BANK MERGERS IN TENNESSEE: AN ANNOTATED MODEL TENNESSEE BANK MERGER AGREEMENT

JOAN MACLEOD HEMINWAY* & JACKIE G. PRESTER**

Preliminary Note

This Annotated Model Tennessee Bank Merger Agreement (the "Tennessee BMA") is a relatively short-form merger agreement. It is annotated with explanatory footnotes and is intended to serve as a reference tool rather than as a template for subsequent bank merger agreements. It has been drafted and annotated with an emphasis on Tennessee law and practice. Accordingly, we have provided in Section 9.08 of the Tennessee BMA that Tennessee law will govern this transaction. Moreover, the Tennessee BMA reflects the authors' stylistic preferences and "practice points." Sources of general application, as well as those reflecting Tennessee law and practice, are cited in support of the authors' drafting choices, ideas, and perspectives, as applicable. Capitalized terms used and not defined in this Preliminary Note have the meanings assigned to them in the text of the Tennessee BMA.

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* A.B., *magna cum laude*, Brown University; J.D., New York University School of Law. Associate Professor of Law, The University of Tennessee College of Law. Before joining the College of Law in 2000, Professor Heminway advised clients on the legal aspects of merger and acquisitions and securities law during nearly fifteen years of private practice in the Boston office of Skadden, Arps, Slate, Meagher, & Flom LLP.

** B.A., *cum laude*, Rhodes College; J.D., highest honors, University of Memphis Law School. Ms. Prester is a shareholder in the Memphis office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. She has extensive experience assisting clients in the financial services industry, particularly banks and broker-dealers, including formation, mergers and acquisitions, regulatory issues, securities offerings and securitizations.

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The Tennessee BMA is a near-final form of agreement. It originally was drafted by counsel for Acquiror Bank and has been negotiated. The Tennessee BMA and related annotations are intended to benefit drafters for both acquirors and targets in bank mergers. Blank lines enclosed in brackets represent transaction-specific information in various places in the Tennessee BMA.[1] However, specific dates and dollar amounts have been inserted where possible throughout the agreement to create a clear and easy-to-read document.[2]

The Tennessee BMA is predicated on a number of general premises relating to the parties and the transaction. Both Acquiror Holding and Target Holding are bank holding companies[3] organized as privately owned Tennessee corporations.[4]

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[1] This transaction-specific information includes party names, dollar amounts that vary with the size of the transaction, disclosures about a party's business or financial conditions, and time frames for various aspects of the transaction.

[2] In the text of this Tennessee BMA, whole numbers lower than 10 and whole numbers that begin sentences are spelled out in text; and all other numbers are expressed as Arabic numerals. In accordance with this style, the word "percent" is spelled out in text only if used to express whole number percentages lower than 10%. Where actual percentages are omitted from the Agreement, the word "percent" is expressed in symbol form (that is, "%"). All dollar amounts and decimal numbers are expressed in the text of the Tennessee BMA as Arabic numerals.

[3] Bank holding companies are parent companies that control commercial banks. *See* 12 U.S.C. § 1841(a)(1) (2000) ("'bank holding company' means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this [Act]."); *see also* TENN. CODE ANN. § 45-2-1402 (2004) (defining "bank holding company" by reference to 12 U.S.C. § 1841(a)(1)). Bank holding companies are prevalent in the United States banking industry, controlling over 75% of the commercial banks and over 93% of the assets of the commercial banking industry in the United States. *See* PAULINE B. HELLER & MELANIE L. FEIN, FEDERAL BANK HOLDING COMPANY LAW § 1.01 (LAW. J. PRESS 2004). Bank holding companies developed as a way for banks to expand their customer bases past the state boundaries to which they were legally confined under state anti-branching laws and the McFadden Act of 1927, as amended. *See id.* § 1.01[3]; *see also* 12 U.S.C. § 36 (referred to as the McFadden Act). The different subsidiary banks operate as separate corporations, but have common management and a common corporate identity. *See* HELLER & FEIN, *supra.* The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. Law 103-328, 108 Stat. 2338 (Sept. 29, 1994) largely eliminated the need for separate banks located across state lines, but bank holding companies continue to be useful for companies that desire to expand into business closely related to banking. *See infra* note 7. In addition, bank holding companies serve as a useful mechanism for commercial banks in meeting minimum regulatory capital requirements because bank holding companies can borrow funds and contribute those funds to banks in the form of equity capital. *See* HELLER & FEIN, *supra, at* §§ 3.05-3.06.

[4] Bank holding companies are not federally chartered, but instead are incorporated under the laws of the individual states. *See id.* at § 1.01. They are regulated at the federal level though the Bank Holding

Both Target Bank and Acquiror Bank are privately owned national banks organized under federal banking laws.[5] Acquiror Holding has total assets of between $100 million and $250 million, while Target Holding has total assets of between $50 million and $100 million.[6] Neither Acquiror Holding nor Target Holding owns any

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Company Act of 1956, as amended. 12 U.S.C. §§ 1841-1850. In Tennessee, bank holding companies are also subject to the Bank Structure Act. *See* TENN. CODE ANN. §§ 45-2-1401-1412) (addressing the ability of a bank holding company to acquire a bank located in the State of Tennessee).

[5] There are many financial institutions in the United States, but not all qualify as banks. To qualify as a bank under the statutory definition, an institution must be chartered under the Federal Deposit Insurance Act either by a state or the federal government and accept deposits and make commercial loans. *See* 12 U.S.C. § 1841(c) (defining the term "bank"); *see also id.* § 1813 (known as the Federal Deposit Insurance Act). Commercial banks possess a broader range of financial powers than other types of banks and financial institutions. They are able to offer many types deposit accounts, to conduct a wide range of fiduciary activities, and are able to offer commercial, consumer, and mortgage loans. *See* ANN GRAHAM, BANKING LAW § 1.05[1] (2004) ("[C]ommercial banks are often called the 'department stores of finance.'"). Persons desiring to establish a commercial bank may elect to organize either under the laws of the state where the bank will be located (a "state bank") or under federal law (a "national bank"). State banks primarily are regulated by the state banking department as set forth in TENN. CODE ANN. §§ 45-2-101 - 45-2-204 and by the Federal Deposit Insurance Corporation as set forth in 12 U.S.C. § 183a. National banks primarily are regulated by the Office of the Comptroller of the Currency ("OCC") as set forth in *id.* § 1 - 216d. The differences in regulation are often referred to as the "dual banking system." *See* BARRON'S FINANCE & INVESTMENT HANDBOOK 289 (5th ed., 1998). National banks generally are seen as preferable by organizers who intend to conduct multi-state activities because of the OCC's broad powers to preempt state laws and only having one regulator with supervisory authority. *See* 12 C.F.R. § 7.4009 (2004) (addressing the applicability of state law to national bank operations). State banks generally are seen as preferable by organizers who focus upon the fees assessed by the regulators. *See* TENNESSEE'S STATE BANK CHARTER - THE CHARTER OF CHOICE, at http://www.Tennessee.gov/financialinst/charter.html.

[6] If, as a result of a business combination transaction, the acquiror would hold an aggregate total amount of the voting securities and assets of the target in excess of (a) $200 million or (ii) $50 million (but not in excess of $200 million) and the acquiror and target meet certain asset or net sales requirements, then the transaction must comply with specified notice and waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"), unless the transaction is exempt. *See* 15 U.S.C. § 18a(a); STEPHEN M. AXINN ET AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT § S.02[3][c] (2d ed. 1988 & Supp. 2002). If required to comply with notice and waiting period requirements, the parties to the transaction must file with the Federal Trade Commission (the "FTC") the required notification regarding the business combination. *See* 15 U.S.C. §18a(d). The parties then must wait 30 days, during which time the FTC reviews the notification materials. *See id.* § 18a(b). It is possible, however, that the transaction will be exempt from the notice and waiting period requirements even if the resulting entity has, for example, over $200 million in total assets or $50 million in voting securities. *See id.* § 18a(c). For example, the HSR Act exempts the merger of two bank holding companies under section 3 of the Bank Holding Company Act of 1956, as amended. *See id.* § 18a(c)(7); *id.* § 1842.

material assets other than its respective bank stock.[7] Neither bank holding company has employees separate from those of its bank subsidiary. Acquiror Bank employs between 50 and 80 employees and Target Bank employs between 20 and 50 employees.[8]

Through this transaction Target Holding will be acquired by and integrated into Acquiror Holding in a statutory merger.[9] After the merger, Acquiror Holding, as the surviving corporation in the Holding Company Merger, obtains all the assets, liabilities, and operations of Target Bank Holding Company, including its equity holdings in Target Bank.[10] Accordingly, as a result of the Holding Company Merger,

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[7] Bank holding companies may own non-bank subsidiaries, but only if the activities of the subsidiaries are "closely related to banking." See 12 C.F.R. § 225.28 for a list of permissible activities.

[8] Acquiror Bank expects to employ more than 100 full-time employees after the completion of the Bank Combination provided for in Article II of the Tennessee BMA. If Acquiror Bank were to lay-off any of these workers, it would be required to notify employees of its plans to do so under the Workers Adjustment and Retaining Notification Act. *See* 29 U.S.C. § 2101(a) (2000); LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES, AND DIVISIONS § 5.08 (2003).

[9] Applicable merger statutes typically define the effects of a statutory merger. *See*, *e.g.*, 8 DEL. C. § 259-61 (2005) (setting forth the effects of a merger and the powers of the surviving corporation in a merger under the Delaware General Corporation Law); TENN. CODE ANN. § 48-21-108 (describing the effects of a merger under the Tennessee Business Corporation Act). In some instances, merger agreements go into great detail reciting the effects of the merger as set forth in the statute; other agreements simply refer to the statute itself. For a merger under Tennessee law, section 48-21-102 of the Tennessee Code Annotated prescribes the terms of the merger that are required to be set forth in a plan of merger, *see* TENN. CODE ANN. § 48-21-102(c), and provides that other terms may be provided for within the merger agreement. *See id.* § 48-21-102(d). Specifically, Tennessee Code Annotated section 48-21-102(d)(3) allows for the inclusion in a Tennessee plan of merger of "[a]ny other provisions relating to the merger," allowing the parties the flexibility to provide for additional terms. *Id.* § 48-21-102(d)(3). In the Tennessee BMA, a brief summary of the effects of the merger is provided within the agreement, with reference to the statute. *See infra* § 1.03 of the Tennessee BMA. This statement of effects adds to, but is not inconsistent with, the statement of effects set forth in section 48-21-108 of the Tennessee Code Annotated, and therefore complies with the Tennessee Business Corporation Act. *Cf. id.* § 48-21-108. The merger of two holding companies usually requires the prior approval of the Federal Reserve Bank with supervisory authority over the acquiring holding company. 12 U.S.C. § 1842. The Federal Reserve Bank can waive this requirement when the holding company merger occurs simultaneously with a bank merger, if the acquiring holding company provides at least 10 days' prior notice to the Federal Reserve Bank and other certain conditions are met. *See* 12 C.F.R. § 225.12(d)(2).

[10] These equity holdings consist of 100% of the issued and outstanding Target Holding Company Common Stock.

Target Bank becomes a subsidiary of Acquiror Holding. In the Holding Company Merger, the issued and outstanding shares of Target Holding are converted into shares of Acquiror Holding; the certificates representing shares of Target Holding Common Stock outstanding immediately prior to the Effective Date (as defined in Section 1.02 of the Tennessee BMA) are exchanged after the Effective Date for certificates representing shares of Acquiror Holding Common Stock.[11] Target Holding has a small number of shareholders, and these shareholders will be receiving a relatively small number of shares of Acquiror Holding Common Stock in the Holding Company Merger. Most of the shareholders are key employees, officers, or directors of Target Holding or Target Bank; all of the shareholders of Target Holding have the ability to bear significant financial risk because of their annual income or individual net worth.[12]

Because former shareholders of Target Holding will receive shares of Acquiror Holding Common Stock in the Holding Company Merger, federal and state securities laws are implicated in the transaction. Section 5 of the Securities Act of 1933, as amended (the "1933 Act"),[13] requires that any offer or sale of securities be registered, unless an exemption is available.[14] The Tennessee Securities Act of 1980, as amended (the "Tennessee Securities Act"), imposes similar registration requirements on offers and sales of securities in Tennessee.[15] Parties to a stock

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[11] This process of conversion and exchange is described in Sections 1.04(b) and 1.05 of the Tennessee BMA.

[12] *See infra* § 3.24 of the Tennessee BMA.

[13] *See* 15 U.S.C. §§ 77a-77aa (2000).

[14] *See id.* § 77e (describing this registration requirement as well as related prospectus content and prospectus and share delivery requirements. Section 3 of the 1933 Act describes securities exempt from these requirements. *See id.* § 77c. The Acquiror Holding Common Stock is not an exempt security. Exempt transactions are described in section 4 of the 1933 Act. *See id.* § 77d. *But see id.* §§ 77c(a)(9), 77c(a)(10), and 77c(a)(11) (each of which also apparently provide for transactional exemptions).

[15] *See* TENN. CODE ANN. § 48-2-104 (2004). The Tennessee Securities Act is found in the Tennessee Code Annotated sections 48-2-101 through 48-2-126. State securities laws, including the Tennessee Securities Act, often are referred to as "Blue Sky" laws. *See* Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917).

> The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, ["]speculative schemes which have no more basis than so many feet of 'blue sky;'["] or, as stated by counsel in another case, "to stop

merger like the Holding Company Merger (which is a transaction that involves the conversion of target corporation stock into acquiror corporation stock) therefore would be well advised to analyze and determine whether the transactions provided for in their merger agreement are exempt from registration under federal and applicable state securities law prior to structuring a transaction in this manner.[16]

A common registration exemption for private company mergers is the private placement exemption. The term "private placement" typically refers to offerings involving a limited number of securities, with a limited aggregate and individual dollar value, in a limited solicitation, of a limited number of investors, each of whom can fend for himself, herself, or itself and are willing and able to acquire securities that are restricted from transfer. Private placements constitute transactions not involving a public offering and, therefore, typically are exempt from registration under Section 4(2) of the 1933 Act and Section 48-2-103 of the Tennessee Securities Act.[17] Accordingly, stock mergers like the one provided for in the Tennessee BMA,

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> the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations."

Id.

[16] It is well settled that the offer and delivery of acquirer stock to a target's shareholders in a merger constitutes an offer and sale of securities for purposes of both the 1933 Act and the Tennessee Securities Act. *See* 15 U.S.C. § 77b (2000); TENN. CODE ANN. §§ 48-2-102 – 48-2-126 (2004).

[17] *See* 15 U.S.C. § 77d(2); TENN. CODE ANN. § 48-2-103. *See also* SEC v. Ralston Purina Co., 346 U.S. 119 (1953). Whether an offering is "private" or "public" is a question of fact, and is not based solely, or even primarily, upon the actual number of purchasers. Court decisions over the years have established four primary factors to evaluate in determining whether an offering is private:

a. the qualifications of investors (i.e., the more sophisticated, the more likely the offering will be deemed "private");

b. the availability of information (i.e., the more information available, the more likely the offering will be deemed "private");

c. the manner of offering (i.e., no general solicitation or advertising may be made or done in a private offering); and

d. the absence of redistribution (i.e., restrictions on resales and other distributions are essential elements of a private offering).

See LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 1361-98 (3d ed. 1999).

While not a primary factor, the number of offerees or purchasers may be relevant in

usually are exempt from registration under both the 1933 Act and the Tennessee Securities Act.[18] Moreover, if the acquirer in a stock merger is a private company (i.e., a company that does not have a class of securities registered under Section 12[19] of the Securities Exchange Act of 1934, as amended (the "1934 Act")[20]) and the stock merger is exempt from 1933 Act registration, the surviving corporation is not required to file periodic reports or other reports or statements under the 1934 Act as a result of the merger.[21] Accordingly, Acquiror Holding, which does not have an outstanding class of securities registered under Section 12 of the 1934 Act, will not become a public company as a result of the Holding Company Merger.

Finally, it is significant to note that the Tennessee BMA has been drafted with an emphasis on "plain English" drafting conventions.[22] Archaic language (such as "hereof," "thereof," "whereof," "hereunder," "thereunder," "hereby," "thereby," "wheretofore," and "whereas") is avoided throughout.[23] Additionally, "under" is

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determining whether the offering is private or public. *See* 17 C.F.R. §§ 230.505(b)(2)(ii) & 230.506(b)(2)(i) (2004) (setting forth limits on the number of purchasers for purposes of certain Regulation D offerings); *see also* Securities Act Release No. 33-285, 11 Fed. Reg. 10952 (Jan. 24, 1935) (stating that one factor in determining whether an offering is private or public is the number of offerees).

[18] In particular, it should be noted here that a number of small community banks tend to be controlled by family groups consisting of a limited number of shareholders, all or most of whom tend to be knowledgeable about investments generally, the banking industry, and the target and acquiror. In these cases, offering stock as consideration may more easily fit the requirements of a "private placement" under the exemptions afforded by federal and state securities law. *See* sources cited *supra* note 17. In cases where the target is widely held and the acquiror is not a public company, *see infra* note 19 and accompanying text, the acquiror often determines that it is more desirable to offer cash as consideration rather than spending the time and money necessary to register the shares of the acquiror's stock being issued in connection with the merger.

[19] *See* 15 U.S.C. § 78l(a)-(b), (g) (2000).

[20] *See id.* §§ 78a-78mm.

[21] *See id.* §§ 78m(a) & 78o(d).

[22] For a general discussion of plain English and other commonly accepted conventions in contract drafting, *see* GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING (2002). *See generally* RICHARD WYDICK, PLANIN ENGLISH FOR LAWYERS 61 (4th ed. Carolina Academic Press 1998) (advising against the use of "lawyerisms" that confuse non-lawyers and mask poor drafting).

[23] *See* HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING 5-6 (2002); *see also* WYDICK, *supra* note 22, at 61.

used instead of "pursuant to" and "such" is used as an adjective as infrequently as possible (and only where the reference is clear).[24] These stylistic preferences have been employed to create a clearer, more readable form.

[24] *See* KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING 165, 166-67 (2004).

AGREEMENT AND PLAN OF MERGER

This AGREEMENT AND PLAN OF MERGER (this "Agreement"), dated as of May 30, 2005, by and among Target Bank Holding Company, Inc.[25] a corporation organized under the laws of the State of Tennessee ("Target Holding"), its wholly owned subsidiary, Target Bank, N.A., a national banking association organized under the laws of the United States ("Target Bank"), Acquiror Bank Holding Company, Inc., a corporation organized under the laws of the State of Tennessee ("Acquiror Holding"), and its wholly owned subsidiary, Acquiror Bank, N.A., a national banking association organized under the laws of the United States ("Acquiror Bank"), is entered into by each party under the authority of a resolution of its Board of Directors.

In consideration of the mutual covenants, representations, warranties, and agreements set forth in this Agreement, the parties agree that Target Holding shall be merged into Acquiror Holding (the "Holding Company Merger") on the terms and subject to the conditions set forth in this Agreement. References to numbered Schedules in this Agreement are references to the disclosure schedules of the parties,[26] which were delivered immediately prior to the execution of this Agreement.

ARTICLE I
THE HOLDING COMPANY MERGER

Section 1.01. Holding Company Merger. In accordance with the applicable provisions of the Tennessee Business Corporation Act ("TBCA"),[27] Target Holding

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[25] It is common in corporate merger and acquisition transactions for a new corporate entity (a "shell corporation") to be created solely for the purpose of conducting the transaction in accordance with a preferred structure. *See* JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS 79 (1975) (noting the use of a shell subsidiary corporation in a reverse subsidiary merger transaction and stating that the subsidiary in that case enjoys "only a brief, phantom-like existence"); Franklin A. Gevurtz, *California's New Limited Liability Company Act: A Look at the Good, the Bad, and the Ambiguous*, 27 PAC. L.J. 261, 281 (1996) (describing the use of a shell corporation in a freeze-out merger); Frederick W. Lambert, *Path Dependent Inefficiency in the Corporate Contract: The Uncertain Case with Less Certain Implications*, 23 DEL. J. CORP. L. 1077, 1125 n.227 (1998) (describing the use of a shell corporation in a leveraged buyout transaction); Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C. L. REV. 687, 786 n.400 (1998) (describing the history of the permitted use of shell corporations in statutory mergers).

