form S-8 (No. 333-190001) filed on July 18, 2013 are incorporated by reference hereby.

PART I

INFORMATION REQUIRED IN THE SECTION 10(A) PROSPECTUS

We are not filing or including in this Registration Statement the information called for in Part I of Form S-8 (by incorporation by reference or otherwise) in accordance with the rules and regulations of the Securities and Exchange Commission (the Commission).

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference

The Commission allows us to incorporate by reference the information we file with it, which means that we can disclose important information to you by referring to those documents. The information incorporated by reference is an important part of this Registration Statement, and information that we file later with the Commission will automatically update and supersede this information. We incorporate by reference the following documents we filed with the Commission:

- (a) our Annual Report on Form 10-K/A for the year ended December 31, 2015 filed with the SEC on November 1, 2016;
- (b) our Quarterly Reports on Form 10-Q/A for the quarters ended March 31, 2016 and June 30, 2016 filed with the SEC on November 1, 2016;
- (c) our Quarterly Report on Form 10-Q for the quarter ended September 30, 2016;
- (d) our Current Report on Form 8-K/A filed on August 12, 2013 and our Current Reports on Form 8-K filed on, February 25, 2016 (only with respect to information under Item 8.01 of such report), March 2, 2016, April 11, 2016, April 15, 2016, May 16, 2016, June 3, 2016, June 6, 2016, July 27, 2016, August 11, 2016, August 11, 2016, August 12, 2016, August 19, 2016, September 21, 2016, October 19, 2016, October 26, 2016 and November 9, 2016; and
- (e) the description of our Common Stock contained in the Registration Statement on Form 8-A filed under the Securities Exchange Act of 1934, as amended (the Exchange Act), on July 16, 2013, including any

amendment or report filed for the purpose of updating such description.

In addition, all documents subsequently filed by us with the Commission pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act, prior to the filing of a post-effective amendment which indicates that all securities offered have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference in this Registration Statement and to be a part hereof from the date of filing of such documents with the Commission. We are not, however, incorporating by reference any documents or portions thereof, whether specifically listed above or filed in the future, that are not deemed filed with the Commission, including our compensation committee report and performance graph or any information furnished pursuant to Items 2.02 or 7.01 of Form 8-K or certain exhibits furnished pursuant to Item 9.01 of Form 8-K. Any statement contained in a document incorporated or deemed to be incorporated by reference in this Registration Statement shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that a statement contained in this Registration Statement, or in any subsequently filed document which also is or is deemed to be incorporated by reference in this Registration Statement, modifies or supersedes such statement. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

Item 4. Description of Securities

Not applicable.

Item 5. Interests of Named Experts and Counsel

Not applicable.

Item 6. Indemnification of Directors and Officers

Maryland law permits a Maryland corporation to include in its charter a provision limiting the liability of its directors and officers to the corporation and its stockholders for money damages except for liability resulting from (a) actual receipt of an improper benefit or profit in money, property or services or (b) active and deliberate dishonesty established by a final judgment as being material to the cause of action. Our charter contains a provision which limits the liability of our directors and officers to the maximum extent permitted by Maryland law.

Our charter permits us, and our bylaws obligate us, to the maximum extent permitted by Maryland law, to indemnify and, without requiring a preliminary determination of the ultimate entitlement to indemnification, to pay or reimburse reasonable expenses in advance of final disposition of a proceeding to (a) any individual who is a present or former director or officer of ours and who is made or threatened to be made a party to the proceeding by reason of his or her service in that capacity or (b) any individual who, while a director or officer of ours and at our request, serves or has served as a director, officer, partner, member, manager, trustee, employee or agent of another corporation, real estate investment trust, partnership, limited liability company, joint venture, trust, employee benefit plan or other enterprise and who is made or threatened to be made a party to the proceeding by reason of his or her service in that capacity. Our charter and bylaws also permit us to indemnify and advance expenses to any person who served a predecessor of the registrant in any of the capacities described above and to any employee or agent of ours or a predecessor of ours.