[26] For general information on disclosure schedules, see ADAMS, *supra* note 24, at 69-71; KUNEY, *supra* note 22, at 31.

[27] Chapters 11 through 27 of Title 48 of the Tennessee Code Annotated comprise the Tennessee

shall be merged with and into Acquiror Holding under a plan of merger and reflected in articles of merger substantially in the forms attached as Exhibit A and Exhibit B, respectively,[28] as executed and acknowledged in the manner required by law;[29] the separate existence of Target Holding shall[30] cease; and Acquiror Holding shall be the corporation surviving the Holding Company Merger.

Section 1.02. Effective Date of the Holding Company Merger. The Holding Company Merger shall become effective at 5:00 PM CST on the date of filing or another later date and time set forth in the articles of merger filed in the office of the State of Tennessee Secretary of State (the "Effective Date").

Business Corporation Act. *See* TENN. CODE ANN. § 48-11-101 (2004) ("Chapters 11-27 of this title shall be known and may be cited as the 'Tennessee Business Corporation Act.'").

[28] A plan of merger is an agreement that sets forth the information required by applicable law, including the means by which the merger will occur. The plan of merger usually contains specific information regarding the parties to the merger, the terms and conditions of the merger, and the mechanics of the share conversion for the transaction. *See* TENN. CODE ANN. § 48-21-102(c); *see also* MODEL BUS. CORP. ACT ANN. § 11.02(c) (2002), *available at* http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf (last visited May 11, 2005) [hereinafter MBCA]. Once the plan of merger is approved by the shareholders or, if no shareholder approval is required, by the Board of Directors, articles of merger are executed. *See* TENN. CODE ANN. § 48-21-107; *see also* MBCA § 11.06(a). Articles of merger also have certain required contents and certify that the merger has received the requisite approvals; the articles of merger are filed with the Secretary of State. *See* TENN. CODE ANN. § 48-21-107 (2004); *see also* MBCA § 11.06. As is true for corporate charters, the nomenclature for articles of merger varies from jurisdiction to jurisdiction. *See*, *e.g.*, DEL. CODE ANN. tit. 8, § 251(c) (2005) (denominating the document with this function a "certificate of merger" under Delaware law).

[29] *See infra* note 107.

[30] Drafters of merger agreements and other contracts face the issue of when to use "shall" and when to use "will" in provisions that call for future action. Professor George Kuney explains the difference by offering that "shall" is most appropriately used to denote a duty and will is most appropriately used merely for predictive value. *See* KUNEY, *supra* note 22, at 36-37 (offering examples and explanations); *see also* ADAMS, *supra* note 24, at 29-30 (describing the benefits and detriments of using "must," "shall," and "will."). Courts may not be constrained to follow this simple prescription, however, especially in light of the subtleties of English usage. *See* DARMSTADTER, *supra* note 23, at 9-10. Consistency of usage may, however, help a party prove its case. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 362 (2002).

Section 1.03. Effect of the Holding Company Merger.[31] At the Effective Date: (a) the separate existence of Target Holding shall cease and Target Holding shall be merged with and into Acquiror Holding; (b) Acquiror Holding shall continue to possess all of the rights, privileges, and franchises possessed by it prior to the Effective Date and shall become vested with and possess all rights, privileges, and franchises possessed by Target Holding; (c) Acquiror Holding shall be responsible for all of the liabilities and obligations of Target Holding in the same manner as if Acquiror Holding had itself incurred the liabilities or obligations, and the Acquiror Holding charter shall not affect or impair the rights of the creditors or of any persons dealing with Target Holding; (d) the Holding Company Merger will not, of itself, cause a change, alteration, or amendment to the Charter or Bylaws of Acquiror Holding; (e) the Holding Company Merger will not, of itself, affect the tenure in office of any officer or director of Acquiror Holding and no person will become an officer or director of Acquiror Holding solely by virtue of the Holding Company Merger; and (f) the Holding Company Merger shall have all the effects provided by applicable Tennessee law.

Section 1.04. Additional Actions.

(a) If, at any time after the Effective Date, Acquiror Holding shall consider or be advised that any further deeds, assignments, assurances, or any other acts are necessary or desirable (i) to vest, perfect, or confirm in Acquiror Holding, of record or otherwise, title to or the possession of any property or right of Target Holding acquired or to be acquired by reason of, or as a result of, the Holding Company Merger or (ii) otherwise to carry out the purposes of this Agreement, Target Holding and its proper officers and directors shall be deemed to have granted to Acquiror Holding an irrevocable power of attorney to execute and deliver all deeds, assignments, or assurances and to do all acts necessary or desirable to vest, perfect, or confirm title to and possession of property or rights in Acquiror Holding and otherwise to carry out the purposes of this Agreement; and the proper officers and directors of Acquiror Holding are fully authorized in the name of Target Holding to take any and all necessary actions in connection with this Section 1.04(a).

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[31] Different drafters take different approaches to this provision in a merger agreement. *See supra* note 9.

(b) Each share of common stock, $1.00 par value,[32] of Target Holding (the "Target Holding Common Stock") issued and outstanding[33] immediately prior to the Effective Date, other than shares of Target Holding Common Stock owned by stockholders who, under the provisions of the TBCA, perfect dissenters' rights ("Dissenting Shares"),[34] shall, by virtue of

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[32] Par value is defined as the face value of a security or interest. *See* BLACK'S LAW DICTIONARY 1145 (Deluxe 7th ed. 1999). Drafters of merger and acquisition agreements generally include the par value of a class of securities when creating a defined term to represent that class, despite the relative unimportance of par value in modern corporate law. *See* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 559 (1990) ("[T]he implications of the par value concept were once important, and didn't disappear overnight, but disappear they did."); *see also* ROBERT W. HAMILTON, THE LAW OF CORPORATIONS IN A NUTSHELL 108 (3d ed. 1991) ("At one time par value had considerable importance because it was widely viewed as the amount for which the shares would be issued: shares with a par value of one hundred dollars could be subscribed for at one hundred dollars per share with confidence that all other identical shares would also be issued for $100. This practice, however, long ago fell into disuse."). Nevertheless, corporation laws often still require that corporate chartering documents set forth the par value of each class of stock authorized for issuance. *See*, *e.g.*, DEL. CODE ANN. tit. 8, § 102(a)(4); N.Y. BUS. CORP. LAW § 402(a)(4) (Consol. 2005); OHIO REV. CODE ANN. § 1701.04(A)(3) (Anderson 2005). *But see* CAL. CORP. CODE § 205 (West 2005) (assigning authorized shares of California corporations "a nominal or par value of one dollar ($ 1) per share"); MASS. GEN. LAWS c. 156D, § 2.02(b)(1)(iv) (2005) (listing par value as a permitted, but not required, charter provision); TENN. CODE ANN. § 48-16-101(c)(5) (providing that the Charter of a Tennessee corporation may, but need not, "authorize one (1) or more classes of shares that: . . . [h]ave a par value; provided, that the mere recitation of a par value for shares shall not create a requirement for a minimum consideration for the issuance of any such shares or impose any other restriction on their issuance or create any other right or liability with respect thereto."). Accordingly, the absence of a reference to par value in the description of a class of securities having a par value arguably renders the description incomplete.

[33] Issued shares are shares authorized in a corporation's charter for which the corporation has received an amount and type of consideration approved by the Board of Directors and permitted under the applicable corporate statute. *See* BLACK'S LAW DICTIONARY, *supra* note 32, at 1429; Chiles v. M.C. Capital Corp., 95 Ohio App. 3d 485, 491 (1994) (citing to, among other things, 11 FLETCHER, ENCYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5082, at 22 (Perm. ed.1986)); Brumfield v. Horn, 547 So. 2d 415, 417-18 (Ala. 1989) (citing 11 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5082, at 20 (Perm. ed. 1971)). Outstanding shares are issued shares that are held of record by persons other than the issuing corporation. *See* BLACK'S LAW DICTIONARY, *supra* note 32, at 1429. Only those shares that have been issued and remain outstanding are converted in the merger. In a direct merger, outstanding shares as to which dissenters' rights to appraisal have been perfected, *see infra* note 34, and outstanding shares that are held of record by the surviving corporation (here, Acquiror Holding) or its subsidiaries, if any, generally are not exchanged for the merger consideration. Dissenters' shares are governed by the applicable statutory appraisal provisions; shares held by the surviving corporation and its affiliates typically are canceled at the effective time of the merger under the terms of the merger agreement.

[34] *Black's Law Dictionary* defines dissenters' rights as "[t]he statutory right of corporate shareholders

this Agreement and without any action on the part of the shareholder, be converted into and become exchangeable for the number of shares of common stock, $1.00 par value,[35] of Acquiror Holding (the "Acquiror Holding Common Stock") determined by dividing 20,000 by the total number of shares of outstanding Target Holding Common Stock, subject to adjustment as provided in this Agreement and, in respect of fractional shares, subject to Section 1.05(e) (the "Exchange Ratio").[36] The shares of Acquiror Holding Common Stock to be issued in the Holding Company Merger are referred to in this agreement as the "Merger Shares."

(c) Subsequent to the date of this Agreement but prior to the Effective Date, if the outstanding shares of Acquiror Holding Common Stock shall be increased, decreased, changed into, or exchanged for a different number or class of shares by reason of the occurrence of a record or effective date for (i) any reclassification, recapitalization, stock split, reverse stock split, split-up, or stock dividend, (ii) a combination or exchange of shares in a transaction in which Acquiror Holding is effectively acquired, or (iii) other like transactions or events resulting in changes in Acquiror Holding's capitalization, the terms and provisions of this Section 1.04 shall be equitably adjusted accordingly.[37]

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who oppose some extraordinary corporate action (such as a merger) to have their shares judicially appraised and to demand that the corporation buy back their shares at the appraised value." BLACK'S LAW DICTIONARY, *supra* note 32, at 486.

[35] *See supra* note 32.

[36] The Exchange Ratio determines the number of shares of Acquiror Holding Common Stock the shareholders of Target Holding will receive in the Holding Company Merger and is based upon the agreed-upon fair market value of Target Holding (effectively, the purchase price for Target Holding) and the agreed-upon fair market value of Acquiror Holding Common Stock. In instances where an acquiror's stock is publicly traded, often the exchange ratio is not fixed until a few business days prior to closing the merger, and the agreed-upon fair market value of the acquiror's stock is based upon the average closing prices of the stock over a pre-determined period of time. *See generally* FREUND, *supra* note 25, at 190-203 (describing this and other methods of valuing stock consideration in mergers and acquisitions). The Acquiror Holding Common Stock is not publicly traded. Accordingly, the fair market value of the Acquiror Holding Common Stock has been established by the parties as of the date of the Agreement, and therefore the exchange ratio can be stated with specificity as of the date of the Agreement.

[37] This antidilution provision clarifies (a) that the Exchange Ratio is fixed in relation to the current equity capitalization of Acquiror Holding and (b) that a change in the equity capitalization of Acquiror Holding between signing of the Agreement and the Effective Date therefore requires a change in the

Section 1.05. Exchange of Shares.

(a) As soon as practicable after the Effective Date, Acquiror Bank, acting as exchange agent (the "Exchange Agent"),[38] shall mail to each holder of record of a certificate or certificates that immediately prior to the Effective Date represented issued and outstanding shares of Target Holding Common Stock (a "Certificate"), a form letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Certificate shall pass, only upon delivery of the Certificate to the Exchange Agent) and instructions for use in effecting the surrender of the Certificate in exchange for a certificate representing Acquiror Holding Common Stock in accordance with the terms of Section 1.04. Upon surrender to the Exchange Agent of a Certificate for exchange, together with a properly completed and executed letter of transmittal, the holder, in exchange for the Certificate, shall be entitled to receive a certificate representing that number of shares of Acquiror Holding Common Stock to which the holder of Target Holding Common Stock has become entitled under Section 1.04, and the Certificate so surrendered shall be canceled. Lost Certificates shall be treated in accordance with the existing procedures of Target Holding.

(b) No dividends or other distributions declared after the Effective Date with respect to, and payable to the holders of record of,

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Exchange Ratio. Negative covenants that operate pending the closing also may preserve the bargained-for value of a stock merger by establishing, prohibiting, or restricting the surviving corporation from engaging in transactions that change its capitalization. *Cf.,* James A. Fanto, *Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 BUFF. L. REV. 249, 338-39 (2001) (discussing, in general, the idea that target shareholders may negotiate value-protection mechanisms in merger agreements).

[38] In instances where an acquiror acts as its own transfer agent for its stock, the acquiror typically also will assume the role of exchange agent. In instances where an acquiror uses a third-party transfer agent for its stock, it is typical to engage the third party to act as exchange agent. The exchange agent's role is to collect all of the stock certificates issued by Target Holding and deliver to the former holders of Target Holding Common Stock their stock certificates representing the Acquiror Holding Common Stock. In order to exchange the shares of Target Holding Common Stock, the former shareholders of Target Holding must make certain certifications to the exchange agent regarding ownership of the Target Holding Common Stock and provide certain tax information that the exchange agent is required to report to the Internal Revenue Service. *See* CORPORATE ACQUISITIONS AND MERGERS § 2C.04 (Matthew Bender & Co., Inc. 2005) (describing the exchange agent provisions as one of the "mechanical matters" included in Article I of a business combination agreement and setting forth an exemplar provision).

Acquiror Holding Common Stock shall be paid to the holder of any unsurrendered Certificate until the holder surrenders the Certificate together with the Letter of Transmittal in accordance with Section 1.05(a). Subject to the effect, if any, of applicable law, after the subsequent surrender and exchange of a Certificate, the record holder of the Certificate shall be entitled to receive any dividends or other distributions on Acquiror Holding Common Stock, without any interest, which had previously been payable with respect to the shares of Acquiror Holding Common Stock to which the holder of the Certificate had become entitled at the Effective Date (as equitably adjusted for any intervening transaction or event referenced in Section 1.04(c)(i), (ii), or (iii)).

(c) If any certificate representing shares of Acquiror Holding Common Stock is to be issued in a name other than that in which the Certificate surrendered in exchange is registered, it shall be a condition to the issuance of the Acquiror Holding Common Stock certificate (i) that the Certificate surrendered in exchange (A) be properly endorsed for (or accompanied by an appropriate instrument of) transfer and (B) otherwise be in proper form for transfer, and (ii) that the person requesting the exchange (A) shall pay to the Exchange Agent, in advance, any transfer or other taxes required by reason of the issuance of an Acquiror Holding Common Stock certificate in any name other than that of the registered holder of the Certificate surrendered or otherwise or (B) shall establish to the satisfaction of the Exchange Agent that the tax has been paid or is not payable.

(d) After the Effective Date, no one shall be permitted to record transfers of shares of Target Holding Common Stock on the stock transfer books of Target Holding. If, after the Effective Date, a Certificate is presented for transfer to the Exchange Agent, it shall be canceled and exchanged for an Acquiror Holding Common Stock certificate as provided in this Section 1.05.

(e) Acquiror Holding shall not issue certificates or scrip representing fractional shares of Acquiror Holding Common Stock (i) upon the surrender for exchange of Certificates or (ii) in satisfaction of any dividend or distribution with respect to Acquiror Holding Common Stock, and no former shareholder of Target Holding who otherwise would be entitled to receive a fractional share of Acquiror Holding Common Stock shall be entitled to vote or to any other rights of a shareholder of Acquiror Holding. In lieu of the issuance of any fractional share of Acquiror Holding Common Stock, Acquiror Holding shall pay to each former shareholder of

Target Holding who otherwise would be entitled to receive a fractional share of Acquiror Holding Common Stock an amount in cash determined by multiplying $65.00[39] by the fraction of a share of Acquiror Holding Common Stock to which the former Target Holding shareholder otherwise would be entitled.[40]

Section 1.06. Acquiror Holding to Make Shares Available. Acquiror Holding shall issue and make available a sufficient number of shares of Acquiror Holding Common Stock for conversion and exchange in accordance with Section 1.05 by transferring a sufficient number of shares to the Exchange Agent for the benefit of the shareholders of Target Holding.

Section 1.07. Shares of Acquiror Holding. The shares of Acquiror Holding Common Stock outstanding immediately prior to the Effective Date shall not be changed or converted by virtue of the Holding Company Merger.

Section 1.08. Tax Consequences. It is intended that the Holding Company Merger shall constitute a reorganization within the meaning of Section 368(a)(1)(A) of the Internal Revenue Code of 1986, as amended (the "Code"),[41] and that this

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[39] Many drafters prefer to state dollar amounts and other numbers in contracts both numerically and textually. This method is cumbersome and provides little benefit to drafters or interpreters of contracts. *See* ADAMS, *supra* note 24, at 171-72; DARMSTADTER *supra* note 23, at 7-8, 159. Accordingly, the authors of this Tennessee BMA have chosen to represent dollar amounts using the dollar sign and Arabic numbers and to represent other numbers under 10 textually and 10 and over numerically. *See* GARNER *supra* note 30, at 75 ("Be consistent about when to use numerals and when to spell out numbers in text—preferably spelling out one to nine and using numerals for 10 and above"). For other rules on representing numbers in legal drafting, see *id.* at 75-82; ADAMS, *supra* note 24, at 171-72; DARMSTADTER, *supra* note 23, at 7-8; TEXAS LAW REVIEW: MANUAL ON USAGE, STYLE & EDITING 42-43 (9th ed. 2002); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 49 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

[40] For the purpose of valuing fractional shares, the Acquiror Holding Common Stock is assigned a fixed value of $65.00. The use of a fixed cash value makes the substitution of cash for fractional shares relatively simple. Other, more complex, methods of assigning a value to stock merger consideration also are common. For example, the parties to the merger agreement may choose to use the price of the applicable stock on a particular day (typically the day before the closing date) or the average price of the stock over a specified period (often a trading day average trailing from a date at or close to the closing date). In addition, the fractional share value may be adjusted for changes in the overall valuation of the acquiror. The considerations that factor into the decision as to how to handle cash for fractional shares represent a microcosm of the overall valuation of the value of stock merger consideration. *See* FREUND, *supra* note 25, at 190-203.

[41] *See* 26 U.S.C. §§ 1 – 9833n (2000).

Agreement shall constitute a "plan of reorganization" within the meaning of Section 368 of the Code.[42]

ARTICLE II
THE BANK COMBINATION

Section 2.01. The Bank Combination. Immediately following the execution and delivery of this Agreement, Target Bank and Acquiror Bank intend to enter into a merger agreement providing for the merger, immediately after the Effective Date, of Target Bank with and into Acquiror Bank (the "Bank Combination")[43] in accordance with the Articles of Association of Acquiror Bank, as amended, existing under Charter No. _____[44] and under the provisions of, and with the effect provided in, 12 U.S.C. § 215a,[45] 12 U.S.C. § 1831u,[46] 12 U.S.C. § 1828(c).[47] [48]

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[42] In stock mergers, the parties often desire that the transaction be treated as a tax-free reorganization under section 368(a) of the Internal Revenue Code of 1986, as amended (the "Code"). *See* Joseph R. Gomez, *Tax Aspects of Mergers and Acquisitions for the Corporate Lawyer*, 5 J. SMALL & EMERGING BUS. L. 321, 335 (2001) ("The A reorganization is among the most commonly used tax-free reorganization structures."). The effects of a stock merger qualifying as a tax-free reorganization are that neither the merging corporations nor the target's shareholders recognize gain or loss on the transaction and that the target's shareholders have a transferred basis in a stock they receive in the merger (i.e., their aggregate basis in the surviving corporation's shares is the same as their aggregate basis in the target corporation's shares immediately prior to the merger). *See* FREUND, *supra* note 25, at 85; Gomez, *supra*, at 334-35. A stock merger transaction may qualify as a tax-free transaction under section 368(a)(1)(A) of the Code (commonly known as an "A reorg") if the transaction meets certain requirements. *See* DALE A. OESTERLE, MERGERS AND ACQUISITIONS IN A NUTSHELL 205-07 (2001); Gomez, *supra*, at 334-36.

[43] Because both Acquiror Bank and Target Bank are national banking associations, the approval of the OCC is required prior to the Bank Combination. *See supra* note 5.

[44] Upon approval by the OCC for organizers to establish a new national bank, the officer issues a charter for the new bank and assigns the bank a unique charter number for identification purposes.

[45] This provision states, among other things, that two or more national banks may be merged into a single national banking entity with the approval of the Office of the Comptroller of the Currency, with the written approval of a majority of the Board of Directors for each national bank, and with an affirmative vote of the holders of two-thirds of the outstanding shares of each national banks. *See* 12 U.S.C. § 215a(a) (2000).

[46] This section sets forth the approval requirements for mergers of banks having different home states.

[47] Merger transactions in the banking industry are subject to strict limitations. All bank mergers must be approved by the OCC, the Federal Reserve Board, the Federal Deposit Insurance Corporation

Section 2.02. Asset Purchase Alternative. In lieu of the Bank Combination, at the option of Acquiror Holding, Acquiror Bank may acquire the assets and assume the liabilities of Target Bank in a purchase and assumption agreement, which would allow Acquiror Holding to sell to a third party the charter of Target Bank (if desired).[49]

("FDIC"), or the Director of the Office of Thrift Supervision. *See id.* § 1828(c)(2). If the proposed merger would result in a monopoly or a lessening of competition, the merger will not be approved. *See id.* § 1828(c)(5). Additionally, insured banking institutions are not allowed to either merge with or assume the liabilities of non-insured institutions without prior written approval from the FDIC. *See id.* § 1828(c)(1). Finally, the approval of a merger will be stayed if any litigation alleging antitrust violations resulting from the merger is initiated prior to the consummation of the approved merger transaction. *See id.* § 1828(c)(7).

[48] The Bank Combination will further rationalize the structure and operations of Acquiror Bank and Target Bank and reduce overhead expenses by combining them into a single entity as a subsidiary of Acquiror Holding. Typically, the merger between the two banks occurs on the same day as the merger of the holding companies. This facilitates the regulatory approval process, since only notice to the appropriate Federal Reserve Bank is required when holding companies merge at the same time as their subsidiary banks, rather than a full application. *See* 12 C.F.R. § 225.12 (2004) and *supra* note 9. In some instances, however, holding companies will retain the target bank as a separate entity for a certain period of time prior to merging the two banks. This is usually done to permit operations staff sufficient time to combine operational aspects of the banks, such as data processing and compliance systems.

[49] The ultimate objective of this transaction is to combine the two banks, Acquiror Bank and Target Bank, into a single bank owned by the surviving corporation, Acquiror Holding. The merger provided for in Section 2.01 of the Agreement easily effectuates this objective as a matter of law. The same result can be achieved, however, if Acquiror Bank purchases all of the assets and liabilities of Target Bank as a going concern, and Acquiror Holding knows at signing that it may want to structure the subsequent bank business combination as an asset purchase. In particular, if Acquiror Holding determines that there are certain liabilities or potential liabilities of Target Bank it does desire to assume (e.g., expenses and damages associated with a pending or threatened lawsuit), a purchase and assumption structure may be a preferred structure. Also, Acquiror Holding and Target Holding may determine that the charter of Target Bank can be sold for consideration with a value in excess of any additional transaction costs that may be incurred by it in structuring the combination as a purchase of assets. This Section 2.02 gives Acquiror Holding the flexibility to choose that option without rendering the representation included in Section 4.14 of the Agreement inaccurate or violating the antifraud provisions of Rule 10b-5 under the 1934 Act ("Rule 10b-5"). *See* 17 C.F.R. § 240.10b-5 (2004).

ARTICLE III

REPRESENTATIONS AND WARRANTIES[50] OF TARGET HOLDING AND TARGET BANK

As of the date of this Agreement, Target Holding and Target Bank jointly and severally[51] make the following representations and warranties to Acquiror Holding and Acquiror Bank:

Section 3.01. Corporate Organization.

(a) Target Holding is a corporation duly organized, validly existing, and in good standing under the laws of the State of Tennessee. Target Holding (i) has the corporate power and authority to own or lease all of its properties and assets and to carry on its business as it is now being conducted and (ii) is duly licensed or qualified to do business in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes licensing or qualification necessary.

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[50] In general, representations are statements of past or present fact on a date certain, while warranties are statements of continuing or future fact. *See* FREUND, *supra* note 25, at 153 n.33; *see also* Angela Humphreys Hamilton & Joan MacLeod Heminway, *Buying Assets in Tennessee: An Annotated Model Tennessee Asset Purchase Agreement*, 4 TRANSACTIONS: TENN. J. BUS. L. 209, 225 n.3 (2003) (citing additional sources regarding the nature of representations and warranties). Often, the two are used interchangeably. *See id.*; OESTERLE, *supra* note 42, at 43 ("Most lawyers compact the two concepts and refer to them in a run-on term as *reps-and-warranties*."). One commentator advises that the use of the word "representations" is sufficient. *See* ADAMS, *supra* note 24, at 46. It is important to consider the nature of the target corporation's business in choosing and constructing representations and warranties, rather than just using generic forms. *See* FREUND, *supra* note 25, at 279 ("[Y]ou are well advised to devise a special set of representations for certain types of companies being acquired, where important information may not be picked up by the usual provisions.")

[51] The use of the words "jointly and severally" here merits some attention. Effectively, these words signify that each of Target Holding and Target Bank are responsible for the accuracy and completeness of each representation and warranty, and each therefore may be held liable if the statements made are inaccurate or incomplete. *See* Terry W. Gentle, Jr. & Joan MacLeod Heminway, *Buying Stock in Tennessee: An Annotated Model Tennessee Stock Purchase Agreement*, 5 TRANSACTIONS: TENN. J. BUS. L. 211, 232 n.40 (2004) (describing the options in drafting lead-ins to the parties' representations and warranties). Under these circumstances, legal proceedings may be brought against either one or both together for any inaccuracies. *See id.* One commentator argues against the use of "jointly and severally" for representations (but supports their use in indemnification provisions) on the basis that these terms relate only to liability or responsibility. *See* ADAMS, *supra* note 24, at 48.

(b) Target Bank is a national banking association duly[52] organized and validly existing under the laws of the United States. Target Bank has the power and authority to own or lease all of its properties and assets and to carry on its business as it is now being conducted.

Section 3.02. Capitalization.

(a) The authorized capital stock of Target Holding consists of 100,000 shares of Target Holding Common Stock. As of the date of this Agreement, there are 6,330 shares of Target Holding Common Stock issued and outstanding and no shares held in Target Holding's treasury. All issued and outstanding shares of Target Holding Common Stock have been duly authorized and validly issued and are fully paid, nonassessable, and free of preemptive rights, with no personal liability attaching to the ownership of the Target Holding Common Stock.[53] Target Holding has not issued any shares of Target Holding Common Stock since March 31, 2005 and does not have, and is not bound by, any outstanding subscription, option, warrant, call, commitment, or agreement of any character calling for the purchase or issuance of any shares of Target Holding Common Stock or any security

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[52] *See* Gentle & Heminway, *supra* note 51, at 233 n.41 (describing the use of "duly" in this context). Although perhaps viewed as synonymous with certain substitute adverbs (including the words "legally" and "validly"), "duly" may have a somewhat less obvious meaning to a corporate executive or other lay reader of a merger agreement. *See* BLACK'S LAW DICTIONARY, *supra* note 32, at 517 (defining "duly" as "[i]n a proper manner; in accordance with legal requirements); *id.* at 905 (defining "legally" as "[i]n a lawful way; in a manner that accords with the law); *id.* at 1548 (defining "valid" as "[l]egally sufficient"). Yet transactional lawyers seem to understand what it means in the context of legal opinions. *See* Thomas L. Ambro & J. Truman Bidwell, Jr., *Some Thoughts on the Economics of Legal Opinions*, 1989 COLUM. BUS. L. REV. 307, 320-21 (1989) (defining "duly authorized" as used in capitalization opinions and suggesting appropriate due diligence); Stephan Hutter, *The Corporate Opinion in International Transactions*, 1989 COLUM. BUS. L. REV. 427, 429-31 (1989) (defining the concepts of due incorporation and due organization in legal opinions).

[53] As a general matter, the statutory concept of nonassessability—the inability of a claimant to assess a shareholder for additional amounts once the shares have been legally issued to and fully paid by or on behalf of the shareholder—adequately covers the matter of personal liability for share ownership. BLACK'S LAW DICTIONARY, *supra* note 32 at 1429. However, an acquiror also may want to be assured that there is no contracted-for personal liability associated with ownership of any of the outstanding shares of the target. Although contractual personal liability generally does not attach to shares of common stock, the last part of this sentence would force disclosure of any contractual personal liability that may exist.

representing the right to purchase or otherwise receive any Target Holding Common Stock or any other equity interest in Target Holding.[54]

(b) The authorized capital stock of Target Bank consists of 30,000 shares of common stock, $1.00 par value (the "Target Bank Common Stock"). As of the date of this Agreement, there are 30,000 shares of Target Bank Common Stock issued and outstanding and no shares of Target Bank Common Stock held in Target Bank's treasury. All issued and outstanding shares of Target Bank Common Stock have been duly authorized and validly issued and are fully paid, nonassessable, and free of preemptive rights, with no personal liability attaching to the ownership the Target Bank Common Stock. Target Bank has not issued any shares of Target Bank Common Stock since March 31, 2005 and does not have, and is not bound by, any outstanding subscription, option, warrant, call, commitment, or agreement of any character calling for the purchase or issuance of any shares of Target Bank Common Stock or any security representing the right to purchase or otherwise receive any Target Bank Common Stock or any other equity interest in Target Bank. Target Holding has good, valid, and marketable title[55] to all of the outstanding shares of Target Bank Common Stock, which shares are pledged to [Lender Bank][56] to secure the debt of Target Holding.

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[54] A representation as to options, warrants, convertibles, exchangeables, and other rights to acquire the target's equity securities commonly is included in the target's capitalization representation. *See* FREUND, *supra* note 25, at 249-50. Note that the representation not only includes outstanding securities and instruments of this nature but also agreements calling for the issuance of these types of securities or instruments, forcing disclosure, ensuring the acquisition of all shares of the target corporation, and closing a potential loophole in valuing the transaction and fixing the merger consideration. *See id.*

[55] A simpler form of this representation calls for the mere assurance of "good title." *See* FREUND, *supra* note 25, at 250. The use of the concept of title with respect to equity holdings in a corporation, while customary both in and outside Tennessee, is somewhat peculiar. *See* Gentle & Heminway, *supra* note 51, at 219 n.18. The primary focus of this representation is disclosure. *See* FREUND, *supra* note 25 at 251.

[56] Often, bank holding companies pledge the stock of their subsidiary banks to obtain a line of credit or term loan from a correspondent lender. In this instance, the loan either will be paid-off or assumed by Acquiror Holding upon consummation of the Holding Company Merger. Because of the outstanding loan, Target Holding will have to get the prior consent of Lender Bank to consummate the Holding Company Merger. This is customary in bank loan agreements. *See* COMMERCIAL LOAN DOCUMENTATION GUIDE § 11.09[2] (Michael A. Leichtling et al. eds, 2004) (noting that it is common to include a covenant prohibiting a merger in commercial loan documents); *id.* § 11.09[3][b] (setting forth an exemplar covenant); FREUND, *supra* note 25, at 436 ("From the viewpoint of a seller with bank or other institutional financing outstanding, . . . the consent of the institution to the deal will undoubtedly be necessary.").

On the Effective Date the outstanding shares of Target Bank Common Stock will be free and clear of all liens, encumbrances, pledges, claims, options, charges, and assessments of any nature whatsoever.

Section 3.03. Investments; No Subsidiaries. The term "Target Holding Consolidated Group," as used in this Agreement, consists of Target Holding and Target Bank. Except as set forth on Schedule 3.03, neither Target Holding nor Target Bank has any active or inactive subsidiaries or equity interest or other investment, direct or indirect, in any corporation, partnership, joint venture, or other entity, except for any equity interest or other investment that Target Bank may have acquired as a result of foreclosure and is holding subject to sale.[57]

Section 3.04. Loan Portfolio. All loans, discounts, and financing leases (in which either member of the Target Holding Consolidated Group is lessor) reflected on the March 31, 2005 consolidated balance sheet of Target Holding (the "Target Holding Latest Balance Sheet"): (a) were, at the time and under the circumstances in which they were made, allowed for, or entered into, made for good, valuable, and adequate consideration in the ordinary course of business of the Target Holding Consolidated Group; (b) are evidenced by genuine notes, agreements, or other evidences of indebtedness; and (c) to the extent secured, have been secured by valid liens and security interests, which have been perfected. Except as set forth in Schedule 3.04, there are no outstanding loans held by Target Bank with an unpaid balance of $[_____] or more as to which a material default has occurred and is continuing. A material default for purposes of this Section 3.04 includes without limitation[58] the failure to pay indebtedness or an installment on the indebtedness more than sixty days after it is due and payable.

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[57] Sometimes exceptions are included in a representation of this type for nominal investment interests in other entities. These exceptions typically reference a specific maximum percentage of equity ownership of another entity that need not be disclosed.

[58] Some drafters question whether the words "without limitation" (or the similar "but not limited to") are necessary after the word "including" in contract drafting. *See*, *e.g.*, KUNEY *supra* note 22, at 40 (suggesting that the word "including," alone, is sufficient). Others take a more equivocal view of the need for these words. *See* ADAMS, *supra* note 24, at 156-57. If an expression of this kind is used, the drafter should ensure that the choice of words and punctuation (i.e., whether the words are set off by commas in the text) is consistent throughout the agreement. The importance of this kind of consistency cannot be understated in the drafting of transactional documents. *See generally id.* at 21 (noting the importance of attention to detail in legal drafting).

Section 3.05. Authority; No Violation.

(a) Each of Target Holding and Target Bank has full corporate power and authority to execute and deliver this Agreement and to consummate the transactions this Agreement contemplates.[59] The Board of Directors of Target Holding[60] has duly and validly approved and adopted this Agreement and the transactions this Agreement contemplates and has authorized the execution and delivery of this Agreement by Target Holding, and, except for the approval of this Agreement by its shareholders, no other corporate proceedings on the part of Target Holding are necessary to consummate the transactions this Agreement contemplates. The Board of Directors of Target Bank has duly and validly approved and adopted this Agreement and the consummation of the transactions this Agreement contemplates and has authorized the execution and delivery of this Agreement by Target Bank and no other corporate proceedings on the part of Target Bank are necessary to consummate the transactions so contemplated. This Agreement has been duly and validly executed and delivered by Target Holding and Target Bank and constitutes a valid and binding obligation of Target Holding and of Target Bank enforceable against each in accordance with its terms, except that enforcement may be limited by bankruptcy, reorganization, insolvency, and other similar laws and court

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[59] The clauses "transactions this Agreement contemplates," "transactions contemplated by this Agreement," and "transactions contemplated in this Agreement" are used interchangeably in this Agreement, with the intention that they have the same meaning and effect.

[60] Recent decisional law in Delaware indicates that the emerging fiduciary duty of good faith will impact Board deliberations of all kinds, including those regarding the approval or adoption of merger agreements. *See generally In re* Emerging Communications, Inc. Shareholders Litigation, 2004 Del. Ch. LEXIS 70 at *142 (Del. Ch. 2004) (stating that "Raynor is liable to Greenlight and the shareholder class for breaching his fiduciary duty of loyalty and/or good faith" and noting in the related footnote that "the Delaware Supreme Court has yet to articulate the precise differentiation between the duties of loyalty and of good faith."); *In re* The Walt Disney Co. Derivative Litigation, 825 A.2d 275, 289 (Del. Ch. 2003) ("Viewed in this light, plaintiffs' new complaint sufficiently alleges a breach of the directors' obligation to act . . . in good faith in the corporation's best interests for a Court to conclude . . . that the defendant directors' conduct fell outside the protection of the business judgment rule."). Accordingly, Boards of Directors (in and outside Delaware) may be well advised to focus on process and documentation in merger deliberations. *See generally* William D. Johnston & Dawn M. Jones, *Director Liability and Indemnification*, *to be published in* DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION 2005 ch. 11 (American Bar Ass'n 2005); Lee Meyerson, *Directors Duties and Liabilities in M&A Transactions—The Changing Landscape*, *in* MERGERS & ACQUISITIONS IN THE FINANCIAL SERVICES INDUSTRY 400 (Practicing Law Institute 2004) (describing relevant Delaware case law and offering a checklist to transactional lawyers for use in connection with merger and acquisition work).

decisions relating to or affecting the enforcement of creditors' rights generally and by general equitable principles.

(b) Neither the execution and delivery of this Agreement by Target Holding or Target Bank, nor the consummation by Target Holding or Target Bank of the transactions contemplated by this Agreement, nor compliance by Target Holding or Target Bank with any of the provisions of this Agreement, will (i) violate any provision of the Charter or Bylaws of Target Holding, or the Articles of Association or Bylaws of Target Bank, (ii) violate any statute, code, ordinance, rule, regulation, judgment, order, writ, decree or injunction applicable to Target Holding or Target Bank, or any of their subsidiaries or any of their respective properties or assets, or (iii) violate, conflict with, result in a breach of any provisions of, constitute a default (or an event which, with or without notice or lapse of time, or both, would constitute a default) under, result in the termination of, accelerate the performance required by, or result in the creation of any lien, security interest, charge, or other encumbrance upon any of the respective properties or assets of Target Holding and Target Bank or any of their subsidiaries under, any of the terms, conditions or provisions of any note, bond, mortgage, indenture, deed of trust, license, lease, agreement, or other instrument or obligation to which Target Holding or Target Bank or any of their respective subsidiaries is a party, or by which they or any of their respective properties or assets may be bound or affected, except for the requirements of the Lender Bank loan to Target Holding, which loan will be paid in full and not in default as of the Effective Date, and except for conflicts, breaches, or defaults that, either individually or in the aggregate, will not have a material adverse effect[61] on the business, operations, properties, assets, or financial condition of Target Holding or Target Bank.

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[61] The words "material adverse effect" or "material adverse change" and the prepositional object or objects that they modify may have critical importance in litigation over a failed business combination transaction. *See* ADAMS, *supra* note 24, at 95-114 (describing various issues relating to the use and drafting of "material adverse change" provisions and the concept of materiality); Gentle & Heminway, *supra* note 51, at 234 n. 43 (citing to related commentary from scholars and others). The appropriateness of these and other materiality qualifiers may best be determined by identifying and addressing the objectives of the parties in providing or requesting the relevant representation. *See* FREUND, *supra* note 25, at 243. The parties may or may not define the concept of materiality in the merger agreement, depending on context and usage. *See* Claire A. Hill, *Theory Informs Business Practice: A Comment on Language and Norms in Complex Business Contracting*, 77 CHI.-KENT. L. REV. 29, 45 (2001) ("The parties sometimes define materiality in the agreement; sometimes, however, they leave the term undefined, relying instead on general understandings as to the term's meaning.").

Section 3.06. Consents and Approvals. No permit, consent, approval, or authorization of, or declaration, filing, or registration with, any public body or authority or any third party is necessary in connection with (a) the execution and delivery by Target Holding or Target Bank of this Agreement or (b) the consummation by Target Holding or Target Bank of the Holding Company Merger by the transactions contemplated by this Agreement, except for: (i) the prior approval of the Holding Company Merger by the Office of the Comptroller of the Currency (the "OCC"); (ii) the prior approval of the Holding Company Merger by the Federal Reserve Board, unless an exemption from this approval is obtained; (iii) the approval of the Holding Company Merger by the shareholders of Target Holding; and (iv) the approval of the Holding Company Merger by the Lender Bank or the payment in full of this debt.

Section 3.07. Financial Statements.