Maryland law requires us (unless its charter provides otherwise, which our charter does not) to indemnify a director or officer who has been successful, on the merits or otherwise, in the defense of any proceeding to which he or she is made a party by reason of his or her service in that capacity.

Maryland law permits a Maryland corporation to indemnify its present and former directors and officers, among others, against judgments, penalties, fines, settlements and reasonable expenses actually incurred by them in connection with any proceeding to which they may be a party by reason of their service in those or other capacities unless it is established that (a) the act or omission of the director or officer was material to the matter giving rise to the proceeding and (i) was committed in bad faith or (ii) was a result of active and deliberate dishonesty, (b) the director or officer actually received an improper personal benefit in money, property or services or (c) in the case of any criminal proceeding, the director or officer has reasonable cause to believe that the act or omission was unlawful. Under Maryland law, a Maryland corporation also may not indemnify a director or officer for an adverse judgment in a suit by or in the right of the corporation or if the director or officer was adjudged to be liable for an improper personal benefit. A court may order indemnification if it determines that the director or officer is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director or officer met the prescribed standard of conduct; however, indemnification for an adverse judgment in a suit in the right of the corporation, or for a judgment of liability on the basis that personal benefit was improperly received, is limited to expenses. In addition, Maryland law permits a Maryland corporation to advance reasonable expenses to a director or officer upon the corporation's receipt of (a) a written affirmation by the director or officer of his or her good faith belief that he or she has met the standard of conduct necessary for indemnification by the corporation and (b) a written statement by or on his or her behalf to repay the amount paid or reimbursed by the registrant if it shall ultimately be determined that the standard of conduct was not met.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers or persons controlling us pursuant to the foregoing provisions, we have been informed that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is therefore unenforceable.

We have entered or expect to enter into customary indemnification agreements with each of our directors and executive officers that obligate us to indemnify them to the maximum extent permitted under Maryland law. The agreements require us to indemnify the director or executive officer, or the indemnitee, against all judgments, penalties, fines and amounts paid in settlement and all expenses actually and reasonably incurred by the indemnitee or on his or her behalf in connection with a proceeding unless (and only to the extent) it is established that (a) the act or omission of the indemnitee was material to the

matter giving rise to the proceeding and (i) was committed in bad faith or (ii) was the result of active and deliberate dishonesty, (b) the indemnitee actually received an improper personal benefit in money, property or services or (c) in the case of any criminal proceeding, the indemnitee had reasonable cause to believe that the act or omission was unlawful. The indemnitee will not be entitled to indemnification if it is established that one of the prohibitions on indemnification under Maryland law exists. In addition, the indemnification agreements require us to advance reasonable expenses incurred by the indemnitee within ten days of the receipt by us of a statement from the indemnitee requesting the advance, provided the statement evidences the expenses and is accompanied by:

a written affirmation of the indemnitee's good faith belief that he or she has met the standard of conduct necessary for indemnification; and

a written undertaking by or on behalf of the indemnitee to repay the amount if it is ultimately determined that the standard of conduct was not met.

The indemnification agreements also provide for procedures for the determination of entitlement to indemnification, including requiring that such determination be made by independent counsel after a change in control of us.

We obtained an insurance policy under which its directors and executive officers will be insured, subject to the limits of the policy, against certain losses arising from claims made against such directors and officers by reason of any acts or omissions covered under such policy in their respective capacities as directors or officers, including certain liabilities under the Securities Act.

Item 7. Exemption from Registration Claimed

Not applicable.

Item 8. Exhibits

Exhibit

No.	Description
4.1	Form of Certificate for Common Stock of Spirit Realty Capital, Inc. ⁽¹⁾
4.2	Amended and Restated Spirit Realty Capital, Inc. and Spirit Realty, L.P. 2012 Incentive Award Plan ⁽²⁾
4.3	Form of 2012 Incentive Award Plan Restricted Stock Award Grant Notice and Agreement ⁽³⁾
4.4	Form of 2012 Incentive Award Plan Stock Payment Award Grant Notice and Agreement ⁽⁴⁾
5.1*	Opinion of Ballard Spahr LLP
23.1*	Consent of Ballard Spahr LLP (included in Exhibit 5.1)
23.2*	Consent of Ernst & Young LLP for Spirit Realty Capital, Inc.
24.1*	Power of Attorney (included on the signature page of this Registration Statement)

* Filed herewith.