(a) Target Holding has previously delivered to Acquiror Holding and Acquiror Bank copies of the Target Holding Latest Balance Sheet and the consolidated balance sheets of Target Holding as at December 31, 2002, 2003, and 2004 and the related consolidated statements of income, changes in shareholders' equity and cash flows for the periods then ended (the "Target Holding Financial Statements"). The Target Holding Financial Statements as at December 31, 2002, 2003, and 2004 and for the fiscal years then ended have not been audited.[62] The Target Holding Latest Balance Sheet (including the related notes, where applicable) fairly presents the consolidated financial position of Target Holding and its subsidiaries as at March 31, 2005, and the other Target Holding Financial Statements referred to in this Agreement (including the related notes, where applicable) fairly present the results of the consolidated operations, changes in shareholders'

[62] Many privately held corporations do not have their financial statements audited on an annual basis. This may be a source of discomfort for an acquiror, which may then request that an audit of the most recent financial statements be performed and a report rendered between signing and closing. *See generally* FREUND, *supra* note 25, at 257 ("At times, unaudited statements are delivered before the agreement is signed, with audited statements to follow prior to the closing."). Under these circumstances, the drafters must concern themselves with complex interactions among the representations and warranties, the closing conditions, and the indemnification provisions in the agreement. *See id.* at 168-71. Moreover, the target may have difficulty making certain representations on its unaudited financial statements, resulting in the need to change the language of the relevant representation from that which appears in the typical form of agreement where audited financial statements are available. *See id.* at 258; *see also* Lou R. Kling et al., *Summary of Acquisition Agreements*, 51 U. MIAMI L. REV. 779, 786-87 (1997).

equity, and cash flows of Target Holding and its subsidiaries as at the respective dates or for the respective fiscal periods covered by the Target Holding Financial Statements.

(b) Each of the Target Holding Financial Statements is true and correct in all material respects and has been prepared in accordance with generally accepted accounting principles applied on a basis consistent with other periods, except as otherwise noted.

Section 3.08. Brokers and Finders. None of Target Holding, Target Bank, or any of their officers or directors has employed any broker or finder or incurred any liability for any broker's fees, commissions or finder's fees in connection with any of the transactions contemplated by this Agreement.

Section 3.09. Title to Properties; Encumbrances. Target Holding and Target Bank have good, valid, and marketable title to, or a valid leasehold interest in, (a) all real properties owned by either Target Bank or Target Holding and (b) all other properties and assets reflected in the Target Holding Latest Balance Sheet, other than any of properties or assets that have been sold or otherwise disposed of since the date of the Target Holding Latest Balance Sheet in the ordinary course of business and consistent with past practice. All properties and assets owned by Target Bank and Target Holding are free and clear of all title defects, mortgages, pledges, liens, claims, charges, security interests, or other encumbrances of any nature whatsoever, including without limitation leases, options to purchase, conditional sales contracts, collateral security arrangements, and other title or interest retention arrangements, and are not, in the case of real property, subject to any easements, building use restrictions, exceptions, reservations, or limitations of any nature whatsoever, except, with respect to all properties and assets, liens for current taxes and assessments not in default, minor imperfections of title, and encumbrances, if any, arising in the ordinary course of business, that are not substantial in character, amount, or extent and which do not detract from the value of or interfere with the present or contemplated use of any of the properties subject to, affected by, or otherwise impaired by the business operations conducted or contemplated by Target Holding or Target Bank. All personal property material to the business, operations, or financial condition of Target Holding or Target Bank, and all buildings, structures, and fixtures used by Target Holding or Target Bank in the conduct of their businesses, are in good operating condition and repair, normal wear and tear excepted. Neither Target Holding nor Target Bank has received any notification of any violation (which has not been cured) of any building, zoning, or other law, ordinance, or regulation in respect of this property or structures or Target Holding's or Target Bank' use of this property.

Section 3.10. No Undisclosed Liabilities. Except as set forth in Schedule 3.10, as of the date of this Agreement, neither Target Holding nor Target Bank has any liabilities or obligations of any nature (whether absolute, accrued, contingent, or otherwise and whether due or to become due), except liabilities and obligations (a) fully reflected or reserved against in the Target Holding Latest Balance Sheet or disclosed in the notes of the Target Holding Latest Balance Sheet or (b) incurred since the date of the Target Holding Latest Balance Sheet in the ordinary course of business and consistent with past practice, which liabilities or obligations are, individually or in the aggregate, material to Target Holding and Target Bank on a consolidated basis.

Section 3.11. Absence of Certain Changes or Events.

(a) Except as set forth in Schedule 3.11(a) of this Agreement, since the date of the Target Holding Latest Balance Sheet, there has not been:

(i) any material adverse change in the business, operations, properties, assets, or financial condition of either Target Holding or Target Bank, or any event which has had or will have a material adverse effect on the business, operations, properties, assets, or financial condition of Target Holding or Target Bank;

(ii) any loss, damage, destruction, or other casualty materially and adversely affecting any of the business, operations, properties, assets, or financial condition of Target Holding or Target Bank or any of their subsidiaries (whether or not covered by insurance);

(iii) any increase of more than 10% in the compensation payable by either Target Holding or Target Bank to any of its directors, officers, agents, consultants, or employees whose total compensation after the increase was in excess of $[____] per annum, or any extraordinary bonus, percentage compensation, service award, or other like benefit granted, made, or accrued to the credit of any director, officer, agent, consultant, or employee, or any extraordinary welfare, pension, retirement, or similar payment or arrangement made or agreed to by Target Holding or Target Bank for the benefit of the director, officer, agent, consultant, or employee;

(iv) any change in any method of accounting or accounting practice of Target Holding or Target Bank;

(v) any loan in excess of $[____] or portion of a loan in excess of $[____] (A) rescheduled as to payments, (B) subject to a moratorium on payment, or (C) written off as uncollectible by Target Holding or Target Bank; or

(vi) any agreement or understanding, whether in writing or otherwise, of Target Holding or Target Bank to do any of the foregoing.

(b) Except as set forth in Schedule 3.11(b), since the date of the Target Holding Latest Balance Sheet, neither Target Holding nor Target Bank has:

(i) issued or sold any promissory note, stock, bond, or other corporate security of which it is the issuer in an amount greater than $[____];

(ii) discharged or satisfied any lien or encumbrance or paid or satisfied any obligation or liability (whether absolute, accrued, contingent, or otherwise and whether due or to become due) in an amount greater than $[____] as to each lien, encumbrance, obligation, or liability, other than (A) current liabilities shown on the Target Holding Latest Balance Sheet and current liabilities incurred since the date of the Target Holding Latest Balance Sheet in the ordinary course of business and consistent with past practice and (B) any lien, encumbrance, obligation, or liability of the nature (regardless of amount) required to be disclosed under Section 3.11(a)(iii) of this Agreement;

(iii) declared, paid, or set aside for payment any dividend or other distribution (whether in cash, stock, or property), except for dividends by Target Bank to Target Holding to the extent necessary to pay necessary and routine expenses of Target Holding, expenses provided for in Section 9.01 of this Agreement;

(iv) split, combined, or reclassified any shares of its capital stock, or redeemed, purchased, or otherwise acquired any shares of its capital stock or other securities;

(v) sold, assigned, or transferred any of its assets (real, personal or mixed, tangible, or intangible), canceled any debts or

claims, or waived any rights of substantial value, except, in each case, in the ordinary course of business and consistent with past practice;

(vi) sold, assigned, transferred, or permitted to lapse any patents, trademarks, trade names, copyrights, or other similar assets, including related applications or licenses;

(vii) paid any amounts or incurred any liability to or in respect of, or sold any properties or assets (real, personal, or mixed, tangible or intangible) to, or engaged in any transaction (other than any transaction of the nature, regardless of amount, required to be disclosed under Section 3.11(a)(iii) of this Agreement) or entered into any agreement or arrangement with, any corporation or business in which Target Holding, Target Bank, or any of their officers or directors, or any "affiliate" or "associate" (as those terms are defined in the rules and regulations promulgated under the Securities Act of 1933, as amended (the "1933 Act")), of Target Holding, Target Bank, or any of their officers or directors, has any direct or indirect interest;

(viii) entered into any collective bargaining agreements; or

(ix) entered into any other transaction, other than in the ordinary course of business and consistent with past practice or in connection with the transactions contemplated by this Agreement.

Section 3.12. Leases. Set forth in Schedule 3.12 is an accurate and complete list of all leases calling for annual rent payments in excess of $[____] under which Target Holding or Target Bank, as lessee, leases real or personal property, including without limitation all leases of computer or computer services and all arrangements for timesharing or other data processing services, describing for each lease Target Holding's or Target Bank's financial obligations under the lease, its rental payments, expiration date and renewal terms. Except as set forth in Schedule 3.12: (a) all leases contemplated in this paragraph are in full force and effect in accordance with their terms; (b) there exists no event of default or event, occurrence, condition, or act that with the giving of notice, the lapse of time, or the happening of any further event or condition would become a default under any lease contemplated in this paragraph; and (c) neither Target Holding nor Target Bank is a lessee under a lease having an unexpired term greater than 36 months that requires Target Holding or Target Bank to make payments for the use of any property at rates currently higher than prevailing market rates for similar properties in the localities where these properties are located.

Section 3.13. Trademarks; Trade Names. Set forth in Schedule 3.13 is an accurate and complete list and brief description of all trademarks (either registered or common law), trade names, and copyrights (and all applications and licenses for these trademarks, trade names, and copyrights) owned by Target Holding or Target Bank or in which they have any interest. Target Holding and Target Bank own, or have the rights to use, all trademarks, trade names, and copyrights used in or necessary for the ordinary conduct of their existing businesses as to this date conducted, and the consummation of the transactions contemplated in this Agreement will not alter or impair any of these rights. Except as set forth in Schedule 3.13, no claims are pending by any person for the use of any trademarks, trade names, or copyrights or challenging or questioning the validity or effectiveness of any license or agreement relating to the use of any trademarks, trade names, or copyrights, and there is no valid basis for any claim, challenge, or question, and no use of any trademarks, trade names, and copyrights by Target Holding or Target Bank infringes on the rights of any person.

Section 3.14. Compliance with Applicable Law. Target Holding and Target Bank hold, and have at all times held, all licenses, franchises, permits, and governmental authorizations necessary for the lawful conduct of their respective businesses under, and have complied in all material respects with and are not in default in any material respect under, any applicable statutes, laws, ordinances, rules, regulations, and orders of all federal, state, and local governmental bodies, agencies, and subdivisions having, asserting, or claiming jurisdiction over them or over any part of their operations (to the extent that a default contemplated in this section could result in a material limitation on the conduct of Target Holding's or Target Bank's business or could cause Target Holding or Target Bank to incur a substantial financial penalty). Neither Target Holding nor Target Bank has received notice of, knows, or has reason to know of any violation of, or any valid basis for any claim of a violation of, any license, franchise, permit, governmental authorization, statute, law, ordinance, rule, regulation, or order referenced in the preceding sentence.

Section 3.15. Absence of Questionable Payments. Target Holding and Target Bank have not, and no director, officer, agent, employee, consultant, or other person acting on behalf of Target Holding or Target Bank has (a) used any Target Holding or Target Bank corporate funds (i) for unlawful contributions, gifts, entertainment, or other unlawful expenses relating to political activity or (ii) to make any direct or indirect unlawful payments to government officials funds or (b) established or maintained any unlawful or unrecorded accounts.

Section 3.16. Insurance. Set forth in Schedule 3.16 is an accurate and complete list of all policies of insurance, including the amounts of the insurance, owned by Target Holding or Target Bank or in which Target Holding or Target Bank

is named as the insured party. All insurance policies are valid, outstanding, and enforceable and will remain in full force and effect at least through the consummation of the transactions contemplated by this Agreement. Any insurance with respect to Target Holding's and Target Bank's property and the conduct of their businesses is in amounts and against risks as are usually insured against by persons operating similar properties and businesses in the State of Tennessee and are adequate for the conduct of Target Holding's and Target Bank's businesses. Neither Target Holding nor Target Bank has been refused any insurance nor has its coverages been limited by any insurance carrier to that it applied for insurance from or with which they have carried insurance during the last five years other than certain standard exclusions for certain events or circumstances stated in Target Holding's and Target Bank's policies.

Section 3.17. Powers of Attorney; Guarantees. Other than in the ordinary course of business, neither Target Holding nor Target Bank has given any power of attorney to any person to act on its behalf, or has any obligation or liability, either actual, accruing, or contingent, as guarantor, surety, cosigner, endorser, co-maker, or indemnitor in respect of the obligation of any individual or entity.

Section 3.18. Tax Matters.

(a) For purposes of this Section, the following definitions shall apply:

(i) The term "Taxes" shall mean all taxes, however denominated, that any member of the Target Holding Consolidated Group is required to pay, withhold, or collect, including (A) all income or profits taxes (federal, state, and local), real property gains taxes, payroll and employee withholding taxes, unemployment insurance taxes, social security taxes, sales and use taxes, ad valorem taxes, excise taxes, franchise taxes, gross receipts taxes, business license taxes, occupation taxes, real and personal property taxes, stamp taxes, environmental taxes, transfer taxes, workers' compensation, Pension Benefit Guaranty Corporation premiums and other governmental charges, (B) any interest, penalties, or other additions to tax that may become payable with respect to interest, penalties imposed by any federal, state, or local government or any agency or political subdivision of the federal, state, or local government, and (C) other obligations of the same or of a similar nature to any of the foregoing.

(ii) The term "Returns" shall mean all reports, estimates, declarations of estimated tax, information statements, and returns relating to, or required to be filed in connection with, any Taxes, including information returns or reports with respect to backup withholding and other payments to third parties.

(b) All Returns required to be filed by or on behalf of members of the Target Holding Consolidated Group have been duly filed and these Returns are true, complete, and correct in all material respects. All Taxes shown to be payable have been paid in full on a timely basis, and no other Taxes are payable by the Target Holding Consolidated Group with respect to items or periods covered by these Returns or with respect to any period prior to the date of this Agreement. Each member of the Target Holding Consolidated Group has withheld and paid all Taxes required to have been withheld and paid, and complied with all information reporting and backup withholding requirements, including maintenance of required records with respect to these Taxes, in connection with amounts paid or owing to any employee, creditor, independent contractor, or other third party. There are no liens on any of the assets of any member of the Target Holding Consolidated Group with respect to Taxes, other than liens for Taxes not yet due and payable or for Taxes that a member of the Target Holding Consolidated Group is contesting in good faith through appropriate proceedings and for which appropriate reserves have been established.

(c) The Returns of the Target Holding Consolidated Group have not been audited since 1995 by a government or taxing authority, and no audit is in process, pending, or threatened. No deficiencies exist or have been asserted or are expected to be asserted with respect to Taxes of the Target Holding Consolidated Group, and no member of the Target Holding Consolidated Group has received notice or expects to receive notice that it has not filed a Return or paid Taxes required to be filed or paid by it. No member of the Target Holding Consolidated Group is a party to any action or proceeding for assessment or collection of Taxes, and no action or proceeding for assessment or collection of Taxes has been asserted or threatened against any member of the Target Holding Consolidated Group or any of its assets. No waiver or extension of any statute of limitations is in effect with respect to Taxes or Returns of the Target Holding Consolidated Group.

Section 3.19. Benefit and Employee Matters.

(a) Schedule 3.19(a) lists all pension, retirement, stock option, stock purchase, stock ownership, savings, stock appreciation right, profit sharing, deferred compensation, employment, compensation arrangements, consulting, bonus, collective bargaining, group insurance, severance and other employee benefit, incentive, and welfare policies, contracts, plans, and arrangements, and all trust agreements related to any employee benefit established or maintained by Target Holding or Target Bank, for the benefit of any of the present or former directors, officers, or other employees of Target Holding and Target Bank. Schedule 3.19(a) also identifies each "employee benefit plan" (defined for purposes of this Agreement as this term is defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")[63]) maintained or contributed to by any member of the Target Holding Consolidated Group. Neither Target Holding nor Target Bank maintains or contributes to any employee benefit plan. Except as set forth in Schedule 3.19(a), all employee benefit plans maintained by Target Holding or Target Bank (all plans being listed in Schedule 3.19(a)) are in material compliance with the provisions of ERISA and the applicable provisions of the Internal Revenue Code of 1986, as amended. No member of the Target Holding Consolidated Group has ever maintained or become obligated to contribute to any employee benefit plan, (i) that is subject to Title IV of ERISA or (ii) that is a multiemployer plan under Title IV of ERISA. No "prohibited transaction," as defined in Section 406 of ERISA or Section 4975 of the Code, has occurred that could result in liability to Target Holding or Target Bank. No member of the Target Holding Consolidated Group has any current or projected liability in respect of post-employment welfare benefits for retired, current or former employees, except as required to avoid excise tax under Section 4980B of the Code.

(b) During the last five years, neither Target Holding nor Target Bank has been or is a party to any collective bargaining or other labor contract. During the last five years, there has not been, there is not presently pending or existing, and there is not threatened, (a) any strike, slowdown, picketing, work stoppage, or employee grievance process, (b) any proceeding against or affecting Target Holding or Target Bank relating to the alleged violation of any legal requirement pertaining to labor relations or employment matters, including any charge or complaint filed by an employee

[63] *See* 29 U.S.C. §§ 1000 – 1461 (2000).

or union with the National Labor Relations Board, the Equal Employment Opportunity Commission, or any comparable governmental body, organizational activity, or other labor or employment dispute against or affecting Target Holding or Target Bank or their premises, or (c) any application for certification of a collective bargaining agent. No event has occurred or circumstance exists that could provide the basis for any work stoppage or other labor dispute. There is no lockout of any employees by Target Holding and Target Bank, and no action is contemplated. Target Holding and Target Bank have complied in all respects with all legal requirements relating to employment, equal employment opportunity, nondiscrimination, immigration, wages, hours, benefits, collective bargaining, the payment of social security and similar taxes, and occupational safety and health. Neither Target Holding nor Target Bank is liable for the payment of any compensation, damages, taxes, fines, penalties, or other amounts, however designated, for failure to comply with any of the foregoing legal requirements.

Section 3.20. Material Contracts; No Default.

(a) Except as described in the Target Holding Financial Statements or as set forth in Schedule 3.20, no member of the Target Holding Consolidated Group is a party to, or is bound or affected by:

(i) any contract with or arrangement for directors, officers, employees, former employees, agents, or consultants with respect to salaries, bonuses, percentage compensation, pensions, deferred compensation, or retirement payments, or any profit-sharing, stock option, stock purchase, or other employee benefit plan or arrangement;

(ii) a collective bargaining or union contract or agreement;

(iii) a contract, commitment, or arrangement (excluding deposits and other ordinary course banking transactions) for the borrowing of money by a member of the Target Holding Consolidated Group or for a line of credit in an amount greater than $[____];

(iv) a contract, commitment, or arrangement (excluding deposits, bank loans made in the ordinary course of business, and

other ordinary course banking transactions) for the lending of money or for the granting of a line of credit in an amount greater than $[____];

(v) a contract or agreement for the future purchase by it of any materials, equipment, services, or supplies, that is not in the ordinary course of business, and has a term of more than twelve months (including periods covered by any option to renew by either party);

(vi) a contract containing covenants purporting to limit its freedom to compete;

(vii) a contract or commitment for the acquisition, construction, or refurbishment of any property, plant, or equipment, other than contracts and commitments for the acquisition, construction, or refurbishment of any property, plant or equipment involving an amount equal to or less than of $[____] for any one establishment or $[____] in the aggregate; or

(viii) any other contracts which are not terminable upon thirty days notice or involve annual revenues or expenditures in excess of $[____].

(b) Target Holding and Target Bank have performed all the obligations required to be performed by either of them under any contract, agreement, arrangement, commitment, or other instrument to which either is a party (including without limitation any of those described in this paragraph or paragraph (a) of this Section 3.20), and there is not, with respect to any such contract, agreement, commitment, or other instrument, (i) any notice of violation or (ii) any existing default (or event which, with or without due notice or lapse of time or both, would constitute a default) on the part of Target Holding or Target Bank, which default would have a material adverse effect on its business, operations, properties, assets, or financial condition, and neither Target Holding nor Target Bank has received notice of any default, nor has Target Holding or Target Bank knowledge[64] of any facts or

[64] Like materiality qualifiers, *see supra* note 61, the knowledge caveat represents a significant risk allocation mechanism in a business combination agreement. *See* FREUND, *supra* note 25, at 247-48. Most counsel to acquirors believe that knowledge caveats are inappropriate in all but a few representations or warranties. *See id.* at 247 ("[T]he only time you should accept a knowledge caveat from seller is in a situation where, if seller does not in fact possess the information, he should not be

circumstances which would reasonably indicate that it will be or may be in default under, any contract, agreement, arrangement, commitment, or other instrument subsequent to the date of this Agreement.

Section 3.21. Contract Termination Provisions. Except for those contracts set forth in Schedule 3.21, all contracts between Target Holding or Target Bank and any employee of either Target Holding or Target Bank or independent contract of either Target Holding or Target Bank shall, by the terms of those contracts or a written addendum to those contracts, be terminable by Acquiror Holding or Acquiror Bank following the Holding Company Merger, upon no more than thirty days written notice to the employee or independent contractor.

Section 3.22. Litigation. Except as listed on Schedule 3.22, there are no actions, suits, proceedings, arbitrations, or investigations pending or threatened, before any court, any governmental agency, or instrumentality or any arbitration panel, against or affecting Target Holding or Target Bank or any of their subsidiaries or any of the directors, officers, or employees of the foregoing, and to the knowledge of Target Holding and Target Bank, no facts or circumstances exist that would be likely to result in the filing of any action that would have a material adverse effect on Target Holding or Target Bank. Neither Target Holding nor Target Bank is subject to any currently pending judgment, order, or decree entered in any lawsuit or proceeding.

Section 3.23. Environmental Matters.

(a) To the knowledge of Target Holding and Target Bank, Target Holding and Target Bank are and have been in compliance with all applicable federal, state, and local laws, regulations, rules, and decrees pertaining to pollution or protection of the environment ("Environmental Laws"), including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq.,[65] the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq.,[66] or any similar

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required to stand behind the representation."). Parties may negotiate about the form of a knowledge qualifier as well as its existence. *See* ADAMS, *supra* note 24, at 159. Moreover, especially in light of potential interpretive issues regarding the knowledge of corporate parties, many business combination agreements include a definition of the concept of "knowledge." *See* Gentle & Heminway, *supra* note 51, at 237 n.48.

[65] 42 U.S.C. §§ 9601-9675 (2000) (commonly known as "CERCLA," this act governs cleanups of hazardous substances). For a brief summary of the purposes of CERCLA, see Crofton Ventures Ltd. Partnership v. G & H Partnership, 258 F.3d 292, 296 (4th Cir. 2001).

[66] 42 U.S.C. §§ 6901-6992k. The Resource Conservation and Recovery Act, commonly referred to as

federal, state, or local law, except for any instances of non-compliance that are not reasonably likely to have, individually or in the aggregate, a material adverse effect on the financial condition, results of operations, or business of Target Holding and Target Bank.

(b) To the knowledge of Target Holding and Target Bank, all property owned, leased, operated, or managed by Target Holding or Target Bank, or in which Target Holding or Target Bank has any interest, including any mortgage or security interest ("Business Property"), and all businesses and operations conducted on any of the Business Property (whether by Target Holding or Target Bank, a mortgagor, or any other person), are and have been in compliance with all applicable Environmental Laws, except for instances of non-compliance that are not likely to have, individually or in the aggregate, a material adverse effect on the financial condition, results of operations, or business of Target Holding or Target Bank.

(c) To the knowledge of Target Holding and Target Bank, there is no judicial, administrative, arbitration, or other similar proceeding pending or threatened before any court, governmental agency, authority, or other forum in which Target Holding or Target Bank or any prior owner of any Business Property has been or, with respect to threatened matters, is threatened to be named as a party relating to (i) alleged noncompliance with any applicable Environmental Law or (ii) the release or threatened release into the environment of any Hazardous Substance, and relating to any of the Business Property, except for proceedings pending or threatened that are not likely to have, individually or in the aggregate, a material adverse effect on the financial condition, results of operations, or business of Target Holding or Target Bank, and there is no reasonable basis for any such proceeding. The term "Hazardous Substance" means any pollutant, contaminant, or toxic or hazardous substance, chemical, or waste defined, listed or regulated by any Environmental Law (and specifically shall include without limitation asbestos, polychlorinated biphenyls, and petroleum and petroleum products).

(d) To the knowledge of Target Holding and Target Bank, there has been no release or threatened release of a Hazardous Substance in, on,

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RCRA (pronounced "rick'rah") regulates hazardous and solid waste. *See* Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 359 (2004).

under, or affecting any of its Business Property, except for any release or threatened release that is not likely to have, individually or in the aggregate, a material adverse effect on the financial condition, results of operations, or business of Target Holding or Target Bank.

Section 3.24. Investment Intent; Limitations on Transfer of Stock. Target Holding acknowledges that (a) the Merger Shares have not been registered under the 1933 Act, Tennessee state securities law, or any other state or federal securities law and (b) the Merger Shares, may not be sold, pledged, or otherwise transferred absent registration or the availability of exemption from registration. The sale, pledge, or transfer of the Merger Shares is also subject to the restrictions of the Stock Restriction Agreement attached to this Agreement in the form of Exhibit C. Each of the shareholders of Target Holding, all of whom are listed on Schedule 3.24, as a condition to closing of the Holding Company Merger, will execute and deliver (i) the Stock Restriction Agreement, (ii) a Subchapter S[67] Election form, and (iii) the Investment Intent Letter attached to this Agreement in the form of Exhibit D. Each of the Target Holding shareholders is an "accredited investor," as defined in Rule 501(a) under the 1933 Act, and can execute and be bound by the Investment Intent Letter, and Target Holding acknowledges that Acquiror Holding, in agreeing to issue the Merger Shares, is relying upon the representations and warranties contained in this Section 3.24 and in the Investment Intent Letter.

Section 3.25. Disclosure.[68] No representation or warranty contained in this Agreement, and no statement contained in any schedule or certificate, list, or other writing furnished to Acquiror Holding or Acquiror Bank under the provisions of this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made in this Agreement or in any of those schedules or certificates not misleading. No information material to this transaction that is necessary to make the representations and warranties contained in

[67] *See* 26 U.S.C. § 1361 (2000).

[68] This representation is similar to Rule 10b-5, the catchall anti-fraud rule covering the purchase and sale of securities. *See* 17 C.F.R. § 240.10b-5 (2004). This representation is very broad. In the event material undisclosed information arises with respect to Target Holding or Target Bank prior to the Effective Date, it is likely that Acquiror Holding would be able to assert a breach of this representation, even if the undisclosed information would not be deemed a breach of any other representation set forth in the Agreement or actionable under Rule 10b-5. Often, the target's counsel will negotiate to eliminate this representation or, in the alternative, narrow the scope of the representation to only the matters set forth in the merger agreement. *See* Gentle & Heminway, *supra* note 51, at 256 n.66; Hamilton & Heminway, *supra* note 50, at 237 n.57.

this Agreement not misleading has been withheld from, or has not been delivered in writing to, Acquiror Holding and Acquiror Bank.

ARTICLE IV[69]
REPRESENTATIONS AND WARRANTIES OF ACQUIROR HOLDING AND ACQUIROR BANK

As of the date of this Agreement, Acquiror Holding and Acquiror Bank make the following representations and warranties to Target Holding and Target Bank:

Section 4.01. Corporate Organization.

(a) Acquiror Holding is a corporation duly organized, validly existing, and in good standing under the laws of the State of Tennessee. Acquiror Holding (i) has the corporate power and authority to own or lease all of its properties and assets and to carry on its business as it is now being conducted and (ii) is duly licensed or qualified to do business in each jurisdiction in which the nature of the business conducted by it or the character or location of the properties and assets owned or leased by it makes licensing or qualification necessary.

(b) Acquiror Bank is a national banking association duly organized and validly existing under the laws of the United States. Acquiror Bank has the corporate power and authority (and has received appropriate authorizations from the OCC) to own or lease all of its properties and assets and to carry on its business as it is now being conducted.

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[69] The breadth and depth of representations by an acquiror varies with the terms of a particular merger. In instances where the consideration for the target's shares of stock is all cash consideration, the acquiror's representations are usually limited to representations regarding corporate organization (Section 4.01), authority (Section 4.05), and consents (Section 4.06). *See generally* FREUND, *supra* note 25, at 281 (describing these types of representations broadly); Kling et al., *supra* note 62, at 794 (describing these types of representations broadly). In instances where the acquirer uses its stock as consideration in the merger, the representations tend to parallel more closely the representations made by the target, focusing on aspects of the acquiror's business and operations as well as transaction-related concerns. *See* Kling et al., *supra* note 62; Hamilton & Heminway, *supra* note 50, at 238 n.58 ("Buyer's representations and warranties would include far more information if the consideration for sale were Buyer securities."). However, depending upon the relative size of the acquiror and target and whether the acquirer is a public company, the acquiror may make more limited representations, even if the consideration for the merger is stock of the acquiror. *See* FREUND, *supra* note 25, at 281-83.

Section 4.02. Capitalization.

(a) The authorized capital stock of Acquiror Holding consists of 500,000 shares of Acquiror Holding Common Stock. As of the date of this Agreement, there are 296,974 shares of Acquiror Holding Common Stock issued and outstanding and no shares held in Acquiror Holding's treasury. All issued and outstanding shares of Acquiror Holding Common Stock have been duly authorized and validly issued and are fully paid, nonassessable, and free of preemptive rights with no personal liability attaching to the ownership of the Acquiror Holding Common Stock. Acquiror Holding has not issued any additional shares of Acquiror Holding Common Stock since March 31, 2005, and, except as disclosed in Schedule 4.02, Acquiror Holding does not have and is not bound by any outstanding subscription, option, warrant, call, commitment, or agreement of any character calling for the purchase or issuance of any shares of Acquiror Holding Common Stock or any security representing the right to purchase or otherwise receive any Acquiror Holding Common Stock or any other equity interest in Acquiror Holding.

(b) The authorized capital stock of Acquiror Bank consists of 320,000 shares of Acquiror Bank Common Stock, $10.00 par value. As of the date of this Agreement, there are 53,333 shares of Acquiror Bank Common Stock issued and outstanding and no shares of Acquiror Bank Common Stock held in Acquiror Bank's treasury. All issued and outstanding shares of Acquiror Bank Common Stock have been duly authorized and validly issued and are fully paid, nonassessable, and free of preemptive rights, with no personal liability attaching to the ownership of the Acquiror Bank Common Stock. Acquiror Bank has not issued any shares of Acquiror Bank Common Stock since March 31, 2005 and does not have, and is not bound by, any outstanding subscription, option, warrant, call, commitment, or agreement of any character calling for the purchase or issuance of any shares of Acquiror Bank Common Stock or any security representing the right to purchase or otherwise receive any Acquiror Bank Common Stock or any other equity interest in Acquiror Bank. Acquiror Holding has good, valid, and marketable title to all of the outstanding shares of Acquiror Bank Common Stock. On the Effective Date, the outstanding shares of Acquiror Bank Common Stock will be free and clear of all liens, encumbrances, pledges, claims, options, charges, and assessments of any nature whatsoever.

Section 4.03. Investments; No Subsidiaries. The term "Acquiror Holding Consolidated Group," as used in this Agreement, consists of Acquiror Holding and Acquiror Bank. Neither Acquiror Holding nor Acquiror Bank has any active or

inactive subsidiaries or equity interest or other investment, direct or indirect, in any corporation, partnership, joint venture, or other entity, except for an equity interest or other investment that Acquiror Bank may have acquired as a result of foreclosure and is holding subject to sale.

Section 4.04. Loan Portfolio. All loans, discounts, and financing leases (in which either member of the Acquiror Holding Consolidated Group is lessor) reflected on the March 31, 2005, consolidated balance sheet of Acquiror Holding (the "Acquiror Holding Latest Balance Sheet") (a) were, at the time and under the circumstances that they were made, allowed for, or entered into, made for good, valuable, and adequate consideration in the ordinary course of business of the Acquiror Holding Consolidated Group, (b) are evidenced by genuine notes, agreements, or other evidences of indebtedness, and (c) to the extent secured, have been secured by valid liens and security interests which have been perfected. Except as set forth in Schedule 4.04, there are no outstanding loans held by Acquiror Bank with an unpaid balance of $[____] or more as to which a material default has occurred and is continuing. A material default for purposes of this Section 4.04 includes without limitation the failure to pay indebtedness or an installment on the indebtedness more than sixty days after it is due and payable.

Section 4.05. Authority; No Violation.

(a) Each of Acquiror Holding and Acquiror Bank has full corporate power and authority to execute and deliver this Agreement and to consummate the transactions this Agreement contemplates. The Board of Directors of Acquiror Holding has duly and validly approved and adopted this Agreement and the transactions this Agreement contemplates and has authorized the execution and delivery of this Agreement by Acquiror Holding, and except for the approval of this Agreement by its shareholders, no other corporate proceedings on the part of Acquiror Holding are necessary to consummate the transactions this agreement contemplates. The Board of Directors of Acquiror Bank has been duly and validly approved and adopted this Agreement and the consummation of the transactions this Agreement contemplates and has authorized the execution and delivery of this Agreement by Acquiror Bank, and no other corporate proceedings on the part of Acquiror Bank are necessary to consummate the transactions this Agreement contemplates. This Agreement has been duly and validly executed and delivered by Acquiror Holding and Acquiror Bank and constitutes a valid and binding obligation of Acquiror Holding and of Acquiror Bank enforceable against each in accordance with its terms, except that enforcement may be limited by bankruptcy, reorganization, insolvency,

and other similar laws and court decisions relating to or affecting the enforcement of creditors' rights generally and by general equitable principles.

(b) Neither the execution and delivery of this Agreement by Acquiror Holding or Acquiror Bank, nor the consummation by Acquiror Holding or Acquiror Bank of the transactions contemplated by this Agreement, nor compliance by Acquiror Holding or Acquiror Bank with any of the provisions of this Agreement, will (i) violate any provision of the Charter or Bylaws of Acquiror Holding, or the Articles of Association or Bylaws of Acquiror Bank, (ii) violate any statute, code, ordinance, rule, regulation, judgment, order, writ, decree, or injunction applicable to Acquiror Holding or Acquiror Bank, or any of their subsidiaries or any of their respective properties or assets, or (iii) violate, conflict with, result in a breach of any provisions of, constitute a default (or an event which, with or without notice or lapse of time, or both, would constitute a default) under, result in the termination of, accelerate the performance required by, or result in the creation of any lien, security interest, charge, or other encumbrance upon any of the respective properties or assets of Acquiror Holding and Acquiror Bank or any of their subsidiaries under, any of the terms, conditions or provisions of any note, bond, mortgage, indenture, deed of trust, license, lease, agreement, or other instrument or obligation to which Acquiror Holding or Acquiror Bank or any of their respective subsidiaries is a party, or by which they or any of their respective properties or assets may be bound or affected, except for conflicts, breaches, or defaults that, either individually or in the aggregate, will not have a material adverse effect on the business, operations, properties, assets, or financial condition of Acquiror Holding or Acquiror Bank.

Section 4.06. Consents and Approvals. No permit, consent, approval, or authorization of, or declaration, filing, or registration with, any public body or authority or any third party is necessary in connection with (a) the execution and delivery by Acquiror Holding or Acquiror Bank of this Agreement or (b) the consummation by Acquiror Holding or Acquiror Bank of the Holding Company Merger and the other transactions contemplated by this Agreement, except for: (i) the prior approval of the Holding Company Merger by the Federal Reserve Board, unless an exemption from the approval is obtained; (ii) the prior approval of the Bank Combination by the OCC; and (iii) the approval of the Holding Company Merger by the shareholders of Acquiror Holding.

Section 4.07. Legality of Merger Shares. The Merger Shares are duly authorized, and when issued and delivered in accordance with the terms of this

Agreement, will be validly issued, fully paid, and nonassessable, free of preemptive rights and with no personal liability attaching to the ownership of the Merger Shares.

Section 4.08. Financial Statements.

(a) Acquiror Holding has previously delivered to Target Holding and Target Bank copies of the Acquiror Holding Latest Balance Sheet and the consolidated balance sheets of Acquiror Holding as at December 31, 2002, 2003, and 2004 and the related consolidated statements of income, changes in shareholders' equity and cash flows for the periods then ended (the "Acquiror Holding Financial Statements"). The Acquiror Holding Financial Statements as at December 31, 2002, 2003, and 2004 and for the fiscal years then ended have been audited by [Acquiror Holding Auditor], certified public accountants, whose report accompanies those financial statements. The Acquiror Holding Latest Balance Sheet (including the related notes, where applicable) fairly presents the consolidated financial position of Acquiror Holding and its subsidiaries as of March 31, 2005, and the other Acquiror Holding Financial Statements referred to herein (including the related notes, where applicable) fairly present the results of the consolidated operations, changes in shareholders' equity, and cash flows of Acquiror Holding and its subsidiaries as at the respective dates or for the respective fiscal periods covered by the Acquiror Holding Financial Statements.

(b) Each of the Acquiror Holding Financial Statements is true and correct in all material respects and has been prepared in accordance with generally accepted accounting principles applied on a basis consistent with other periods, except as otherwise noted.

Section 4.09. No Undisclosed Liabilities. As of the date of this Agreement, neither Acquiror Holding nor Acquiror Bank has any liabilities or obligations of any nature (whether absolute, accrued, contingent, or otherwise and whether due or to become due), except liabilities and obligations (a) fully reflected or reserved against in the Acquiror Holding Latest Balance Sheet or disclosed in the notes of the Acquiror Holding Latest Balance Sheet or (b) incurred since the date of the Acquiror Holding Latest Balance Sheet in the ordinary course of business and consistent with past practice, which liabilities or obligations are, individually or in the aggregate, material to Acquiror Holding and Acquiror Bank on a consolidated basis.

Section 4.10. Absence of Certain Changes or Events.

(a) Since the date of the Acquiror Holding Latest Balance Sheet, there has not been:

(i) any material adverse change in the business, operations, properties, assets, or financial condition of either Acquiror Holding or Acquiror Bank, or any event which has had or will have a material adverse effect on the business, operations, properties, assets, or financial condition of Acquiror Holding or Acquiror Bank;

(ii) any loss, damage, destruction, or other casualty materially and adversely affecting any of the business, operations, properties, assets, or financial condition of Acquiror Holding or Acquiror Bank or any of their subsidiaries (whether or not covered by insurance);

(iii) any increase of more than 10% in the compensation payable by either Acquiror Holding or Acquiror Bank to any of their directors, officers, agents, consultants, or employees whose total compensation after the increase was in excess of $[____] per annum, or any extraordinary bonus, percentage compensation, service award, or other like benefit granted, made, or accrued to the credit of any director, officer, agent, consultant, or employee, or any extraordinary welfare, pension, retirement, or similar payment or arrangement made or agreed to by Acquiror Holding or Acquiror Bank for the benefit of the director, officer, agent, consultant, or employee;

(iv) any change in any method of accounting or accounting practice of Acquiror Holding or Acquiror Bank;

(v) any loan in excess of $[____] or portion of a loan in excess of $[____] (A) rescheduled as to payments, (B) subject to a moratorium on payment, or (C) written off as uncollectible by Acquiror Holding or Acquiror Bank; or

(vi) any agreement or understanding, whether in writing or otherwise, of Acquiror Holding or Acquiror Bank to do any of the foregoing.