Management contract or compensatory plan or arrangement.

- (1) Incorporated by reference to the Registration Statement on Form S-4/A as filed with the Commission on March 29, 2013 (No. 333-187122).
- (2) Incorporated by reference to the Definitive Proxy Statement on Schedule 14A filed with the Commission on April 11, 2016 (No. 001-36004).
- (3) Incorporated by reference to the Current Report on Form 8-K as filed with the Commission on July 18, 2013 (No. 001-36004).
- (4) Incorporated by reference to the Current Report on Form 8-K as filed with the Commission on July 18, 2013 (No. 001-36004).

Item 9. Undertakings

(1) We hereby undertake:

(a) To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

(i) To include any prospectus required by section 10(a)(3) of the Securities Act;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the Registration Statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20 percent change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective Registration Statement; and

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement;

provided, however, that paragraphs (a)(i) and (a)(ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by us pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference in the Registration Statement.

(b) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof; and

(c) To remove from registration by means of post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(2) We hereby undertake that, for purposes of determining any liability under the Securities Act, each filing of our annual report pursuant to section 13(a) or section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Exchange Act) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) Insofar as indemnification for liabilities arising under the Securities Act may be permitted to our directors, officers and controlling persons pursuant to the foregoing provisions, or otherwise, we have been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by us of expenses incurred or paid by our director, officer or controlling person in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, we will, unless in the opinion of counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Dallas, State of Texas, on this 14th day of December, 2016.

SPIRIT REALTY CAPITAL, INC.

By: /s/ Phillip D. Joseph, Jr.
Phillip D. Joseph, Jr.

**Chief Financial Officer, Executive Vice
President and Treasurer**

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below does hereby constitute and appoint Thomas H. Nolan Jr., Phillip D. Joseph, Jr., Jackson Hsieh, Jay Young and Prakash Parag, with full power to act without the other, such person's true and lawful attorneys-in-fact and agents, with full power of substitution and resubstitution, for him and in his name, place and stead, in any and all capacities, to sign this Registration Statement, and any and all amendments thereto, and to file the same, with exhibits and schedules thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing necessary or desirable to be done in and about the premises, as fully to all intents and purposes as he might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them, or their or his substitute or substitutes, may lawfully do or cause to be done by virtue hereof.

Name	Title	Date
/s/ Thomas H. Nolan, Jr. Thomas H. Nolan, Jr.	Chairman of the Board, Chief Executive Officer and Director (Principal Executive Officer)	December 14, 2016
/s/ Phillip D. Joseph, Jr. Phillip D. Joseph, Jr.	Chief Financial Officer, Executive Vice President and Treasurer (Principal Financial Officer)	December 14, 2016
/s/ Prakash Parag Prakash Parag	Chief Accounting Officer (Principal Accounting Officer)	December 14, 2016
/s/ Kevin M. Charlton Kevin M. Charlton	Director	December 14, 2016
/s/ Todd A. Dunn	Director	December 14, 2016

Todd A. Dunn

/s/ David J. Gilbert

Director

December 14, 2016

David J. Gilbert

/s/ Richard I. Gilchrist

Director

December 14, 2016

Richard I. Gilchrist

/s/ Diane M. Morefield

Director

December 14, 2016

Diane M. Morefield

/s/ Sheli Z. Rosenberg

Director

December 14, 2016

Sheli Z. Rosenberg

Name	Title	Date
/s/ Thomas D. Senkbeil	Director	December 14, 2016
Thomas D. Senkbeil		
/s/ Nicholas P. Shepherd	Director	December 14, 2016
Nicholas P. Shepherd		

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