(b) Since the date of the Acquiror Holding Latest Balance Sheet, neither Acquiror Holding nor Acquiror Bank has:

(i) issued or sold any promissory note, stock, bond, or other corporate security of which it is the issuer in an amount greater than $[____];

(ii) discharged or satisfied any lien or encumbrance or paid or satisfied any obligation or liability (whether absolute, accrued, contingent, or otherwise and whether due or to become due) in an amount greater than $[____] as to each lien, encumbrance, obligation, or liability, other than (A) current liabilities shown on the Acquiror Holding Latest Balance Sheet and current liabilities incurred since the date of the Acquiror Holding Latest Balance Sheet in the ordinary course of business and consistent with past practice and (B) any lien, encumbrance, obligation, or liability of the nature (regardless of amount) required to be disclosed under Section 4.10(a)(iii);

(iii) declared, paid, or set aside for payment any dividend or other distribution (whether in cash, stock, or property), except for dividends by Acquiror Bank to Acquiror Holding to the extent necessary to pay necessary and routine expenses of Acquiror Holding;

(iv) split, combined, or reclassified any shares of its capital stock, or redeemed, purchased, or otherwise acquired any shares of its capital stock or other securities;

(v) sold, assigned, or transferred any of its assets (real, personal or mixed, tangible, or intangible), canceled any debts or claims, or waived any rights of substantial value, except, in each case, in the ordinary course of business and consistent with past practice;

(vi) sold, assigned, transferred, or permitted to lapse any patents, trademarks, trade names, copyrights, or other similar assets, including related applications or licenses;

(vii) paid any amounts or incurred any liability to or in respect of, or sold any properties or assets (real, personal or mixed, tangible or intangible) to, or engaged in any transaction (other than

any transaction of the nature required to be disclosed under Section 4.10(a)(iii)) or entered into any agreement or arrangement with, any corporation or business in which Acquiror Holding, Acquiror Bank, or any of their officers or directors, or any "affiliate" or "associate" (as those terms are defined in the rules and regulations promulgated under the 1933 Act) of Acquiror Holding, Acquiror Bank, or any of their officers or directors, has any direct or indirect interest;

(viii) entered into any collective bargaining agreements; or

(ix) entered into any other transaction, other than in the ordinary course of business and consistent with past practice or in connection with the transactions contemplated by this Agreement.

Section 4.11. Compliance with Applicable Law. Acquiror Holding and Acquiror Bank hold, and have at all times held, all licenses, franchises, permits, and governmental authorizations necessary for the lawful conduct of their respective businesses under, and have complied in all material respects with and are not in default in any material respect under, any applicable statutes, laws, ordinances, rules, regulations, and orders of all federal, state, and local governmental bodies, agencies, and subdivisions having, asserting, or claiming jurisdiction over them or over any part of their operations (to the extent that a default could result in a material limitation on the conduct of Acquiror Holding's or Acquiror Bank's business or could cause Acquiror Holding or Acquiror Bank to incur a substantial financial penalty). Neither Acquiror Holding nor Acquiror Bank has received notice of, knows, or has reason to know of a violation of, or any valid basis for any claim of a violation of, any license, franchise, permit, governmental authorization, statute, law, ordinance, rule, regulation, or order referenced in the preceding sentence.

Section 4.12. Brokers and Finders. None of Acquiror Holding, Acquiror Bank, or any of their officers or directors has employed any broker or finder or incurred any liability for any broker's fees, commissions, or finder's fees in connection with any of the transactions contemplated by this Agreement.

Section 4.13. Tax Status. Acquiror Holding and Acquiror Bank have elected Subchapter S status for federal income tax purposes for the calendar years 2004 and 2005 and intend to continue that status for the indefinite future. Acquiror Holding management believes that Acquiror Holding has properly qualified as a Subchapter S Corporation for the years 2004 and 2005. Acquiror Holding has not received any notices of deficiency or ineligibility for Subchapter S status from the U.S.

Internal Revenue Service, and Acquiror Holding has no knowledge of any basis for any claim of ineligibility for Subchapter S status.

Section 4.14. Disclosure. No representation or warranty contained in this Agreement, and no statement contained in any schedule or certificate, list, or other writing furnished to Target Holding or Target Bank under the provisions of this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made in this Agreement or in any of those schedules or certificates not misleading. No information material to this transaction that is necessary to make the representations and warranties contained in this Agreement not misleading has been withheld from, or has not been delivered in writing to, Target Holding or Target Bank.

ARTICLE V
COVENANTS OF THE PARTIES

Section 5.01. Conduct of Business. Except with the consent of the other parties to this Agreement, during the period from the date of this Agreement to the Effective Date:

(a) Target Holding and Target Bank will conduct their respective businesses and engage in transactions only in the ordinary course and consistent with prudent banking practice.

(b) Neither Target Holding nor Target Bank shall (i) increase by more than 10% the compensation payable by it to any of its directors, officers, agents, consultants, or employees whose total compensation after the increase would be in excess of $[___][70] per annum, (ii) grant or pay any extraordinary bonus, percentage compensation, service award, or other like benefit to any director, officer, agent, consultant, or employee, or (iii) make or agree to make any extraordinary welfare, pension, retirement, or similar payment or arrangement for the benefit of any director, officer, agent, consultant, or employee; provided, however, that Target Bank may pay its regular profit sharing-contribution and annual performance bonuses to employees and directors, the amount of which is not included in monthly accruals and will not exceed a total of $[___].[71]

[70] The dollar-value compensation threshold used in this provision is based on the compensation profile of Target Holding and Target Bank.

[71] Exceptions of this kind frequently must be inserted for compensation payments that are or may be

(c) Neither Target Holding nor Target Bank shall sell or dispose of assets material to the ordinary course operations of Target Holding or Target Bank, except in the ordinary course of business.

(d) Neither Target Holding nor Target Bank shall enter into any new capital commitments or make any capital expenditures, except commitments or expenditures within existing operating and capital budgets or otherwise in the ordinary course of business.

(e) Neither Target Holding nor Target Bank shall authorize or issue any additional shares of any class of its capital stock or any securities exchangeable for or convertible into any shares of its capital stock or any options or rights to acquire any shares of its capital stock, nor shall Target Holding or Target Bank otherwise authorize or affect any change in its capitalization as set forth in the Charter of Target Holding or the Articles of Association of Target Bank, as each are in effect on the date of this Agreement.

(f) No dividends shall be paid by Target Holding. No dividends shall be paid by Target Bank, except that (i) Target Bank may pay dividends to Target Holding to the extent necessary to enable Target Holding to pay necessary and routine expenses, including taxes and lease payments on any property leases and expenses provided for in Section 9.01, and (ii) Target Bank may declare a cash dividend in an amount up to $100,000 to enable Target Holding to make a scheduled debt service payment with respect to the Target Holding Debt.

Section 5.02. Nonsolicitation; Nondisclosure; No Discussions or Negotiations. Prior to the Effective Date, without the prior approval of the chief executive officer of Acquiror Holding, Target Holding shall not, and shall instruct its officers, directors, agents, and affiliates not to,

(a) solicit or encourage inquiries or proposals with respect to or

(b) furnish any information relating to or

(c) participate in any discussions or negotiations concerning

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due in the ordinary course between signing and closing. The target must be able to accurately and completely inform the acquiror of the amount and nature of the payments that will become due because the acquiror will want to craft the exception as narrowly as possible.

any acquisition or purchase of all or a substantial portion of the assets of, or of a substantial equity interest in, Target Holding or any subsidiary of Target Holding, or any business combination with Target Holding or any subsidiary of Target Holding, other than as contemplated by this Agreement. Notwithstanding the foregoing, Target Holding, after written notice to Acquiror Holding, may furnish information in response to an unsolicited inquiry from a third party or engage in discussions or negotiations with a third party if, in each case, the Board of Directors of Target Holding determines in good faith, based on the advice of legal counsel, that the failure to furnish information in response to the unsolicited inquiry or the failure to engage in discussions or negotiations is likely to be deemed to constitute a breach of fiduciary duties under applicable Tennessee law.

Target Holding and Target Bank agree to notify Acquiror Holding by telephone within 24 hours of receipt of any inquiry with respect to a proposed merger, consolidation, assets acquisition, tender offer, or other takeover transaction with another person or receipt of a request for information from the FDIC, OCC, or other governmental authority with respect to a proposed acquisition of Target Holding or Target Bank by another party.

Section 5.03. Current Information.[72] During the period from the date of this Agreement to the Effective Date, Target Holding and Target Bank each will cause one or more of its designated representatives to confer on a regular and frequent basis with representatives of Acquiror Holding and to report the general status of its ongoing operations. In addition, separate reporting on matters involving Target Bank's loan portfolio will occur monthly and will include without limitation: (i) all Board reports; (ii) new and renewed loans (including loan applications); (iii)

[72] Because of the requisite regulatory approvals, there typically is a delay of at least three months between signing a merger agreement and completing a merger between two bank holding companies. During this interim period of time, Target Bank will provide daily operating information to Acquiror Bank, as contemplated by Section 5.03. In some instances, banks have negotiated information provisions which effectively result in the Acquiror Bank having control over Target Bank's daily management decisions prior to the Effective Date. (*E.g.*, Acquiror Bank determines which loans are approved by Target Bank, has veto power over Target Bank's decisions on new employees, and has veto power over decisions of Target Bank's Board of Directors.) In these instances, the bank regulatory authorities may determine that Acquiror Holding has effectively acquired control over Target Bank prior to regulatory approval of the acquisition, resulting in a violation of banking law by Acquiror Holding and Acquiror Bank. 12 U.S.C. § 1841(a)(2)(C) (2000). *See* FleetBoston Financial Corp., 86 Fed. Res. Bull. 751, 752-753 (2000), where the Board of Governors of the Federal Reserve System (the "Board") evaluated a potential acquiror's relationship in determining whether the potential acquiror had exercised a controlling influence over the management or policies of the potential target.

delinquency reports; (iv) loan extensions; (v) to the extent possible, loan policy exceptions, loan documentation exceptions, and financial statement exceptions; (vi) watch list reports; (vii) all written communications concerning problem loan accounts greater than $[____];[73] (viii) notification and written details involving new loan products and loan programs; and (ix) other information regarding specific loans, the loan portfolio, and management of the loan portfolio as may be requested. Target Holding and Target Bank each will promptly notify Acquiror Holding of any material change in the ordinary course of its business or in the operation of its properties and of any governmental complaints, investigations, or hearings (or communications indicating that the same may be contemplated), or the institution or the threat of litigation involving either party, and will keep Acquiror Holding fully informed of any governmental complaints, investigations, or hearings (or communications indicating that the same may be contemplated), or the institution or the threat of litigation involving either party,.

Section 5.04. Due Diligence; Access to Properties and Records; Confidentiality.

(a) Acquiror Holding shall be entitled to conduct a preliminary due diligence review of the books, records, and operations of the Target Holding Consolidated Group, including without limitation to a review of Target Holding Consolidated Group's loan portfolios, other real estate owned, and classified assets, investment portfolios, and properties.

(b) For purposes of allowing Acquiror Holding and Acquiror Bank and their counsel to conduct due diligence and to prepare regulatory submissions and for other relevant purposes, Target Holding and Target Bank shall permit Acquiror Holding reasonable access to their properties during normal business hours, and shall disclose and make available to Acquiror Holding and its agents all books, papers, and records relating to their respective assets, stock ownership, properties, operations, obligations, and liabilities, including without limitation to: their respective books of account (including their general ledgers); tax records; minute books of directors' and shareholders' meetings; charter documents; bylaws; material contracts and agreements; filings with any regulatory authority; litigation files; compensatory plans affecting its employees; and any other materials pertaining to business activities, projects, or programs in which the other

[73] The dollar value of this materiality threshold is likely to be determined on the basis of Acquiror Holding's valuation of Target Bank's aggregate loan portfolio.

parties may have a reasonable interest in light of the proposed Holding Company Merger. No member of the Target Holding Consolidated Group shall be required to provide access to or to disclose information where this access or disclosure would violate or prejudice the rights of any customer or other person, would jeopardize the attorney-client privilege of the institution in possession or control of the information, or would contravene any law, rule, regulation, order, judgment, decree, or binding agreement. The parties will make appropriate substitute disclosure arrangements under circumstances in which the restrictions of the preceding sentence apply.

(c) All information furnished by any member of the Target Holding Consolidated Group under this Agreement shall be treated as the sole property of the party furnishing the information until consummation of the Holding Company Merger and, if the Holding Company Merger shall not occur, Acquiror Holding and Acquiror Bank shall return to Target Holding all documents or other materials containing, reflecting, or referencing this information, shall use its best efforts[74] to keep confidential all of this information and shall not directly or indirectly use this information for any competitive or other commercial purpose. The obligation to keep this information confidential shall continue after the date the proposed Holding Company Merger is abandoned but shall not apply to (i) any information that (A) was already in the possession of Acquiror Holding or Acquiror Bank prior to the information's disclosure by Target Holding or Target Bank, (B) prior to the information's disclosure by Target Holding or Target Bank was generally known to the public or available in public records, (C) became known to the public through no fault of Acquiror Holding or Acquiror Bank, or (D) was disclosed to the party receiving the information by a third party not bound by an obligation of confidentiality, or (ii) disclosures made by Acquiror Holding or Acquiror Bank in accordance with an order of a court of competent jurisdiction.

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[74] The "best efforts" standard should be used with caution. *See* ADAMS, *supra* note 24, at 88-94 (describing and defining various performance standards in acquisition agreements); Gentle & Heminway, *supra* note 51, at 225 n.28 (same); Hamilton & Heminway, *supra* note 50, at 239 n.64 (same). The contracts professor of one of the authors of this Tennessee BMA drilled into her head that an agreement to use "best efforts" is an agreement to do everything humanly possible to accomplish the task, even at the risk of monetary expenditures or physical damage. By contrast, an agreement to use "commercially reasonable efforts" is an agreement to do what a reasonable participant in commerce would do to accomplish the task. The authors both accept an agreement to use "commercially reasonable efforts" in most circumstances.

(d) Target Holding and Target Bank shall have the right to conduct a due diligence examination of Acquiror Holding and Acquiror Bank and to be furnished with documents, subject to the terms and limitations contained in subparagraph (a) and (b) of this Section 5.04. Target Holding and Target Bank agree to be bound by the confidentiality provisions of subparagraph (c) of this Section 5.04 that are applicable to Acquiror Holding and Acquiror Bank (as if they were Acquiror Holding and Acquiror Bank, respectively, and Acquiror Holding and Acquiror Bank were Target Holding and Target Bank, respectively), subject to the terms and conditions set forth in subparagraph (c) of this Section 5.04.[75]

Section 5.05. Interim Financial Statements. As soon as reasonably available, but in no event more than 15 days after the end of each month ending after the date of this Agreement, Target Holding and Target Bank will deliver to Acquiror Holding copies of their monthly financial statements.

Section 5.06. Regulatory Matters.

(a) Each of Acquiror Holding and Target Holding shall prepare a proxy statement to be mailed to their respective shareholders in connection with the meeting to be called to consider approval of this Agreement and the transactions contemplated by this Agreement, as soon as reasonably practicable following the date of this Agreement.

(b) Each of Acquiror Holding and Target Holding will use its best efforts to prepare all necessary documentation, to effect all necessary

[75] In this Agreement, each bank holding company has agreed to conduct due diligence on the other party until the Effective Date, which permits each party to continue its investigation of the other party after the execution and delivery of the Agreement. Section 8.01(g) gives Acquiror Holding and Acquiror Bank the right to terminate the Agreement within 30 days of the date of the Agreement if Acquiror Holding is dissatisfied with its due diligence findings (under standards set forth in Section 8.01(g)). Section 8.01(h) gives Target Holding and Target Bank the same right on a reciprocal basis. Therefore, from a business perspective, it is important that each party have completed the more critical aspects of its diligence inquiry within 30 days after executing the definitive agreement. This provision is included in a merger agreement in the instance where an acquiror is unable to conduct diligence prior to the execution of a definitive agreement due to, for example, confidentiality concerns on the part of a target. It is generally preferable for both parties to have completed diligence prior to signing a definitive agreement and not have to provide for a right to terminate after signing the agreement on the basis of diligence findings in order to give both parties more assurance that the transaction will be consummated once the agreement is executed and publicly announced. *See* FREUND, *supra* note 25, at 171-72 (describing similar considerations and provisions used in connection with the delivery of a delayed disclosure schedule).

filings, and to obtain all necessary permits, consents, approvals, and authorizations of all third parties and governmental bodies necessary to consummate the transactions contemplated by this Agreement, including those required by the OCC and the Federal Reserve Board.

Section 5.07. Approval of Shareholders. Each of Acquiror Holding and Target Holding shall (a) take all steps necessary to call, give notice of, convene, and hold a special meeting of its shareholders as soon as practicable for the purpose of approving this Agreement and the transactions contemplated by this Agreement and for any other purposes as may be necessary or desirable, (b) subject to the fiduciary obligations of its Board of Directors, recommend to its shareholders the approval of this Agreement and the transactions contemplated by this Agreement and any other matters as may be submitted to its shareholders in connection with this Agreement, and (c) cooperate and consult with each other with respect to each of the matters set forth in clauses (a) and (b) of this Section 5.07.

Section 5.08. Further Assurances. Subject to the terms and conditions provided in this Agreement, each of the parties to this Agreement agrees to use its best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper, or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement. In case at any time after the Effective Date any further action is necessary or desirable to carry out the purposes of this Agreement, the proper officers and directors of each party to this Agreement shall take that further action.[76]

Section 5.09. Public Announcements. Acquiror Holding, Acquiror Bank, Target Holding, and Target Bank shall cooperate with each other in the development and distribution of all news releases and other public information disclosures with respect to this Agreement or any of the transactions contemplated by this Agreement. No party to this Agreement shall make any public announcement or otherwise make any disclosure (either public or private), other than disclosure to employees or agents of any party as may be required to carry out the transactions contemplated by this Agreement and except as may be required by law, without the express written consent of all parties to this Agreement. Each party to this Agreement shall take any reasonable steps required to ensure that its employees and agents comply with the provisions of this Section 5.09.

[76] Arguably, this sentence is unenforceable or unnecessary. The officers and directors of the parties to this Agreement are not individually bound by this Agreement. Moreover, the matters covered in this sentence already are covered in the preceding sentence, since a corporation typically acts through its officers under the direction of its Board of Directors.

Section 5.10. Benefits. Any Target Holding employee who, immediately prior to the Effective Date, is covered by or is a participant in a Target Holding employee benefit plan listed in Schedule 3.19, shall, on the Effective Date, be covered by or participate in the comparable Acquiror Holding employee benefit plan if a comparable plan is maintained by Acquiror Holding and if the Target Holding employee meets the eligibility requirements of the comparable Acquiror Holding plan. All prior years of service of Target Holding employees will be counted for vesting and eligibility purposes under each Acquiror Holding employee benefit plan to the extent permitted by applicable law and the terms and provisions of the applicable Acquiror Holding benefit plan.

Section 5.11. Indemnification.[77]

(a) From and after the Effective Date, Acquiror Holding shall indemnify, defend, and hold harmless the current and former directors, officers, employees, and agents of Target Holding (each Target Holding director, officer, employee, or agent referred to as a "Holding Company Indemnified Party") against all losses, claims, damages, liabilities, judgments (and related expenses, including without limitation attorney's fees and amounts paid in settlement), whether joint, several, or solidary, and any action or other proceeding in respect to these losses, claims, damages, liabilities, judgments, and any action or other proceeding, to which the

[77] One of the effects of the Holding Company Merger will be that Acquiror Holding will be liable for the obligations of Target Holding on and after the Effective Date. Similarly, the Bank Combination will result in Acquiror Bank being liable for the obligations of Target Bank on and after the Effective Date. *See supra* notes 9 & 31 and accompanying text. These assumed liabilities include the obligations of Target Holding and Target Bank to indemnify their respective officers and directors for certain third-party claims as provided in the Tennessee Business Corporation Act. *See* TENN. CODE ANN. § 48-18-503 (2004). However, many Tennessee corporations have a provision in their charters or bylaws that provides indemnification for officers and directors to the fullest extent permitted under Tennessee law, rather than indemnification at the minimum level required by Tennessee law. *Cf.* TENN. CODE ANN. § 48-18-502 (maximum permissible indemnification obligation) *with* TENN. CODE ANN. § 48-18-503 (minimum required indemnification obligation). Section 5.11(a) obligates Acquiror Holding to afford the officers and directors of Target Holding the indemnification protections afforded in Target Holding's charter and bylaws after the Effective Date and to the fullest extent permitted under Tennessee law. Section 5.11(b) obligates Acquiror Bank to afford the officers and directors of Target Bank to the indemnification protections afforded in Target Bank's charter and bylaws after the Effective Date and to the fullest extent permitted under United States law. These provisions are separate since the indemnification protections offered by Target Holding may differ from those offered by Target Bank, and also to maintain consistency with respect to Acquiror Holding assuming the obligations of Target Holding and Acquiror Bank assuming the obligations of Target Bank under the other provisions of this Agreement. *See also* Chamison v. Healthtrust, Inc.: No. 15,904, 24 DEL. J. CORP. L. 1060, 1073 (1999) (describing a similar provision in another merger agreement); Fanto, *supra* note 37, at 320 n.228 (noting the inclusion in a merger agreement of covenants "for the acquirer, that it will provide indemnification and insurance to the target's officers and directors for suits arising post-merger"). An acquiror can protect itself from liability arising as a result of this provision by purchasing "tail coverage insurance," which insures for acts of an officer or director of Target Holding and Target Bank prior to the Effective Date. *See* Darryl P. Rains et al., *Directors' and Officers' Insurance*, *at* http://www. Realcorporatelawyer.com/faq/d&o.htm#22 (last visited on May 4, 2005 (noting and describing this type of coverage in response to question 22: "What coverage is available if your company merges or is acquired?"). An acquiror also can limit its exposure by providing that the extended protection only will be in effect for a certain number of years after the Effective Date or up to a specified maximum dollar limitation. *See In re* Talley Industries, Inc. Shareholders' Litigation, No. 15,961 (Consolidated), 24 DEL. J. CORP. L. 331, 341 (1999) (describing a six-year term as common).

Holding Company Indemnified Parties or any of them become subject, based upon or arising out of actions or omissions of those persons occurring at or prior to the Effective Date (including the transactions contemplated by this Agreement) to the full extent permitted under Tennessee law or by Target Holding's Charter and Bylaws as in effect on the date of this Agreement.

(b) From and after the Effective Date, Acquiror Bank shall indemnify, defend, and hold harmless the current and former directors, officers, employees, and agents of Target Bank (each director, officer, employee, or agent referred to as a "Bank Indemnified Party") against all losses, claims, damages liabilities, judgments (and related expenses, including without limitation attorneys' fees and amounts paid in settlement), whether joint, several, or solidary, and any action or other proceeding in respect thereof, to which the Bank Indemnified Parties or any of them become subject, based upon or arising out of actions or omissions of those persons occurring at or prior to the Effective Date (including the transactions contemplated by this Agreement) to the full extent permitted under United States law or by Target Bank's Articles of Association and Bylaws as in effect on the date of this Agreement.

Section 5.12. Additions to Management. As of the Effective Date, or as soon after the Effective Date as practical, Acquiror Holding and Acquiror Bank shall elect as officers or directors the persons listed on Schedule 5.12.[78]

ARTICLE VI
CLOSING CONDITIONS

Section 6.01. Conditions to Each Party's Obligations under this Agreement. The respective obligations of each party under this Agreement shall be subject to the satisfaction, at or prior to the Effective Date, of the conditions set forth below:

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[78] In transactions that constitute a "merger of equals" and in other negotiated business combinations where the business of the target corporation is well run by knowledgeable directors and management, the acquiror's Board often will be enlarged to take on directors from the target's Board and the acquiror's management will incorporate members of the target's management upon consummation of the merger. *See* FREUND, *supra* note 25, at 400 ("More commonly . . . the purchaser is looking to the very people who ran the seller to continue operating it—at least for as long as it takes the purchaser to decide that the business is being mismanaged and to train his own people to take over the job."); JEFFREY J. HAAS, CORPORATE FINANCE IN A NUTSHELL 391-92 (2004) (indicating that there are difficulties in combining management on a coequal basis).

(a) This Agreement and the transactions contemplated in this Agreement shall have been approved by the affirmative vote of the holders of at least two-thirds of the outstanding shares of Target Holding Common Stock and by the affirmative vote of the holders of at least a majority of the outstanding shares of Acquiror Holding Common Stock, voted at the special meeting of shareholders of Target Holding and Acquiror Holding, respectively, called under Section 5.07.[79]

(b) None of the parties to this Agreement shall be subject to any order, decree or injunction of a court or agency of competent jurisdiction which enjoins or prohibits the consummation of the Holding Company Merger.

(c) Acquiror Holding, Acquiror Bank, Target Holding, and Target Bank shall have received an opinion of [Special Tax Counsel to Target Holding], dated the Effective Date and in form and substance reasonably satisfactory to counsel for Target Holding, substantially to the effect that the transactions contemplated by this Agreement will be treated for federal income tax purposes as a tax-free reorganization under Section 368 of the Code.

(d) The Federal Reserve Board shall have approved the Holding Company Merger, and the OCC shall have approved the Bank Combination.

(e) Target Holding's Chief Executive Officer, [name] shall have entered into an employment agreement with Acquiror Bank, in the form attached to this Agreement as Exhibit E.

Section 6.02. Conditions to the Obligations of Acquiror Holding and Acquiror Bank under this Agreement. The obligations of Acquiror Holding and Acquiror Bank under this Agreement shall be further subject to the satisfaction, at or prior to the Effective Date, of the conditions set forth below.

(a) Each of the obligations of Target Holding and Target Bank required to be performed by it at or prior to the Effective Date under the

[79] The TBCA provides that the plan of merger must be approved by a majority of the votes entitled to be cast on the plan, unless the charter or the Board of Directors requires a greater vote or a separate vote by voting groups. TENN. CODE ANN. § 48-21-104. Target Holding's charter contains a provision requiring approval of a merger transaction by the affirmative vote of the holders of at least two-thirds of the outstanding shares of Target Holding Common Stock.

terms of this Agreement shall have been duly performed and complied with, and the representations and warranties of Target Holding and Target Bank contained in this Agreement shall be true and correct in all material respects[80] as of the date of this Agreement[81] and as of the Effective Date as though made at and as of the Effective Date, and Acquiror Holding and Acquiror Bank shall have received a certificate to that effect signed by an authorized officer[82] of Target Holding and Target Bank.

(b) All action required to be taken by, or on the part of, Target Holding and Target Bank to authorize the execution, delivery, and performance of this Agreement by Target Holding and Target Bank and the consummation of the transactions contemplated in this Agreement shall have been duly and validly taken by the Boards of Directors of Target Holding and Target Bank, and Acquiror Holding and Acquiror Bank shall have received certified copies of the resolutions evidencing that authorization.

(c) Any and all permits, consents, waivers, clearances, approvals, and authorizations (in addition to those referred to in Section 6.01) of all third parties and governmental bodies that are necessary in connection with the consummation of the Holding Company Merger and the other transactions contemplated by this Agreement by Target Holding and Target Bank shall have been obtained by Target Holding and Target Bank.

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[80] The parties will want to consider the possibility that unacceptable "double materiality" effects will prevent this condition from operating as the party had intended. *See* FREUND, *supra* note 25, at 245-46; Gentle & Heminway, *supra* note 51, at 263 n.74

[81] In the experience of one of the authors of this Tennessee BMA, this condition (requiring that representations and warranties have been true and correct when made) is unusual, in that it would allow a party (here, Acquiror Holding or Acquiror Bank) to forego closing, rather than merely be entitled to damages, on the basis of a material misrepresentation that was untrue when made but is true at the time of closing. In that author's experience, a more common formulation of the closing condition would call for the representations and warranties of a party to be true at the closing, as if they had been made at and as of the date of the closing. *See* FREUND, *supra* note 25, at 157; Gentle & Heminway, *supra* note 51, at 263, 267; Hamilton & Heminway, *supra* note 50, at 242, 244.

[82] At the time the Board of Directors of each party to this Agreement approves the Agreement and recommends approval by its shareholders, the Board also will authorize one or more officers of the corporation to execute the agreement and other documents ancillary to consummation of the Holding Company Merger. This authorization may be relied upon in addition to or in lieu of any authorizations set forth in the corporation's bylaws. These officers with either or both types of authority are referred to in this Agreement as "authorized officers."

(d) Acquiror Holding and Acquiror Bank shall have received an opinion[83] from [Name of counsel to Target Holding and Target Bank], counsel to Target Holding and Target Bank an opinion, dated as of Effective Date,[84] in form and substance satisfactory to Acquiror Bank and Acquiror Holding, to the effect set forth below:

(i) Target Holding is a corporation duly organized, validly existing, and in good standing under the laws of the State of Tennessee and has all requisite power and authority to own, lease, and operate its properties and to carry on its business as now being conducted. Target Bank is a national banking association duly organized, validly existing, and in good standing under the laws of the

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[83] It is customary for each party to the merger to insist on a closing opinion from counsel to the other party as to certain key matters relating to corporate organizational status and operations, as well as the authorization and execution of the merger agreement and the merger. *See* FREUND, *supra* note 25, at 304-05. The subject matter, or, if possible, the complete text, of the closing opinions should be negotiated at the time the text of the merger agreement is negotiated. *See* Gentle & Heminway, *supra* note 51, at 265 n.76; *cf.* FREUND, *supra* note 25, at 305-15, 318 (discussing issues relating to the negotiation and delivery of closing opinions in business combination transactions and the ways in which legal opinions are reflected in the conditions to closing). This approach allows for fair negotiation of the text of the opinions (which are legal liability documents for the involved firms) and prevents the lawyers from holding up the closing with their opinion negotiation strategies. Among the most important matters settled by counsel to the parties during these negotiations are the actual opinions to be rendered. *See* FREUND, *supra* note 25, at 318-21 (describing subjects that are and are not appropriate for legal opinions); Gentle & Heminway, *supra* note 51, at 265 n.76.

[84] The Bank Combination requires the prior approval of the OCC, since the surviving institution will be a national banking association. *See* 12 U.S.C. § 215 (2000) ("Any national bank or any bank incorporated under the laws of any State may, with the approval of the Comptroller, be consolidated with one or more national banking associations located in the same State under the charter of a national banking association . . . ."). If the Bank Combination qualifies for "expedited approval" under the OCC's regulations, the OCC will render a decision on the Bank Combination by the later of (i) the 45th day after it receives a complete application and (ii) 15 days after expiration of the comment period. *See* 12 C.F.R. § 5.33(i) (2004). Target Bank and Acquiror Bank are required to file a public notice in a newspaper in the area where each bank's main office is located. *Id.* The public is invited to comment on the proposed merger and has 30 days after initial public notice of the transaction appears in the newspaper in which to submit comments to the OCC. *Id.* If the Bank Combination does not qualify for expedited approval, there is no predefined timeframe for approval of the application. The regulations governing the Holding Company Merger require Acquiror Holding to file a notice with the Federal Reserve Bank that has oversight authority for Acquiror Holding at least 10 days prior to the proposed Effective Date. *See id.* § 225.12(d)(2). The Federal Reserve will review the notice and, absent extenuating circumstances (such as concerns regarding safety and soundness or competitive factors), the Federal Reserve will not require any further application or review of the Holding Company Merger. *Id.*

United States and (A) has all requisite corporate power to own, lease, and operate its properties and to carry on its business as now being conducted, (B) is duly authorized to conduct a general banking business under the banking laws of the United States, and (C) is an "insured bank" as defined in the Federal Deposit Insurance Act.

(ii) This Agreement has been duly and validly authorized, executed, and delivered by Target Holding and Target Bank and is valid and enforceable against each of them, except that enforcement may be limited by bankruptcy, reorganization, insolvency, and other similar laws and court decisions relating to or affecting the enforcement of creditors' rights generally and by general equitable principles.

(iii) The execution and delivery by Target Holding and Target Bank of this Agreement, consummation by Target Holding and Target Bank of the transactions contemplated in this Agreement, and compliance by Target Holding and Target Bank with the provisions of this Agreement will not violate the Charter of Target Holding or the Articles of Association of Target Bank or violate, result in a breach of, or constitute a default under, any material lease, mortgage, contract, agreement, instrument, judgment, order, or decree to which Target Holding or Target Bank is a party or to which either of them may be subject.

(e) There shall not have occurred any material adverse change in the financial condition, results of operations, or business of Target Holding or Target Bank from the date of the Target Holding Latest Balance Sheet[85] to the Effective Date.

(f) Target Holding, on or before the Effective Date, shall have caused each shareholder of Target Holding that is receiving Acquiror Holding Common Stock in the Holding Company Merger to execute an election for Subchapter S taxation[86] with respect to the Acquiror Holding

[85] This is the date as of which Acquiror Holding valued Target Holding for purposes of determining the amount of consideration to be offered in the Holding Company Merger. *See also infra* § 8.01(b).

[86] Acquiror Holding is an S corporation—a corporation that has elected pass-through tax treatment (akin to partnership tax treatment) under the Internal Revenue Code. *See* 26 U.S.C. §§ 1361-1379 (2000). To qualify as an S corporation, the corporation may have no more than 100 shareholders and, with certain exceptions, shareholders must be individuals. *See id.* § 1361(b). As a consequence of this

Common Stock to which the shareholder is entitled at the Effective Date, as well as the Stock Restriction Agreement attached to this Agreement in the form of Exhibit C.

(g) The Target Holding Debt shall not exceed $1,100,000 as of the Effective Date.

(h) Acquiror Holding shall have received from each Target Holding shareholder an executed Investment Intent Letter in the form attached to this Agreement as Exhibit D.[87]

(i) Target Holding and Target Bank shall have furnished Acquiror Holding and Acquiror Bank with any certificates of their respective officers or others and any other documents to evidence fulfillment of the conditions set forth in this Section 6.02 as Acquiror Holding and Acquiror Bank reasonably may request.

Section 6.03. Conditions to the Obligations of Target Holding and Target Bank under this Agreement. The obligations of Target Holding and Target Bank under this Agreement shall be further subject to the satisfaction, at or prior to the Effective Date, of the conditions set forth below.

(a) Each of the obligations of Acquiror Holding or Acquiror Bank, respectively, required to be performed by it at or prior to the Effective Date under the terms of this Agreement shall have been duly performed and complied with, and the representations and warranties of Acquiror Holding and Acquiror Bank contained in this Agreement shall be true and correct in all material respects[88] as of the date of this Agreement[89] and as of the

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status, shareholders of Acquiror Holding are restricted in certain ways. So that Acquiror Holding can maintain this pass-through federal income tax status after the Closing, it needs to ensure (among other things) that Target Holding's shareholders understand, acknowledge, and agree to abide by the applicable restrictions. For example, Target Holding's shareholders should understand the restrictions on the transfer of stock to ensure that the number of shareholders of Acquiror Holding, as the surviving corporation in the Bank Holding Company Merger, does not exceed 100. This condition enables Acquiror Holding to achieve this important federal income tax objective.

[87] This letter confirms, among other things, that each Target Holding shareholder is acquiring the Acquiror Holding shares for investment and not for resale or redistribution. *See supra* note 17.

[88] *See supra* note 80 (regarding the potential for double materiality).

[89] *See supra* note 81 (expressing an alternative view on this provision).

Effective Date as though made at and as of the Effective Date, and Target Holding and Target Bank shall have received certificates to that effect signed by an authorized officer of Acquiror Holding and Acquiror Bank.

(b) All action required to be taken by, or on the part of, Acquiror Holding and Acquiror Bank to authorize the execution, delivery, and performance of this Agreement of Acquiror Holding and Acquiror Bank and the consummation of the transactions contemplated in this Agreement shall have been duly and validly taken by the Boards of Directors of Acquiror Holding and Acquiror Bank, and Target Holding and Target Bank shall have received certified copies of the resolutions evidencing this authorization.

(c) Any and all permits, consents, waivers, clearances, approvals, and authorizations (in addition to those referred to in Section 6.01) of all third parties and governmental bodies that are necessary in connection with the consummation of the Holding Company Merger and the other transactions contemplated by this Agreement by Acquiror Holding and Acquiror Bank shall have been obtained by Acquiror Holding and Acquiror Bank.

(d) There shall not have occurred any material adverse change in the financial condition, results of operations, or business of Acquiror Holding or Acquiror Bank from the date of this Agreement[90] to the Effective Date.

(e) Target Holding and Target Bank shall have received from [Name of counsel to Acquiror Holding and Acquiror Bank], counsel for Acquiror Holding and Acquiror Bank, an opinion, dated as of the Effective Date, in form and substance satisfactory to Target Holding and Target Bank, to the effect set forth below.

(i) Acquiror Holding is a corporation duly organized, validly existing, and in good standing under the laws of the State of Tennessee and has all requisite power and authority to own, lease, and operate its properties and to carry on its business as now being conducted. Acquiror Bank is a national bank duly organized, validly existing, and in good standing under the laws of the United States

[90] This is the date as of which the Acquiror Holding Common Stock is valued for use as consideration in the Holding Company Merger. *See also infra* § 8.01(c).

and (A) has all requisite corporate power to own, lease, and operate its properties and to carry on its business as now being conducted, (B) is duly authorized to conduct a general banking business under the banking laws of the United States, and (C) is an "insured bank" as defined in the Federal Deposit Insurance Act.

(ii) This Agreement has been duly and validly authorized, executed, and delivered by Acquiror Holding and Acquiror Bank and is valid and enforceable against each of them, except that enforcement may be limited by bankruptcy, reorganization, insolvency, and other similar laws and court decisions relating to or affecting the enforcement of creditors' rights generally and by general equitable principles.

(iii) The execution and delivery by Acquiror Holding and Acquiror Bank of this Agreement, consummation by Acquiror Holding and Acquiror Bank of the transactions contemplated in this Agreement, and compliance by Acquiror Holding and Acquiror Bank with the provisions in this Agreement will not violate the Charter of Acquiror Holding or the Articles of Association of Acquiror Bank or violate, result in a breach of, or constitute a default under, any material lease, mortgage, contract, agreement, instrument, judgment, order, and degree to which Acquiror Holding and Acquiror Bank is a party or to which either of them may be subject.

(f) Acquiror Holding and Acquiror Bank shall have furnished Target Holding and Target Bank with any certificates of their respective officers or others and any other documents to evidence fulfillment of the conditions set forth in this Section 6.03 as Target Holding and Target Bank may reasonably request.

ARTICLE VII[91]
CLOSING[92]

Section 7.01. Time and Place. Subject to the provisions of Articles VI and VIII, the closing of the transactions contemplated by this Agreement shall take place at the offices of [Name and address of counsel to Acquiror Holding and Acquiror Bank] at 9:00 A.M., local time, on the last business day of the month after all of the conditions contained in Section 6.01(a) and Section 6.01(d) are satisfied[93] or at some

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[91] In many business combination agreements and general corporate contracts, the provision included in this Article VII would instead be included with or near the operative terms of the transaction at the beginning of the agreement. *See, e.g.*, KUNEY, *supra* note 22, at 25 (including the closing provisions in a grouping with other core substantive provisions of a contract); Hamilton & Heminway, *supra* note 50, at 224 (setting forth closing provisions in Article 2 of a ten-article asset purchase agreement). *But see* ADAMS, *supra* note 24, at 60 (grouping the closing and termination provisions together near the end of the agreement); FREUND, *supra* note 25, at 148 (same); Gentle & Heminway, *supra* note 51, at 263 (setting forth closing provisions in Article V of an eight-article stock purchase agreement). The placement of these provisions is a matter of drafting style and does not affect the legality or the operation of the provisions in any respect.

[92] Article VII provides for a traditional closing in which all parties are present in one location to sign the closing documents and consummate the Holding Company Merger. In most instances, however, the closing for a merger transaction takes place with the parties in separate locations, with closing documents exchanged via facsimile, overnight mail, and electronic mail. An alternative provision to reflect a closing in this manner is as follows:

> The Closing will occur by telephone with deliveries of Closing documents by Federal Express or other reputable overnight delivery service, in person at a mutually convenient location, or by such other method as shall be mutually agreeable to the parties. Any executed Closing documents sent by a party or its counsel to the other party or its counsel prior to Closing shall be held in escrow by such other Party or its counsel until the executed documents are authorized to be released by an executive officer of the sending party or by the sending party's counsel.

For a brief summary of electronic signatures and other issues relating to electronic document transmissions, see KUNEY, *supra* note 22, at 120-22; Sam Stonefield, *Electronic Real Estate Documents: Context, Unresolved Cost-Benefit Issues And A Recommended Decisional Process*, 24 W. NEW ENG. L. REV. 205 (2002); Mark D. Earles, *Clicking on the Dotted Line: Florida's Enactment of the Uniform Electronic Transactions Act as a Boost to E-Commerce*, 25 NOVA L. REV. 317 (2000); Carrie A. O'Brien, *E-Sign: Will the New Law Increase Internet Security Allowing Online Mortgage Lending to Become Routine?*, 5 N.C. BANKING INST. 523 (2001).

[93] By wording the closing provision in this way, the parties state their mutual expectation that, once shareholder and regulatory approvals have been obtained, the parties will work together toward satisfaction of the remaining closing conditions by month's end. A closing at the end of a month makes financial and operational combinations easier.

other place, at another time, or on another date as Acquiror Holding, Acquiror Bank, Target Holding, and Target Bank mutually may agree upon for the closing to take place.

Section 7.02. Deliveries at the Closing. Subject to the provisions of Articles VI and VIII, at the closing, there shall be delivered to Acquiror Holding, Acquiror Bank, Target Holding, and Target Bank the opinions, certificates, and other documents and instruments required to be delivered to each of them under Article VI.

ARTICLE VIII
TERMINATION[94]

Section 8.01. Termination. This Agreement may be terminated at any time prior to the Effective Date, whether before or after approval of this Agreement and the transactions contemplated in this Agreement by the shareholders of Target Holding:

(a) by mutual written consent of the parties, properly authorized by their respective Boards of Directors;

(b) by Acquiror Holding and Acquiror Bank, if at the time of termination there shall have been any material adverse change in the financial condition, results of operations, or business of Target Holding or Target Bank since the date of the Target Holding Latest Balance Sheet;

(c) by Target Holding and Target Bank, if at the time of termination there shall have been any material adverse change in the financial condition, results of operations, or business of Acquiror Holding since the date of this Agreement;

(d) by any party to this Agreement, if a United States District Court shall rule upon application of the Department of Justice, after a full trial on the merits or a decision on the merits based on a stipulation of facts, that the transactions contemplated by this Agreement violate the antitrust laws of the United States;[95]

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[94] *See* FREUND, *supra* note 25, at 323-24.

[95] *See* FREUND, *supra* note 25, at 316 (describing this type of termination provision); Fanto, *supra* note 37, at 345 n.307 (same). Often, one or more of the parties to a merger agreement will not want to provide for termination of the agreement in the event of a conditional or adverse antitrust

(e) by any party to this Agreement, if at the special meeting of shareholders to be called by Target Holding under this Agreement, this Agreement shall not have been approved by the affirmative vote of the holders of at least two-thirds of the outstanding shares of Target Holding Common Stock voted at the special meeting of shareholders of Target Holding called under Section 5.07;

(f) by any party to this Agreement, if at the special meeting of shareholders to be called by Acquiror Holding under this Agreement, this Agreement shall not have been approved by the affirmative vote of the holders of at least a majority of the outstanding shares of Acquiror Holding Common Stock voted at the special meeting of shareholders of Acquiror Holding called under Section 5.07;

(g) by Acquiror Holding and Acquiror Bank, within thirty days from the date of this Agreement, in the event Acquiror Holding, based on Acquiror Holding's opportunity to conduct a preliminary due diligence review of the books, records, and operations of the Target Holding Consolidated Group as provided in Section 5.04(a), in good faith determines in its sole discretion that the results of the review conducted by Acquiror Holding or its agents do not support Acquiror Holding's expectations prior to the execution and delivery of this Agreement as to the earnings, financial condition, liabilities, and business of the Target Holding Consolidated Group based on the representations and warranties contained in this Agreement as of the date of this Agreement and the schedules and other information

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determination. Instead, the parties may provide, by covenant, that they will use a specified level of effort to modify the facts that created the conditional or adverse determination, including by requested or required disposition of assets or businesses. *Cf.* Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect Against Market Power When the Market Rules Encourage Its Use)*, 83 OR. L. REV. 207, 261-62 (2004) (describing the circumstances under which these covenants may need to be used); Donald Hawthorne, *Media Concentration and Democracy: Panel Three Commentary*, 1999 ANN. SURV. AM. L. 269, 271 (1999) (same); President's Council of Economic Advisers, *Economic Organization and Competition Policy*, 19 YALE J. ON REG. 541, 564 (2002) (same); Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH. L.J. 631, 632 (2001); E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565, 573-74 (2002) (describing then-current trends with respect to renegotiation and termination of mergers that raise antitrust concerns). Pre-closing divestitures are not uncommon in bank mergers. *See* Cheryl R. Lee, *Amalgamation of the Southern California Banking Industry: San Diego a Microcosm*, 35 CAL. W. L. REV. 41, 99-100 (1998); Geoffrey P. Miller, *Legal Restrictions on Bank Consolidation: An Economic Analysis*, 77 IOWA L. REV. 1083, 1116 (1992).

provided to Acquiror Holding by Target Holding prior to the execution and delivery of this Agreement;

(h) by Target Holding and Target Bank, within thirty days from the date of this Agreement, in the event Target Holding, based on Target Holding's opportunity to conduct a preliminary due diligence review of the books, records, and operations of the Acquiror Holding Consolidated Group as provided in Section 5.04(d), in good faith determines in its sole discretion that the results of the review conducted by Target Holding or its agents do not support Target Holding's expectations prior to the execution and delivery of this Agreement as to the earnings, financial condition, liabilities, and business of the Acquiror Holding Consolidated Group based on the representations and warranties contained in this Agreement as of the date of this Agreement and the Schedules and other information provided to Target Holding by Acquiror Holding prior to the execution and delivery of this Agreement; or

(i) by any party to this Agreement if the closing shall not have occurred by October 31, 2005.[96]

Section 8.02. Effect of Termination. In the event of termination of this Agreement by Acquiror Holding, Acquiror Bank, Target Holding, or Target Bank as provided in Section 8.01, this Agreement shall become void, and except as provided in Section 5.04 and Section 9.01, there shall be no further liability under this Agreement

[96] *See* FREUND, *supra* note 25, at 324 (describing this and other customary termination provisions). Parties to merger agreements often quibble over the date to be inserted in this type of termination provision, known as a "drop dead date." *See* Richard E. Climan et al., *Negotiating Acquisitions of Public Companies*, 10 U. MIAMI BUS. L. REV. 219, 262-66, 295-300 (2002) (describing interactions among shareholder voting, drop dead date clauses, and other termination provisions and setting forth sample termination provisions); R. Hewitt Pate, *Antitrust Enforcement at the United States Department of Justice: Issues in Merger Investigations and Litigation*, 2003 COLUM. BUS. L. REV. 411, 425 (2003) (referencing this type of termination provision, noting that "the merger agreement provides for a drop-dead date of January 21, 2003, that permits either party to walk away from the deal by that date, if the merger has not been completed."). Selection of a proper date can be difficult in that the chosen date must be far enough off to allow for contingencies, yet soon enough to allow the parties to pursue other options or renegotiate the deal to address the barriers to closing, as necessary or desirable. The parties often have different ideas on the date that most appropriately reflects that balance of considerations based on, for example, their own operating profiles or risk tolerance.

on the part of Target Holding, Target Bank, Acquiror Holding, Acquiror Bank, or their respective officers or directors.[97]

ARTICLE IX
MISCELLANEOUS

Section 9.01. Expenses. All out-of-pocket costs and expenses incurred in connection with the Holding Company Merger, including fees and expenses of brokers, finders, financial consultants, accountants, and counsel shall be paid by the party incurring these expenses.[98]

Section 9.02. Notices.[99] All notices or other communications pertaining to this Agreement shall be in writing and shall be deemed given upon receipt if delivered personally, by courier, by prepaid registered or certified first class mail (return receipt requested), or by facsimile, cable, telegram, or telex addressed as follows:

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[97] In acquisitions by and between public companies, it is customary for a party to be entitled to a payment on termination most commonly known as a "termination fee," a "break-up fee," or a "bust-up fee." *See* Fanto, *supra* note 37, at 323-24. *See generally* Judd F. Sneirson, *Merger Agreements, Termination Fees, and the Contract-Corporate Tension*, 2002 COLUM. BUS. L. REV. 573 (2002) (discussing the nature and enforceability of termination fee provisions in merger agreements); Heath Price Tarbert, *Merger Breakup Fees: A Critical Challenge to Anglo-American Corporate Law*, 34 LAW & POL'Y INT'L BUS. 627 (2003) (same); Thomas A. Swett, Comment, *Merger Terminations After* Bell Atlantic*: Applying a Liquidated Damages Analysis to Termination Fee Provisions*, 70 U. COLO. L. REV. 341, 355-57 (1999) (commenting that these provisions are "critical for today's mergers."). This payment is not triggered by all termination events, but rather by a few of the listed events that are significant and relate to matters wholly out of the control of the party asserting the termination right. *See* Tarbert, *supra*, at 639 ("The triggering events usually fall into one of four broad categories: (1) the board's exercise of a fiduciary out; (2) the company's breach of any warranties or covenants; (3) shareholder rejection of the merger; or (4) the acceptance of a third-party bid."). This Agreement does not provide for the payment of a termination fee.

[98] Parties to merger agreements often agree on expense reimbursement in cases where the merger agreement is terminated for reasons beyond a party's control in accordance with the termination provisions of the agreement. *See* Kling et al. *supra* note 62, at 780 (listing expense reimbursement as a typical provision in acquisition agreements). These provisions are most typical in public company merger and acquisition transactions and most often are triggered if a third party acquiror interrupts the transaction. *See id.* at 808; Michael G. Hatch, *Clearly Defining Preclusive Corporate Lock-Ups: A Bright-Line Test for Lock-Up Provisions in Delaware*, 75 WASH. L. REV. 1267, 1275 (2000) ("In an expense-reimbursement provision, if the target accepts another bid, then the target reimburses the initial prospective acquirer for any costs incurred during the initial merger effort.").

[99] For some interesting observations on notice provisions, see DARMSTADTER, *supra* note 23, at 109-13.

(a) If to Acquiror Holding or Acquiror Bank, to:

Acquiror Bank Holding Company, Inc.
[street address]
[city, state, and zip code]

Copy to:
[Name of counsel to Acquiror Holding and Acquiror Bank]
[street address]
[city, state, and zip code]

(b) If to Target Holding or Target Bank, to:

Target Bank Holding Company, Inc.
[street address]
[city, state, and zip code]

Copy to:

[Name of counsel to Target Holding and Target Bank]
[street address]
[city, state, and zip code]

or any other address furnished in writing by any party.

Section 9.03. Parties in Interest. This Agreement shall be binding upon and shall inure to the benefit of the parties to this Agreement and their respective successors and assigns; provided, however, (a) that neither this Agreement nor any of the rights, interests, or obligations under this Agreement shall be assigned by any party to this Agreement without the prior written consent of the other parties and (b) that nothing in this Agreement is intended to confer, expressly or by implication, upon any other person any rights or remedies under or by reason of this Agreement.

Section 9.04. Amendment, Extension and Waiver. Subject to applicable law, at any time prior to the consummation of the Holding Company Merger, Acquiror Holding, Acquiror Bank, Target Holding, and Target Bank may, by action mutually taken by their respective Boards of Directors, (a) amend this Agreement, (b) extend the time for the performance of any of the obligations or other acts of the other parties to this Agreement, (c) waive any inaccuracies in the representations and warranties contained in this Agreement or in any document delivered under this Agreement, or (d) waive compliance with any of the agreements or conditions

contained in Articles V and VI (other than the conditions set forth in Section 6.01); provided, however, that after any approval of this Agreement and the transactions contemplated in this Agreement by the shareholders of Target Holding, there may not be, without further approval of Target Holding's shareholders, any amendment, extension, or waiver of this Agreement which changes the amount or form of consideration to be delivered to shareholders of Target Holding. This Agreement may not be amended, except by an instrument in writing, signed on behalf of each of the parties to this Agreement. Any agreement on the part of a party to this Agreement to any extension or waiver shall be valid only if set forth in an instrument in writing signed on behalf of the waiving party, but this waiver or failure to insist on strict compliance with an obligation, covenant, agreement, or condition shall not operate as a waiver of, or estoppel with respect to, any subsequent or other failure.

Section 9.05. Complete Agreement. This Agreement, including the documents and other writings referred to in or delivered under this Agreement, contains the entire agreement and understanding of the parties with respect to its subject matter. There are no restrictions, agreements, promises, warranties, covenants, or undertakings between or among the parties with respect to the transactions contemplated in this Agreement other than those expressly set forth or referenced[100] in this Agreement. This Agreement supersedes all prior agreements and understandings between or among the parties, both written and oral, with respect to its subject matter.

Section 9.06. Non-Survival of Representations and Warranties. None of the representations and warranties in this Agreement shall survive the Effective Date or the earlier termination of this Agreement under Article VIII. Each party to this Agreement agrees that its sole right and remedy with respect to any breach of a representation or a warranty by the other party shall be not to consummate the transactions described in this Agreement if the breach results in the failure of a condition set forth in Section 6.02(a) or 6.03(a); provided, however, that the foregoing

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[100] Without the addition of "or referenced" in Section 9.05, the parties would run the risk of excluding from their agreement matters set forth in the exhibits and disclosure schedules (for example) that comprise part of their agreement. When parties to an acquisition agreement employ an integration (or merger) clause, they must consider what documents to include and exclude or risk being too restrictive or too expansive in their coverage. *See* FREUND, *supra* note 25, at 395; Robert M. Lloyd, *Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course*, 36 ARIZ. ST. L.J. 257, 269 (2004) ("It's not uncommon to find merger clauses that have not been tailored to the deal at hand and thus appear to exclude from the contract collateral documents that other provisions of the same document attempt to incorporate."). In other words, an integration clause is not boilerplate and should be given serious consideration by the drafters. *See* Lloyd, *supra*.

terms and provisions of this Section 9.06 shall not be deemed a waiver of any claim for intentional misrepresentation or fraud.[101]

Section 9.07. Counterparts. This Agreement may be executed in two or more counterparts, all of which shall be considered one and the same agreement and each of which shall be deemed an original.[102]

Section 9.08. Governing Law. This Agreement shall be governed by the laws of the State of Tennessee, without giving effect to the principles of conflicts of law in effect in the State of Tennessee.[103] In the event that an action shall be brought under this Agreement, all attorneys' fees of plaintiff(s) and defendant(s) in that action shall be paid to the prevailing party.[104]

Section 9.09. Headings. The Article and Section headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

[signature page follows]

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[101] In certain cases, some or all of the shareholders may agree to indemnify an acquiror in the event certain breaches of the representations and warranties are discovered after the closing date. However, in this instance (as in most public company mergers and acquisitions), no shareholders have joined in the Agreement and there is no separate holdback or indemnification agreement by shareholders of Target Holding. Accordingly, Acquiror Holding typically would have no legal recourse on the representations and warranties if misrepresentations surface after the Effective Date. In the event of intentional misrepresentations or fraud by management of Target Holding or Target Bank, however, it is possible that Acquiror Holding could pursue a common law fraud claim (rather than a breach of contract claim) against those persons who made the misrepresentations or committed the fraud in their individual capacities after the Effective Date of the Holding Company Merger. *See* FREUND, *supra* note 25, at 161. Again, although this provision typically appears in the final article of a merger or acquisition agreement, it is not mere boilerplate and should be carefully drafted. *See id.* at 395.

[102] For general information about counterparts provisions, see DARMSTADTER, *supra* note 23, at 101-05; Kuney, *supra* note 22, at 108.

[103] *See* ADAMS, *supra* note 24, at 206-07 (advocating the avoidance of synonym strings in choice of law provisions).

[104] Known as the "English Rule," this cost-shifting provision constitutes a penalty that often is intended to forestall litigation and favor negotiation among the parties as to their differences. *See* James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 248 (1995); Stephen E. Kalish, *The English Costs War, 2000-2003, and a Moment of Repose*, 83 NEB. L. REV. 114, 115, 118, 119 (2004).

Acquiror Holding, Acquiror Bank, Target Holding, and Target Bank have caused this Agreement to be executed[105] by their duly authorized officers, all as of the day and year first above written.[106]

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[105] *See* ADAMS, *supra* note 24, at 63-64 (regarding the use of "signed" rather than "executed"). In some jurisdictions, specified documents (especially including real estate transfer instruments and wills) need to be signed under seal in order to be valid. *See*, *e.g.*, Werner v. Werner, 526 P.2d 370, 375 (Wash. 1974) ("[T]he notarial seal is a mandatory legal prerequisite to the valid execution of many documents."); Gerald Haberkorn & Julie Z. Wulf, *The Legal Standard of Care for Notaries and their Employers*, 31 J. MARSHALL L. REV. 735, 735 (1998) ("[I]t is the seal of a notary that is often a mandatory legal prerequisite to the valid execution of many different documents."); George A. Nation III, *Agency Law and Secured Transactions: The Use of Agents in the Creation of Security Interests*, 11 GEO. MASON L. REV. 739, 747 n.66 (2003) ("[D]epending on the state involved, certain real estate documents or corporate documents that require a seal may not be enforceable against an undisclosed principal."); *Survey of 2002-2003 Developments in Alabama Caselaw*, 55 ALA. L. REV. 445, 494-95 (2004) (regarding sealing requirements for Alabama wills); *What's new?*, 8 S. CAROLINA LAWYER 47, 51 (1996) ("A conveyance of land to be valid at law must be by deed under seal, . . . "). Although formal corporate documents, including contracts and instruments used in business combination transactions, once may have required a seal, these requirements have been abolished or relaxed in most jurisdictions. *See generally* E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 392-96 (2000) (describing the institutionalization and deinstitutionalization of sealing requirements in connection with promises to make gifts); Nation, *supra*, at 747 n.66 ("In many states, however, the legal significance of sealed instruments has been eliminated or greatly reduced."); Joseph Siprut, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration is not Binding, but Should be*, 97 NW. U. L. REV. 1809, 1812 (2003) ("By the early part of the twentieth century, state legislatures had largely abolished the seal's legal status."). In Massachusetts, for example, a recital that an instrument is sealed is sufficient to indicate that the document has the legal validity of a sealed instrument. *See* MASS. GEN. LAWS c. 4 § 9A (2005). Tennessee has abolished seal requirements altogether. *See* TENN. CODE ANN. § 47-50-101 (2004) ("The use of seals in or upon written contracts or other instruments of writing, whether of persons or of corporations, is abolished, and the absence of such seal therefrom, or its addition thereto, shall not affect its character or validity or legal effect in any respect.").

[106] *See* ADAMS, *supra* note 24, at 63-66 (describing and recommending drafting conventions for this concluding sentence). One must be careful about the use of the words "all as of the day and year first above written" or other similar cross-references to the date set forth on the first page of the agreement in the introductory language to the signature blocks. If the effective the date of the contract is not the first date written into the agreement, however, this language results in a busted or inaccurate cross-reference. It is surprising, for example, how many drafters inadvertently leave the date on the first page of the agreement blank, even after the agreement has been signed by both parties, creating confusion later as to the effective date of the parties' agreement on the terms of the contract. *See* KUNEY, *supra* note 22, at 117 (making this same point and suggesting a simpler form of introduction as an alternative).

TARGET HOLDING

By_____
Name:
Title:

ACQUIROR HOLDING

By_____
Name:
Title:

TARGET BANK

By_____
Name:
Title:

ACQUIROR BANK

By_____[107]
Name:
Title:

[107] Applicable state law may articulate the need for specific signatories, authentications, or acknowledgements for a specific type of contract. *See* ADAMS, *supra* note 24, at 67; KUNEY, *supra* note 22, at 120 ("Witness and notary requirements vary from state to state and transaction to transaction."). For example, a merger agreement approved under Ohio law must be "signed by the chairperson of the board, the president, or a vice-president and by the secretary or an assistant secretary." OHIO REV. CODE ANN. § 1702.41(A)(2) (Anderson 2005). The basic state law requirements for authentications and acknowledgements under state law are perhaps most easily found in the state law summaries in the Martindale-Hubbell Law Digest. *See*, *e.g.*, MARTINDALE-HUBBELL LAW DIGEST TN-24 (2004) (summarizing the Tennessee requirements for authentications and acknowledgements). *See generally* KUNEY, *supra* note 22, at 120 (making the same suggestion regarding use of the Martindale-Hubbell Law Digest as a resource).